

IN THE SUPREME COURT OF MISSOURI

No.: SC100724

JACOB DAWSON, Appellant / Defendant,

v.

ETHEL BARRY MASTERS, Respondent / Plaintiff

Appeal from the Court of Appeals, Eastern District, Eastern Division Following
Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit
HON. JOSEPH L. WALSH, III - Circuit Judge
Division 17

RESPONDENTS' SUBSTITUTE BRIEF

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Introduction

Appellant Jacob Dawson (“Dawson”) argues four of the six points raised in his appeal of the trial court’s ruling in favor of the Respondent, Ethel Barry Masters (“Masters”), representing two general challenges to the trial court’s rulings. Dawson has abandoned the first two Points Relied On raised in his brief on appeal. Point Relied On I¹ argues that the trial court’s entry of the February 23, 2023 Memorandum and Order cancelling the jury trial on the issue of damages amounted to an abuse of the trial court’s discretion. In points relied on II, III and IV, Dawson argues that the entry of the February 23, 2023 Memorandum and Order, as well as the entry of final judgment, violated Mr. Dawson’s constitutional right to a jury trial under Article I, § 22(a) of the Missouri Constitution. Because the trial court was well within its discretion to sanction Dawson for his repeated failures to obey the trial court’s orders – including its pre-trial order, Point Relied on I fails as a matter of law. As Dawson never raised his constitutional challenges asserted in Points Relied on II, III and IV at the first available instance, those challenges are waived, and cannot be asserted for the first time on appeal. Even did Dawson’s constitutional challenges survive, since the trial court properly exercised its discretion, after repeated

¹ Point Relied on I was previously Point Relied on Three in Dawson’s brief on appeal. Similarly, Points Relied On II-IV were previously Points Relied On 4-6 in the Brief on Appeal. For purposes of clarity, Masters will refer to the Points Relied on with their designations in Dawson’s Substitute Brief in this Court.

dilatory conduct on the part of Dawson, points relied on II-IV also fail.

Statement of Facts

This matter commenced upon the death of Gerald R. Dawson (“G. Dawson”) on March 2, 2018. On the date of G. Dawson’s death, there were five vehicles in his possession, custody or control that were either owned outright by Plaintiff Ethel Barry Masters (“Masters”) or held as joint tenants by G. Dawson and Masters. Legal File – Document 2, Page 2.² Three of the vehicles (the 1940 Ford, the 2004 Ford F-150 and the 2008 Chevrolet HHR) were jointly titled in Masters and G. Dawson’s names. L.F. Doc. 3, Doc. 4 and Doc. 5. The 1970 Porsche was titled solely in Master’s name, as was the 1965 Austin-Healey Sprite. L.F. Doc 6., Doc. 7. Masters made demand on G. Dawson’s son - Jacob Dawson (“Dawson”) for the return of the vehicles, but Dawson refused to relinquish possession. L.F. Doc. 2, p. 3. Masters initially filed a probate proceeding on behalf of G. Dawson (L.F. Doc. 61, p. 1), but when she learned that Dawson had filed a probate proceeding (L.F. Doc. 60, p. 1), dismissed her action. L.F. Doc. 61, p. 4. Dissatisfied with her counsel, Masters hired her current attorney, who advised her that this was not a probate proceeding and commenced the replevin action that is the subject of this appeal. L.F. Doc. 2, p. 1. Dawson then filed an answer to Master’s petition, which asserted no affirmative defenses, but stated that Dawson was planning on filing a

² Citations to the Legal File will hereinafter be in the format “L.F. Doc. X, p. Y-Z”. For example, the current citation would be “L.F. Doc. 2, p. 2. Single page documents will not include page numbers.

discovery of assets petition in the probate court and a mechanic's lien for work done on the 1940 Ford. L.F. Doc. 11, pp. 2-3. Neither action was ever actually filed. Masters conducted discovery, which Dawson failed to timely answer. L.F. Doc. 1, p. 4. Masters then filed a Motion for Partial Summary Judgment as to the ownership of the vehicles on August 24, 2021, which Dawson again failed to timely answer. L.F. Doc. 1, p. 5. Counsel for Dawson then filed a Motion to Extend the Time to Answer both Master's Requests for Admissions and Statement of Uncontroverted Facts (Doc. 1, p. 5). In Dawson's Response to Masters Statement of Uncontroverted Material Facts he alleged that the estate of G. Dawson (hereinafter the "Estate") was filing a Motion to Intervene in the replevin action - which motion was never filed. L.F. Doc. 11, p. 3. The Court granted Dawson leave to file his responses out of time on October 26, 2021. L.F. Doc. 1, p. 5. The motion for partial summary judgment was then argued on October 29, 2021 and the trial court granted the motion by order dated November 2, 2021 (hereinafter the "Summary Judgment Order"). L.F. Doc. 22. Masters then made arrangements to retrieve the vehicles from Dawson with his counsel, but Dawson failed to appear on the date of the arranged transfer. L.F. Doc. 95, pp. 1-2. Masters filed a motion for contempt, after which counsel for Dawson sought, and was granted, leave to withdraw on February 14, 2022. L.F. Doc. 1, p. 10. In the order granting counsel leave to withdraw, Dawson was ordered to obtain replacement counsel by February 8, 2022 - the date set for hearing on the motion for contempt. L.F. Doc. 1, p. 12. Dawson did obtain counsel, who appeared at the motion for contempt. L.F. Doc. 1, p. 13. Dawson's new counsel subsequently withdrew by order dated April 26, 2022. L.F. Doc. 1, p. 14. Dawson failed to appear at his counsel's hearing

