Standard of Review on Appeal

by Thomas A. Sheehan

Introduction

One of the most difficult tasks a lawyer may encounter is advising a client to live with an unfavorable judgment. Clients are frequently convinced that they have the better position and that defeat can be easily cured on appeal. But rather than mechanically file a notice of appeal, counsel should carefully evaluate whether an appeal is in the client's best interest. In this regard, many of the same considerations that guided counsel when deciding whether to file the lawsuit should also go into deciding whether to appeal its unfavorable outcome. These considerations generally include the likelihood of success and whether the appeal will be worth the additional costs to the client.[1] This article focuses on the first consideration -- the likelihood of success.

Appellate counsel should be mindful that not all issues are worthy of appellate court consideration. Many trial court errors are simply not substantial enough to require a new trial, outright reversal, or some other form of relief.[2] After identifying potential issues, counsel s next most important exercise may be determining the standards that will govern the court’s review of those issues.

The standard of review determines the degree of scrutiny the appellate court will apply when reviewing the rulings made below. The highest degree of scrutiny-- *de novo* review-- enables the court to review even the smallest errors. Under a more deferential standard of review-- such as an abuse of discretion standard-- only the largest and most egregious errors will warrant relief.

The impact of the standard of review is enormous. In one case, a federal appeals court stated, "if the question of law were reviewed under the deferential standard

. . . which permits reversal only for clear error, then [we] would affirm; but, if [we] were to review the determination under an independent de novo standard, [we] would reverse."[3]

For this reason, it is imperative that attorneys evaluating potential appeals be familiar with the differing standards of review that apply in the Missouri appellate courts and the United States Court of Appeals for the Eighth Circuit. Whether prosecuting or defending an appeal, appellate counsel must be able to frame the issues in the standard most favorable to his or her client.[4]

The remainder of this article discusses the most commonly encountered standards of review: the abuse of discretion standard, the clearly erroneous or substantial evidence standard, the *de novo* standard, and the standard relating to orders granting or denying a motion for new trial. Unless otherwise indicated,

each proposition will be supported by a citation from the Eighth Circuit Court of Appeals and the Missouri appellate courts.

II. Abuse of Discretion

The most deferential standard of review, the abuse of discretion standard, severely limits the power of the appellate court to reverse or otherwise alter the rulings of the lower court. Missouri courts have defined the term "discretion" as the option of doing or not doing that which a party does not have the absolute right to demand.[5] In both the federal and state courts of appeals, discretionary rulings are presumed correct and the appellant has the burden of proving that there has been error.[6] These courts will reverse a discretionary ruling only under certain limited circumstances. In Missouri, reversal is warranted only when the lower court ruling is "clearly against the logic of circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration; if reasonable men can differ about the propriety of action taken by the trial court, then t cannot be that the trial court abused discretion."[7]

The Eighth Circuit has its own definition of what constitutes an abuse of discretion. The court has stated that simply because an act is discretionary does not mean that the district court is free to do whatever it pleases. The district court still must stay within the range of options offered by the applicable law. Thus, a federal district court abuses its discretion when it: (1) fails to consider a relevant factor that should have been given significant weight; (2) considers and gives significant weight to an irrelevant or improper factor; or (3) considers all proper and no improper factors, but commits a clear error of judgment in weighing those factors.[8]

Trial court rulings relating to discovery are usually left to the sound discretion of the trial court.[9] These include rulings as to whether a physical examination is necessary,[10] the selection of a physician for an examination,[11] rulings on objections to interrogatories,[12] the sanction for failing to timely disclose the identity of witnesses in answers to interrogatories, and rulings imposing sanctions for failure to comply with proper discovery procedures.[13]

The trial court is vested with broad discretion when deciding other pretrial issues as well. These include whether to entertain a declaratory judgment action,[14] whether to allow an amendment to the pleadings,[15] whether to dismiss on the ground of *forum non conveniens,*[16] whether to set aside a default judgment for good cause,[17] and whether to grant a continuance.[18]

The abuse of discretion standard also governs appellate review of many trial and post-trial orders. For example, the court of appeals will only reverse an order qualifying an expert if there has been a clear abuse of discretion.[19] The abuse of discretion standard also applies to the trial court’s determination of the relevancy[20] and admissibility[21] of evidence and the admissibility of experimental tests.[22] The trial court is also vested with discretion to regulate closing arguments,[23] to determine whether to submit interrogatories to the jury,[24] whether to recuse itself as biased or impartial,[25] and whether to award

attorney fees or assess sanctions for violation of Fed. R. Civ. P. 11.[26] The trial court also has discretion to determine whether to grant a motion for new trial or for reconsideration,[27] or whether to grant a motion for relief from judgment under Fed. R. Civ. P. 60(b).[28]

Although the preceding paragraphs do not include all of the issues governed by the abuse of discretion standard, they do reveal a common element. If an issue before the trial court can be decided in different, but equally plausible ways, then the abuse of discretion standard likely will apply on appeal. If only one result can be correct, then a more stringent standard will apply. It is up to appellate counsel, then, to characterize the issue in the light that triggers the most favorable standard of review.

