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Notes

Five Decades of Explanation and Evolution, Yet the Rule Appears Unchanged: Missouri's Points Relied On Rule

*State ex rel. Marshall v. Hercey*¹

*A just rule, fairly interpreted and enforced, wrongs no man.*²

I. INTRODUCTION

Missouri Supreme Court Rule 84.04(d) provides that appellate briefs must contain "points relied on,"³ the purpose of which is to inform the court and the party-opponent of the specific issues of the case.⁴ Practitioners have had difficulty complying with the rule's requirements since it was first adopted in 1944.⁵ Missouri's courts have explained the specific requirements of the rule on a case-by-case basis over the years.⁶ Through the case law, the rule itself has evolved; now practitioners are required to use a certain format when drafting a point relied on.⁷ Despite the efforts of the courts, many attorneys have continued to make the same errors, which has often resulted in the dismissal of individual points relied on, and sometimes the dismissal of entire appeals.⁸

The rule has been explained and has evolved for fifty-one years, yet the language of the points relied on rule has undergone only minor changes.⁹ This note suggests that incorporating five decades of case law into the language of Rule 84.04(d) would give practitioners better notice of the rule's requirements, which would lead to fewer violations of those requirements.¹⁰

1. 869 S.W.2d 878 (Mo. Ct. App. 1994).

2. *Sullivan v. Holbrook*, 109 S.W. 668, 670 (Mo. 1908).

3. MO. SUP. CT. R. 84.04(d).

4. *See infra* notes 23-24 and accompanying text.

5. *See infra* notes 28-33, 37-39, 44, 48-53, 61-62, 67-73, 76-77 and accompanying text.

6. *See infra* notes 28-33, 38-39, 44, 49-50, 60-66, 69-70, 77 and accompanying text.

7. *See infra* note 66 and accompanying text.

8. *See infra* notes 71-77 and accompanying text.

9. *See infra* notes 21, 26, 34, 42, 45 and accompanying text.

10. *See infra* notes 113-46 and accompanying text.

As a result, the purpose of Missouri's points relied on rule would be more fully served.¹¹

II. FACTS AND HOLDING

Plaintiffs, the State of Missouri, Wendell Lavell Marshall and Mary Jane Franklin, brought this action for a "declaration of paternity and other relief."¹² A jury verdict was entered in favor of defendant, Herman Wendell Hercey, on the paternity issue,¹³ and plaintiffs appealed.¹⁴

Plaintiffs filed an appellant's brief with the Southern District of the Missouri Court of Appeals, which contained seven points relied on.¹⁵ Hercey asked the appellate court to dismiss the appeal on the ground of numerous violations of Rule 84.04.¹⁶ Plaintiffs filed a reply brief which argued that their points relied on were in compliance with Rule 84.04(d).¹⁷

The Southern District held that when the appellant's points relied on violate Missouri Supreme Court Rule 84.04(d), the court may dismiss the appeal.¹⁸ The appellate court dismissed the appeal after finding that all of plaintiffs' points relied on violated Rule 84.04(d).¹⁹

11. *Id.*

12. *Marshall*, 869 S.W.2d at 879.

13. *Id.*

14. *Id.*

15. *Id.* See *infra* notes 91, 94, 96, 100, 103, 105, 107 and accompanying text for appellants' points relied on.

16. *Id.* at 879. Hercey asked that the appeal be dismissed in his brief and in a separate motion. *Id.* MO. SUP. CT. R. 84.04(d) sets forth the requirement for appellants to include "points relied on" in appellate briefs and explains what shall be stated in a point relied on. See *infra* note 21 and accompanying text.

17. *Id.* at 882. The court cited part of the Plaintiffs' argument in the reply brief, which stated

[Plaintiffs'] brief in its Points Relied Upon clearly states that error was made and why such error was made. Points I through III and V through VII use the terminology of "erred because". Point IV uses the terminology "erred in that". Both phrases clearly indicate the wherein and why error was made as required by Rule 84.04(d).

Id.

18. *Id.* at 882. The court declined to exercise discretionary authority to examine the argument portion of appellant's brief for plain error. *Id.* This authority is granted to the court under MO. SUP. CT. R. 84.13(e). *Id.*

19. *Id.*

III. LEGAL BACKGROUND

The wording of the points relied on rule has remained relatively consistent during the five decade history of the rule.²⁰ The current points relied on rule, Missouri Supreme Court Rule 84.04(d), states:

The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous, with citations of authorities thereunder. If more than three authorities are cited in support of a point made, the three authorities principally relied on shall be cited first. All authorities discussed in the argument shall be cited under the "Points Relied On." Long lists of citations should not be included.

Setting out only abstract statements of law without showing how they are related to any action or ruling of the court is not a compliance with this Rule.²¹

Much like the wording of the points relied on rule, the purpose of the rule has also remained consistent through the years.²² In 1954, Missouri Supreme Court Judge Hyde explained that the purpose of points relied on is "to tell the Court what the appellate issues are so it will know what the argument is about."²³ In 1978, the Missouri Supreme Court stated that the function of points relied on is to give notice to the party opponent of "the precise matters which must be contended with and answered" and to give notice to the court of the "issues presented for resolution."²⁴

20. See *supra* note 9 and accompanying text.

21. MO. SUP. CT. R. 84.04(d).

22. See *infra* notes 23-24 and accompanying text.

23. *Ambrose v. M.F.A. Co-Operative Ass'n*, 266 S.W.2d 647, 651 (Mo. 1954) (en banc) (Hyde, J., concurring). Note that Judge Hyde explained, "All that is required to comply with [the points relied on rule] is a concise statement of what the Court did that is claimed to be wrong and a concise statement of why it is contended the court was wrong." *Id.*

24. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. 1978) (en banc). The court explained that absent clear points relied on the court would have to search the appellant's argument to determine the appellant's contentions and as a result could possibly interpret the "thrust of the contention differently" than the appellant or the opponent. *Id.* See also *Amparan v. Martinez*, 862 S.W.2d 497 (Mo. Ct. App. 1993) in which the court explained that when the points relied on rule is not followed the possibility is created that the appellate court will become an advocate for the appellant.