on their motion to withdraw, and the court set the matter for a status conference on July 18, 2022. L.F. Doc. 1, p. 14. On July 18, 2022 Dawson again failed to appear and the court re-set the case for a status conference on August 29, 2022. L.F. Doc. 1, p. 17. On August 29, 2022 Dawson again failed to appear, and the court set the matter for a bench trial on October 27, 2022. L.F. Doc. 1, p. 19. On October 26, 2022 new counsel appeared for Dawson and requested a continuance of the bench trial set for the next day. L.F. Doc. 1, p. 19. The trial court continued the bench trial to December 8, 2022. L.F. Doc. 1, p. 19. On December 8, 2022, the trial court continued the bench trial to January 19, 2023. L.F. Doc. 1, p. 19. On January 4, 2023, Dawson filed his demand for a jury trial. L.F. Doc. 24. The jury trial demand resulted in the cancellation of the scheduled bench trial. L.F. Doc. 1, p. 20. The trial court then entered a scheduling order on January 19, 2023, setting a pre-trial conference for February 23, 2023, setting the jury trial for February 27, 2023 and ordering that motions in limine and jury instructions be submitted to the court at least one week prior to the trial setting. L.F. Doc. 25, p. 1. On January 24, 2023 Dawson's counsel moved to withdraw (L.F. Doc. 26), which motion was granted on January 31, 2023. L.F. Doc. 28. Dawson did not appear at the motion hearing, although he was represented when the scheduling order was entered. L.F. Doc. 28. Plaintiff timely submitted his motions in limine and jury instructions to the Court. On the date set for the pre-trial conference, Dawson again failed to appear. L.F. Doc. 30, p. 1. The Court called the halls for Dawson, and when he could not be found, adjudged him in default, cancelled the scheduled jury trial set for February 27, 2023 and directed plaintiff to submit their proposed damages by affidavit on or before 4:00 p.m. on February 24, 2023. L.F. Doc. 30, p. 1. The trial court

entered judgement in favor of Plaintiff on March 1, 2023. L.F. Doc. 31. On March 20, 2023, new counsel (current counsel) entered their appearance for Dawson. L.F. Doc. 35. On March 30, 2023, Dawson filed his Motion for New Trial pursuant to Rule 78.01 (L.F. Doc. 36), his Motion to vacate, re-open, correct or amend the judgment pursuant to Rule 75.01 (L.F. Doc. 44) and his memoranda of law in support (L.F. Doc. 37 and 45 respectively). On March 31, 2023, Dawson filed his Rule 74.05 Motion to Set Aside Default Judgment. L.F. Doc. 48. On April 24, 2023 Plaintiff filed her opposition to Defendant's motions. L.F. Docs. 51, 52 and 53. The motions were heard by the trial court on April 25, 2023, and the motions were denied on April 26, 2023. L.F. Doc. 57, p. 1. At the April 26, 2023 hearing, counsel for Dawson never raised the claimed constitutional issue that Dawson was denied his constitutional right to a jury trial under Article I, Section 22(a) of the Missouri Constitution, and the trial court did not rule on this specific objection. *See* Transcript on Appeal, pp. 1 – 15. Dawson was granted two weeks in which to obtain an appeal bond, which was never obtained. L.F. Doc. 57, p. 1. This matter was subsequently argued to the Court of Appeals for the Eastern District of Missouri, Eastern Division on February 29, 2024. On July 2, 2024 the Court of Appeals issued its Opinion. Masters then applied to the Court of Appeals for rehearing en banc or alternatively for transfer to this Court, which requests were denied on August 12, 2024. Masters then sought transfer directly from this Court, which application was granted on October 1, 2024.

Argument

I. Point Relied On 1 Fails To Identify The Trial Court Ruling Dawson Claims Constitutes Reversible Error, Mischaracterizes The Record By Erroneously Claiming A Default Judgment Resulted From Dawson's Non-Appearance At The Pre-Trial Conference, And Fails To Assert Facts Demonstrating That Dawson's Actions, In The Context Of The Case, Were Not Intentional Or Reckless

Dawson's Point Relied On I violates Rule 84.04(d), as it fails to identify the specific trial court ruling Dawson claims constitutes error in this appeal. Rule 84.04(d) requires that a point relied on: "(A) Identify the trial court ruling or action that the appellant challenges; (B) State concisely the legal reasons for the appellant's claim of reversible error; and (C) Explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error." Rule 84.04(d)(1). In Point Relied on I, Dawson argues that the trial court's February 23, 2023 Memorandum And Order (hereinafter the "Memorandum And Order") was erroneous – but neglects to point out what ruling contained in the Memorandum And Order forms the basis for his claims of reversible error. Dawson also neglects to point out the legal reason for the purported error (stating only that the trial court "abused its discretion") and fails to state a brief statement of facts why in the context of the case the trial court's specific ruling support his claim of reversible error. "A deficient point relied on that fails to comply with Rule 84.04(d) is a sufficient basis upon which to dismiss or deny the point." *Boyd v. Boyd*, 134 S.W.3d 820, 823 (Mo. App. 2004).

