

APPEALS: PRACTICAL TIPS AND PITFALLS

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Creating a Trial Record that Preserves Error

- Offers of Proof

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 - Necessary if the proponent of evidence excluded at trial wishes to challenge the court's ruling
 - If the evidence excluded is testimony, a proper offer of proof entails putting the witness on the stand and examining the witness.

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- Jury Instructions

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 - Specific objections “stating distinctly the matter objected to and the grounds of the objection” are required. Rules 28.03 & 70.03.

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 - In civil cases, a motion for new trial is due 30 days after the entry of judgment. Rule 78.04.

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- After-Trial Motions
 - Required to preserve certain errors in jury-tried cases
 - In civil cases, necessary to preserve allegations of error related to form or language of judgment, including failure to make statutorily required findings
 - In civil cases, a motion for new trial is due 30 days after the entry of judgment. Rule 78.04. In criminal cases, the motion is due 15 days after the verdict, but the court may grant a 10-day extension. Rule 29.11.

Initiating an Appeal

- Generally, an appeal may only be taken from a final judgment or a judgment the trial court has certified is final for purposes of appeal under Rule 74.01(b).

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- Deadline: A notice of appeal must be filed with the circuit clerk 10 days after the judgment becomes final.
- A “late” notice of appeal is permitted in the discretion of the court of appeals. But the provision applies only to judgments entered by *trial courts*.

The Record on Appeal

- The record on appeal consists of the legal file and any transcript.

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- It is due 30 days after the filing of the notice of appeal if there is no transcript or 90 days after the filing of the notice of appeal if there is a transcript.

The Legal File

- The legal file shall contain “clearly reproduced exact copies of the pleadings and other portions of the trial record previously reduced to written form.” Rule 81.12(a).

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- Secure the legal file on the top or left side and include a cover page labeled “Legal File”

The Legal File

- **Include:** The docket sheet or case record, which contains a complete summary of all events in the case; the pleadings upon which the action was tried, the verdict, the findings of the court or jury, the judgment or order appealed from, motions and orders after judgment, and the notice of appeal, together with their respective dates of filing or entry of record

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- **Exclude (unless relevant to an issue raised in the appeal):** Voir dire, opening statements, closing arguments, MAI 2.01, evidence regarding damages, briefs and memoranda, notices of filing, subpoenas, summonses, motions to extend time, affidavits and admissions of service and mailing, notices of settings, depositions and notices, and jury lists

TABLE OF CONTENTS

<u>Document</u>	<u>Page</u>
Circuit Court Minutes	1
Third Amended Petition	21
Answer to Third Amended Petition	29
Amendment of Third Amended Petition by Interlineation	33
Jury Instructions	35
Jury Question and Response	47
Verdict	48
Judgment	49
Motion for New Trial	52
Judgment Denying Motion for New Trial	61
Notice of Appeal	62
Certification of Circuit Clerk	72

Working with the Record

Appellate Briefs: Mandatory Sections

Appellant's Brief

- Table of Contents
- Table of Authorities
- Jurisdictional Statement
- Statement of Facts
- Point(s) Relied On
- Argument
- Conclusion
- Certificates of Service and Compliance
- Appendix

Respondent's Brief

- Table of Contents
- Table of Authorities
- Argument
- Certificates of Service and Compliance

Appellate Briefs: Requirements

- All text, including footnotes, must be in a font not smaller than 13-point type, Times New Roman format, on Microsoft Word

