

# CHAPTER 8

## Standards and Scope of Appellate Review

### I. INTRODUCTION

#### § 8.1 Preliminary Matters

Following an appellate court's determination that it has jurisdiction over an appeal, the next inquiry is the proper standard of review to be applied to each issue.

#### § 8.2 Standard of Review – Definition

A standard of review is an indication of the degree of deference an appellate court must give to the trial court's actions and decisions. In other words, a standard of review is a statement of the appellate court's power, as well as that of the trial court, measured by the appellate court's hesitation to overturn the trial court's decision. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 47-48 (2000).

#### § 8.3 Requirements for Appellate Briefs

Pursuant to Kansas Supreme Court Rules, an appellant *shall* begin each issue with a citation to the appropriate standard of review and a reference to the specific location in the record on appeal where the issue was raised and ruled upon. Rule 6.02(e). An appellee also has a duty to cite to the appropriate standard of review and *shall* either concur in the appellant's citation to the standard of review or offer additional authority. Rule 6.03(d).

## § 8.4 Issues Must be Preserved for Appeal

An appellant must be able to establish through the record that an issue was preserved for appeal. Arey, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End*, 2 J. App. Prac. & Process 27, 34 (2000). Rule 6.02(e) requires that an appellant's brief contain a reference to the specific location in the record on appeal where each issue on appeal was raised and ruled upon. This requirement is consistent with the general rule that an appellant cannot raise an issue on appeal that was not raised below. See *Board of Lincoln County Comm'rs v. Nielander*, 275 Kan. 257, 268, 62 P.3d 247 (2003) (civil case), and *State v. Williams*, 275 Kan. 284, 288, 64 P.3d 353 (2003) (criminal case).

The rationale for this rule is simple: a trial court cannot abuse its discretion on a matter that was never before it. *Williams*, 275 Kan. at 288. As a general matter, including when it is alleged the trial court has abused its discretion, the appellate court may consider the matter where the appellant shows one of the following exceptions applies:

“(1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court is right for the wrong reason. [Citations omitted.]”  
*Williams*, 275 Kan. at 288-289.

See also *Smith v. Yell Bell Taxi, Inc.*, 276 Kan. 305, 311, 75 P.3d 1222 (2003).

## § 8.5 Determining the Appropriate Standard of Review

The standard of review flows from the nature of both the substantive issue on appeal and the trial court's function in deciding that issue. See Lawson, *Seeing the Appellate Horizon: Civil Trial Strategy and Standards of Review in the Eighth Circuit*, 4 J. App. Prac. & Process 561, 563 (2002).

Generally speaking, trial court actions can be divided into three categories: factual determinations, legal conclusions, and discretionary decisions. An appellate court owes a certain amount of deference to a trial court's factual determinations; accordingly, an appellate court will review the record to determine whether those factual findings are

supported by substantial competent evidence. Conversely, an appellate court owes no deference to a trial court's conclusions of law. For this reason, an appellate court exercises de novo, or unlimited, review over the issue. If the trial court's action was discretionary in nature, an appellate court considers whether the trial court's action constituted an abuse of discretion; that is, whether no reasonable person would take the view adopted by the trial court.

To assist in understanding the distinctions among various standards of review, further explanation and examples are provided in §§ 8.7-8.22.

## § 8.6 Practical Considerations

Not only is the standard of review the lens through which the appellate court will review the trial court's actions, it is "the blueprint for success on appeal." Lawson, *Seeing the Appellate Horizon: Civil Trial Strategy and Standards of Review in the Eighth Circuit*, 4 J. App. Prac. & Process 561, 562 (2002). Thus, litigants should frame an issue with an eye toward the applicable standard of review and argue the merits of the issue within this context. See Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. App. Prac. & Process 47, 82 (2000); Arey, *Competent Appellate Advocacy and Continuing Legal Education: Fitting the Means to the End*, 2 J. App. Prac. & Process 27, 37 (2000).