As the history of Missouri's points relied on rule reveals, however, the rule, in any of its slightly different versions, has never fully achieved its purpose.²⁵

A. *The Early History of Points Relied On*

In 1944, Rule 1.08(a)(3) was adopted as Missouri's first points relied on rule.²⁶ The rule provided that the points relied on "shall specify the allegations of error, with citations of authorities thereunder."²⁷

In 1954, the Missouri Supreme Court dismissed an appeal, partially on the basis of violations of Rule 1.08.²⁸ In that case, *Ambrose v. M.F.A. Co-Operative Ass'n*, the court explained it is not the duty of the court to search the record to discover the error of the trial court, but "it is the duty of the appellant to distinctly point out the alleged errors of the trial court. . . ."²⁹

In a concurring opinion, Judge Hyde explained that recent appellate briefs had failed to comply with Rule 1.08 in two ways.³⁰ First, appellants had made "only abstract statements of law without any showing of how they are related to anything the trial court did."³¹ Second, appellants had only alleged error but did not state "any reasons why it is contended that the Court erred in making the ruling which is said to be erroneous."³² Judge Hyde explained simply, "All that is required to comply with Rule 1.08(a)(3) is a concise

25. See *infra* notes 26-77 and accompanying text.

26. Mo. Sup. Ct. R. 1.08(a) (1944) provided:

All briefs shall be printed. The brief of appellant shall contain: . . .

(3) The points relied on, which shall specify the allegations of error, with citations of authorities thereunder; provided, however, if more than three authorities are cited in support of point made, the three authorities principally relied on shall be cited first.

In his article, *Effective Appellate Briefs*, Judge A.P. Stone explained that Rule 1.08 "points relied on" served the purposes of both "assignments of error" and "points and authorities" under Rule 15 [the immediate predecessor of Rule 1.08] and thus "simplified appellate practice." Judge A.P. Stone, *Effective Appellate Briefs*, 15 J. MO. BAR, 80, 84 (1959). In the same article, Judge Stone set forth the formula for writing a correct point relied on, which was adopted by the Missouri Supreme Court in a 1977 decision. See *infra* notes 40-41, 60 and accompanying text.

27. *Id.*

28. *Ambrose*, 266 S.W.2d at 649.

29. *Id.* at 648.

30. *Id.* at 650.

31. *Id.*

32. *Id.*

statement of *what* the Court did that is claimed to be wrong and a concise statement of *why* it is contended the Court was wrong."³³

After the *Ambrose* decision, the points relied on rule was rewritten for clarification.³⁴ The new Rule 1.08(d) provided that the points relied on are to state the actions of the trial court sought to be reviewed and why it is contended that the court was wrong, and are not to set out abstract statements of law.³⁵ The amended Rule 1.08(a)(3) concisely explained that points relied on "shall show what actions or ruling of the court are sought to be reviewed and wherein and why they are claimed to be erroneous. . . ."³⁶

Despite the rule's "clarification", non-compliance with Rules 1.08(d) and 1.08(a)(3) continued in Missouri's appellate courts, often resulting in dismissal.³⁷ The courts often explained that appellants made the errors of not specifically stating *why* the ruling of the trial court was wrong³⁸ and setting out only abstract statements of law.³⁹

33. *Id.* at 651 (emphasis added).

34. *Turner v. Mitchell*, 297 S.W.2d 458, 460 (Mo. 1957) (citing *Ambrose v. M.F.A. Co-Operative Ass'n*, 266 S.W.2d. 647 (Mo. 1954)).

Mo. Sup. Ct. R. 1.08(d) (1959) provided:

The points relied on shall briefly and concisely state what actions or rulings of the Court are claimed to be erroneous and briefly and concisely state why it is contended the Court was wrong in any action or ruling sought to be reviewed. Setting out only abstract statements of law without showing how they are related to any action or ruling of the Court is not a compliance with this rule.

Mo. Sup. Ct. R. 1.08(a)(3) (1959) stated:

The points relied on, which shall show what actions or rulings of the Court are sought to be reviewed and wherein and why they are claimed to be erroneous, with citations of authorities thereunder; provided, however, if more than three authorities are cited in support of a point made, the three authorities principally relied on shall be cited first.

35. *Id.*

36. *Id.* Although 1.08(d) formally set out the requirements of points relied on, 1.08(a)(3) should be noted because it uses the language "wherein and why" which is the source of much of the problem in the current rule. See *infra* note 69 and accompanying text.

37. See *infra* notes 38-39 and accompanying text.

38. See, e.g., *Evinger v. Thompson*, 265 S.W.2d 726 (Mo. 1954) The appellant's point relied on stated, "The trial court erred in refusing to give instruction A offered by defendant." *Id.* at 736. The court stated that the allegation of error was in compliance with the rule, but the point was defective because it failed to state why the ruling was claimed to be wrong. *Id.*

39. See, e.g., *Thrasher v. Allen Estate*, 291 S.W.2d 630 (Mo. Ct. App. 1956). One of Appellant's points relied on stated, "Person must have special skill or knowledge respecting the matter involved so superior to that of men in general as to

In a 1959 article, Springfield Court of Appeals Judge A.P. Stone suggested a formula that counsel might use to write points relied on that will emphasize what the trial court did wrong and why the court was wrong.⁴⁰ The formula was: "The trial court erred in (the particular action or ruling of which complaint is made) because (of the specific reason to be stated here) in that (here supplying reasonable detail supporting the specific reason assigned)."⁴¹

A new points relied on rule, Rule 83.05(e), became effective in 1960.⁴² As did the previous rule, Rule 83.05 required a brief and concise statement of the trial court's rulings claimed to be erroneous and a brief and concise statement of why the court was wrong in any action sought to be reviewed.⁴³ Appellate courts continued to note the same violations of the rule and continued to dismiss appeals based on those violations.⁴⁴

make formation of a judgment a fact of probative value in order to qualify as an expert witness." *Id.* at 632. The court held that this was an abstract statement of law. *Id.*; *Repple v. East Texas Motor Freight Lines*, 289 S.W.2d 109 (Mo. 1956). One of appellant's five points relied on stated, "An appellate court will set aside an order of a trial court granting a new trial if it appears that there has been an abuse of discretion." *Id.* at 111. One reason cited by the appellate court for rejecting appellant's points relied on was because they contained statements of law or fact that were too general. *Id.*

40. Stone, *supra* note 26, at 85-86.

41. *Id.* at 86.

