



**In the
Missouri Court of Appeals
Western District**

AARON M. MALIN,

Appellant,

v.

**COLE COUNTY PROSECUTING
ATTORNEY,**

Respondent.

WD83774

OPINION FILED:

July 27, 2021

**Appeal from the Circuit Court of Cole County, Missouri
The Honorable Patricia S. Joyce, Judge**

Before Division One:

Anthony Rex Gabbert, P.J., Edward R. Ardini, Jr., and Thomas N. Chapman, JJ.

Aaron Malin (“Malin”) appeals a judgment of the Circuit Court of Cole County denying his Motion for Civil Contempt, which requested that the Cole County Prosecuting Attorney (the “Prosecutor”) be found in contempt for failing to comply with an earlier judgment that required the Prosecutor to search for and produce records responsive to records requests made by Malin. He raises four points on appeal. Points one and two fail to comply with the requirements of Rule 84.04(d), preserve nothing for review, and are denied. Malin’s third point has not been preserved and is denied. Malin’s fourth point is also denied. The judgment is affirmed.

Background

In 2015, Malin made three separate records requests to the Prosecutor. The Prosecutor responded (sometimes untimely) with general objections; indicated that the requests were too burdensome; and declined to confirm or deny the existence of the requested records. Malin filed a petition in the circuit court alleging that the Prosecutor had committed Sunshine Law violations. On May 26, 2017, Malin moved for summary judgment, which the trial court granted. The trial court's judgment ("Malin I Judgment") decreed:

1. Defendant knowingly and purposely violated the Sunshine Law.
2. Defendant must search for and produce all open records responsive to Plaintiff's requests, which includes the following:
 - a) any correspondence or communication between the Office of the Prosecuting Attorney of Cole County (or its associates/employees) and the MUSTANG drug task force (or its associates/employees);
 - b) any indictments handed down in Cole County between July 1, 2014 and the present, limited to indictments for selling narcotics in public housing; and
 - c) any Sunshine Law (or open records) requests received by the Cole County Prosecutor's Office, as well as any responses provided, between January 1, 2015 and the present.
3. Defendant is ordered to pay a \$12,100 civil penalty to Plaintiff.
4. Defendant is further ordered to pay Plaintiff's costs and reasonable attorneys' fees in the amount of \$24,070.00. This judgment is final for purposes of appeal.

The Prosecutor appealed, and our court affirmed the Malin I Judgment. *Malin v. Cole Cnty. Pros. Att'y*, 565 S.W.3d 748 (Mo. App. W.D. 2019). In conjunction with the appeal, Malin moved for attorney fees and his motion was taken with the case. Our court granted the motion and remanded the issue to the trial court to determine the reasonableness of Malin's attorney's fees on appeal and enter an appropriate award.

After remand, the parties began discussions related to the production of records and the payment of monetary fees and penalties with respect to the Malin I Judgment. In March of 2019, the Prosecutor paid the monetary part of the judgment and directed personnel to begin to search for records responsive to Malin's requests. The Prosecutor produced a number of records to Malin.

Dissatisfied with the Prosecutor's efforts with respect to the production of documents, Malin filed a Motion for Civil Contempt on June 12, 2019, which sought to enforce the Malin I Judgment. After Malin filed his Motion for Civil Contempt, the Prosecutor provided a number of other documents to Malin on June 28, 2019. At that time, the Prosecutor indicated to Malin that additional documents might be discovered through a forensic review of the office's IT systems, and offered to discuss the cost to Malin for undertaking such a search.¹

On June 30, 2019, the Prosecutor filed a response to Malin's Motion for Civil Contempt, and included in that response was a "Motion for Entry of Satisfaction of Judgment" that requested that the court "enter satisfaction of judgment or [sic] record for the Court's judgment on civil penalties and attorney's fees." On July 1, 2019, Malin filed a "Partial Satisfaction of Judgment," in which Malin acknowledged that the Prosecutor had paid in full the civil penalties and the attorney's fees that had accrued at the time our court issued its opinion affirming the trial court's Malin I Judgment. The "Partial Satisfaction of Judgment" also acknowledged that the Prosecutor had fulfilled the requirements of the Malin I Judgment with respect to his second and third records requests, but contended that the Prosecutor had yet to fulfill the part of the order that required the Prosecutor to "search for and produce all open records" responsive to his first

¹ Malin was not charged for the records previously produced by the Prosecutor.

request, which included “any correspondence or communication between the Office of the Prosecuting Attorney of Cole County (or its associates/employees) and the MUSTANG drug task force (or its associates/employees)[.]”