In selecting issues for appeal, an appellant should look for issues having standards of review that afford less deference to the trial court's actions. An appellee, as the prevailing party below, naturally wants more deference given to the trial court's actions. Accordingly, an appellee should scrutinize the appellant's citation of the standard of review and should try to frame the issues to require more deferential review. For example, the abuse of discretion standard is the least favorable for an appellant and the most favorable for the appellee. It is the hardest standard to overcome, as shown by the following explanation:

“A high degree of appellate deference is allowed a trial judge’s exercise of discretion in assessing the texture and feel of the trial, the credibility of witnesses, and the perceived impact of an allegedly prejudicial event. In these circumstances, appellate decisions often recognize a presumption of validity in the exercise of discretion because of the superior vantage point of the trial judge. The judge’s decision will be affirmed even though the appellate tribunal might otherwise be inclined to take a precisely opposite view of the matter.” *Saucedo v. Winger*, 252 Kan. 718, 731, 850 P.2d 908 (1992).

Finally, litigants should be aware that mere error is insufficient for relief. An appellate court is concerned only with reversible error, not harmless error. *Arej*, 2 J. App. Prac. & Process at 34. Harmless error is error that does not prejudice the substantial rights of a party. *Drake v. Kansas Dept. of Revenue*, 272 Kan. 231, 238, 32 P.3d 705 (2001) (civil case); and *State v. Murray*, 285 Kan. 503, 535, 174 P.3d 407 (2008) (criminal case). An appellate court will disregard mere technical errors and irregularities that do not affirmatively appear to have prejudicially affected the complaining party’s substantial rights, provided it appears from the record that substantial justice has been done by the trial court’s judgment or order. K.S.A. 60-2105.

The harmless error rule has been applied in criminal cases. In *State v. Meeks*, 277 Kan. 609, 616, 88 P.3d 789 (2004), the court stated the decision to grant or deny a continuance in a criminal case will be affirmed on appeal unless the party challenging that decision can show the trial court abused its discretion and that party’s substantial rights have been prejudiced. See also K.S.A. 60-261 (the court must disregard any error or defect that does not affect the substantial rights of the parties).

## II. DISCUSSION AND EXAMPLES

### § 8.7 Discretionary Issues

“Judicial discretion implies the liberty to act as a judge should act, applying the rules and analogies of the law to the facts and situations which occur prior to and during the trial.” *Hurlbut v. Conoco, Inc.*, 253 Kan. 515, 529, 856 P.2d 1313 (1993).

The standard of review for discretionary decisions is: Where the district court's decision involves the exercise of judicial discretion, the appellate court will review for abuse of discretion. *Empire Mfg. Co. v. Empire Candle, Inc.*, 273 Kan. 72, 85, 41 P.3d 798 (2002). “Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court.” [Citation omitted.]” *Empire*, 273 Kan. at 87.

The abuse of discretion standard is also applied in criminal cases. See *State v. Navarro*, 272 Kan. 573, 580, 35 P.3d 802 (2001) (motion for mistrial); *State v. Graham*, 272 Kan. 2, 4, 30 P.3d 310 (2001) (revocation of probation); and *State v. Shears*, 260 Kan. 823, 829, 925 P.2d 1136 (1996) (withdrawal of a plea before sentencing).

One way to determine whether the discretionary standard will apply is to look at the language of the applicable statute. Statutes typically use the word “may” to indicate that the decision is discretionary. The following are examples of statutes granting discretionary authority. “[T]he court may: (1) Join for hearing any or all matters at issue . . . .” K.S.A. 60-242(a). “The court may, on motion, grant a new trial . . . .” K.S.A. 60-259(a). “Attorney fees and related expenses may be awarded . . . .” K.S.A. 79-3268(f). The “judge may in his or her discretion” exclude admissible evidence after weighing probative value and risk of unfair prejudice. K.S.A. 60-455.

## **§ 8.8 Factual Issues When Appellant Did Not Have Burden of Proof**

If the appellant was not the party who had the burden of proof on the issue, the appellate court will apply either the substantial competent evidence or the sufficiency of evidence standard. Which of these standards is appropriate depends on whether factual determinations were made by the trial court or by a jury.

## **§ 8.9 Substantial Competent Evidence**

The substantial competent evidence standard is applied in contested matters decided by the trial court. In such instances, the trial court is required to make findings of fact and state the legal principles supporting

its legal conclusions. See K.S.A. 60-252(a) and Rule 165. Nevertheless, the appellant should be mindful that the general rule is “a general finding of fact by the district court raises a presumption that it found all facts necessary to sustain and support the judgment rendered. [Citation omitted.]” *Cason v. Geis Irrigation Co.*, 211 Kan. 406, 412, 507 P.2d 353 (1973).