Because the state and federal standards heavily favor affirming the trial court, appellate counsel should think long and hard before filing an appeal challenging only discretionary rulings. Counsel should appeal discretionary rulings only if genuinely convinced that reasonable minds could not have ruled as the trial court did. Absent a firm conviction that an error was made, counsel should exercise good discretion and advise the client to forego an appeal.

III. Findings of Fact-- *Murphy V. Carron* and the Clearly Erroneous Standard

A trial court's factual findings, like its discretionary rulings, are given significant deference by the appellate court. Although the state and federal courts use different phrases to govern their standards of review, the result in either forum is that it is difficult to successfully challenge a trial court's findings of fact on appeal.

Appellate court review of a trial court's findings of fact in Missouri is governed by Mo. R. Civ. P. 73.01 (c)[29] and *Murphy v. Carron*.[30] Appellate review of a federal district court's findings of fact is governed by Fed. R. Civ. P. 52(a)[31] and *Anderson v. City of Bessemer City*.[32]

Missouri Rule of Civil Procedure 73.01(c) authorizes the court of appeals to review the trial court's factual findings "as in suits of an equitable nature" and instructs the court to defer to the trial court's credibility determinations. Prior to 1974 this rule also instructed that the "judgment shall not be set aside unless clearly erroneous." When the clearly erroneous phrase was omitted, a debate ensued as to whether findings of fact were to be reviewed *de novo* or whether the clearly erroneous standard continued to apply as part of the normal standard of review applicable in suits in equity. The Court in *Murphy* ended this debate.

The *Murphy* Court recognized that the law had been confused by courts and practicing attorneys erroneously using the phrases "*de novo*" and "clearly erroneous" in the same standard of review. In an effort to avoid further confusion, the Court instructed that the "use of the words de novo and clearly erroneous is no longer appropriate in appellate review of cases under Rule 73.01."[33]

The new rule announced by the *Murphy* Court provides that "the decree or judgment of the trial court will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is

against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law."[34] The Court emphasized the limited scope of review of trial court factual findings when it stated that "[a]ppellate courts should exercise the power to set aside a decree or judgment on the ground that it is against the weight of the evidence' with caution and with a firm belief that the decree or judgment is wrong."[35]

The *Murphy* standard also makes it difficult for a reviewing court to reverse a trial court's fact finding based on credibility determinations. The Court stated that the "credibility of the witnesses and the inferences to be drawn from the evidence are for the trial court, as it is in the best position to make such decisions."[36]

Although it employs different terminology, the federal standard of review is substantially similar to the Missouri standard. In *Anderson v. City of Bessemer City*, the U.S. Supreme Court held that "a finding is clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed."[37] Stated differently, the clearly erroneous standard provides that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."[38] The Court made plain that the clearly erroneous standard does not authorize the appellate court to review *de novo* the trial court's findings of fact even if it disagrees with those findings.[39]

The Court also held that even more deference must be given to the trial court when its factual findings are based on credibility determinations. The Court recognized that only the trial court is aware of a witness' demeanor and held that "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error."[40] Despite the Court's heavy reliance on credibility determinations as a basis for its holding, the clearly erroneous standard also applies where the case was decided on documentary evidence where no credibility determinations had to be made.[41]

The similarities between the clearly erroneous and abuse of discretion standards have not gone unnoticed by the Court. In *Cooter & Gell v. Hartmarx Corp.*,[42] the Court declared that the standards were essentially the same:

> When an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable: A court of appeals would be justified in concluding that a district court had abused its discretion in making a factual finding only if the finding were clearly erroneous.

Thus, at least in the federal courts, the semantical problems the *Murphy* Court sought to avoid, still exist.

IV. *De Novo* Review

The *de novo* standard of review governs pure questions of law. It is the most stringent standard of review in the appellate courts. Because the appellate court is in as good a position as the trial court to decide questions of law, it is free to substitute its own judgment for that of the trial court.[43] Accordingly, the likelihood of reversal is much greater when an issue is reviewed *de novo* than when a less stringent standard is employed.

