



IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

HOMER AND DORETHA	)	
SHARP,	)	
	)	
Appellants,	)	
	)	
v.	)	WD83368
	)	
ALL-N-ONE PLUMBING,	)	Opinion filed: November 10, 2020
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI THE HONORABLE JENNIFER M. PHILLIPS, JUDGE

Division Two: Karen King Mitchell, Presiding Judge,
Anthony Rex Gabbert, Judge and W. Douglas Thomson, Judge

Homer and Doretha Sharp (collectively, “Appellants”) appeal the circuit court’s judgment granting All-N-One Plumbing’s (“Respondent”) motion for sanctions and dismissing Appellants’ amended petition with prejudice. Due to substantial deficiencies in the Appellants’ amended appellate brief and amended appendix which prevent any meaningful review, we dismiss this appeal.

Appellate Procedural History

Although the dismissal of this appeal is based on substantial deficiencies in Appellants' amended brief and amended appendix, we are compelled to offer a brief examination of the appellate procedural history as it highlights Appellants' pattern of disregard for appellate court rules and court orders. Appellants filed their notice of appeal on November 26, 2019. On January 6, 2020, Appellants were notified by the court that their appeal was placed on a dismissal docket for failure to timely file the record on appeal which was due December 26, 2019. Appellants were to remedy the default by January 21, 2019. On January 16, 2020, Appellants filed an *incomplete* legal file omitting their amended petition. The court notified Appellants of the omission and requested Appellants file a supplemental legal file by January 27, 2020. Appellants filed the supplemental legal file on January 30, 2020, notably three days later than the court's expressed deadline.

On March 18, 2020, Respondent filed a motion to dismiss Appellants' appeal due to Appellants failure to comply with court-imposed deadlines including their failure to timely file their brief which was due March 16, 2020. Respondent's motion to dismiss remains pending as it was taken with the case. On March 19, 2020, Appellants filed a motion for an extension to file their brief out of time until March 25, 2020, which was sustained.

On March 26, 2020, Appellants filed a "motion requesting to file exhibits never submitted" stating that because there was not a trial, the exhibits contained in their

appendix were never admitted into evidence.¹ On March 27, 2020, the Appellants filed their brief and appendix containing the “exhibits never submitted” that were the subject of their motion. On March 30, 2020, the court struck Appellants’ brief for numerous violations of Rule 84.04.² Appellants’ were given fifteen days to file an amended brief to correct the violations. On April 7, 2020, the court denied Appellants’ motion to file exhibits never submitted. On April 13, 2020, Appellants’ filed their amended brief and amended appendix which *again* contained the “exhibits never submitted” in violation of the court’s order. Respondent filed a motion to strike Appellants’ amended brief and appendix and dismiss the appeal shortly thereafter. In their motion, Respondent alleges Appellants’ amended brief fails to comply with Rule 84.04, and the amended appendix fails to comply with Rule 84.04(h) and is in violation of the court’s April 7, 2020 order in that it contains the “exhibits never submitted.” This motion remains pending as it was taken with the case. On April 22, 2020, Appellants filed a motion to reconsider the denial of Appellants’ motion requesting to file exhibits never submitted which was denied by the court.

¹We find no Rule which would allow such a motion, nor would we expect to find such a Rule given that we cannot consider evidence not a part of the record. *See* discussion *infra*, I. Amended Appendix.

²The following deficiencies were noted by the court in striking Appellants’ brief: (1) the Statement of Facts lacks specific page references to the legal file noting that when citing the appendix, a page reference to the legal file or transcript should also be included as required by Rule 84.04(c); (2) the Points Relied On are not in compliance with Rule 84.04(d); (3) the argument does not include a concise statement describing whether the error was preserved and lacks page references to legal file in violation of Rule 84.04(e); and (4) the brief lacks an appendix, which includes the judgment in violation of Rule 84.04(h).