Further, Dawson’s preservation statement under Rule 84.04(e) is also deficient. Rule 84.04(e) requires that “[f]or each claim of error, the argument shall also include a concise statement describing whether the error was preserved for appellate review; if so, how it was preserved; and the applicable standard of review.” Rule 84.04(e). “Rule 84.04(e) requires more than a conclusory preservation statement. A preservation statement, while concise, must nevertheless precisely identify with specific page references to the relevant portion of the record on appeal both (1) the challenged trial court ruling or action challenged in the point relied on and (2) how the legal reasons and the context of the case supporting those legal reasons as the claim for reversible error asserted in the point relied on were timely and specifically presented to the trial court in relation to the trial court making or taking the challenged ruling or action.” *Hale v. Burlington N. & Santa Fe Ry. Co.*, 638 S.W.3d 49, 61 (Mo. App. 2021).

Dawson’s preservation statement asserts that “Appellant preserved this point in his Rule 78.01 Verified Motion for a New Trial (D36, p.2, ¶1 and pp.3- 4, ¶4e) by incorporation of Dawson’s Memorandum of Law in Support of the Rule 78.01 Verified Motion for a New Trial. (D37, pp.16-21).” While Dawson does cite to the specific page in his Motion for New Trial and Memorandum in Support on which he relies (something he failed to do in his original brief on appeal), Dawson does not state any facts demonstrating how he placed the issue before the trial court, or whether it was ever ruled on by the trial court. Dawson’s preservation statement in his Substitute Brief continues to fail to comply with the requirements of Rule 84.04(e).

In addition, Dawson’s Verified Motion for New Trial fails to set forth any facts or

arguments concerning the “good cause” arguments now raised in this point on appeal.

The only references to the “good cause” claims of Dawson, are statements in the affidavit attached as Exhibit E to his Verified Motion for New Trial. L.F. Doc. 43. “In order to meet the standard of Rule 78.07, the allegations in the motion must be sufficient to give the trial court an opportunity to correct its errors, without requiring the court to resort to aid extrinsic to the motion.” *Sutton v. McCollum*, 421 S.W.3d 477,485 (Mo. App. 2013), citing *Brandt v. Csaki*, 937 S.W.2d 268, 275 (Mo. App. 1996). “Requiring legal claims to be presented in the motion without reference to extrinsic documents preserves the courts’ impartiality as ‘[i]t is not the function of the circuit court or appellate court to sift through a voluminous record in an attempt to determine the basis for the motion.’ *State ex rel. Nixon v. Hughes*, 281 S.W.3d 902, 908 (Mo. App. 2009)”. *Id.* at 486.

Even assuming *arguendo* that Exhibit E to Dawson’s Verified Motion for New Trial was properly included in the Motion for New Trial, “good cause” for not appearing at the hearing is not a valid basis for attacking a valid order of the trial court, entered pursuant to Rule 62.01. A trial court has broad discretion and the inherent authority to enforce compliance with his reasonable orders – including pre-trial orders. *Foster v. Kohm*, 661 S.W.2d 628, 630 (Mo. App. 1983). Under Rule 62.01 “[a] trial court, therefore, may, at its discretion, impose sanctions when they are justified, considering the conduct of the parties and counsel.” *Id.* Reversal of a trial court’s discretionary ruling is only appropriate when the ruling is “clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Tate v. Dierks*, 608 S.W.3d 799, 803 (Mo. App. 2020).

“Discretionary rulings are presumed correct and the appellant has the burden of proving that there has been error.” *Id.* citing *State ex rel. Webster v. Lehdorff Geneva, Inc.*, 744 S.W.2d 801, 804 (Mo. banc 1988).

Exhibit E does not establish good cause for Dawson’s failure to appear. In Exhibit E Mr. Dawson states that he was informed on January 24th, 2023, that his counsel was withdrawing because he had not been paid, and that attached to the e-mail were documents to remind him that the case was set for trial on February 27, 2023 among other dates, but that he did not open the attachments, instead relying entirely on the summary of the documents in the e-mail. L.F. Doc. 43, p. 1. Of course, Dawson’s statements leave out other pertinent facts that might provide greater context. The Scheduling Order entered in the case was entered on January 19, 2023 (L.F. Doc. 25, p. 1) - while Mr. Dawson was still represented by counsel - and is not referenced in Exhibit E at all. Second, simply not reading the documents sent by his prior counsel does not constitute good cause under Missouri law. A self-represented litigant has a duty to keep abreast of the status of his case - he cannot simply hide his head in the sand and assert that ignorance is now equivalent to “good cause”. *See e.g. Lee v. Lee*, 449 S.W.3d 383, 386 (Mo. App. 2014)(failing to read and understand the terms of a notice provided to a litigant is not “good cause”). For example, the pre-trial conference scheduled for February 23, 2023 was not only referenced in the scheduling order entered while Dawson was represented by counsel, and included in the e-mail sent to Dawson when his counsel withdrew, but it was shown on CaseNet – which Dawson could have checked, instead of repeatedly seeking legal counsel from the trial court.