Where the trial court made findings of fact as a basis for its conclusions of law, the appellate court determines whether the factual findings are supported by substantial competent evidence and whether those findings are sufficient to support the trial court’s conclusions of law. Substantial evidence is evidence possessing both relevance and substance and furnishing a substantial basis of fact from which the issues can reasonably be resolved. *U.S.D. No. 233 v. Kansas Ass’n of American Educators*, 275 Kan. 313, 318, 64 P.3d 372 (2003) (trial court); *City of Wichita v. Public Employee Relations Bd.*, 259 Kan. 628, 630, 913 P.2d 137 (1996) (state agency). The appellate court does not weigh conflicting evidence, decide the credibility of witnesses, or redetermine questions of fact. *State ex rel. Morrison v. Oshman Sporting Goods Co. Kansas*, 275 Kan. 763, 775, 69 P.3d 1087 (2003).

The substantial competent evidence standard of review may apply in both civil and criminal cases. See *State v. Walker*, 276 Kan. 939, 944, 80 P.3d 1132 (2003); *State v. Goeller*, 276 Kan. 578, 582-83, 77 P.3d 1272 (2003); *Link, Inc. v. City of Hays*, 268 Kan. 372, 377, 997 P.2d 697 (2000).

## § 8.10 Sufficiency of the Evidence

The sufficiency of the evidence standard is applied in cases resolved by a jury trial where factual findings are not made. The standard is stated differently for civil and criminal cases.

Civil case: “When a verdict is challenged for insufficiency of evidence or as being contrary to the evidence, it is not the function of the appellate court to weigh the evidence or pass on the credibility of the witnesses. If the evidence, with all reasonable inferences to be drawn therefrom, when considered in the light most favorable to the prevailing party, supports the verdict, it will not be disturbed on appeal.” [Citations omitted.] *Dieker v. Case Corp.*, 276 Kan. 141, 162, 73 P.3d 133 (2003).

Criminal case: “When a defendant challenges the sufficiency of evidence, [the appellate court’s] standard of review is whether, after review

of all of the evidence, viewed in the light most favorable to the State, the appellate court is convinced that a rational jury could have found the defendant guilty beyond a reasonable doubt. [Citation omitted.]” *State v. Mays*, 277 Kan. 359, 377, 85 P.3d 1208 (2004). See also *State v. Graham*, 273 Kan. 844, 852, 46 P.3d 117 (2002) (standard applied for bench trial); *In re B.M.B.*, 264 Kan. 417, 433, 955 P.2d 1302 (1998) (standard applied in juvenile offender adjudication); *In re Care & Treatment of Ward*, 35 Kan. App. 2d 356, 370, 131 P.3d 540, *rev. denied* 282 Kan. 789 (2006) (civil commitment proceeding).

### § 8.11 Factual Issues When Appellant Had Burden of Proof

“The correct appellate standard of review when a party has failed to sustain its burden of proof is the one applied to a negative finding of fact.” *In re Marriage of Kuzanek*, 279 Kan. 156, 159, 105 P.3d 1253 (2005). “That negative finding will not be rejected on appeal unless the party challenging the finding proves arbitrary disregard of undisputed evidence, or some extrinsic consideration such as bias, passion, or prejudice. [Citation omitted.]” *Kuzanek*, 279 Kan. at 160. It is not the function of the appellate court to reweigh the evidence and determine the credibility of the witnesses. *Id.*

Where the defendant in a criminal case appeals the trial court’s decision to deny his or her motion to suppress, the appellate court applies a substantial competent evidence standard to the facts. See *State v. Walker*, 276 Kan. 939, 944, 80 P.3d 1132 (2003). In such instances, the State has the burden to prove to the trial court the lawfulness of the search and seizure. See *State v. Shelton*, 278 Kan. 287, 292, 93 P.3d 1200 (2004). However, it is not clear whether the standard of review for a negative finding is appropriate in a criminal case involving an appeal by the State challenging the trial court’s decision to grant the defendant’s motion to suppress evidence. Compare *City of Dodge City v. Norton*, 262 Kan. 199, 203, 936 P.2d 1356 (1997) (the court applied the negative finding standard) and *State v. Gray*, 270 Kan. 793, 796, 18 P.3d 962 (2001) (the court applied substantial competent evidence standard).