Some of the questions of law reviewed under the *de novo* standard include whether the trial court had subject matter jurisdiction,[44] whether a complaint or petition states a claim upon which relief can be granted,[45] whether the court properly granted a motion for directed verdict or for judgment notwithstanding the verdict,[46] and whether the trial court properly granted summary judgment.[47]

V. Orders Relating to New Trial Motions

The appellate process in Missouri essentially begins with the filing of a motion for new trial. Counsel should be aware that any decision regarding what issues should be raised in the new trial motion will have a significant impact on the way in which the appeal can be prosecuted. Counsel must be prepared to evaluate *all* potential issues for appeal within the 30-day time for filing the new trial motion, as the failure to raise an issue in the new trial motion will generally bar the appellate court from considering it.

In Missouri, any issue other than subject matter jurisdiction, sufficiency of the petition to state a claim, and legal defenses to a claim that is not included in a timely-filed motion for new trial is waived.[48] In addition, the allegation of error must be stated with sufficient specificity to allow the trial court to rule the issue. The federal courts do not have a similar requirement. A motion for new trial need not be filed in federal court in order to preserve issues for appeal.[49]

In cases tried to the bench in Missouri, there is no requirement that a motion for new trial be filed.[50] Nevertheless, the issues raised on appeal still must have been presented to the trial court, as the appellate court will not consider issues raised for the first time on appeal.[51] If a new trial motion is filed after a bench trial, the appellant is not limited on appeal to the issues raised in the motion.[52]

Generally, a Missouri appellate court will be more liberal in upholding an order granting a new trial than an order denying one.[53] Even so, an order granting a new trial will be affirmed only if the appellate court is satisfied there was error below that prejudiced the moving party.[54]

In Missouri, the standard of review applicable to a trial court's order granting a motion for new trial depends largely on the grounds upon which the motion was based and in whose favor it was granted. If the trial court grants a new trial, but fails to specify the reasons for doing so, the order is presumed erroneous and the burden shifts to the moving party to defend the order.[55] The general presumption that the judgment of the trial court is correct,[56] does not apply. Furthermore, the appellate court will neer presume that the trial court based its ruling on discretionary grounds.[57]

When the trial court grants a new trial on the ground that the jury verdict is against the weight of the evidence, the appellate court will not interfere. The Missouri Court of Appeals has held:

> There is, perhaps, no more firmly established doctrine than that on appeal from a judgment rendered on a verdict of a jury, an appellate court is not authorized to weigh the evidence . . . . Whether a jury's verdict is against the weight of the evidence is a question for the trial court alone.[58]

As a result of this absolute deference given the trial court, a trial court's *refusal* to grant a new trial on the grounds that the jury verdict was against the weight of the evidence is also not reviewable.[59] The trial court's decision is shielded from appellate review even if based on extensive discussion of questions of law.[60]

This is not to say that there is no recourse available in Missouri to a party aggrieved by an order granting a new trial on the ground that the verdict is against the weight of the evidence. To the contrary, in the proper case an aggrieved party may argue that the moving party failed to make a submissible case in the trial court and, therefore, should not be granted a new trial. In fact, whenever the party carrying the burden of proof at trial appeals, the respondent may argue, as an alternative ground for affirming the judgment below, that the appellant failed to make a submissible case.[61]

One Missouri case squarely demonstrates the practical effect of this rule. *Gilomen v. Southwest Missouri Truck Center*[62] involved a dispute over a real estate sales contract. In Claim A, Gilomen alleged that Southwest breached the contract, and in Claim B Southwest counterclaimed, alleging that Gilomen had breached. After a jury verdict had been rendered in favor of Southwest on Claim A and Claim B, the trial court granted Gilomen's motion for new trial on both claims on the ground that the verdicts were against the weight of the evidence.

On appeal, the court noted that its standard of review differed depending on whether it was reviewing the trial court order granting a new trial on Claim A or on Claim B. Regarding Claim A, the court stated that although it is not allowed to weigh the evidence before the jury, it would uphold the order granting a new trial in favor of Gilomen only if Gilomen made a submissible case. The court stated that "[w]here there is substantial evidence to support a verdict for the party to whom the new trial was granted, the order of the trial court cannot be held to be an abuse of discretion."[63] Finding no substantial evidence to support Gilomen's claim, the court reversed the order granting a new trial and reinstated the jury verdict for Southwest on Claim A.