42. Mo. Sup. Ct. R. 83.05(e) (1971). The rule stated:

The points relied on shall briefly and concisely state what actions or rulings of the Court are claimed to be erroneous and briefly and concisely state why it is contended the Court was wrong in any action or ruling sought to be reviewed. Setting out only abstract statements of law without showing how they are related to any action or ruling of the Court is not a compliance with this rule.

43. *See supra* note 34.

44. *See, e.g., DeCharia v. Fuhrmeister*, 440 S.W.2d 182 (Mo. Ct. App. 1969). The court explained that the appellant's brief contained three points relied on, each stated only that the trial court erred in making a certain ruling and did not state "wherein and why" the ruling was erroneous. *Id.* at 184. Based on this error, and the fact that there was no jurisdictional statement, an insufficient statement of facts and no citation of authorities under the points relied on, the appeal was dismissed. *Id.* at 183-84; *Parsons Constr. Co. v. Missouri Pub. Serv. Co.*, 425 S.W.2d 166 (Mo. 1968). The Missouri Supreme Court found one of appellant's points relied on in violation of Rule 83.05(e) because it was too general and because the "why" requirement of the rule was not met. *Id.* at 174; *Bonds v. City of Webster Groves*, 432 S.W.2d 777 (Mo. Ct. App. 1968). The court rejected three of appellant's six points relied because they were only "abstract statements of law." *Id.* at 783. One of these points stated, "Zoning must bear a substantial relationship to the public health, safety, morals or

In 1972, the points relied on rule was renumbered as Rule 84.04(d), and the text of the rule was reworded slightly to state, in part, "The points relied on shall state briefly and concisely what actions or ruling of the court are sought to be reviewed and wherein and why they are claimed to be erroneous. . . ." ⁴⁵ Thus, the "wherein and why" language, which had been used in former Rule 1.08(a)(3), was adopted. ⁴⁶ Since 1972, changes have been made to other sections of Rule 84.04, but the points relied on section of the rule has remained unchanged. ⁴⁷

After the adoption of Rule 84.04(d), appellants continued to make the same mistakes in their points relied on. ⁴⁸ Courts continued to explain the requirement that appellants point out why, now labeled "wherein and why," the action of the trial court was erroneous ⁴⁹ and the requirement that

general welfare." *Id.* The court also rejected a point relied on which stated, "The Court erred in allowing into evidence the minutes of the meeting of the planning commission of April and May 1964." *Id.* The court found that it presented nothing for review because it did not state any reason why the ruling was erroneous. *Id.* See also *Rose v. Rose*, 401 S.W.2d 946 (Mo. Ct. App. 1966); *Beasley v. Hull*, 400 S.W.2d 423 (Mo. Ct. App. 1966); *Anderson v. Orscheln Bros. Truck Lines, Inc.*, 393 S.W.2d 452 (Mo. 1965).

45. Mo. Sup. Ct. R. 84.04(d) (1979) stated:

The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and why they are claimed to be erroneous, with citations of authorities thereunder. If more than three authorities are cited in support of a point made, the three authorities principally relied on shall be cited first. All authorities discussed in the argument shall be cited under the "Points Relied On". Long lists of citations should not be included.

Setting out only abstract statements of law without showing how they are related to any action or ruling of the court is not a compliance with this Rule.

46. See *supra* notes 34, 36 and accompanying text.

47. See *infra* note 21 and accompanying text for the current points relied on rule, Rule 84.04(d), which became effective in 1980. Mo. Sup. Ct. R. 84.04(d) (1979) and Mo. SUP. CT. R. 84.04(d) (the current rule) are identical.

48. See *infra* notes 49-50 and accompanying text.

49. See, e.g., *Thigpen v. Dodd's Truck Lines, Inc.*, 498 S.W.2d 816 (Mo. Ct. App. 1973). Appellant's second point relied on stated, "The court erred in allowing defendant's counsel to introduce the display of a certain exhibit purporting to be claim for compensation filed on behalf of plaintiff in November, 1971 for an injury occurring on the job in January, 1971." *Id.* at 818. The court held that the point presented nothing for appellate review because it failed to "point out 'wherein and why' these actions or rulings are claimed to be erroneous." *Id.*; *Dors v. Wulff*, 522 S.W.2d 325 (Mo. Ct. App. 1975). Appellant's point relied on stated, "the evidence required a cancellation of the instruments enumerated on the grounds of lack of

appellants not make abstract statements.⁵⁰ Missouri's appellate courts cited problems with points relied on in thirty-five cases in 1972, thirty-two cases in 1973, forty-seven cases in 1974 and fifty-two cases in 1975.⁵¹ The courts often reacted to these errors by disregarding one or more points relied on or by dismissing entire appeals.⁵² For example, in 1975, one or more points relied on were disregarded in eighteen appeals.⁵³

consideration authorized by Appellant and fraud; and for the further reasons of Appellant's advanced age, physical infirmities and circumstances surrounding the transaction." *Id.* at 326. The court found that appellant's single point relied on violated Rule 84.04(d) because it did not state "why" the errors asserted were erroneous, and thus the point preserved nothing for error. *Id.*; *Estate of Langford*, 529 S.W.2d 31 (Mo. Ct. App. 1975). In dismissing the appeal, the court noted that appellant's four points relied on failed comply with Rule 84.04(d) because the points did not fulfill the "wherein and why" requirement. *Id.* at 32-33. *See also Barber v. MFA Milling Co.* 536 S.W.2d 208, 209-211 (Mo. Ct. App. 1976); *Griffith v. State*, 504 S.W.2d 324 (Mo. Ct. App. 1974).

50. *See, e.g., Long v. Lincoln*, 528 S.W.2d 512 (Mo. Ct. App. 1975). Appellant's only point relied on stated:

When a special contract exists and a realtor agrees to sell real estate for a net price to his principal, the realtor is bound by his contract and cannot in the absence of bad faith on the part of the seller or a waiver of the right to insist upon the strict terms of the agreement receive any commission based upon the total sales price.