This was not the first time Mr. Dawson's counsel had resigned due to his failure to pay. His first attorney resigned - and Mr. Dawson did not hire new counsel until the eve of the next scheduled hearing. L.F. Doc. 1, p. 11. Replacement counsel then resigned, and Mr. Dawson did nothing until nearly five months later, when the damages hearing was scheduled in his case. L.F. Doc. 1, p.12. Mr. Dawson had a pattern of delaying the proceedings by hiring counsel, not paying them, and then going unrepresented. While Dawson was advised to attend the hearing on his counsel's motion for leave to withdraw, he chose not to be there. He chose to do nothing. While he claims that he called the court to see about representing himself - he never inquired about upcoming dates, or looked the case up on CaseNet, or did anything else to monitor the status of the case. His lack of interest in the proceedings does not constitute "good cause" to set-aside the Memorandum And Order. Mr. Dawson had also failed to answer discovery for almost nineteen months - well after summary judgment was entered against him. L.F. Doc. 1, p. 17. His pattern of dilatory practices were well known to the trial court. The fact that the trial court drew the line at summoning jurors when Dawson not only failed to appear at the pre-trial conference but failed to abide by any of the deadlines in the pre-trial order, and had repeatedly failed to appear for hearings, is by no means an abuse of discretion. And Dawson cites no authority, and no facts within the record on appeal, establishing any abuse of discretion on the part of the trial court. At best, Dawson believes that the consequences of his inaction were too severe. This is not a legal basis to overturn the trial court's ruling under an abuse of discretion standard.

Dawson asserts that there is no evidence presented that his conduct was not contumacious in the record. This is also a mischaracterization. Dawson missed numerous court appearances, failed to appear for the inspection of the vehicles – prompting his then counsel, Blair Lant, to withdraw on the basis that Dawson’s blatant disregard of the orders of the court placed her in an ethical quandary. Dawson also failed to appear multiple times before the trial court set a bench trial on December 8, 2022. Only then did Dawson seek new counsel, who entered, delayed the trial further, and then withdrew prior to the scheduled jury trial for non-payment. The record is replete with Dawson’s indifference to the proceedings – despite the fact that he received notice of every appearance.

Finally, Dawson’s arguments concerning federal case law under Fed.R.Civ.P. 16 have no application to the facts of this case and are outside of the issues raised in his point relied on. Similarly, Dawson’s arguments concerning damages are nowhere addressed in the point relied on, rendering it multifarious, preserving nothing for appeal. *Hale* at p. 61.

II. Point Relied On II Raises Constitutional Challenges To The Judgment Waived When Not Presented At The First Opportunity To The Trial Court, Fails To Comply With Rule 84.04(d) And Rule 84.04(e), and Mischaracterizes The Law - Claiming That The Trial Court Cannot Cancel A Jury Trial When The Defendant Fails to Appear At The Pre-Trial Conference Or Otherwise Comply With The Court’s Pre-Trial Orders

In Point Relied on II, Dawson argues that the Court’s Memorandum And Order -

based on Dawson's failure to appear for the pre-trial conference, communicate with the Court or otherwise follow the requirements of the January 19, 2023 scheduling order, both constitutes a default judgment and violates the Missouri Constitution's guarantee of a jury trial as set forth in Article I, Section 22(a). As a principal matter, the Point Relied On violates the dictates of Rule 84.04(d) in and among other ways by failing to identify the challenged legal ruling. Dawson states that the trial court erred when it entered the Memorandum And Order – but does not identify which portion of the Memorandum And Order was erroneous. *See e.g. Morfin v. Werdehausen*, 448 S.W.3d 343, 349 (Mo. App. 2014) (holding that a point relied on is “defectively vague” under Rule 84.04 if it fails to identify the ruling or action challenged).

Dawson also fails to explain why the legal reasons, in the context of the case, support his claim of reversible error, stating only that he was deprived of his right to a jury trial. Given its most generous reading, the point relied on states that the legal basis for the claim of error was the trial court's misapplication of Article 1, § 22(a) of the Missouri Constitution; and that the facts demonstrating the violation were that the trial court cancelled the February 27, 2023 jury trial after defendant requested one. Substitute Brief of Appellant at p. 30. There is nothing in this point that demonstrates the why of the cancellation of the scheduled jury trial constituted reversible error - or that provides context for the argument that the cancellation of a jury trial for *any* reason violates the Missouri Constitution. Rule 84.04(d) specifically requires that the appellant “[e]xplain, in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error.” No such statement is contained in Point Relied On II - and therefore

Point Relied On II preserves nothing for appellate review. *Hale* at p. 61.

A. Dawson's Preservation Statements In Points Relied On II, III and IV Fail To Comply With Rule 84.04(e) - In That They Do Not Adequately Or Accurately Cite To The Record On Appeal

Dawson asserts in his preservation statements for Points Relied On II, III and IV, that he raised the issue of violation of Article I, Section 22(a) of the Missouri Constitution in “his Verified Motion for a New Trial and Memorandum of Law in Support of the Verified Motion for a New Trial”. Substitute Brief of Appellant at pp. 30, 40. “A preservation statement, while concise, must nevertheless precisely identify with specific page references to the relevant portion of the record on appeal both (1) the challenged trial court ruling or action challenged in the point relied on and (2) how the legal reasons and the context of the case supporting those legal reasons as the claim for reversible error asserted in the point relied on were timely and specifically presented to the trial court in relation to the trial court making or taking the challenged ruling or action.” *Hale* at 61. On appeal, Dawson's preservation statement identified only the documents where he claimed his arguments were raised (Documents 36 and 37) but did not direct either the respondent or the court to *where* in those documents his constitutional arguments were presented to the trial court. In Dawson's Substitute Brief he adds page references (D36, p.2, ¶1) and (D37, p.21) – but neglects to mention that the reference on Page 21 of Document 37 is actually contained in footnote 38. While there are now some page references to some specific documents within the Legal File, the Preservation Statement

still does not identify “how the legal reasons and the context of the case supporting those legal reasons as the claim for reversible error asserted in the point relied on were timely and specifically presented to the trial court in relation to the trial court making or taking the challenged ruling or action.” *Id.* In other words, the Preservation Statement in Dawson’s Substitute Brief still fails to meet the standards required under Rule 84.04(e). Further, it would take construction to arrive at the conclusion that the referenced pages presented anything for the trial court to decide. Dawson set out seven reasons why he asserts a new trial is required in his Rule 78.01 Motion, but none of them rely on Article I, Section 22(a). As the court stated in Hale:

The foregoing preservation and briefing principles demonstrate the interconnected nature of a point relied on, the argument of that point, and the required preservation statement in that argument. Simply put, as a necessary step to preserve and present a claim of error for appellate review, an appellant must identify in the argument *specific factual assertions*, supported by citation to specific page references to the relevant portion of the record on appeal, as to (1) the existence of a *singular challenged ruling or action* of the trial court identified in the point relied on and (2) the *timely presentation* to the trial court of *the legal reasons and the case context for the claimed reversible error* identified in the point relied on as related to the challenged ruling or action.

Hale at 62. (emphasis in original).

B. Points Relied On II, III and IV Raise Constitutional Challenges That Were Not Raised At The First Opportunity With The Trial Court And Were Thus Waived

Points Relied On II, III and IV assert that the trial court erred by denying Dawson his right to a jury trial under Article I, Section 22(a) of the Missouri Constitution. “To raise a constitutional challenge properly, the party must: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.” *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004).

The preservation requirements of Rule 78.01, which Dawson concedes apply to the issues raised in this appeal, are clear. To preserve a constitutional question, the party must: “(1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review. *United C.O.D.* at 313. The purpose of this rule is ‘to prevent surprise to the opposing party and permit the trial court an opportunity to fairly identify and rule on the issue.’ *Winston v. Reorganized Sch. Dist. R-2, Lawrence Cnty., Miller*, 636 S.W.2d 324, 327 (Mo. banc 1982).” *Mayes v. St. Luke's Hosp. of Kan. City*, 430 S.W.3d 260, 266

(Mo. banc 2014). “‘It is well recognized that a party should not be entitled on appeal to claim error on the part of the trial court when the party did not call attention to the error at trial and did not give the court the opportunity to rule on the question.’ *Niederkorn v. Niederkorn*, 616 S.W.2d 529, 535–36 (Mo. App. 1981)”. *Brown v. Brown*, 423 S.W.3d 784, 787-788 (Mo. banc 2014). What Dawson does not address is that the constitutional issue raised in his appeal was never presented to the trial court to decide. He never mentioned it at oral argument on his Motion for New Trial (*See* Transcript on Appeal, pp. 2, ln. 5 - 15, ln. 11), and the trial court never addressed it in its ruling. LF Doc. 30, p. 1. All because it would take a mentalist to construct Dawson’s constitutional argument from Dawson’s motion pleadings.

Dawson did not mention Article I, Section 22(a) as any of the seven (7) reasons he was requesting a new trial. LF Doc. 36, pp. 2-3, ¶¶ a) – g). Neither did Dawson’s counsel mention Article I, Section 22(a) once in his over half an hour argument in support of his Motion for New Trial before the trial court. *See* Transcript on Appeal, pp. 2, ln. 5 - 15, ln. 11. In fact, when cut-off by the trial court, after more than half an hour of uninterrupted argument, counsel for Dawson only protested that he had additional matters he wished to argue under his Rule 75.01 and Rule 74.05 Motions - he never mentioned the jury trial argument at all. TA at p. 15, ln. 10 - 11. Yet Dawson’s counsel continues to argue to this Court that his failure to raise this issue with the trial court was due to the trial court’s limits on the length of his arguments. *See* Substitute Brief at pp. 37, and 42. The truth is simpler - Dawson’s counsel didn’t think about the constitutional arguments until well after he lost his after-trial motions, at which point he inserted them into his appeal. But an

argument never presented to the trial court cannot be asserted for the first time on appeal.

Id.

Dawson's Motion for New Trial nowhere either identifies Article I, § 22(a), nor argues that the new trial request is based upon his claim that he was unconstitutionally denied his right to a jury trial. L.F. Doc. 36. Dawson relies on his Memorandum of Law in Support of his Verified Motion for New Trial (L.F. Doc. 37, p. 21) for the opposite proposition, but such reliance is not only misplaced, it is simply incorrect. Dawson's reference to Article I, Section 22(a) was included only in a footnote to his legal memorandum. LF Doc. 37, p. 21, fn. 1.

In addition, even had Dawson somehow incorporated his constitutional arguments by reference into his Verified Motion for New Trial, such incorporation by reference is insufficient to preserve the issue for appeal. "Motions for new trial are governed by Rule 78.07. In pertinent part, the rule provides that '[a]llegations of error based on matters occurring or becoming known after final submission to the court or jury shall be stated specifically.' Rule 78.07(a)(3). 'In order to meet the standard of Rule 78.07, the allegations in the motion must be sufficient to give the trial court an opportunity to correct its errors, without requiring the court to resort to aid extrinsic to the motion.' *Brandt* at 275. *See also Cross v. Drury Inns, Inc.*, 32 S.W.3d 632, 636 (Mo. App. 2000) (holding new claims cannot be raised in suggestions in support of a motion for summary judgment). Requiring legal claims to be presented in the motion without reference to extrinsic documents preserves the courts' impartiality as '[I]t is not the function of the circuit court or appellate court to sift through a voluminous record in an attempt to

determine the basis for the motion.’ *State ex rel Nixon v. Hughes* at 908 (explaining why the rules for summary judgment motions must be strictly enforced). *See also Smith v. City of St. Louis*, 395 S.W.3d 20, 29 (Mo. banc 2013) (noting that addressing an argument requiring the court to sift through the record to detect possibly valid arguments would require the court to assume the role of advocate).” *Sutton* at 485.