On October 18, 2019, a hearing was held on Malin’s Motion for Civil Contempt. On December 18, 2019, the trial court entered a handwritten order that stated: “Court finds that Defendant is not in Contempt. Counsel for defendant is to prepare a proposed order.” On January 2, 2020, the trial court issued the judgment which is the subject of this appeal, entitled “Final Judgment and Order Denying Plaintiff’s Motion for Civil Contempt” (“Malin II Judgment” or “Malin II Judgment Denying Motion for Contempt”). In denying Malin’s Motion for Civil Contempt, the trial court concluded that Malin had failed to meet his burden of proof to show that the Prosecutor failed to abide by the court’s prior order; and found that the Prosecutor had acted in “good faith” in searching for the requested records and in paying the monetary judgment. As an additional ground for denying the motion, the trial court found that the Prosecutor had met his burden of showing that he did not act in intentional contempt for the Court or its orders.

Malin appeals.

Standard of Review

“As in any court tried matter, in a civil contempt proceeding, ‘[t]his court will affirm the judgment unless there is no substantial evidence to support the decision, the decision is against the weight of the evidence, or the decision erroneously declares or applies the law.’” *Ream-Nelson v. Nelson*, 333 S.W.3d 22, 28 (Mo. App. W.D. 2010) (quoting *Walters v. Walters*, 181 S.W.3d 135, 138 (Mo. App. W.D. 2005)).

Analysis

At the outset, we note that Malin's briefing makes clear that he is not appealing the trial court's denial of his Motion for Civil Contempt, and that none of his points challenge the denial of his Motion for Civil Contempt. Malin instead attempts to challenge (in his first two points on appeal) the trial court's purported entry of a "New Judgment" that, Malin argues, erroneously amended the Malin I Judgment. In his third point, Malin challenges a specific finding of the trial court without challenging the judgment it supports, and without having preserved any argument regarding the form of the judgment. In his fourth point, Malin argues that the trial court erred in failing to award his attorney's fees incurred in prosecuting the motion for contempt (which was denied and which denial is not challenged on appeal). For ease of analysis, we address these points out of order, addressing point two first, then point one, and concluding with points three and four.

Point Two

Malin's second point states:

The trial court erred in entering the New Judgment because its ruling erroneously applied Rule 74.11(c) in that a party asking a court to deem a judgment satisfied must bear the burden of proving that the judgment has, in fact, been satisfied.

Malin's second point fails to comply with the briefing requirements of Rule 84.04(d) and preserves nothing for review. *See Wallace v. Frazier*, 546 S.W.3d 624, 628 (Mo. App. W.D. 2018).

Rule 84.04(d) governs briefing requirements with respect to points relied on, and provides:

- (1) Where the appellate court reviews the decision of a trial court, each point shall:
 - (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.

The point shall be in substantially the following form: “The trial court erred in [*identify the challenged ruling or action*], because [*state the legal reasons for the claim of reversible error*], in that [*explain why the legal reasons in the context of the case, support the claim of reversible error*].”

“The purpose of the points relied on is ‘to give notice to the opposing party of the precise matters which must be contended with and to inform the court of the issues presented for review.’” *Hiner v. Hiner*, 573 S.W.3d 732, 735-36 (Mo. App. W.D. 2019) (quoting *Wallace*, 546 S.W.3d at 627). As stated in *Hiner*:

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. Deficient points relied on force the appellate court to search the argument portion of the brief or the record itself to determine and clarify the appellant’s assertions, thereby wasting judicial resources, and, worse yet, creating the danger that the appellate court will interpret the appellant’s contention differently than the appellant intended or his opponent understood.