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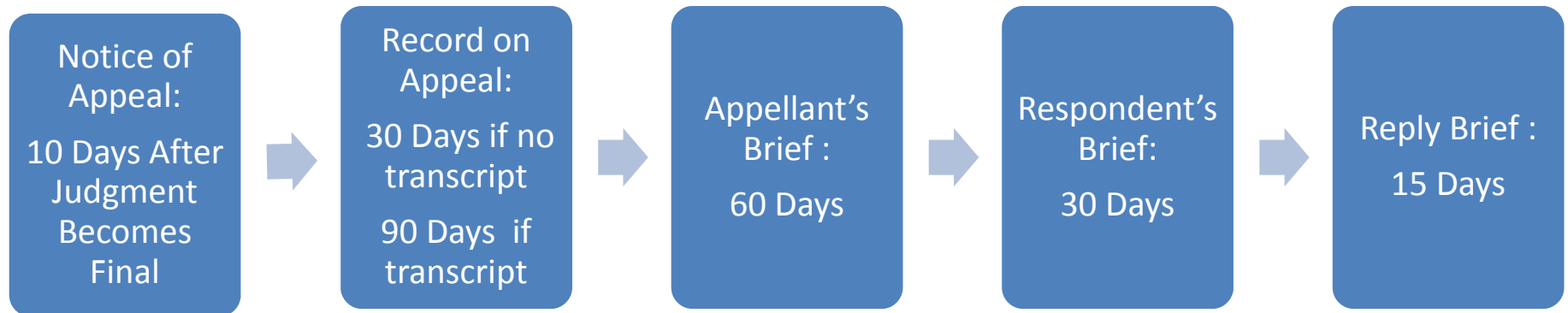
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- Margins must be at least 1 inch
- Length
- Color
- Electronic copy of brief

Important Deadlines



THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI

Respondent

vs.

JOHN Q. PUBLIC

Appellant

No. SC 90210

Appeal from the Circuit Court of St. Louis County
The Honorable Larry Kendrick, Circuit Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	1
Table of Authorities	2
Statement of Jurisdiction	7
Statement of Facts	8
Point Relied On	35
Argument	36
A. Threshold Issues	39
1. No waiver of right to remain silent	39
2. No waiver of plain error review of video admissibility	52
B. The State committed numerous <i>Doyle</i> violations	55
C. The <i>Doyle</i> violations had a decisive effect on the jury	66
1. The <i>Doyle</i> violations were repeated and intentional	68
2. The trial court's curative efforts were inadequate	69
3. Mr. Brooks' defense was not transparently frivolous	72
4. The State did not prove guilt overwhelmingly	74
Conclusion	81
Certificate of Compliance	82
Certificate of Service	83
Appendix	84
Table of Contents of Appendix	85

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Anderson v. Charles</i> , 447 U.S. 404 (1980)	41, 49
<i>Bass v. Nix</i> , 909 F.2d 297 (8 th Cir. 1990)	40, 41, 43
<i>Doyle v. Ohio</i> , 426 U.S. 610 (1976)	35, 37, 40, 43, 46, 49
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938)	39, 53, 55
<i>State v. Antwine</i> , 743 S.W.2d 50 (Mo. 1988)	44, 48
<i>State v. Dexter</i> , 954 S.W.2d 332 (Mo. 1997)	36, 37, 38, 66, 67, 71, 72, 74, 78
 <u>Constitutional Provisions</u>	
U.S. CONST. AMEND. V	38
MISSOURI CONST. ARTICLE I, SECTION 19	38

STATEMENT OF JURISDICTION

This is an appeal from a judgment entered on a jury verdict in a civil case tried in the Circuit Court of the City of St. Louis. The judgment was entered on January 13, 2006. L.F. 49. Appellants filed a motion for new trial on February 7, 2006. L.F. 52. The trial court overruled the motion for new trial on April 17, 2006. L.F. 61. Appellants filed a notice of appeal on April 27, 2006. L.F. 62.

This appeal does not involve the validity of a treaty or statute of the United States, a statute or provision of the Constitution of this state, or title to any state office, nor is it a case in which the punishment of death has been ordered. As provided in Article 5, Section 3, of the Missouri Constitution, the Missouri Court of Appeals, Eastern District, has jurisdiction of this appeal.

Statement of Facts

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 - The purpose “is to afford an immediate, accurate, complete and unbiased understanding of the facts of the case.” *Kent v. Charlie Chicken, II, Inc.*, 972 S.W.2d 513, 515 (Mo.App. E.D.1998).
- Include specific page reference to the record that support factual assertions. Rule 84.04(i).