As Dawson’s Verified Motion for New Trial nowhere addressed the application or purported violation of Article I, Section 22(a) within the motion itself, even had Dawson put these arguments in the Memorandum of Law in Support (which he did not), such a reference would still have resulted in waiver of those arguments under Missouri law. *Id.* In discussing the requirements of Rule 78.07(a)(3), the court of appeals has held that “the allegations must be sufficiently definite to direct the trial court's attention to the particular acts or rulings asserted to be erroneous.” [*Bowman v. Burlington Northern, Inc.*, 645 S.W.2d 9, 11 (Mo. App. 1983)]; *Gwin by and through Gwin v. City of Humansville*, 525 S.W.3d 567, 571 (Mo. App. 2017) ; *see also Bowman*, 645 S.W.2d at 11 (similarly recognizing that “[a] party ... is precluded from urging on civil appeal any allegation of error not properly presented to the trial court in a motion for new trial, and any deficiencies in the motion may not be supplied by appellant's brief”).” *Williams v. Williams*, 669 S.W.3d 708, 717 (Mo. App. 2023).

Dawson listed seven reasons the trial court should grant his Motion for New Trial – not one of which mentions Article I, Section 22(a) of the Missouri Constitution. L.F. Doc. 36, p. 2-3. The seven reasons asserted were:

(a) The Court lacks subject matter jurisdiction because this Circuit’s Probate

Division (“Probate Court”) is vested with exclusive jurisdiction over the subject matter of this case;

(b) The Court lacks jurisdiction because Masters failed to name the Estate of Gerald Dawson, hereafter the (“Estate”) as a necessary and indispensable party;

(c) The case should be dismissed because Masters has impermissibly split her cause of action;

(d) Based on undisputed material facts and application of law, Dawson is entitled to summary judgment.

(e) The Judgment for damages was entered in error because it is based on the February 23, 2023 Order wherein the Court abused its discretion when it sanctioned Dawson;

(f) The Judgment’s award of compensatory damages is based on insufficient evidence, and the result of the Court’s misapplication of law computing damages; and

(g) The Judgment’s award of punitive damages was entered because of the Court’s misapplication of law, based on insufficient evidence or based on error in its findings of fact.

Not a single listed reason in Dawson’s Rule 78.01 Motion identified his denial of a jury trial on the issue of damages under Article I, Section 22(a) as a basis upon which he sought a new trial. Instead, Dawson now argues that his Motion for New Trial, at p. 2, ¶1 when taken together with his Memorandum of Law in Support at p.

21, supplied the necessary references. *See* Substitute Brief at pp. 30, 40. But a look at those arguments refutes Dawson’s claims. Page 2, ¶ 1 of the Motion for New Trial states: “Defendant’s Motion incorporates by reference Defendant Dawson’s Memorandum Of Law In Support Of Defendant’s Verified Motion For A New Trial Based On Rule 78.01 and Dawson’s Affidavit, marked as Exhibit E, therein. Page 21 of Dawson’s Memorandum of Law in Support (LF Doc. 37, p. 21) contains only the following language addressing the denial of Dawson’s right to a jury trial: “As in Brueggemann, this court has abused its discretion when it defaulted Defendant, denying him his constitutional right to a jury trial,³⁸ which resulted in a Judgment against Defendant that awarded Masters compensatory and punitive damages.” Footnote 38 stated in its entirety: “Missouri Constitution, Art. I, § 22(a).” LF Doc. 37, p.21, fn. 38. Nowhere in the Memorandum of Law was there any attempt to explain what trial court ruling Dawson was challenging, or how, based on the facts, this ruling violated the constitutional provision cited. Neither was this argument tied to any of the seven reasons Dawson asserted that he was entitled to a new trial under Rule 78.01.

Finally, the argument ignores that the cancellation of the jury trial was a sanction for Dawson’s failure to either appear at the pre-trial conference, or to otherwise comply with the trial court’s pre-trial order. LF Doc. 30, p.1. As this Court stated in dicta in the case of *Brancato v. Wholesale Tool Co., Inc.*, 950 SW2d 551, 556 (Mo. App. 1997) denial of a jury trial as a sanction for non-compliance with the court’s pre-trial order would not constitute error. *Id.* However, given that this issue was not preserved in the first instance,

the Court need never reach this issue by virtue of the cannon that decisions of constitutional issues are disfavored if the matter may be resolved on other grounds.

Foremost Ins. Co. v. Public Service Com'n of Missouri, 985 S.W.2d 793, 795 (Mo. App. 1998) citing *State ex rel. Director of Revenue, State of Mo. v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996).

III. Point Relied on III Additionally Violates The Requirements Of Rule 84.04(d) and 84.04(e), And Fails To Establish Any Abuse Of Discretion On The Part Of The Trial Court In Cancelling The Jury Trial For Damages When Dawson Failed To Appear For The Pre-Trial Conference.