Id. at 736 (quoting *Wallace*, 546 S.W.3d at 627-28).

Malin’s second point fails to identify a specific action of the trial court that he is challenging, as required by Rule 84.04(d)(1)(A); and instead asserts, generically, that the trial court erred in entering judgment. His second point also fails to state concisely the legal reasons for his claim of reversible error, and does not explain, in summary fashion why, in the context of the case, those legal reasons support his claim of reversible error. See Rule 84.04(d)(1)(B)-(C). Malin’s second point thus fails to satisfy any of the requirements set forth in Rule 84.04(d). Points that fail to comply with the requirements of Rule 84.04(d) preserve nothing for review and are subject to dismissal. *Wallace*, 546 S.W.3d at 628.

Although Malin’s second point fails to comply with the mandatory requirements of Rule 84.04(d), we exercise our discretion to attempt to review the point on the merits *ex gratia* because his argument is sufficiently understandable to put the court and his opponent on notice that he purports to challenge what he asserts was an entry of satisfaction of judgment by the trial court in the Malin II Judgment Denying Motion for Contempt.

However, Malin’s contention that the trial court erred in entering satisfaction of judgment is contingent on the trial court actually ordering an entry of satisfaction of judgment. We find it did not. Consequently, Malin’s point asks us to review an action of the trial court that the trial court did not take.

When the Malin II Judgment Denying Motion for Contempt was entered in January of 2020, the only matter pending before the trial court was Malin’s Motion for Civil Contempt. After Malin initiated the contempt proceedings, the Prosecutor had filed a document entitled “Response to Plaintiff’s Motion for Civil Contempt and Motion for Entry of Satisfaction of Judgment.” The prayer of the Prosecutor’s motion stated: “Wherefore, the defendant prays that the Court either deny plaintiff’s motion for contempt outright, or set the same for hearing, and enter satisfaction of judgment or [sic] record for the Court’s judgment on civil penalties and attorney’s fees.” Although the motion was styled broadly as a “Motion for Entry of Satisfaction of Judgment,” “[a] pleading is judged by its subject matter – not its caption.” *Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000). The relief requested by the Prosecutor was specific to an entry of partial satisfaction of judgment *on civil penalties and attorney’s fees*, rather than an entry of complete satisfaction. “Relief granted in a judgment is limited to that sought in the pleadings.” *Residential & Resort Associates, Inc. v. Wolfe*, 274 S.W.3d 566, 569 (Mo. App. W.D. 2009); *cf. Zeiser v. Tajkarimi*, 184 S.W.3d 128, 131 n.7 (Mo. App. E.D. 2006) (trial court

erred in granting summary judgment on counterclaim where no motion requested such relief). Prior to the hearing on Malin's contempt motion, Malin filed a "Partial Satisfaction of Judgment" acknowledging that the Prosecutor had satisfied the Malin I Judgment with respect to the civil penalty and attorney's fees. Because all of the relief requested in the Prosecutor's motion had been received prior to the contempt hearing, there was nothing left for the trial court to determine with respect to the Prosecutor's motion which sought partial satisfaction regarding the monetary obligations of the Malin I Judgment.

Moreover, the Malin II Judgment does not indicate it is addressing the Prosecutor's motion for satisfaction of judgment or doing anything other than denying the Motion for Civil Contempt. Rather, the Malin II Judgment was styled as a "Final Judgment and Order Denying Plaintiff's Motion for Civil Contempt." The judgment's opening paragraph stated "[t]his order addresses a motion for civil contempt Malin filed on June 12, 2019[.]" At no point did the Malin II Judgment mention or indicate that it was addressing or ordering an entry of satisfaction of judgment. Likewise, there is no indication in the record that an entry of satisfaction has been entered.