Points Relied On

- Each point relied on shall: (1) identify the trial court ruling or action challenged; (2) state concisely the legal reasons for the appellant's claim of reversible error; and (3) explain in summary fashion why, in the context of the case, those legal reasons support the claim of reversible error. Rule 84.04(d).

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- Each point relied on shall: (1) identify the trial court ruling or action challenged; (2) state concisely the legal reasons for the appellant’s claim of reversible error; and (3) 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).
- The recommended format is: “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].” Rule 84.04(d)(1).

POINT RELIED ON

I.

The trial court erred in finding that Law Firm's fees were \$42,104 because the finding violates the law of the case doctrine, in that (1) the uncontroverted evidence introduced in the prior trial established that Law Firm's fees were at least \$59,200; (2) in the judgment rendered in the prior trial, the trial court found the attorney's fees were "reasonable and necessary"; and (3) in the prior appeal, this Court denied Respondent's challenge to the attorney's fees and held there was no evidence the fees were unreasonable.

POINT RELIED ON

I.

The trial court erred in finding that Law Firm's fees were \$42,104 because the finding violates the law of the case doctrine, in that (1) the uncontroverted evidence introduced in the prior trial established that Law Firm's fees were at least \$59,200; (2) in the judgment rendered in the prior trial, the trial court found the attorney's fees were "reasonable and necessary"; and (3) in the prior appeal, this Court denied Respondent's challenge to the attorney's fees and held there was no evidence the fees were unreasonable.

Williams v. Kimes, 25 S.W.3d 150 (Mo. 2000)

Ironite Products Co. v. Samuels, 17 S.W.3d 566 (Mo.App. E.D.2000)

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- Draft each point relied on with great care. Appellate courts may decline to review issues that are not properly raised in a point relied on.
- Errors not asserted in a point relied on “are not reviewable.” *Klinkerfuss v. Cronin*, 199 S.W.3d 831, 840 n.2 (Mo.App. E.D.2006).

Argument

- Restate the point relied on at the beginning of the argument concerning that point relied on.

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 - If the standard of review is unfavorable (e.g., abuse of discretion or plain error), ask yourself whether you should include the issue in the brief.
 - The standard of review drives the statement of facts. Whether the statement of facts is “fair” is determined from the applicable standard of review.

Common Standards of Review

Court-tried cases. The court of appeals will affirm the judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30 (Mo. 1976).

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Plain error. Applies when an issue has not been preserved. Appellate review is discretionary and examines whether the error resulted in manifest injustice or a miscarriage of justice.

Standard of Review: The question of whether a defendant's constitutional rights were violated by the erroneous admission of evidence is a question of law that is reviewed *de novo*. *State v. Davidson*, 242 S.W.3d 409, 416 (Mo.App. E.D.2007). The State bears the burden of proving constitutional errors were harmless beyond a reasonable doubt. *State v. Dexter*, 954 S.W.2d 332, 340 n.1 (Mo. 1997). To find an error harmless beyond a reasonable doubt, the court of appeals "must find that no reasonable doubt exists that the admitted evidence failed to contribute to the jury's verdict." *Davidson*, 242 S.W.3d at 417. In the event the Court determines that the error is unpreserved, Mr. Brooks requests that the Court review for plain error. *Dexter*, 954 S.W.2d at 340.

Argument

- Develop issues raised in the point relied on. Otherwise, the appellate court may find that the appellant has abandoned the issue. *Kuenz v. Walker*, 244 S.W.3d 191 (Mo.App. E.D.2007).

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- Arguments must be supported with authority. The appellant is required to cite both favorable and unfavorable precedent.
- Within the context of the standard of review, concisely and persuasively apply the legal authority to the facts of the case.
- Show how the error was prejudicial.