## § 8.12 Factual Evidence Undisputed or Based Solely Upon Documents

In cases decided on the basis of documents and stipulated facts, the appellate courts have de novo review. *Ward v. Ward*, 272 Kan. 12, 19, 30 P.3d 1001 (2001).

“Where the controlling facts are based upon written or documentary evidence by way of pleadings, admissions, depositions, and stipulations, the trial court has no peculiar opportunity to evaluate the credibility of witnesses. In such situation, [an appellate court] has as good an opportunity to examine and consider the evidence as did the court below, and to determine de novo what the facts establish.” *Heiman v. Parrish*, 262 Kan. 926, 927, 942 P.2d 631 (1997). The rationale for not applying the de novo standard of review to facts in a case derived from witness testimony is that the appellate court does not weigh conflicting testimony. *Giblin v. Giblin*, 253 Kan. 240, 253, 854 P.2d 816 (1993).

## § 8.13 Legal Issues

On questions of law, the appellate review is de novo, plenary, or unlimited. In such instances, the appellate court is free to substitute its judgment for that of the trial court. Examples where this broad standard of review is applied are:

Contract interpretation: “The interpretation and legal effect of written instruments are matters of law, and an appellate court exercises unlimited review. Regardless of the construction given a written contract by the trial court, an appellate court may construe a written contract and determine its legal effect.” *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001).

Existence of a duty: “Whether a duty exists [in a negligence case] is a question of law.” *Gooch v. Bethel A.M.E. Church*, 246 Kan. 663, 668, 792 P.2d 993 (1990), quoting *Duflinger v. Artiles*, 234 Kan. 484, 488, 673 P.2d 86 (1983).

Jurisdiction: Whether jurisdiction exists is a question of law over which the appellate court’s scope of review is unlimited. *In re Marriage of Werrell*, 274 Kan. 984, 987, 58 P.3d 734 (2002) (civil); *State v. James*, 276 Kan. 737, 744, 79 P.3d 169 (2003) (criminal).

Legal Conclusions: Where the material facts are not disputed and only the trial court’s legal conclusions are challenged, the appellate court’s review on the conclusions of law is unlimited. *Nicholas v. Nicholas*, 277 Kan. 171, 177, 83 P.3d 214 (2004) (civil); *State v. Boyd*, 275 Kan. 271, 273, 64 P.3d 419 (2003) (criminal).

Prima facie showing to strike a juror: “Whether a prima facie showing of a racially-based strike has been made is a question of law subject to plenary review.” *State v. Douglas*, 274 Kan. 96, 102, 49 P.3d 446 (2002).

Statutory interpretation: “Interpretation of a statute is a question of law and an appellate court’s review is unlimited. An appellate court is not bound by the district court’s interpretation of a statute.” *State v. Maass*, 275 Kan. 328, 330, 64 P.3d 382 (2003). See also *Cooper v. Werholtz*, 277 Kan. 250, 252, 83 P.3d 1212 (2004) (habeas corpus case); *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 472, 15 P.3d 338 (2000) (civil).

### III. PARTICULAR TOPICS OR AREAS OF LAW

#### § 8.14 Administrative Actions – State Agencies

Judicial review of a state administrative agency action is defined by the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), K.S.A. 77- 601 *et seq.* *Brewer v. Schalansky*, 278 Kan. 734, 737, 102 P.3d 1145 (2004). K.S.A. 77-621(c) defines eight issues that a court can review. In reviewing the district court’s review of an agency action, the appellate court determines whether the district court observed the requirements and restrictions placed upon it and then makes the same review of the administrative agency’s action as did the district court. *Hickman Trust v. City of Clay Center*, 266 Kan. 1022, 1036, 974 P.2d 584 (1999).