Id. at 513. The trial court reviewed the transcript and briefs ex gratia and affirmed the decision of the trial court after stating that the point relied on was "nothing more than a mere abstract statement of law" and as such was in violation of Rule 84.04(d). *Id.*; *Dors*, 522 S.W.2d at 327. The court attacked the point relied on as being "nothing more than an abstract assertion." *Id.* The court noted that the court is unwilling to speculate about the point relied on when it is unrecognizable from the brief. *Id.* (*citing Butterbaugh v. Public Water Supply Dist. No. 12*, 512 S.W.2d 445, 447 (Mo. Ct. App. 1974)). *See supra* note 45 for the text of the point relied on; *Kellin v. ACF Industries, Inc.*, 528 S.W.2d 533 (Mo. Ct. App. 1975). The court held that the appellant's four points relied on preserved nothing for review because all four were "mere abstractions." *Id.* at 534. The court nonetheless chose to review the brief for plain error pursuant to Rule 84.13(c) to determine if it showed "manifest injustice." *Id.* The court found no manifest injustice and affirmed the trial court's decision. *Id.* *See also Estate of Langford*, 529 S.W.2d at 32-33; and *Barber*, 536 S.W.2d at 209-211.

51. Judge Harry L. C. Weier and William A. Fairbank, *Why Write a Defective Brief?: Give Your Client a Chance on Appeal*, 33 J. MO. BAR 79, 81 (1977).

52. *Id.*

53. *Id.*

B. Evolution of the Requirements for Writing Points Relied On

In a 1977 article, *Why Write a Defective Brief?: Give Your Client a Chance on Appeal*, Judge Harry L.C. Weier and William A. Fairbank wrote to help attorneys with "that area which appears to be the most difficult," complying with the points relied on requirements.⁵⁴ They explained that the best format is that which Judge Stone set out in *Effective Appellate Briefs*.⁵⁵ Weier and Fairbank noted that the first portion of the point relied on is satisfied by stating the action of the trial court which is claimed to be erroneous.⁵⁶ The authors explained that as to the "wherein and why" portion of the rule,⁵⁷ the *because* clause satisfies the "why"⁵⁸ and the *in that* clause satisfies the "wherein."⁵⁹

The Missouri Supreme Court attempted to clarify the requirements of Rule 84.04(d) in *Thummel v. King* by adopting the formula set out in the Weier and Fairbank article.⁶⁰ The court explained that the appellant's points relied on did not set out any specific rulings that were in error or identify a time when the court was asked to make a ruling on the issue, but only made "bare allegations that the trial court erred."⁶¹ The *Thummel* court next explained that appellants failed to meet the "wherein and why" requirement of the rule, noting it is the "most common source of error in appellant briefing."⁶² The court stated that after explaining the court's erroneous ruling "it stands to

54. *Id.*

55. *Id.* See *supra* note 41 and accompanying text.

56. *Id.* at 89. The authors note that a common error of practitioners is to only give "abstract or conclusionary statements of law or fact" rather than a specific erroneous action of the trial court. *Id.*

57. See *supra* note 21 and accompanying text for the text of Rule 84.04(d).

58. "The 'why' part usually will indicate the reason the trial court erred. . . ." See Weier and Fairbank, *supra* note 51, at 90.

59. "[T]he 'wherein' section should provide specific details, sometimes to the point of referring to testimony or other evidence." See Weier and Fairbank, *supra* note 50, at 90.

60. 570 S.W.2d 679 (Mo. 1978) (en banc). Appellant's brief contained the following points relied on: I. "The Court Erred in Failing to Enforce a Written Contract of Agency and Guaranty for Which Consideration Was Paid to the Agent." II. "The Court Erred in Failing to Enforce Fiduciary Responsibilities on Defendant Brady Company." III. "The Court Erred in Failing to Require Defendant to Account as Disbursal Agent." IV. "The Court Erred in Failing to Enforce Settlement Agreement of September 20, 1973." *Id.* at 684.

61. *Id.* at 685.

62. *Id.* at 685 (citing Weier and Fairbank, *supra* note 50, at 88-91). The court says that "compliance with these requirements is a matter of common sense. . . ." *Id.*

reason that the point should then specify *why* the ruling was erroneous."⁶³ The court concluded by explaining the last step, which is to inform the appellate court "*wherein* the testimony or evidence gives rise to the ruling for which appellant contends."⁶⁴

To demonstrate the proper application of these requirements, the court rewrote appellant's first point relied on using the format suggested in the Weier and Fairbank article.⁶⁵ The court stated that this is the form required by Rule 84.04.⁶⁶

Even after *Thummel* gave practitioners a formula, appellants continued to erroneously draft points relied on.⁶⁷ The types of errors cited since *Thummel* are not significantly different from the errors cited before *Thummel*.⁶⁸ Still, the most commonly cited error is the failure to adequately state "*wherein and why*" a given ruling was erroneous.⁶⁹ Another common

63. *Id.*

64. *Id.*

65. The rewritten point relied on stated:

The trial court erred in its interpretation of the contract as stated in conclusion of law no. 1 to the effect that Swander was obligated to pay all amounts of labor and materials, including amounts paid on forged requests, over and above the amount of the loan [b]ecause paragraph 11 of the contract constituted a written contract of agency and guaranty, supported by consideration, whereby Brady Co. undertook the responsibility for such payments in that it provided that Brady Co. would pay [a]ll bills for labor and material (not just to the extent of loan proceeds) and would guarantee against all liens on the property.

Id.

66. *Id.*

67. *See infra* note 69-70 and accompanying text.

68. *Id.*

69. *See, e.g.,* Cook v. Holcomb, 854 S.W.2d 78 (Mo. Ct. App. E.D. 1993). One of appellant's points relied on presented: "The jury's verdict for the plaintiff was so excessive as to constitute bias, prejudice and misconduct on the part of the jury." *Id.* at 82. This point relied on was dismissed for the failure to allege error in a ruling and the failure to state "*wherein and why*" any ruling resulted in error. *Id.*; White v. White, 846 S.W.2d 212 (Mo. Ct. App. 1993). All four of the appellant's points relied on were held to have violated Rule 84.04(d) because they failed to state "*wherein and why*" the ruling of the trial court was erroneous. *Id.* at 214. One of Appellant's four points relied on read, "That the trial court erred in not dismissing the Respondent's petition for lack of jurisdiction once the Respondent stated that she was a resident of the state of Georgia." *Id.* at 213; *In re Marriage of Daniele*, 854 S.W.2d 489 (Mo. Ct. App. 1993). The appellant's fourth point stated that the trial court erred "as a matter of law and fact and abused its discretion in its division of property and debt because the trial court did not set apart to [husband] all of his separate property and because the division of marital property and debt is not just, all in contravention of

error made by appellants is submitting points relied on which are too abstract to comply with the rule.⁷⁰