Malin's belief that the trial court entered satisfaction of judgment seems to arise from his misunderstanding that the trial court's judgment "terminated the litigation." The trial court's judgment concluded:

Now, therefore, on this 2nd day of January 2020, the Court enters this final judgment and order overruling plaintiff Aaron Malin's motion for civil contempt, *and does by so ruling dispose of all claims and issues remaining in the case.*

Any costs are taxed to plaintiff Aaron Malin.

(emphasis added).

Malin points to the emphasized language above and expresses concern that such language “terminated the litigation,” which he argues could only be done through the entry of satisfaction of judgment. However, we conclude that, by disposing of all claims and issues remaining in the case, the trial court was actually addressing *pending* claims and issues. The Malin I Judgment, which Malin sought to enforce through contempt proceedings, was not a pending claim or issue. Rather, it was a judgment, which was not interlocutory or pending. The Malin II Judgment does not amend the Malin I Judgment,² does not declare the Malin I Judgment fully satisfied, and does not prohibit further efforts by Malin to seek to enforce it. Rather, it merely disposed of the only issue then pending before it – Malin’s Motion for Contempt.³

Because Malin’s second point fails to satisfy the requirements of Rule 84.04(d), and because, even if addressed *ex gratia*, challenges an action that the trial court did not take, point two of Malin’s appeal is denied.

Point One

In his first point on appeal, Malin contends:

The trial court erred in entering the New Judgment because in doing so it effectively altered its Original Judgment in that the trial court concluded the Original Judgment required the Prosecutor to search for and produce only part of the records retained by his office for documents responsive to Malin’s public records requests, rather than all of them.

² The trial court, in fact, lacked authority in the instant action to amend the Malin I Judgment. Once a judgment becomes final, the trial court loses jurisdiction to entertain further motions to change, alter, or modify the final judgment. Rule 81.05; Rule 75.01; *Schumacher v. Austin*, 400 S.W.3d 364, 369 (Mo. App. W.D. 2013).

³ We note that the trial court did find that Malin had failed to carry his burden of proof of demonstrating a violation of the court’s orders. However, this finding occurred in the context of denying Malin’s Motion for Civil Contempt, and Malin has made clear that he is not challenging the trial court’s denial of his Motion for Civil Contempt. We express no opinion on what impact that finding would have in any future action taken by Malin to seek enforcement of the Malin I Judgment, or what impact it would have in any future action taken by the Prosecutor to seek a declaration that the Malin I Judgment has been fully satisfied.

Malin's first point also fails to comply with the briefing requirements of Rule 84.04(d) and preserves nothing for review. *Wallace*, 546 S.W.3d at 628.

Malin's first point fails to identify a trial court ruling or action that he is challenging, but instead asserts that the Malin II Judgment "in effect" amended the Malin I Judgment by failing to enforce all of its requirements. This seems most akin to a challenge to the Malin II Judgment's denial of Malin's motion for contempt – but any such interpretation would be inconsistent with Malin's unequivocal statement that he is **not** challenging the denial of the motion for contempt. Furthermore, his point relied on fails to state concisely the legal reasons for his claim of reversible error, or explain why those legal reasons support the claim of reversible error. *See* Rule 84.04(d)(1)(B)-(C).

The argument section of the first point of Malin's brief likewise fails to crystallize precisely what action of the trial court he is challenging. Although it appears near the end of Malin's argument section on point one that he is alleging that the trial court erred in entering satisfaction of judgment, that allegation is not found in his point relied on, and it is not clear throughout his argument whether that is indeed his allegation. "A point relied on written contrary to the mandatory requirements of Rule 84.04(d), which cannot be comprehended without resorting to other portions of the brief, preserves nothing for appellate review." *Storey v. State*, 175 S.W.3d 116, 126 (Mo. banc 2005).

Even if we were to exercise our discretion in an attempt to review Malin's first point on the merits with the understanding that it was a challenge to the trial court's entry of satisfaction of judgment, the point would be denied for the reasons stated in our discussion of Malin's point two.

