



Missouri Court of Appeals
Southern District

Division Two

KAREN LEANN JONES,)	
)	
Respondent,)	
)	
vs.)	No. SD34935
)	
MICHAEL STEVEN JONES,)	FILED: January 16, 2018
)	
Appellant.)	

APPEAL FROM THE CIRCUIT COURT OF CHRISTIAN COUNTY

Honorable Larry G. Luna, Judge

AFFIRMED

Husband appeals the denial of his Rule 74.06(b) motion to set aside a dissolution judgment.¹

Background

Wife petitioned to dissolve the parties’ long-time marriage. Several months after Husband entered his appearance, but did not answer or otherwise respond, the

¹ We refer to the parties as Husband and Wife. Our references to the “judgment” generally mean the dissolution judgment, in contrast to the judgment denying relief in this independent action. Statutory citations herein are to RSMo as amended through 2016. Rule references are to Missouri’s 2016 “Supreme Court Rules.” See Rule 1.01 (rules shall be known as “Supreme Court Rules” with individual rules citable as “Rule ____”).

court entered a default judgment in Wife's proposed form.

Three days later, Husband moved to set that judgment aside, citing, *inter alia*, Rule 75.01, which provides that a court maintains control over its civil judgment for 30 days after entry. The court granted that motion and set the judgment aside.

A year into the case, Wife's attorney filed a "Joint Affidavit for Judgment (Pursuant to Local Rule 68.8)" (hereafter "Affidavit") bearing both parties' notarized signatures, plus a proposed judgment nearly identical to the one previously set aside, except for a significant reduction of Husband's equalization payment to Wife. The court entered the proposed judgment without a hearing via docket entry as follows:

18 Aug 2016 Judgment on Dissolution
JUDGMENT OF DISSOLUTION OF MARRIAGE

Uncontested

Cause submitted by affidavit pursuant to local rule.

Court finds it has jurisdiction of the parties and the subject matter.

Dissolution of marriage is granted.

The distribution of marital and non-marital property and debts is approved as fair and not unconscionable.

All per written judgment entered.

SO ORDERED

DATE: 08/17/2016

/S/ JUDGE LARRY G. LUNA

Husband, who was still represented by counsel, filed no motion while the court maintained control over the judgment and took no appeal.

Nearly five months later and with new counsel,² Husband moved per Rule 74.06(b) to set aside the judgment, alleging that it was irregular and void due to noncompliance with a local court rule. Husband noticed his motion for hearing; the

² Indeed, both parties obtained new counsel for the post-judgment motion and this appeal.

parties and their attorneys appeared; argument was heard; and the court took the matter under advisement.³ The court later denied the motion and entered formal judgment accordingly. We allowed Husband to appeal out of time and consider his two complaints in reverse order.

Failure to Conduct Evidentiary Hearing

Husband complains that the court denied his motion without an evidentiary hearing. Yet he makes no effort to show how that prejudiced him and cites no evidence that he was precluded from presenting to the court. We review for prejudice, not mere error. *Pruett v. Pruett*, 280 S.W.3d 749, 751 (Mo.App. 2009) (also noting that a complaint about excluded evidence requires a specific and definite offer of proof to inform the trial court of the proffered evidence and allow an appellate court to assess the prejudicial effect of its exclusion).

Further, we do not see and Husband does not show that he requested to offer evidence to the trial court or was refused that opportunity, or that he objected when the court took his motion under advisement after hearing only the arguments of counsel, or that he raised any complaint below prior to complaining here.

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.

To give the court an opportunity to rule on the issue, a party must make a timely objection or request, which is one made when the occasion for the ruling desired first appears.

Mayes v. Saint Luke's Hosp., 430 S.W.3d 260, 267 (Mo.banc 2014) (internal

³ No transcript of this hearing has been filed on appeal.

citations and quotation marks omitted). This is so by statute, controlling case law, and court rule.

Thus “no allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court.” § 512.160.1. “An issue that was never presented to or decided by the trial court is not preserved for appellate review.” **Brown v. Brown**, 423 S.W.3d 784, 788 (Mo. banc 2014) (citation and internal quotation omitted). Likewise, Rule 78.09 requires a party, “at the time the ruling or order of the court is made or sought, [to make] known to the court the action that the party desires the court to take or objections to the action of the court and grounds therefor” or waive its right to appellate review of alleged error. **Brown**, 423 S.W.3d at 787. All this aims to catch errors early to reduce the delay, expense, and hardship of appeals and retrials. See **Brown**, 423 S.W.3d at 787-88.⁴ Point denied.