When reviewing an administrative agency’s decision, the court may not substitute its judgment for that of the administrative tribunal. Rather, the administrative agency’s factual findings may not be set aside by a reviewing court if supported by substantial competent evidence. On disputed facts, the evidence must be viewed in the light most favorable to the prevailing party and the reviewing court should not reweigh the evidence. When the agency’s order is not supported by substantial evidence, it is arbitrary or capricious. When deciding issues of law, the

court reviews the administrative agency's decision de novo; however, the agency's statutory interpretation should be granted deference if it is supported by a rational basis. *Lacy v. Kansas Dental Board*, 274 Kan. 1031, 1037-38, 1040, 58 P.3d 668 (2002).

### **§ 8.15 Administrative Actions – Non-state Agencies**

If the administrative decision was made by a non-state agency, the appropriate standard of review depends on whether the agency is acting in a legislative or quasi-judicial capacity. K.S.A. 60-2101(d) authorizes an appeal to the district court from any “judgment rendered or final order made by a political or taxing subdivision, or any agency thereof, exercising judicial or quasi-judicial functions.”

If the non-state agency was acting in a quasi-judicial capacity, the district court may not ““substitute its judgment for that of an administrative tribunal, but is restricted to considering whether, as a matter of law, (1) the tribunal acted fraudulently, arbitrarily or capriciously; (2) the administrative order is substantially supported by evidence; and (3) the tribunal's action was within the scope of its authority. [Citations omitted.]”” *Reiter v. City of Beloit*, 263 Kan. 74, 85-86, 947 P.2d 425 (1997). In reviewing the district court's judgment, the appellate court will first determine whether the district court followed the requirements and restrictions placed upon it and then make the same review of the administrative agency's decision as does the district court. *Reiter*, 263 Kan. at 86.

If the non-state agency was acting in a legislative capacity, the review by the district and the appellate court is limited to determining whether the agency had the statutory authority to issue the order that it made. *Cedar Creek Properties, Inc. v. Board of Johnson County Comm'rs*, 249 Kan. 149, 156, 815 P.2d 492 (1991).

However, the standard of review in zoning cases is slightly different. See *McPherson Landfill, Inc. v. Board of Shawnee County Comm'rs*, 274 Kan. 303, 304-05, 40 P.3d 522 (2002).

### **§ 8.16 Cumulative Error**

“Cumulative trial errors, when considered collectively, may be so great as to require reversal of a defendant's convictions when ‘the totality of circumstances substantially prejudiced the defendant and denied the defendant a fair trial. [Citation omitted.]”” *State v. Lowe*, 276 Kan. 957,

966, 80 P.3d 1156 (2003). “No prejudicial error may be found upon this cumulative effect rule, however, if the evidence is overwhelming against the defendant.’ [Citations omitted.]” *State v. Kirby*, 272 Kan. 1170, 1191-92, 39 P.3d 1 (2002).

### § 8.17 Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel presents mixed questions of law and fact on appeal. Where the trial court made factual findings and legal conclusions, the appellate court determines whether the trial court’s factual findings have substantial support in the evidence and whether the trial court’s decision follows as a matter of law from those facts. *Flynn v. State*, 281 Kan. 1154, 1157, 136 P.3d 909 (2006) (habeas); *State v. Davis*, 277 Kan. 309, 315, 85 P.3d 1164 (2004) (direct appeal).

### § 8.18 Jury Instructions

If the appellant in a civil case either objected to or requested a jury instruction, the standard of review is:

“The trial court is required to properly instruct the jury on a party’s theory of the case. Errors regarding jury instructions will not demand reversal unless they result in prejudice to the appealing party. Instructions in any particular action are to be considered together and read as a whole, and where they fairly instruct the jury on the law governing the case, error in an isolated instruction may be disregarded as harmless. If the instructions are substantially correct and the jury could not reasonably have been misled by them, the instructions will be approved on appeal. [Citation omitted.]” *Wood v. Groh*, 269 Kan. 420, 423-24, 7 P.3d 1163 (2000).

The standard in criminal cases is substantially the same as above. See *State v. Mays*, 277 Kan. 359, 378-79, 85 P.3d 1208 (2004). However, an appellate court has unlimited review when the appellant’s complaint concerns a constitutional due process challenge. *State v. Wade*, 284 Kan. 527, 534, 161 P.3d 704 (2007).

The issue of whether the instructions fairly instruct the jury on the law as applied to the facts of the case is a question of law over which the

appellate court has unlimited review. *Cox v. Lesko*, 263 Kan. 805, 810-11, 953 P.2d 1033 (1998).