Analysis

“Compliance with Rule 84.04 briefing requirements is mandatory in order to ensure that appellate courts do not become advocates by speculating on facts and on arguments that have not been made.” *Wallace v. Frazier*, 546 S.W.3d 624, 626 (Mo. App. W.D. 2018) (citation omitted). “An appellant’s failure to substantially comply with Rule 84.04 ‘preserves nothing for our review’ and constitutes grounds for dismissal of the appeal.” *Id.* (citation omitted). “This is particularly true where, as here, ‘we cannot competently rule on the merits of [the Appellants]’ argument without first reconstructing the facts . . . and then refining and supplementing [their] points and legal argument.” *Id.* (citation omitted).

Although Appellants’ initial brief was struck by the court for failing to comply with several provisions of Rule 84.04, Appellants’ amended brief still fails to adequately comply with Rule 84.04’s requirements.

I. Amended Appendix

Appellants’ amended appendix fails to comply with Rule 84.04(h) as it primarily consists of documents that are not in the record on appeal. *Washington v. Gorden*, 286 S.W.3d 824, 826 (Mo. App. E.D. 2009). Rule 84.04(h) “allows the inclusion of certain other materials ‘pertinent to the issues’ in the appendix, but the authorized record on appeal is the firm boundary of our consideration—materials cannot be shoehorned into the record via the appendix, and such attempts may be stricken by the reviewing court.” *State ex rel. Hawley v. Allen*, 536 S.W.3d 380, 383 (Mo. App. S.D. 2018). Rule 84.04(h) “does not authorize the inclusion of evidence

outside the record of appeal.” *J & M Securities, LLC v. Brown*, 388 S.W.3d 566, 570 (Mo. App. E.D. 2012). “The mere inclusion of documents in an appendix to a brief does not make them part of the record on appeal.” *Id.* at 570-571. “We cannot and will not consider documents outside the record.” *Id.* at 571.

Here, the Appellants included documents labeled A1-A110 in their amended appendix which were not included in the record on appeal. The only document that is properly included in the amended appendix is the circuit court’s judgment, labeled A112-113. In their motion to file exhibits never submitted, Appellants conceded the documents were not authorized by Rule 84.04 to be included in their amended appendix. The court denied Appellants’ motion and motion for reconsideration. Nonetheless, Appellants included documents not in the record in their amended appendix in violation of Rule 84.04 and the court’s order. We cannot and will not consider these documents. *Id.* This is even more problematic because Appellants predominantly relied on and cited these documents in their statement of facts.

II. Statement of Facts

Appellants’ statement of facts fails to comply with Rule 84.04(c) in that it lacks specific page references to the legal file and, instead, cites nearly exclusively to Appellants’ amended appendix of improperly filed exhibits which are not part of the record on appeal, and which we may not consider. Rule 84.04(c) provides:

The statement of facts shall be a fair and concise statement of the facts relevant to the questions presented for determination without argument. All statements of facts shall have specific page references to the relevant portion of the record on appeal, i.e., legal file, transcript, or exhibits.

Appellants' failure to provide specific page references to the legal file in their statement of facts was identified by the court in striking their initial brief, yet it remains a significant deficiency in their amended brief. Dismissal is particularly appropriate where appellant makes no effort to correct the deficient points in his amended brief, even after being put on notice that they were inadequate. *Nicol v. Nicol*, 491 S.W.3d 266, 270 (Mo. App. W.D. 2016). There are only three citations to the legal file while there are nineteen cites to Appellants' amended appendix to documents that we cannot consider. Notably, the three citations to the legal file are to Respondent's suggestions in support of their motion to enforce discovery.

Moreover, numerous statements are without any citation at all. This is completely insufficient in that it essentially requires the court to improperly speculate on the facts. *Wallace*, 546 S.W.3d at 626. "Failure to substantially comply with Rule 84.04(c) preserves nothing for review." *Carroll v. AAA Gail Bonds*, 6 S.W.3d 215, 217 (Mo. App. S.D. 1999). "Specific relevant cites to the record are 'mandatory and essential for the effective functioning of appellate courts because courts cannot spend time searching the record to determine if factual assertions in the brief are supported by the record.'" *Jimmy Jones Excavation, Inc. v. JDC Structural Concrete, LLC*, 404 S.W.3d 922, 924 (Mo. App. S.D. 2013) (citation omitted). "It is not the function of the appellate court to search the record to discover the facts that substantiate a point on appeal." *Id.* (citation omitted).