After *Thummel*, the number of errors noted in appeals was similar to the number of errors noted in years immediately preceding *Thummel*.⁷¹ In 1993, errors in points relied on were noted in forty-three appeals.⁷² Of these forty-three appeals, one or more points relied on were found to preserve nothing for appeal in twenty-nine cases.⁷³

The Missouri Supreme Court recently addressed the points relied on issue in *Doe v. Roman Catholic Diocese*.⁷⁴ In a 4-3 decision, the court decided the appeal on the merits of the case.⁷⁵ However, the dissenting judges argued that the appeal should have been dismissed on the basis of "woefully insufficient" points relied on.⁷⁶ The dissent noted the points relied on failed

[MO. REV. STAT. § 452.330]." *Id.* at 489. The Eastern District stated that the point failed to sufficiently state "wherein and why" the trial court erred, and thus the point preserved nothing for appeal. *Id.* at 490; *Farm Credit Bank of St. Louis v. Jensen*, 844 S.W.2d 132 (Mo. Ct. App. 1993). Appellant's points relied on stated, "I. The Circuit Court of Dallas County, Missouri, erred in entering the order of March 5, 1991, that dismissed Count II of the [appellant's] counterclaim."; "II. The Circuit Court of Dallas County, Missouri, erred in entering the order of July 26, 1991, striking [appellants'] affirmative defenses." *Id.* at 133. The court stated that neither point was in compliance with Rule 84.04(d) because neither stated why the actions of the trial court are erroneous. *Id.*

70. *See, e.g., Straeter Distributing, Inc. v. Fry-Wagner Moving & Storage Co, Inc.*, 862 S.W.2d 415, 417 (Mo. Ct. App. 1993) (The court stated that the points relied on were "simply abstract statements of law."); *State v. Lieurance*, 844 S.W.2d 81, 84 (Mo. Ct. App. 1992) (The court stated that a point relied on which stated that "the trial court's refusal to rule on [petitioner's] constitutional claims may mean that its decision is not . . . final . . ." is a mere abstract assertion that preserves nothing for appeal.).

71. *Compare infra* notes 72-73 and accompanying text *with supra* notes 51-53 and accompanying text.

72. MO. ANN. RULES, Rule 84.04 (Vernon Supp. 1995).

73. The Western District of the Missouri Court of Appeals has been less apt to note errors in points relied on. *Id.* In 1993, the Western District only noted errors in points relied on in three cases, but considered the points relied on in all three cases. *Id.* In contrast, the Eastern District and Southern District noted forty errors in 1993. *Id.* In 1993, the Southern District disregarded one or more points relied on based on violations of Rule 84.04(d) in fifteen of twenty cases cited for violations. *Id.* The Eastern District did the same in fourteen of twenty cases. *Id.*

74. 862 S.W.2d 338 (Mo 1993) (en banc) (Benton, J., dissenting).

75. *Id.* at 339-342.

76. *Id.* at 342. Appellant's points relied on stated: "I. Mo. Stat. Sec. 537.046 is presumed constitutional. II. Mo. Stat. Sec. 537.046 is purely procedural and thus may be applied retroactively. III. Laws across the country support the retroactive application of Mo. Stat. Sec. 537.046." *Id.*

to identify any actions or rulings of the trial court and failed to specify wherein and why the ruling of the trial court was erroneous.⁷⁷

IV. THE INSTANT DECISION

The Southern District of the Missouri Court of Appeals began its analysis by setting out the text of Rule 84.04(d).⁷⁸ The court then noted that the standards for complying with the rule are set out in numerous appellate court opinions⁷⁹ and noted that the policy behind the requirements of the rule has been set out by the Missouri Supreme Court.⁸⁰ The court stated that points relied on that do not meet the Rule 84.04(d) standard "preserve nothing for appeal"⁸¹ and added that "allegations of error . . . not properly briefed shall not be considered in any civil appeal. . . ."⁸²

The *Hercey* Court then set out the three components of a point relied on:

(1) "A concise statement of the challenged ruling or action of the trial court."⁸³

(2) "Why the action or ruling was erroneous."⁸⁴ The Court explained that this requirement can ordinarily be met by appellant stating what the trial court's conclusion of law should have been on the disputed point.⁸⁵

(3) The *wherein* requirement, which is satisfied either by stating testimony or evidence that "gives rise to the ruling for which appellant contends"⁸⁶ or by stating the way the trial court incorrectly applied the law or misconstrued the facts.⁸⁷

The Southern District next cited Judge Stone's formula for writing a point relied on.⁸⁸ The court noted that this formula was endorsed by the

77. *Id.* at 343.

78. *Hercey*, 869 S.W.2d at 880. See *supra* note 21 and accompanying text for the text of MO. SUP. CT. R. 84.04(d).

79. *Id.* at 880. The court cited *Thummel v. King*, 570 S.W.2d 679 (Mo. 1978) (en banc) and *Midwest Material Co. v. Village Development Co.*, 806 S.W.2d 477, 483 n.1 (Mo. Ct. App. 1991).

80. *Id.* (citing *Thummel*, 570 S.W.2d at 686[6-7]).

81. *Id.* (citing *Thummel*, 570 S.W.2d at 684.)

82. *Id.* (citing MO. SUP. CT. R. 84.13(a)).

83. *Id.* (citing *Thummel*, 570 S.W.2d at 684-85[3-4]).

84. *Id.*

85. *Id.* at 880-81 (citing *Thummel*, 570 S.W.2d at 685).

86. *Id.* at 881 (citing *Thummel*, 570 S.W.2d at 685).

87. *Id.* (citing *Estate of Goslee*, 807 S.W.2d 552, 556 (Mo. Ct. App. 1991) (quoting *State ex rel Mayfield v. City of Joplin*, 485 S.W.2d 473, 475 (Mo. Ct. App. 1972)).

