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### MISSOURI APPELLATE LAW – 2013 UPDATE

I was asked recently to make a presentation on Missouri appellate practice as part of a continuing legal education program. The program is sponsored by the Solo and Small Firm Section of the Bar Association of Metropolitan St. Louis. In preparation for my talk, I compiled a few decisions this year that address different aspects of the appellate process:

Judgment Beyond the Scope of the Pleadings: The Missouri Supreme Court declined to decide the merits of an unpreserved issue in *Smith v. City of St. Louis*, 395 S.W.3d 20 (Mo. 2013). In one of its more publicized decisions this year, the Missouri Supreme Court reversed a circuit court decision to void ordinances authorizing a tax increment financing (TIF) plan for a redevelopment project in North St. Louis. Circuit Judge Robert H. Dierker declared that the ordinances were void because they did not include “defined redevelopment projects and cost-benefit analysis of such projects as required by [sections] 99.820.1(3), 99.820.1(5) and 99.845.1.” *Id.* at 22.

Plaintiffs raised the issue of the lack of a specific project for the first time through a motion in limine. The plaintiffs had neglected to raise the issue in their petition, and they did not move for leave to amend to add the point. *Id.* at 23. Judge Dierker recognized that the issue of whether the ordinances included a specific project was an issue “detected by the court” and may not be “fairly embraced by the pleadings in the case.” Still, Judge Dierker determined that the issue was raised sufficiently by the motion in limine and by the introduction of the ordinances into evidence. *Id.* at 23.

The Supreme Court disagreed. The Court held that the issue was not sufficiently raised by the motion in limine. *Id.* at 24-25. The Court also held that the issue was not tried by implied consent. The Court reviewed portions of the transcript containing questions posed and answers given during the testimony of an

alderwoman and the city director of development. The Court found that neither line of questioning satisfied the requirements of a trial by implied consent. The plaintiffs failed to introduce any evidence into the case or specifically to apprise the defendant that the plaintiffs were litigating the previously unpled legal issue. The Court concluded that the judgment went beyond the scope of the pleadings. *Id.* at 25-26. The Court thus never addressed the merits of the specific project issue “detected” by the circuit court.

Reviewability of an Issue on Appeal: The Eastern District also confronted the reviewability of an issue in *Little v. McSwain*, 2013 Mo.App. LEXIS 424 (Mo.App. E.D. April 9, 2013), application for transfer filed May 22, 2013 (SC933397) (not final). A 2005 legislative amendment authorized the Board of Probation and Parole to require supervisees to pay a monthly fee for the cost of supervision and to levy sanctions for nonpayment. Appellant filed an action to enjoin the Chairman of the Board from applying a sanction against him retroactively. On the same day, the trial court granted the Chairman’s motion for judgment on the pleadings and denied the Appellant’s motion for summary judgment. *Id.* at \* 2-3.

The sole point raised by Appellant on appeal was whether the trial court erred in denying his motion for summary judgment. The Eastern District held that this issue was not reviewable. As a general rule, the denial of a motion for summary judgment is not a final appealable order. In limited circumstances, the denial can be reviewed when its merits are completely intertwined with a grant of summary judgment in favor of the other party. Because Appellant’s motion for summary judgment in this appeal did not rebut the Chairman’s motion for judgment on the pleadings, the Eastern District concluded that the merits were not “completely intertwined.” *Id.* at \*4-5. The appeal was dismissed.<sup>1</sup>

Appeal from the Denial of an Extraordinary Writ: The normal procedure for obtaining an extraordinary writ is to file a petition for the writ in the circuit court or the court of appeals. But the Missouri Supreme Court recognized the right to appeal from the denial of a writ by a lower court in *United States Department of Veterans Affairs v. Boresi*, 396 S.W.3d 356, 2013 Mo. LEXIS 25 (Mo. 2013).

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<sup>1</sup> Technically, the Eastern District dismissed Appellant’s point for lack of a final judgment. *Id.* at \*5. Yet it appears the trial court did enter a final judgment when it granted the motion for judgment on the pleadings. The Chairmen argued in his motion that the Missouri Supreme Court had decided the retroactivity question in an earlier decision. *Id.* at \*4. Appellant chose not to appeal from the judgment.