“Irregular” Judgment

Husband also charges abuse of discretion in denying his motion, alleging that the judgment violated a local court rule and was “irregular” because the Affidavit failed to state, per a form accompanying the local rule, that the parties had entered a signed

⁴ To the same end, our supreme court recently amended yet another court rule:

(b) Except as otherwise provided in Rule 78.07(c), in cases tried without a jury or with an advisory jury, neither a motion for a new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review *if the matter was previously presented to the trial court.*

Rule 78.07(b) (emphasis ours, effective July 1, 2017). This casts considerable doubt on any intimation that a trial court might abuse its discretion unless it orders an evidentiary hearing that no party requests, suggests any need for, or says anything about at the trial level. See, e.g., **Vang v. Barney**, 480 S.W.3d 473, 477 & n.1 (Mo.App. 2016).

written agreement for division of assets and debts.⁵

Rule 74.06(b) embodies the strictest, “highest standard of the three rules for setting aside a judgment, giving effect to the interests in stability of final judgments and precedent.” *Cotleur v. Danziger*, 870 S.W.2d 234, 236 (Mo. banc 1994). Save for “void judgment” complaints not applicable here,⁶ we review Rule 74.06(b) rulings for abuse of discretion. See *Bate v. Greenwich Ins. Co.*, 464 S.W.3d 515, 517 (Mo. banc 2015). We will not reverse unless the record proves such abuse of discretion; *i.e.*, a ruling so illogical, unreasonable, arbitrary, and ill-considered that it shocks the sense of justice. *Marriage of Hendrix*, 183 S.W.3d 582, 587 (Mo. banc 2006). If reasonable minds could differ as to the trial court’s action, we cannot say that the court abused its discretion. *Id.*

“Rule 74.06(b) reaches only procedural errors which, if known, would have prevented entry of a judgment” and “does not serve as an alternative to a timely appeal.” *Adoption of C.P.G.B.*, 302 S.W.3d 745, 752 (Mo.App. 2010) (citations and internal quotations omitted). “Rule 74.06 is not intended as an alternative to a timely appeal. Relief from a trial court judgment, which may have been available by appeal, is not necessarily available by a Rule 74.06 proceeding.” *Love v. Board of Police Comm’rs*, 943 S.W.2d 862, 863 (Mo.App. 1997) (citation omitted). “One might go

⁵ A judgment is “irregular” in this context if it is “‘materially contrary to an established form and mode of procedure for the orderly administration of justice’” such that the judgment is “‘contrary to a proper result.’” *Kerth v. Polestar Entertainment*, 325 S.W.3d 373, 387 (Mo.App. 2010) (quoting *Burris v. Terminal R.R. Ass’n*, 835 S.W.2d 535, 538 (Mo.App. 1992)).

We disregard Husband’s § 452.325 argument that the record does not show he raised in the trial court. “An appellant cannot broaden or change allegations of error on appeal, and we will not convict the trial court of error on issues that were not presented below and raised for the first time here.” *State v. Lane*, 415 S.W.3d 740, 750 (Mo.App. 2013) (internal punctuation omitted).

⁶ Husband has abandoned, on appeal, his voidness assertion below.

so far as to say the availability of relief by means of a timely appeal weighs against the availability of that relief by way of Rule 74.06, in that the movant's request in that case has less appeal to the conscience of the chancellor." **Anderson v. Anderson**, 850 S.W.2d 404, 406 (Mo.App. 1993).

Husband does not dispute the Affidavit's authenticity, or claim he did not know the Affidavit would be presented as a basis for entry of judgment, or deny that a division of assets and debts was submitted to the court therewith, or challenge the judicial finding that said division was fair and not unconscionable, or suggest why he could not have timely sought relief in the trial court via Rule 75.01 (as he had done previously in the same case) or by appeal. His rule-violation claim is one of legal error, and thus waived because he did not timely object; this would have been true had even a Supreme Court Rule been involved. See **State v. Jacobs**, 421 S.W.3d 507, 509-12 (Mo.App. 2013). See also **Hendrix**, 183 S.W.3d at 590 (observing that a court's non-jurisdictional failure to follow statutory procedures "should be raised on appeal and, if prejudicial, may lead to reversal and remand"); **Anderson**, 850 S.W.2d at 406 (no Rule 74.06 relief when results of dissolution judgment were foreseeable when it was entered and no appeal was taken).

For all these reasons, and given Husband's delayed action below and failure to allege prejudice here, we cannot say the court abused its discretion in denying Rule 74.06(b) relief. Point denied. Judgment affirmed.

DANIEL E. SCOTT, J. – OPINION AUTHOR

NANCY STEFFEN RAHMEYER, C.J./P.J. – CONCURS

JEFFREY W. BATES, J. – CONCURS