88. *Id.* (citing A.P. Stone, *Effective Appellate Briefs*, 15 J. MO. BAR 80-91 (1959),

Missouri Supreme Court in *Thummel*.⁸⁹ The Court then examined each of Appellants' points relied on.⁹⁰ The first point relied on stated:

I. The trial court erred in refusing to grant petitioners' motion for a new trial because the verdict was against the greater weight of the credible evidence, which included reliable and probative evidence of paternity by means of human leukocyte antigen (HLA) blood testing.⁹¹

The court stated that although this point proposes a rule of law,⁹² the point lacks a "wherein" statement "referenc[ing] a principle of law or other reason that would require the court to rule contrary to the general rule" regarding jury verdicts.⁹³

The second point relied on stated:

II. The trial court erred in overruling petitioners' motion for summary judgment because Missouri Supreme Court Rule 74.04 as well as Missouri case law required the trial court to sustain petitioners' motion for summary judgment.⁹⁴

The *Hercey* court found that the second point relied on does not satisfy the *wherein* or the *why* requirements of Rule 84.04(d).⁹⁵

Appellant's third point relied on stated:

III. The trial court erred in admitting evidence of respondent's financial condition in direct violation of the trial court's order sustaining petitioners'

which the court had cited in *Midwest Materials*, 806 S.W.2d at 483, n.1.). The Court also cites Judge Harry L.C. Weier and William A. Fairbank, *Why Write a Defective Brief?: Give Your Client a Chance on Appeal*, 33 J. MO. BAR 79-92 (1977), which was cited by the Missouri Supreme Court in *Thummel*, 570 S.W.2d at 685 n.3. See *infra* notes 41 and accompanying text for the method that Judge Stone described for writing points relied on.

89. *Id.* (citing *Thummel*, 570 S.W.2d at 685). The *Hercey* court explained that the *Thummel* court re-wrote the appellant's point relied "in the form required by Rule 84.04" by using Judge Stone's pattern. *Id.* (citing *Thummel*, 570 S.W.2d at 685).

90. *Id.* at 881-82.

91. *Id.* at 880.

92. *Id.* at 881. The court notes that the proposed rule of law is "the verdict was against the greater weight of the credible evidence." *Id.* The court explained that this is "the *why* portion" of a point relied on. *Id.*

93. *Id.*

94. *Id.* at 880.

95. *Id.* at 881. The court additionally notes that the ruling of the trial court is not appealable on this issue. *Id.*

motion in limine "B" because it prejudicially affected the jury's deliberations when the only issue before the jury was paternity.⁹⁶

The court explained that the error in this point relied on is that even if the phrase "in direct violation of the trial court's order sustaining petitioners' motion in limine 'B'" is the *why* portion, there is still not a *wherein* portion.⁹⁷ The court stated that the wherein statement should have explained why the general rule that a trial court may admit evidence even when it was the subject of a motion in limine is not applicable.⁹⁸ In the alternative, the court stated that if the why statement is "because it prejudicially affected the jury's deliberations", then the phrase "when the only issue before the jury was paternity" does not meet the wherein requirement, because it fails to explain in what way the evidence was prejudicial.⁹⁹

The fourth point relied on provided:

IV. The trial court erred in admitting evidence of sexual access to petitioner at a time other than the probably [sic] period of conception in that the admission of said evidence was in direct violation of the trial court's order sustaining petitioner's motion in limine "D" requiring that evidence of sexual access to petitioner at a time other than the probable period of conception was not to be mentioned in the hearing of the jury by either respondent's counsel or by any of the witnesses called by respondent and also was in violation of Section 210.839(2) which prohibits anyone who has not made another possible father known and made him a correspondent subject to blood tests from trying to bring up such a person at the time of trial.¹⁰⁰

The court explained that the first "why" statement, which concerns a motion in limine, is deficient in the same way as the third point relied on.¹⁰¹ While the court found the second "why" statement adequately states a rule of law that appellants propose the trial court should have applied, the why is still not supported by a wherein statement that should have referred to testimony or evidence.¹⁰²

Appellants provided in their fifth point relied on:

96. *Id.* at 880.

97. *Id.* at 881.

98. *Id.* (citing *Littles v. Cummins*, 854 S.W.2d 45, 46 (Mo. Ct. App. 1993)).

99. *Id.* at 881-82.

100. *Id.* at 880.

101. *Id.* at 882. See *supra* notes 97-99 and accompanying text.

102. *Id.*

V. The trial court erred in refusing to grant petitioners' motion for a new trial because the verdict of the jury herein reflects bias, passion and racial prejudice, in violation of petitioners' constitutional right to a fair and impartial jury, thereby entitling petitioners to a new trial.¹⁰³

The *Hercey* Court explained that a proper wherein statement for this point relied on would have given support for the conclusion that the verdict "reflects bias, passion and racial prejudice."¹⁰⁴

The sixth point relied on stated:

VI. The trial court erred in refusing to grant petitioners' motion for new trial because respondent's improper use of the term "reasonable doubt" during closing argument was extremely prejudicial to petitioners, thereby mandating a new trial.¹⁰⁵

The court stated that this point contains neither a why nor a wherein statement.¹⁰⁶

The final point relied on stated:

VII. The trial court erred in refusing to grant petitioners' motion for new trial because newly discovered evidence in the form of respondent's and his wife's testimony form[s] an additional basis for granting a new trial to petitioners.¹⁰⁷

According to the court, this point did not meet the wherein requirement because appellants failed to identify any evidence that would support the trial court granting the motion for new trial.¹⁰⁸

The court next turned to appellants' reply brief and stated that apparently appellants viewed "the *why* and *wherein* components... as interchangeable or alternative requirements."¹⁰⁹ The *Hercey* court responded, "The rule, the cases, and the journal articles cited in this opinion make clear the *why* and *wherein* requirements are separate ones, each intended to fulfill a specific purpose and each satisfied in different ways."¹¹⁰

The court noted that Rule 84.13(c) gives the court discretionary authority to examine the argument portion of appellants' brief or record on appeal for

103. *Id.* at 880.

104. *Id.* at 882.

105. *Id.* at 880.

106. *Id.* at 882.

107. *Id.* at 880.

108. *Id.*

109. *Id.* at 882.