If the appellant did not challenge the jury instructions, the clearly erroneous standard of review is applied.

“An instruction is clearly erroneous when the reviewing court reaches a firm conviction that if the trial error had not occurred there was a real possibility that the jury would have returned a different verdict. [Citation omitted.]” *Secretary of Kansas Dept. of Transportation v. Underwood Equipment, Inc.*, 273 Kan. 453, 455, 44 P.3d 439 (2002).

The clearly erroneous standard is also applied in criminal cases when the defendant did not request or object to a jury instruction. See *State v. Pabst*, 273 Kan. 658, 660, 44 P.3d 1230, *cert. denied* 537 U.S. 959 (2002); K.S.A. 22-3414(3) (without making an objection to or a request for an instruction, no party may claim the jury was instructed improperly unless the instruction as given was clearly erroneous).

### **§ 8.19 Motions to Dismiss – Civil**

The granting of a motion to dismiss is not favored by courts. When reviewing a trial court’s decision granting a motion to dismiss, the appellate court must assume that the facts alleged by the plaintiff are true and make any reasonable inferences to be drawn from those facts. Additionally, the court is required to determine whether those pleaded facts and inferences state a claim, not only on the theory espoused by the plaintiff, but on any possible theory that can be ascertained. Dismissal is justified only when the allegations in the petition clearly show plaintiff has not stated a claim. *Halley v. Barnabe*, 271 Kan. 652, 656, 24 P.3d 140 (2001). The standard of review is different when the decision is entered during a bench trial prior to the conclusion of trial. See K.S.A. 60-252(c) and *Lyons v. Holder*, 38 Kan. App. 2d 131, 134-35, 163 P.3d 343 (2007).

### **§ 8.20 Motions to Dismiss – Criminal**

The question of whether a charging document was sufficient to confer subject matter jurisdiction is a question of law, and the appellate court has unlimited review. The test for evaluating the sufficiency of the charging document depends upon when the issue was raised. *State v. Shirley*, 277 Kan. 659, 661, 89 P.3d 649 (2004). See *State v. Hooker*, 271 Kan. 52, 61, 21 P.3d 964 (2001) (test to evaluate defective complaint claim

where the defendant timely filed with the trial court a motion for arrest of judgment under K.S.A. 22-3502) and *State v. Waterberry*, 248 Kan. 169, 170-71, 804 P.2d 1000 (1991) (test to evaluate defective complaint claim where the defendant raised the issue for the first time on appeal).

## § 8.21 Prosecutorial Misconduct

The standard of review for a claim of prosecutorial misconduct is a two step process:

“First, the court decides whether the prosecutor’s comments were outside the wide latitude allowed in discussing the evidence. Second, the court must decide whether the comments constitute plain error; that is, whether the statements are so gross and flagrant as to prejudice the jury against the defendant and deny him or her a fair trial, thereby requiring reversal. The facts of each case must be scrutinized in determining whether a prosecutor’s remarks deny the defendant a fair trial. If the prosecutor’s statements rise to the level of violating a defendant’s right to a fair trial and deny a defendant his or her Fourteenth Amendment right to due process, reversible error occurs without regard to a contemporaneous objection. [Citation omitted.]” *State v. Elnicki*, 279 Kan. 47, 58, 105 P.3d 1222 (2005).

Factors for the second step are stated in *State v. Tosh*, 278 Kan. 83, Syl. ¶ 2, 91 P.3d 1204 (2004).

## § 8.22 Summary Judgment

“Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences that may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On

appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.” [Citations omitted.]” *Nicholas v. Nicholas*, 277 Kan. 171, 176, 83 P.3d 214 (2004).

In cases where the parties do not dispute the material facts for summary judgment and only the legal conclusions are challenged, appellate review of the conclusions of law is unlimited. *Nicholas*, 277 Kan. at 177.

### **§ 8.23 Termination of Parental Rights**

The State must prove by “clear and convincing evidence” that a child is a child in need of care. K.S.A. 38-2250. “Clear and convincing evidence” is an intermediate standard of proof between a preponderance of the evidence and beyond a reasonable doubt. *In re B.D.-Y.*, 286 Kan. 686, 691, 187 P.3d 594 (2008). “Clear and convincing evidence is evidence which shows that the truth of the facts asserted is highly probable.” *In re B.D.-Y.*, 286 Kan. at Syl. ¶ 3.