Because Malin's first point fails to comply with the requirements of Rule 84.04(d), and because, even if addressed *ex gratia*, it challenges an action that trial court did not take, point one of Malin's appeal is denied.⁴

Point Three

In his third point, Malin contends:

The trial court erred in finding that "all of the records Malin sought were . . . electronically stored" because that finding was not supported by any substantial evidence in that no testimony or evidence in the record suggests that all of the records responsive to Malin's requests were electronically stored.

Our standard of review allows an appellant to challenge a judgment or decree on the basis that there is no substantial evidence to support it. *Ream-Nelson*, 333 S.W.3d at 28. When a fact necessary to sustain the trial court's judgment is not supported by substantial evidence, then the judgment is not supported by substantial evidence. *Ivie v. Smith*, 439 S.W.3d 189, 199-200 (Mo. banc 2014). However, Malin does not argue that the *judgment* was not supported by substantial evidence, but instead argues that a specific *finding* was not supported by substantial evidence. Malin's briefing makes clear that he does not challenge the trial court's denial of his Motion for Civil Contempt. By attempting to challenge a specific finding that he does not allege was

⁴ While not clear, Malin's complaints in Points I and II seem to derive from what he perceives as an inconsistency between the judgment in Malin I and the trial court's denial of his motion for contempt in the instant action. The judgment in Malin I unequivocally ordered the Prosecutor to "search for and produce all open records responsive" to Malin's first sunshine request. Malin argues that the Prosecutor's partial production and accompanying request for him to pay for any additional search necessary to produce additional documents is not in accord with the remedy ordered, and affirmed by this Court, in Malin I. Malin asserts that Malin I, as a remedy for the knowing and purposeful violations of the Sunshine Law, simply ordered the Prosecutor's office to conduct the search for (and to produce) said responsive documents; and did not condition the Prosecutor's duty in any manner (such as advance payment by Malin for the costs associated with producing such records). However, to the extent Malin directs this argument to the trial court's denial of his motion for contempt, we reiterate that Malin makes clear that he is not challenging that judgment. In fact, we recognize that the trial court could have found that the prosecutor's efforts were sufficient to defeat the motion for contempt without concluding that those same efforts were adequate to fully satisfy the Malin I Judgment. Since satisfaction of judgment relating to the Prosecutor's response to request number 1 has not been entered by the trial court, it would be premature for us to express an opinion on that question.

material to the judgment, Malin does not challenge the judgment, but instead challenges the *language* of the judgment. Rule 78.07(c) provides: “In all cases, allegations of error relating to the form or language of the judgment, including the failure to make statutorily required findings, must be raised in a motion to amend the judgment in order to be preserved for appellate review.”

In this matter, Malin filed a Post-Judgment Motion to Vacate or Amend Judgment. In that motion, Malin never challenged the language of the finding that he now asserts was erroneous. Rather, the motion more generally attacked the trial court’s denial of his motion for contempt. By failing to challenge the language of the finding in his motion to amend, Malin has failed to preserve his claim of error.⁵ Malin’s third point is denied.

Point Four

In his fourth point, Malin argues that the trial court misapplied the law in declining to order the Prosecutor to pay Malin’s attorney’s fees accrued in his efforts to enforce the Malin I Judgment. Specifically, he argues that, because he established a purposeful violation of the Sunshine Law in the litigation leading to the Malin I Judgment, section 610.027.4⁶ required the trial court to award him attorney’s fees for his efforts in attempting to enforce the Malin I Judgment.

“In general, Missouri follows the American Rule, which requires that litigants bear their own attorney’s fees unless otherwise authorized by statute.” *Soto v. Costco Wholesale Corp.*, 502 S.W.3d 38, 58 (Mo. App. W.D. 2016). Section 610.027.4 provides a plaintiff with the

⁵ Regarding Malin’s third point, we note *ex gratia* that in *Wright v. Rankin*, 109 S.W.3d 696, 699 (Mo. App. S.D. 2003), the Southern District of this court held that a party who disputed the trial court’s factual findings, but not its judgment, were not “aggrieved” and therefore lacked standing to challenge the trial court’s conclusions, as they had not challenged the ultimate relief afforded by the trial court.

