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A WORD OF CAUTION FOR MISSOURI APPELLATE LAWYERS

Missouri appellate lawyers are accustomed to the constraints of Rule 84.04(d) in framing issues for appeal. This Rule requires compliance with the formalities of presenting the issues as "points relied on." Last year, the Missouri Supreme Court added a new layer of complexity to the Rule in *Ivie v. Smith*, 439 S.W.3d 189 (Mo. banc 2014). Because of the general standard of review in a court-tried case, appellate lawyers often would raise a single claim of trial court error on the ground that the challenged ruling was not supported by substantial evidence, was against the weight of the evidence and involved a misapplication of law.[1] But in *Ivie*, the Supreme Court cautioned appellate counsel that this combined approach no longer would be tolerated under Rule 84.04(d).[2] This article highlights the significance of this word of caution.

When working under the Missouri Rules, appellate lawyers must use a full disclosure method of identifying "points relied on."[3] An appellant must state the basis of the claim of trial court error and explain in the body of the point wherein and why the court erred. The point must be presented in substantially the following format: "The trial court erred in *[identify the challenged ruling or action*] because [*state the legal basis for the claim of reversible error*] in that [*explain why the legal reasons, in the context of the case, support the claim of reversible error*]."[4] Missouri appellate courts routinely dismiss scores of appeals for non-compliance with the rule on points relied on.[5]

[1] See, *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).
[2] *Ivie v. Smith*, 439 S.W.3d 189, 199, n. 11 (Mo. banc 2014).
[3] Mo. Sup. Ct. Rule 84.04(d).
[4] *Id.*
[5] See, *Thummel v. King*, 570 S.W.2d 679 (Mo. banc 1978).

In the *Ivie* decision, the Missouri Supreme Court clarified the second element of the point relied on in a court-tried case. That is, the Court focused on the "because" element that requires the appellant to state the legal basis for the claim of trial court error. The Court cautioned there can be only one legal basis for each point relied on.[6] This represents a significant departure from what had been accepted appellate practice in court-tried cases.

In a court-tried case, the standard of review requires the appellate court to affirm the circuit court's judgment unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. This is the often-cited standard from *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Because of the general standard of review, lawyers customarily raised a single claim of trial court error by alleging a challenged ruling was not supported by substantial evidence, was against the weight of the evidence or involved a misapplication of law.

The Supreme Court in *Ivie* took aim at this customary approach. Judge Zel M. Fischer, writing for the Court, observed in a footnote that the appellant's brief combined into the same point relied on a substantial-evidence challenge, a misapplication-of-law challenge, and an against-the-weight-of-the-evidence challenge. Judge Fischer ruled that these were distinct claims. Relying on his own decision from a few months earlier, Judge Fischer ruled that the distinct claims must appear in separate points relied on in the appellant's brief to be preserved for appellate review.[7] Although the Court gratuitously addressed the merits of the appellant's claims, Judge Fischer declared: "Appellate counsel should take caution to follow Rule 84.04(d)." [8]

In more recent decisions, appellate courts have picked up on the *Ivie* footnote to criticize appellants for non-compliance with Rule 84.04(d).[9] Although

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[6] *Ivie v. Smith*, 439 S.W.3d 189, 199, n. 11 (Mo. banc 2014).

[7] *Id.* at 199, n. 11, citing Rule 84.04 and *In re J.A.R.*, 426 S.W.3d 624, 630, n. 10 (Mo. banc 2014) (ruling in a footnote that "not supported by substantial evidence" and "against the weight of the evidence" were distinct legal claims and should have been raised in two separate points relied on).

[8] *Ivie*, 439 S.W.3d at 199, n. 11.

[9] See, *John Knox Village v. Fortis Construction Company, LLC*, 449 S.W.3d 68, 78, n. 3 (Mo.App. W.D. 2014); *Family Support Division v. North*, 444 S.W.3d 905, 909, n. 3 (Mo.App. W.D. 2014); *In the Matter of M.L.T.*, 2015 Mo.App. LEXIS 557 *5 (Mo.App. S.D. May 21,

the courts thus far have stopped short of dismissing appeals under the *Ivie* rule, this remains a threat in future cases.

From a practical standpoint, the *Ivie* rule adds a new layer of complexity to Rule 84.04(d). The Missouri Supreme Court has recognized a claim of error may present a mixed question of law and fact. In the past, the reviewing court would segregate the parts of the issue that were dependent upon factual determinations from those dependent on legal determinations.[10] Now, under the *Ivie* rule, the Court is cautioning that the appellant must draw this distinction and raise separate points – not only for substantial evidence and weight of the evidence claims – but also for any alleged misapplication of law. By being forced to raise multiple points for a single act of trial court error, the appellant's lawyer inevitably will have to duplicate some arguments. And the risk of structuring points incorrectly is the dismissal of the appellant's appeal.

Appellate practice is not for the faint of heart!

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[10] *Pearson v. Ko*ster, 367 S.W.3d 36, 44 (Mo. banc 2012)