Respondent's Brief

- Although the respondent is not required to file a brief, the respondent should strongly consider doing so for the following reasons:
 - To address misstatements of fact

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 - To dispute or expound upon the standard of review set forth by the appellant

Standard of Review: In a court-tried case, the court of appeals will affirm the judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). “Where the running of the statute of limitations depends upon when the plaintiff discovered or by reasonable diligence could have discovered the fraud, a question of fact is presented.” *Schwartz v. Lawson*, 797 S.W.2d 828, 836 (Mo.App. W.D.1990). When reviewing questions of fact, the court of appeals views “the evidence and all reasonable inferences in the light most favorable to the judgment and disregard[s] all contrary evidence and inferences.” *Christian Health Care of Springfield West Park, Inc. v. Little*, 145 S.W.3d 44, 48 (Mo.App. S.D.2004). Appellate courts “defer to the trial court’s determination of witness credibility and recognize that the court is free to accept or reject all, part, or none of the testimony presented.” *Id.*

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 - To address misstatements of fact
 - To correct misstatements of law
 - To dispute or expound upon the standard of review set forth by the appellant
 - To present arguments supporting the judgment that are not raised in the appellant's brief (e.g., plaintiff failed to make a submissible case)

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- Although the respondent is not required to file a brief, the respondent should strongly consider doing so for the following reasons:
 - To address misstatements of fact
 - To correct misstatements of law
 - To dispute or expound upon the standard of review set forth by the appellant
 - To present arguments supporting the judgment that are not raised in the appellant's brief (e.g., plaintiff failed to make a submissible case)
 - To present an oral argument

Reply Brief

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- Remember, most effective reply briefs are short and focused

Appendix to Brief

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 - The judgment, order, or decision appealed from
 - The complete text of any controlling statutes, ordinances, court rules, or agency rules
 - The complete text of any instruction to which a point relied on relates
- In addition, consider including copies of other materials that may assist the court to decide the case (e.g., exhibits, transcript pages)

Exhibits

- The appellant “is responsible for depositing all exhibits that are necessary for the determination of any point relied on.” Rule 81.12(e).

Exhibits

- The appellant “is responsible for depositing all exhibits that are necessary for the determination of any point relied on.” Rule 81.12(e).
- Exhibits are often misplaced after trial. Therefore, counsel for the appellant should request copies of all exhibits from trial counsel as soon as possible.

Exhibits

- In civil cases, the appellant must deposit exhibits with the appellate court on or before the day the reply brief is due or when the court so directs, whichever is earlier. Rule 81.16(c).

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- In civil cases, the appellant must deposit exhibits with the appellate court on or before the day the reply brief is due or when the court so directs, whichever is earlier. Rule 81.16(c).
- In criminal cases, the appellant must deposit the exhibits on or before the date of oral argument, or, if submitted on the briefs, within 5 days after submission. Rule 30.05.

Oral Argument

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- Questions are good. This your only chance to address any concerns the judges may have about the case. Answer questions directly.
- Ask for the full time. Don't feel compelled to use it.
- Prepare a short outline to refer to if your mind blanks or to refocus your argument if sidetracked by questions.

Post-Disposition Motions

- **Motion for rehearing.** Designed “to call attention to material matters of law or fact overlooked or misinterpreted by the court.” Rule 84.17(a)(1).

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- **Motion for rehearing.** Designed “to call attention to material matters of law or fact overlooked or misinterpreted by the court.” Rule 84.17(a)(1).
- **Application for transfer.** Demonstrate why transfer is appropriate due to the general interest or importance of a question involved in the case or for the purpose of reexamining existing law. An application directed to the Supreme Court may also argue that the opinion is contrary to a previous decision of a Missouri appellate court. Rule 83.02 & 83.04.

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- **Motion for rehearing.** Designed “to call attention to material matters of law or fact overlooked or misinterpreted by the court.” Rule 84.17(a)(1).
- **Application for transfer.** Demonstrate why transfer is appropriate due to the general interest or importance of a question involved in the case or for the purpose of reexamining existing law. An application directed to the Supreme Court may also argue that the opinion is contrary to a previous decision of a Missouri appellate court. Rule 83.02 & 83.04.
- **Motion to publish.** Argue that the disposition of the appeal has precedential value. Rule 84.17(a)(3).

Resources

- Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (NITA 2nd ed. 2003)
- Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (Oxford University Press, 2nd ed. 2004)

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