In the preservation statement required under Rule 84.04(e), Dawson again claims that his constitutional challenges to the trial court's rulings were presented in his Verified Motion For New Trial. This statement is demonstrably false, and is fatal to Dawson's claims, as discussed *supra*. Because the analysis of this Point Relied On is identical to that asserted in response to Point Relied on II, it will not be repeated here. Unlike Appellant, Respondent bears no burden on appeal, and may address identical deficiencies by reference to the earlier arguments presented in response to Appellant's points relied on. *See e.g. Indep. Sch. Dist. No. 30 v. Cnty. of Jackson*, 666 S.W.3d 279, 285 n. 10 (Mo. App. 2023). While Rule 84.04(f) requires that respondent's brief "shall contain headings identifying the points relied on contained in the appellant's brief to which each such argument responds[]" it does not require that identical arguments be repeated *verbatim* under separate headings when the points can "logically be addressed together." *Id. See also Coyne v. Edwards*, 395 S.W.3d 509, 521 n. 10 (Mo. banc 2013) ("the suggestion that

a respondent's brief has to address the issues raised by the appellant's brief in the exact order that they are raised by appellant is a misinterpretation of Rule 84.04(f), which states: The argument portion of the respondent's brief shall contain headings identifying the points relied on contained in the appellant's brief to which each such argument responds. This Rule does not purport to control the manner in which a party's brief is organized, only the content therein.”).

A. Point Relied On III Fails To Comply With The Requirements Of Rule 84.04(d)

Dawson’s Point Relied On III again fails to follow the required format of Rule 84.04(d), in that it does not either identify the specific legal ruling challenged (citing the entry of the Memorandum And Order - but not a specific ruling within that Memorandum And Order), or explain why the cancellation of the jury trial, in the context of his non-appearance at the pre-trial conference, constitutes an abuse of discretion. As previously discussed, the failure of Dawson to properly set forth his point relied on in accordance with Rule 84.04(d) preserves nothing for review. *Hale* at p. 61.

B. Dawson Cannot Establish An Abuse Of Discretion On The Part Of The Trial Court

Dawson again asserts that the trial court entered a default judgment against him when he failed to appear for the February 23, 2023 pre-trial conference. Dawson’s allegations in this regard misstate the record. As previously discussed, liability had already been determined by Masters’ Motion for Partial Summary Judgment and was not at issue at the

trial originally scheduled for February 27, 2023. LF doc. 20. The scheduled jury trial was solely on the issue of damages. *See* L.F. Doc. 1, p. 20. The only consequence imposed on Dawson for his failure to appear, was that the trial court canceled the jury trial, as the trial court did not want to summon jurors when there was significant doubt as to whether the defendant would even appear. No default as to liability was entered.

But even had Dawson properly identified the trial court's ruling, Dawson fails to identify how the trial court's ruling constituted an abuse of discretion. Instead, Dawson veers off into a discussion of the appropriateness of denying a jury trial as a discovery sanction under Rule 61.01, and his belief that denial of a jury trial as a sanction for not appearing at the pre-trial conference would be inconsistent with Missouri law. "The right to a jury trial in a civil action at law is guaranteed in Missouri but it is a personal right which may be waived." *Brancato* at 555-556 citing *State ex rel. E.J. Cunningham, M.D. v. Luten*, 646 S.W.2d 67, 68 (Mo. banc 1983), § 510.190 RSMo. 1994, Rule 69.01.

Dawson claims that the issue of the denial of a jury trial as a Rule 62.01 sanction has never been discussed in a Missouri case - but his statement is incorrect. In *Brancato*, the court of appeals stated in dicta that denial of a jury trial as a Rule 62.01 sanction "would not be error". *Id.* While dicta, and not the holding of the case, it appears disingenuous to argue that the trial court loses the ability to control the conduct of litigants before it once liability attaches. Even had Dawson properly preserved his constitutional challenge for appeal by presenting it to the trial court at the first opportunity and then preserving it through appeal by complying with the requirements of Rule 84.04, his claim of error is not well-taken, and this point relied on is properly denied.

Dawson primarily relies on the case of *Holm v. Wells Fargo Home Mortg., Inc.*, 514 S.W.3d 590 (Mo. banc 2017) in support of his arguments. In *Holm* this Court held that just because liability is based on a default does not deprive the litigant of his right to a jury trial on the issue of damages under Article I, Section 22(a) of the Missouri Constitution. While Masters has no quarrel with this holding, it was based on a different factual and procedural basis than the trial court's ruling in this case. In *Holm* there was a default, the defaulting party requested a jury trial on damages and the trial court refused. *Id.* at 600. Here, Dawson requested a jury trial, the trial court cancelled the scheduled bench trial and scheduled a jury trial on February 27, 2023 with a pre-trial conference on February 23, 2023. When Dawson failed to show up for the pre-trial conference – a pattern that he developed during periods where he was unrepresented – the trial court decided that it did not want to summon a full venire panel on the questionable grounds that Dawson might suddenly appear a few days later. Dawson asserts that his prior counsel told him, via e-mail, that the court was going to permit Masters to submit damages by affidavit, but Dawson took no action at that time. These facts are distinguishable from the facts in *Holm*, as the denial of the jury trial in that case was mistakenly based only on an event of default. LF D43, p.2, ¶8.