III. Argument

Appellants' argument fails to comply with Rule 84.04(e) in that it consists of conclusory statements and fails to provide sufficient page references to the legal file. "To properly brief a case, an appellant is required to develop the issue raised in the point relied on in the argument portion of the brief." *Carlisle v. Rainbow Connection, Inc.*, 300 S.W.3d 583, 585 (Mo. App. E.D. 2009) (citation omitted). "If a party does not support contentions with relevant authority or argument beyond conclusory statements, the point is deemed abandoned." *Id.* "An argument should show how the principles of law and the facts of the case interact." *Carroll*, 6 S.W.3d at 218. "It is not our duty or responsibility to spend judicial time searching through the argument portions of briefs in an attempt to interpret the thrust of [Appellants'] contentions." *Id.*

Here, Appellants' argument in both points consists entirely of recitation of law and conclusory statements without any significant reference to the legal file. Appellants merely rest on broad brush strokes which generalize their complaints with the trial court's actions without specifying *why* the trial court was in error or *what* the trial court should have considered. The Appellants' argument must tie the legal principles together with the facts at hand in order to make their argument. We are not in a position to comb the legal file for facts to which we can tie the mere recitations of law Appellants set forth in order to understand their argument, nor can we do so and remain steadfast to our role as the neutral arbiter of the case.

Specifically, in Point I, Appellants state that the trial court's dismissal of their case with prejudice as a sanction amounts to abuse because there was no bad faith. However, Appellants offers no further explanation of how they did not act in bad faith and do not address the allegations made by Respondent in its motion for sanctions. Appellants provide only three page references to the legal file, one to the circuit court's order of dismissal and two to the circuit court's judgment and amended order of dismissal.³ Neither document supports Appellants' argument as they do not contain any factual findings by the circuit court.

In Point II, Appellants assert that they were "essentially" in compliance with the trial court's orders and that any discovery failures were only partial while also conceding they did not answer discovery timely. In support of these statements, they provide only two page references to the legal file, both to Respondent's suggestions in support of their motion for enforcement of discovery. Appellants offer no citations for their assertions that at the time of the trial court's dismissal they "were not in violation of the discovery order" or that they "had turned over all documents responsive to Respondent's request." Again, Appellants do not address the Respondent's motion for sanctions or the allegations contained therein, which allege more discovery violations than those addressed in the Respondent's suggestions in support of their motion for enforcement of discovery including the Appellants' failure to appear at their own depositions.

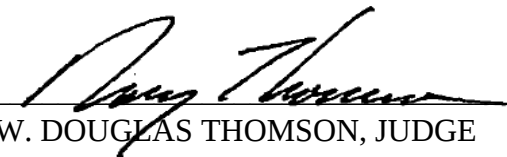
³The circuit court first entered an "Order" granting Respondent's motion for sanctions and dismissing Appellants' amended petition with prejudice which it later amended denominating it a "Judgment" for purposes of appeal pursuant to Rule 74.01(a).

In addition, we note Appellants cite the wrong standard of review. Rule 84.04(e) requires the Appellants to state the applicable standard of review. Appellants cite authority for the standard of review of a trial court's decision to admit or exclude evidence. However, Appellants' are seeking review of the circuit court's judgment granting a motion for sanctions.

We are cognizant of the plight of Appellants where, as here, their appeal of the trial court's sanction of dismissal with prejudice is, itself, dismissed. We are also mindful that a party's sense of justice is not met when their case is not decided upon the merits. However, to be true to our role as neutral arbiter, we are prevented from entering the realm of advocacy by making Appellants' argument for them as we would have to do here.

Conclusion

Appellants' appendix, statement of facts, and argument cause their brief to fall short of compliance with Rule 84.04. *Carroll*, 6 S.W.3d at 218. Accordingly, the appeal is dismissed and the pending motions are denied as moot.


W. DOUGLAS THOMSON, JUDGE

All concur.