110. *Id.* (emphasis added).

plain error, but the court declined to exercise that authority.¹¹¹ The court concluded by dismissing the appeal.¹¹²

V. COMMENT

By dismissing the appeal in *State ex rel. Marshall v. Hercey*, the Southern District of the Missouri Court of Appeals draws attention to Missouri's points relied on problem. Since the first points relied on rule was enacted, attorneys have had difficulty mastering the rule's requirements.¹¹³ Although Missouri's appellate courts have explained what is necessary to comply with the points relied on rule,¹¹⁴ and the Missouri Supreme Court has provided a formula for meeting the rule's requirements,¹¹⁵ the same mistakes have been made since 1944.¹¹⁶

Before Missouri's appellate courts explain the rule yet again, Missouri's legal community should examine why the courts' efforts have been unsuccessful. The source of the problem is that over the past five decades the rule's requirements have been *explained*, and the method for writing a point relied on has *evolved*, but neither the explanation nor the evolution is reflected in the rule's wording.¹¹⁷ As a result, an attorney who reads the points relied on rule, but who is unfamiliar with the points relied on case law, will not understand the requirements of the rule. While some would argue that the attorney should know the points relied on case law, history has shown that many attorneys do not. Consequently, we must decide which is more important, seeing that the informational purpose of the rule is served and that fewer cases are dismissed or asserting a principal that "attorneys should know the case law".

If the wording of the rule were changed to reflect the explanation and evolution that are now found only in the case law, attorneys would be more likely to understand how to write a point relied on.¹¹⁸ In turn, Missouri's points relied on rule would more fully achieve its purpose of clearly informing

111. *Id.*

112. *Id.*

113. *See supra* note 5 and accompanying text.

114. *See supra* note 6 and accompanying text.

115. *See supra* note 66 and accompanying text.

116. *See supra* note 8 and accompanying text.

117. *See supra* note 21 and accompanying text for the text of the current points relied on rule.

118. *See infra* notes 121-46 and accompanying text.

the court and the party opponent of the specific issues of the appeal¹¹⁹ and fewer appeals would have to be dismissed.¹²⁰

A. The Source of the "Points Relied On" Problem

During the fifty-one years since the first points relied on rule was adopted, Missouri's appellate courts have continually explained the requirements of the rule.¹²¹ The courts have frequently explained that appellants must make specific allegations of *what* the trial court did that was in error¹²² and give specific explanations of *why* the court was in error.¹²³

The points relied on rule evolved to its present state through Missouri's courts' struggle to tell practitioners how to meet these requirements. This evolution culminated in the *Thummel v. King*,¹²⁴ when the Missouri Supreme Court adopted a three-clause formula for drafting a point relied on.¹²⁵ The Thummel formula was a significant change in the points relied on rule for two reasons. First, the formula was not just a suggested format for writing a point relied on, the formula is a requirement of the rule.¹²⁶ Second, in adopting this formula, the Missouri Supreme Court stated for the first time that "wherein and why" are actually two separate requirements of the rule, which are satisfied in different ways.¹²⁷

After *Thummel*, Missouri's appellate courts continued to explain the necessary information of a point relied on, now with reference to the *Thummel*

119. See *supra* notes 23-24 and accompanying text. See also *infra* notes 121-46 and accompanying text.

120. See *infra* notes 121-46 and accompanying text.

121. See *supra* note 6 and accompanying text.

122. *Id.*

123. *Id.*

124. See *supra* notes 60-66 and accompanying text.

125. See *supra* note 66 and accompanying text.

126. *Thummel*, 570 S.W.2d at 685. The court drafted a point relied on and stated that it was written in "the form required by Rule 84.04." *Id.*

127. *Thummel*, 570 S.W.2d at 686. The court stated, "[I]t stands to reason that [after stating the erroneous ruling] the point should then specify why the ruling was erroneous. . . . After stating *why* the ruling was erroneous, the court then must be informed *wherein* the testimony or evidence gives rise to the ruling for which appellant contends. *Id.* at 685. The formula which Thummel adopted was originally published in 1959 by Judge Stone to help practitioners emphasize "**what**" actions of the court are erroneous and "**why**" the court is wrong. See *supra* note 40 and accompanying text. Judge Stone never said that the formula was meant to help practitioners explain "wherein and why" the court was wrong. This proposition was first made by Weir and Fairbank in their 1977 article. See *supra* notes 57-59 and accompanying text.

formula.¹²⁸ The text of the points relied on rule has never been changed to reflect the explanation of the rule's requirements or the *Thummel* formula for writing a point relied on.¹²⁹ The first sentence of Rule 84.04(d) states: "The points relied on shall state briefly and concisely what actions or ruling of the court are sought to be reviewed and wherein and why they are claimed to be erroneous, with citations of authorities thereunder."¹³⁰

This single sentence is the only explanation given in the text of the rule regarding what must be included in a point relied on.¹³¹ The rule itself provides no guidance as to the format which is essential to drafting a point relied on under *Thummel*.¹³² The rule fails to state that a specific allegation must be made of what the court did that was in error.¹³³ The rule does not state that the *why* clause must set forth the specific reason why the ruling was erroneous¹³⁴ or that the *wherein* clause must state specific testimony or evidence that gives rise to the ruling that appellant contends should have been made.¹³⁵

Prior to 1994, The Missouri Supreme Court Rules included a Committee Note following the text of Rule 84.04 which stated, "See the case of *Thummel v. King* for an analysis of the requirements of Rule 84, particularly those specified in Rule 84.04(d)."¹³⁶ Arguably, this Committee Note did not lead many practitioners to read *Thummel*, and in turn, write better points relied on. However, the Committee Note did reference the best authority on the requirements of points relied on. Because that reference may have helped some practitioners, the repeal of the committee note was a step backward in improving the compliance with Rule 84.04(d).

Since the original points relied on rule was adopted, there has been a movement for the use of "plain English" in the legal profession.¹³⁷ While attorneys are now encouraged to use "plain English" rather than "lawyerisms," the points relied on rule has not been clarified with the use of a plain English explanation of the rule's requirements.¹³⁸

128. See *supra* notes 67-70, 80-112 and accompanying text.

129. See *supra* note 9 and accompanying text.

130. See *supra* note 21 for the text of MO. SUP. CT. R. 84.04(d).

131. *Id.*

132. See *infra* note 60, 66 and accompanying text.

133. See *supra* note 61 and accompanying text.

134. See *supra* note 63 and accompanying text.

135. See *supra* note 64 and accompanying text.

136. MO. ANN. RULES, Rule 84.04 (Vernon Supp. 1993), Committee Note, (citations omitted).

137. The Missouri Bar has formed a Special Committee on Plain English.

138. See *supra* note 21 and accompanying text.

The rule's phrase "wherein and why"¹³⁹ has baffled many attorneys, judging from the number of points relied on which have not adequately met this requirement of the rule.¹⁴⁰ The confusion is for good reason. As stated earlier, the phrase "wherein and why" was not adopted in 1972 to evidence a change in the requirements of the rule.¹⁴¹ "Wherein and why" meant nothing more than "why" until 1978 when the Missouri Supreme Court gave the phrase two specific meanings in *Thummel*.¹⁴² A plain English explanation of what is required by Rule 84.04(d), including the *Thummel* formula, would be more clear than "wherein and why."