IV. Point Relied On IV Fails To Comply With The Requirements Of Rule 84.04(d) By Failing To Identify The Precise Trial Court Ruling Challenged And By Failing To Explain Why, In The Context Of The Case, The Challenged Ruling Supports His Claim Of Reversible Error

“The appellate court is a court of review.” *Henson v. Henson*, 195 S.W.3d 479, 484

(Mo. App. 2006). As a general matter, this Court’s review is guided by four policy interests: “(1) we presume the challenged judgment is correct; (2) we presume the trial court knows and applies the law; (3) we will affirm the outcome on any basis supported by the record; and (4) it is appellant’s burden to dislodge us from the presumption that the outcome below was correct.” *Bramer v. Abston*, 553 S.W.3d 872, 879 (Mo. App. 2018). “To satisfy this burden, and overcome the judicial preference for ‘finality of judgments,’ an appellant must comply with the rules of appellate procedure.” *Id.* “Substantial compliance with Rule 84.04 is required in order to give proper notice to the party opponent of the precise issue on appeal. *Amparan v. Martinez*, 862 S.W.2d 497, 499 (Mo. App. 1993). Compliance is also required because an appellate court should not speculate as to the parameters of the appellant’s argument because to do so would cast the court in the role of the appellant’s advocate. *Blakey [v. AAA Professional Pest Control]*, 219 S.W.3d [792,] 794 [(Mo. App. 2007)]. Dismissal is warranted ‘not for lack of sympathy but rather it is necessitated by the requirement of judicial impartiality, judicial economy and fairness to all parties.’ *Id.* (quoting [*Thornton v. City of Kirkwood*, 161 S.W.3d 916, 919 (Mo. App. 2005)]). “A ‘Point Relied On’ must be included for each claim of reversible error and must identify the challenged administrative ruling, concisely state the legal reasons for the claim and must summarily explain, why, in the context of this case, the stated legal reasons support the appellant’s claim. *Porter v. Division of Emp’t Sec.*, 310 SW 3d 295, 296 (Mo. App. 2010) citing Rule 84.04(d).

Point Relied On 4 identifies the challenged ruling of the trial court as the entry of the Final Judgment in this case - but cites to no specific ruling within that judgment Dawson

claims constitutes reversible error. This is similar to Dawson's contentions regarding the Memorandum And Order in points relied on 2 and 3 *supra*. The principal difference is that the entry of judgment occurred after the cancellation of the jury trial due to Dawson's non-appearance at the scheduled pre-trial conference - making the nexus between the challenged ruling and the claim of reversible error more tenuous. As with points relied on 2 and 3, Dawson fails to explain why, in the context of the case, entry of judgment constitutes reversible error. Because of these deficiencies, Masters and the Court are left to guess as to Dawson's precise complaints, and then attempt to prepare arguments in response.

Dawson again argues that the Memorandum And Order constituted a default judgment, from which his denial of his right to a jury trial flowed. As previously discussed, this is incorrect. The pre-trial conference was the prelude to a jury trial on the issue of damages. The pre-trial order mandated that the parties present motions in limine, proposed jury instructions and other matters prior to empaneling a jury. Dawson failed to appear - as he had a habit of doing - and the trial court decided that he was not taking the jury trial process seriously and sanctioned him under Rule 62.01 as a result. Even had this issue been properly preserved and presented, it would not constitute reversible error under Missouri law. Point relied on IV is therefore properly denied.

CONCLUSION

The trial court did not abuse its discretion in sanctioning Dawson for failing to appear at the pre-trial conference, but in fact exercised great restraint, given Dawson's actions

throughout the proceedings, through three prior attorneys, and in ignoring his discovery obligations for over a year and a half. Dawson's final three points are all based on constitutional claims that he waived when he failed to raise them with the trial court in his Verified Motion For New Trial. While Dawson's preservation statements all claimed that the Verified Motion for New Trial contained his constitutional arguments (without citation as to exactly where) - a close reading of both his motion and the accompanying memorandum of law in support and attachments contain no reference to his constitutional claims in this appeal. Dawson's appeal is appropriately dismissed due to his failure to preserve his constitutional claims under Rule 78, and to inform the court of appeals of how these issues were preserved in compliance with Rule 84.04(e), or to comply with the requirements of Rule 84.04(d). The judgment of the trial court should be affirmed in all respects.

RULE 84.06 CERTIFICATION

This Respondents' brief is filed by Karl W. Dickhaus, MBE 47951, Beck Dickhaus & Associates, L.P., 4660 Maryland Ave., Ste. 215, St. Louis, Missouri 63108; Telephone: (314) 772-2889; email: karl@bda.law.

I, Karl W. Dickhaus, certify that:

1. I am a lawyer and I have composed and prepared this Brief in accordance with Rule 55.03;
2. This Brief complies with the limitations contained in Rule 84.06(b); and
3. This Brief contains 8087 words as calculated by Microsoft Word.

Respectfully submitted,

Beck Dickhaus & Associates, L.P.

/s/ Karl W. Dickhaus

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 55.03(a)

The undersigned hereby certifies that a true and correct copy of the foregoing was served upon all parties by operation of this Court's Electronic Filing System in accordance with Missouri Supreme Court Rule 103.08 this 27th day of December 2024. The undersigned further certifies that he signed the original of this document and that the original of this document shall be maintained in the files of counsel for the Respondents until such time as all proceedings in this case shall have concluded, to include the maximum time for any appeal, pursuant to Missouri Supreme Court Rule 55.03(a).

/s/ Karl W. Dickhaus

Karl W. Dickhaus
Attorney for Respondent