The VA petitioned for a writ of mandamus in the circuit court to compel the chief administrative law judge to allow the VA to intervene in a workers compensation proceeding. The VA claimed that it was entitled to intervene as a matter of right under federal law and the Supremacy Clause of the Constitution. The circuit court issued a summons, which the Supreme Court treated as the functional equivalent of a preliminary order, and then the lower court denied the writ. The Supreme Court held that an appeal would lie from the denial of a writ when the lower court has issued a preliminary order but then denies the permanent writ. *Id.*, 2013 LEXIS 25, at \* 3. The Court noted that this same appeal right applies in prohibition and mandamus actions. *Id.* The Court reversed the circuit court and issued the permanent writ of mandamus.

Defective Briefs: The Missouri Supreme Court has expressed its policy preference for deciding a case on the merits rather than on technical deficiencies in the brief. *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 338 (Mo. 1998). Yet an appellate court occasionally will dismiss an appeal or point because of briefing deficiencies. This year is no exception. See, *Wong v. Wong*, 391 S.W.3d 917 (Mo.App. E.D. 2013); *Ireland v. Division of Employment Security*, 390 S.W.3d 895 (Mo.App.W.D. 2013); *Smith v. City of St. Louis*, 395 S.W.3d 20, 29 (Mo. 2013); *Nichols v. Division of Employment Security*, 2013 Mo.App. LEXIS 680 (Mo. App. W.D. June 4, 2013).

Rule 84.04 sets forth mandatory rules for appellate briefing. An appellant's failure to substantially comply with Rule 84.04 "preserves nothing for review and is grounds for dismissing the appeal." *Wong v. Wong*, 391 S.W.3d at 918. In *Wong*, *Ireland*, *Smith* and *Nichols*, the courts took note of a number of specific briefing deficiencies. If you are not familiar with the Missouri appellate court rules, I caution you to avoid these pitfalls:

- (1) Appellant's statement of facts contained argument. *Wong v. Wong*, 391 S.W.3d at 919.
- (2) Appellant's statement of facts omitted facts necessary to a determination of the appeal. *Nichols v. Division of Employment Security*, 2013 Mo.App. LEXIS 680 at \*2.
- (3) Assertions made in statement of facts and argument lacked "specific page references to relevant portion of the record on appeal, i.e., legal file,

transcript, or exhibits.” *Wong v. Wong*, 391 S.W.3d at 919, citing Rule 84.04(c) and 84(e); *Ireland v. Division of Employment Security*, 390 S.W.3d at 900.

(4) Appellant’s point relied on did not identify the action of the trial court or appeals tribunal being challenged. *Wong v. Wong*, 391 S.W.3d at 919, citing Rule 84.04(d)(1); *Ireland v. Division of Employment Security*, 390 S.W.3d at 899; *Smith v. City of St. Louis*, 395 S.W.3d at 29.

(5) Appellant’s point relied on did not include a proper list of cases, not to exceed four, cited in the argument section corresponding to the point. *Nichols v. Division of Employment Security*, 2013 Mo.App. LEXIS 680 at \*5, citing Rule 84.04(d)(5).

(6) Appellant’s argument section failed to substantially follow the point relied on and to restate the point at the beginning of the section. *Nichols v. Division of Employment Security*, 2013 Mo.App. LEXIS 680 at \*5, citing Rule 84.04(e).

(7) Appellant failed to cite any legal reasons for the claim of reversible error or explain why such reasons support the claim. *Wong v. Wong*, 391 S.W.3d at 919, citing Rule 84.04(d)(1); *Smith v. City of St. Louis*, 390 S.W.3d at 29; *Nichols v. Division of Employment Security*, 2013 Mo.App. LEXIS 680 at \*4.

(8) Appellant’s argument failed to contain “a precise statement of the applicable standard of review for each claim of error.” *Wong v. Wong*, 391 S.W.3d at 919, citing Rule 84.04(e); *Ireland v. Division of Employment Security*, 390 S.W.3d at 900; *Nichols v. Division of Employment Security*, 2013 Mo.App. LEXIS 680 at \*6.

(9) The argument portion contained conclusory statements with no citations to authority. *Wong v. Wong*, 391 S.W.3d at 919; *Ireland v. Division of Employment Security*, 390 S.W.3d at 900.

(10) Appellant did not provide “[a] short conclusion stating the precise relief sought.” *Wong v. Wong*, 391 S.W.3d at 919, citing Rule 84.04(a)(6).

(11) Appellant failed to include an appendix that complied with Rule 84.04(h)(1). *Ireland v. Division of Employment Security*, 390 S.W.3d at 900.

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