B. A Possible Revision of the "Points Relied On" Rule

The following is a possible updated version of Rule 84.04(d), written in plain English. While the substance of the current rule is retained, five decades of case law are now included in the text of the rule:

84.04(d) Points Relied On. A point relied on shall include each of the following: (1) A sentence which briefly states that the trial court erred in making a specific ruling or in taking a specific action; (2) A sentence which briefly and specifically explains why the action or ruling was erroneous. This requirement should be met by explaining what the trial court's conclusion should have been on the disputed point; (3) A sentence which supports the explanation of why the court's action or ruling was erroneous. This requirement should be met by briefly and specifically explaining either (a) the testimony or evidence which supports the conclusion which should have been made or (b) the way the trial court incorrectly applied the law or misconstrued the facts that resulted in the incorrect conclusion.

Following the point relied on, all cases, rules, and statutes which support the point and which are cited in the argument shall be listed. If more than three authorities are cited in the argument, the three most important should be listed first.

139. The phrase "wherein and why" seems to fit the definition of lawyerisms provided by Richard C. Wydick, in his book *PLAIN ENGLISH FOR LAWYERS*, which includes words such as "said" and "hereinafter". RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 57-58 (1994). Wydick explained that when lawyerisms are used in legal writing, they give a false sense of precision and sometimes obscure a dangerous gap in analysis. *Id.* at 57.

140. See *supra* note 6 and accompanying text.

141. See *supra* note 127 and accompanying text. The phrase "wherein and why" was not completely new to the points relied on rule; the phrase had been used in Mo. Sup. Ct. R. 1.08(a)(3) (1959). See *supra* notes 34, 36 and accompanying text.

142. See *supra* notes 63-64, 127 and accompanying text.

The proposed rule is largely borrowed from the formula set forth in *Thummel*¹⁴³ and the explanation given by the Southern District in *Hercey*, which is based on *Thummel* and *Estate of Goslee*.¹⁴⁴ As previously noted, the proposed rule is written in plain English, which should be easier to read and understand. Another change is a requirement that points relied on be written in a three-sentence format, rather than the present one-sentence format adopted in *Thummel*. This change would allow practitioners to use plain English, rather than force their argument into one long, awkward sentence.¹⁴⁵

The result of these changes would be that attorneys could determine the requirements of the rule simply by reading the text of the rule. Because this would likely lead to greater compliance with the requirements, the purpose of the rule, which is to inform the court and the party opponent of the issues of the case,¹⁴⁶ will more likely be accomplished. This has positive implications for clients, the courts, and attorneys. Clients benefit from well-written points relied on because the court is more likely to understand the issues of the case, and their appeal is less likely to be dismissed on procedural grounds. The courts benefit when the purpose of the rule is served because they are better informed of the issues of the case and will have to spend less time searching the brief for the attorney's argument. Additionally, the courts will be more likely to make a decision based on the merits of the case. Appellants' attorneys benefit from these implications as well. Respondents' attorneys benefit because they are more likely to know how to respond to an appellant's argument if it is clear from the points relied on what that argument is.

If the rule is changed, the Missouri Supreme Court should observe the response of the lower courts and practitioners to the new rule. Rather than waiting fifty-one years to change the rule again, the court should consider

143. See *supra* notes 60-66 and accompanying text.

144. See *supra* notes 83-87 and accompanying text.

145. The *Thummel* court drafted a point relied on to show the demonstrate the proper application of Rule 84.04(d)'s requirements. See *supra* note 65 and accompanying text. The point relied on is a rather long, awkward sentence. The point relied on received a Readability Index of 17.52 when evaluated by the computer program RightWriter. A Readability Index of six to ten is "good," while fourteen is "complex." The program stated, "The writing is complex and may be difficult to read." The overall critique of the point relied on noted fifteen possible errors and suggestions, including "Split into 2 sentences?" and "Legalese: whereby." RightWriter (R) Version 3.1, Copyright 1989 by RightSoft, Inc. Licensed to UMC School of Law.

The evaluation of the "model" point relied on demonstrates that even when a point relied on is written correctly under the current rule, the result is something that is hard to read and understand.

146. See *supra* notes 23-24 and accompanying text.

changing the wording of the rule as the legal community recognizes its shortcomings.

VI. CONCLUSION

In *Sullivan v. Holbrook*, Judge Lamm stated,

The rules of appellate practice in hand are simple and plain. They fill no office of mere red tape, or as a show of surface routine. . . . If they are not to be obeyed, they should be done away with once for all. A just rule, fairly interpreted and enforced, wrongs no man. Ostensibly enforced, but not, it necessarily wrongs some men viz., those who labor to obey it -- the very ones it should not injure.¹⁴⁷

Because non-compliance with the points relied on rule has been a problem in Missouri's appellate courts for five decades,¹⁴⁸ Missouri's legal community must question whether the current rule is "just." The requirements of the rule are not necessarily unjust—Missouri's courts have painstakingly explained and developed the rule's requirements for the past fifty-one years.¹⁴⁹ However, because the text of the rule did not change with the case law,¹⁵⁰ the same mistakes are made by attorneys who read the rule in 1995 as were made by attorneys who read the rule in 1944. This is why the current rule is unjust, and why the rule should be revised to embody five decades of case law which were meant to improve the rule. Through Rule 84.04(d)'s revision, attorneys would have notice of the rule's requirements, and Missouri's points relied on rule would be able to serve its intended purpose.

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147. *Sullivan*, 109 S.W. at 670.

148. *See supra* note 5 and accompanying text.

149. *See supra* note 6 and accompanying text.

150. *See supra* note 9 and accompanying text.