⁶ Unless otherwise indicated, statutory references are to RSMo 2016.

ability to recover civil penalties and fees in conjunction with litigation establishing a purposeful violation of the Sunshine Law. As relevant here, section 610.027.4 provides: “If the court finds that there was a purposeful violation of sections 610.010 to 610.026, then the court shall order the payment by such [public governmental] body or member of all costs and reasonable attorney fees to any party successfully establishing such a violation.” The trial court had previously found a purposeful violation of the Sunshine Law in the Malin I Judgment. Malin did not allege or establish a purposeful violation of the Sunshine Laws in the contempt proceedings that resulted in the denial of his Motion for Civil Contempt from which he now appeals. Malin argues that by establishing a previous purposeful violation of the Sunshine Law, he is entitled to all of his attorney’s fees in any attempt to enforce that judgment without regard to whether his attempts to enforce the judgment were successful.

Malin relies on *Chasnoff v. Mokwa*, 466 S.W.3d 571 (Mo. App. E.D. 2015), for the proposition that section 610.027.4 provides for attorney’s fees in separate litigation necessary to enforce a judgment in which a purposeful violation of the Sunshine Law has been found. In *Chasnoff*, the trial court awarded Chasnoff his attorney’s fees pursuant to section 610.027.3 for his intervention in a separate declaratory judgment action. *Id.* at 584. The trial court found that Chasnoff’s intervention in the separate suit was part and parcel of his establishment of the knowing violation of the Sunshine Law. *Id.* The court further found that Chasnoff’s intervention in the separate litigation was “essential to preserve the *Chasnoff* judgment, and that without the intervention, Chasnoff’s ability to enforce his judgment would have been foreclosed.” *Id.* The appellate court affirmed the award of fees because it found that “Chasnoff’s intervention in the police officers’ action was undoubtedly necessary to enforce his 2010 judgment ordering disclosure of the records at issue.” *Id.*

Although *Chasnoff* may stand for the proposition that section 610.027.4 provides for an award of attorney's fees in separate litigation that is necessary to preserve an earlier judgment (wherein a purposeful violation of the Sunshine Law was found), the efforts in the separate litigation must still be *necessary* to justify the award. Although whether section 610.027.4 justifies an award of fees on a given set of facts is a question of law, whether Malin's efforts to enforce the Malin I Judgment were necessary is a question of fact. When presented with a mixed question of law and fact, we defer to the fact-finder in its assessment of the facts and then apply *de novo* review in determining how the law applies to those facts. *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo. banc 2012).

In this matter, unlike in *Chasnoff*, the trial court did not find that Malin's efforts in prosecuting a Motion for Civil Contempt were necessary. No specific findings of fact were requested or made on the issue of attorney's fees. Rule 73.01(c) provides that "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." We defer to the trial court's implicit determination that Malin's efforts to enforce the Malin I Judgment were unnecessary. Although Malin asserts that it was necessary for him to pursue a Motion for Civil Contempt, the motion was unsuccessful. Malin does not challenge the motion's lack of success or make any compelling arguments regarding what the contempt proceedings accomplished. Because Malin failed to establish that his unsuccessful efforts to prosecute a Motion for Civil Contempt were necessary to preserve the

Malin I Judgment, *Chasnoff* provides him little support. The trial court did not err in declining to award Malin attorney's fees pursuant to section 610.027.4. Point four is denied.⁷⁸

Conclusion

The judgment is affirmed.



Thomas N. Chapman, Judge

All concur.

⁷ Malin filed a Motion for Attorney Fees on Appeal, and said motion was taken with the case. Malin's Motion for Attorney Fees on Appeal is denied.

⁸ The Prosecutor filed a Motion to Dismiss Appeal and For Attorney's Fees on Appeal, and these motions were taken with the case. These motions are also denied.