## **IV. NO APPELLATE REVIEW**

### **§ 8.24 Acquiescence**

The right of appellate review is cut off by acquiescence in a judgment. Acquiescence that is sufficient to cut off a right to appeal is voluntary compliance with the judgment. To hold that a party has acquiesced in a judgment, the appellant must have either assumed the burdens or accepted the benefits of the contested judgment. The rationale behind the acquiescence rule is that a party who voluntarily complied with a judgment cannot thereafter take an inconsistent position and appeal that judgment. *Alliance Mortgage Co. v. Pastine*, 281 Kan. 1266, 1271, 136 P.3d 457 (2006); *Varner v. Gulf Ins. Co.*, 254 Kan. 492, 494-95, 866 P.2d 1044 (1994). However, the question of whether a party has acquiesced in a judgment is a question of law subject to de novo review. *Alliance Mortgage Co.*, 281 Kan. at 1271.

### § 8.25 Invited Error

A party may not invite and lead a trial court into error and then complain of the trial court's error on appeal. *State v. Hebert*, 277 Kan. 61, 78, 82 P.3d 470 (2004) (criminal); *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003) (civil); *Catholic Housing Services, Inc. v. State Dept. of SRS*, 256 Kan. 470, 476, 886 P.2d 835 (1994) (administrative agency). However, the doctrine does not apply when the issue is jurisdiction. *State v. Belcher*, 269 Kan. 2, 9, 4 P.3d 1137 (2000).

### § 8.26 Moot Issues

The general rule is appellate courts do not decide moot questions or render advisory opinions. *Smith v. Martens*, 279 Kan. 242, 244, 106 P.3d 28 (2005); *Board of Johnson County Comm'rs v. Duffy*, 259 Kan. 500, 504, 912 P.2d 716 (1996).

### § 8.27 Correct Ruling for Erroneous Reason

Even though the lower court assigned a different or erroneous reason, its decision will be upheld if correct for any reason. *Whye v. City Council for the City of Topeka*, 278 Kan. 458, 464, 102 P.3d 384 (2004) (civil); *State v. Jones*, 267 Kan. 627, 634, 984 P.2d 132 (1999) (criminal).

### § 8.28 Abandoned Points

Incidentally raising a point without providing authority, or without showing why it is sound despite a lack of supporting authority or contrary authority, is akin to failing to brief an issue. An issue that is not briefed is considered waived or abandoned. *McCain Foods USA, Inc. v. Central Processors, Inc.*, 275 Kan. 1, 15, 61 P.3d 68 (2002) (civil); *State v. Walker*, 283 Kan. 587, 594, 153 P.3d 1257 (2007) (criminal).

### § 8.29 Failure to Designate a Record

A party has a duty to provide a record to support its appellate argument; without an adequate record, any argument or claim of error fails. Assertions in a party's brief or at oral argument are insufficient to satisfy the inadequacies of the record on appeal. *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 777, 27 P.3d 1 (2001) (civil). Where the appellant fails to provide a record affirmatively showing the alleged

error, an appellate court presumes that the trial court's decision was proper. *State v. Moncla*, 262 Kan. 58, 68, 936 P.2d 727 (1997) (criminal).

### **§ 8.30 Summary**

The parties must always be mindful that “a presumption of validity attaches to a judgment of the district court until the contrary is shown. [Citation omitted.]” *Cason v. Geis Irrigation Co.*, 211 Kan. 406, 412, 507 P.2d 353 (1973). Thus, the appellate court must be shown that the presumption has been overcome within the context of the correct standard of review.

The above standards of review are not an exhaustive list but should assist the parties in deciding how to address an issue. The parties should research the applicable area of law to determine if a different standard can be used for an issue, based upon the particular facts of the case. In many instances, there are exceptions to the above rules.

In conclusion, the appellant should choose an issue that shows the alleged error warrants reversal of the case and cite to the record where such error was raised to the trial court. Thereafter, the parties should state the proper standard of review and weave it into their arguments. By doing so, the parties' arguments and the appellate court's review of the case will be properly focused on how the appellate court can grant/deny relief within the limitations of its authority.