



Missouri Court of Appeals
Southern District

Division Two

IN THE INTEREST OF:)
BREANNA LYNN SUTTON,)
INDIVIDUALLY AND BY HER NEXT FRIEND,)
RALPH RAYMOND SUTTON,)
AND RALPH RAYMOND SUTTON,)
INDIVIDUALLY,)
)
Petitioners-Respondents,)
)
vs.)
)
ERIN NICOLE MCCOLLUM,)
)
Respondent-Appellant.)

No. SD32021

Filed: September 16, 2013

OPINION ON MOTION FOR REHEARING AND/OR TRANSFER TO SUPREME COURT

DENIED

In her motion for rehearing and/or transfer, Mother claims, among other things, that this Court disregarded Rule 78.07(b) when it held Mother invited the alleged error with respect to the deployment provision in the parenting plan. This assertion is incorrect, and we deny Mother's motion for rehearing.

The following additional facts are useful for understanding our disposition of Mother's motion. The case was tried without a jury. Nevertheless, Mother filed a motion

for new trial, but did not file any motion to amend the judgment. The final paragraph of the motion for new trial stated:

Regarding the Respondent's addition [sic] concerns related to the court, the Guardian ad Litem, and other aspects of the case the Respondent attaches her affidavit addressing those concerns a [sic] Exhibit C.

The motion for new trial itself did not mention any complaint with respect to the inclusion of the deployment provision in the parenting plan. Over 60 pages of evidentiary documents were attached to the motion for new trial. Mother's Exhibit C was among these evidentiary documents.

Mother's Exhibit C was not a model of clarity. In the affidavit, Mother quoted rules and portions of the judgment. Below each quotation, Mother listed copious facts. These quotations and facts primarily related to the alleged bias of the trial judge and the guardian ad litem. Finally, Mother quoted the deployment provision from the parenting plan. Beneath that quotation Mother stated:

The following applies:

- 1) No Missouri Law/Statute exists that gives a step-parent custodial rights over the biological parent when the biological parent is willing/able to assume custody of the child during this time and the biological parent has not been proven unfit under Missouri Law/Statute.
- 2) To give the step-parent custodial rights over the biological parent is a violation of the respondent's rights as a mother. Given that the petitioner's spouse has a history of filing for divorce while her spouse is deployed, giving her custody of a child she has no biological connection to is unjust to the child.
- 3) As the respondent is non-deployable as stated in court the child should reside with the respondent in the event the petitioner is deployed.
- 4) Petitioner's parents were entered into this court case a[s] movants in the event the petitioner was not available for military duty.

- 5) In the event of a deployment visitations should be given the appropriate grandparents (i.e. if the petitioner is deployed, the paternal grandparent should have visitation. If the respondent is deployed, the maternal grandparents should have visitation.)

In support of her argument that this Court overlooked Rule 78.07(b) in reaching the result in this case, Mother suggests (1) no motion for new trial was necessary because this case was tried without a jury and (2) she did raise the issue in her motion for new trial by incorporation of Exhibit C. These arguments are without merit. Mother ignores the difference between the issue of whether a claim is preserved for appeal and the issue of whether a party invited error. Furthermore, Mother's evidentiary affidavit, Exhibit C, was not sufficient to give notice of the issue to the trial court.

As Mother correctly relates, Rule 78.07(b) provides that "in cases tried without a jury . . . neither a motion for new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review." However, our opinion did not find Mother's error to be unpreserved. Rather, we found Mother invited the error of which she complained. In such circumstances, because of our concern that the trial court be allowed the opportunity to correct its own errors, "the appellant must make some effort to bring the alleged error to the trial court's attention." *Heck v. Heck*, 318 S.W.3d 760, 767 (Mo. App. W.D. 2010) (quoting *McMahan v. Missouri Dep't of Soc. Servs. Div. of Child Support Enf.*, 980 S.W.2d 120, 126 (Mo. App. E.D. 1998)). That is, even in a court-tried case, an alleged error must be brought to the trial court's attention in some manner, especially where the party raising the error as grounds for reversal "specifically requested the trial court to order that about which the party now complains." *Id.* at 768.

One way to bring such an error to the trial court's attention would be by motion for new trial. And, as Mother points out, she did file a motion for new trial.

Nevertheless, the motion for new trial did not sufficiently present the issue about which Mother now complains.

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 v. Csaki*, 937 S.W.2d 268, 275 (Mo. App. W.D. 1996). *See also Cross v. Drury Inns, Inc.*, 32 S.W.3d 632, 636 (Mo. App. E.D. 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*, 281 S.W.3d 902, 908 (Mo. App. W.D. 2009) (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).

Mother's claim involves the language of the judgment, so it necessarily arose after final submission of the case. Thus, the allegation had to be stated specifically without reference to extrinsic aids. *See* Rule 78.07(a)(3). Here, the only place Mother's claim was raised below was in her affidavit. That was not sufficient to give the trial court the

opportunity to address the claim. *Brandt*, 937 S.W.2d at 275. This is especially so in light of the fact that Mother requested inclusion of a deployment provision. See *Heck*, 318 S.W.3d at 768. Mother's affidavit was not the appropriate vehicle for raising a new legal claim. As an evidentiary document, it was to provide support for the allegations contained in the motion for new trial.

This conclusion is supported by examination of the nature of an affidavit. The purpose of an affidavit is only to provide evidentiary support. For example, Black's Law Dictionary defines affidavit as "[a] voluntary declaration of *facts* written down and sworn to by the declarant before an officer authorized to administer oaths, such as a notary public." Black's Law Dictionary 62 (8th ed 2004) (emphasis added). Additionally, Rule 78.05 provides that where an after-trial motion "is based on facts not appearing of record, affidavits may be filed[.]" That is, in the context of post-trial motions, the purpose of the affidavits is merely to provide factual support for legal claims. As such, affidavits are evidentiary documents that cannot be used to *raise* additional claims. If it were otherwise, trial judges could be required to sift through numerous documents such as medical records or contractual documents, or even legal or medical journal articles in order to ascertain a party's legal arguments. Such an effort would impermissibly render the court an advocate for the party. See *Smith*, 395 S.W.3d at 29.

In sum, while Mother was not required to file a motion for new trial to preserve her claim for appellate review, she was required to bring the matter to the trial court's attention in some manner because Mother herself had previously invited the court to make some provision regarding what would occur if one of the parties were to be deployed. Hiding the issue in an affidavit buried in 60 pages of factual exhibits without

mentioning the legal issue specifically in her motion for new trial was not sufficient to alert the trial court to the issue. It would have required the trial court to become Mother's advocate by sifting through a voluminous record to ascertain Mother's claim. Mother's argument was not properly raised below.

The remaining contentions in Mother's motion for rehearing and/or transfer are conclusory or merely reargue points already addressed in our principal opinion. Mother's motion for rehearing and/or transfer is denied.