Regarding Claim B, the court held that because a new trial had been granted in favor of the party who did not carry the burden of proof, it could not reweigh the evidence and therefore summarily affirmed the order. As a result of the different standards of review applied by the court, the case was remanded for further proceedings on Southwest's counterclaim only.

In the Eighth Circuit, a trial court's order denying a motion for new trial is reviewed for abuse of discretion.[64] Unlike in Missouri, an order granting a new trial is not immediately appealable in federal court.[65]

VI. Conclusion

Counsel should know which standard of review the court of appeals will apply before filing a notice of appeal. If the court of appeals will defer to the trial court's ruling on an issue, the appellant is likelyto lose the appeal. On the other hand, if the court will substitute its judgment for that of the trial court, the appellant has a much better chance of prevailing. A few minutes of research into the appropriate standard of review will go a long way toward predicting the outcome of most cases.

Footnotes

1 Criminal cases present additional considerations that are outside the scope of this article.

2 Professor Michael Tigar argues against any formalistic approach to determining whether to appeal an adverse judgment. In his opinion:

> It would be soothing - but very misleading - to say that the decision to appeal could be reduced to a formula. For example, one might try to quantify the chance of reversal, and then multiply that factor by the judgment. Such an approach is wrong because the chance of reversal cannot be determined with precision. The lawyer, still smarting from defeat, may tend to overstate it.

Michael E. Tigar, Federal Appeals, Jurisdiction and Practice 198 (2d ed. McGraw Hill 1993). Even though the likelihood of success cannot be predicted with "precision," practitioners know that their clients want an estimate of the chance of reversal. Counsel cannot provide even a rough estimate without reference to the applicable standard of review.

3 *In re McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984).

4 Federal Rule of Appellate Procedure 28(a)(6), which governs appeals to the Eighth Circuit Court of Appeals, requires that the argument portion of all appellant's briefs contain "a concise statement of the applicable standard of review." The Supreme Court of Missouri Rules contain no counterpart to this rule.

5 *Jennings v. City of Kansas City*, 812 S.W.2d 724, 735 (Mo. App. W.D. 1991).

6 *Danaher v. United States*, 184 F.2d 673, 675 (8th Cir. 1950); *State ex rel. Webster v. Lehndorff Geneva*, 744 S.W.2d 801, 804 (Mo. banc 1988).

7 *Webster*, 744 S.W.2d at 804; *see also In re Marriage of Johnson*, 817 S.W.2d 666, 670 (Mo. App. S. D. 1991).

8 *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984).

9 *Davis v. American Jet Leasing, Inc.*, 864 F.2d 612, 614 (8th Cir. 1988); *State ex rel. Metro. Transp. v. Meyers*, 800 S.W.2d 474, 476 (Mo. App. W.D. 1990).

10 *Fletcher v. Southern Farm Bureau Life Ins. Co.*, 757 F.2d 953 (8th Cir. 1985); *Enyart v. Santa Fe Trail Transp. Co.*, 241 S.W.2d 268, 270 (Mo. 1951).

11 *Fletcher*, 757 F.2d 953; *Meyers*, 800 S.W.2d at 476.

12 *Edgar v. Finley*, 312 F.2d 533, 535-36 (8th Cir. 1963); *State ex rel. Rowlett v. Wilson*, 574 S.W.2d 376, 378 (Mo. banc 1978).

13 *Savola v. Webster*, 644 F.2d 743, 745-46 (8th Cir. 1981); *Roach v. Consolidated Forwarding Co.*, 665 S.W.2d 675, 682 (Mo. App. E.D. 1984).

14 *BASF Corp. v. Symington*, 50 F.3d 555, 557-58 (8th Cir. 1995); *Millers Mut. Ins. Ass'n v. Babbitt*, 790 S.W.2d 944, 946 (Mo. App. W.D. 1990).

15 *Beeck v. Aquaslide N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977); *Young v. Jack Boring's, Inc.*, 540 S.W.2d 887, 891 (Mo. App. W.D. 1976).

16 *Reid-Walen v. Hansen*, 933 F.2d 1390, 1393-94 (8th Cir. 1991); *Blankenship v. Saitz*, 682 S.W.2d 116, 118 (Mo. App. E.D. 1984).

17 *Canal Ins. Co. v. Ashmore*, 61 F.3d 15, 17 (8th Cir. 1995); *Hughes v. Britt*, 819 S.W.2d 381, 383 (Mo. App. E.D. 1991).

18 *Watson v. Miears*, 772 F.2d 433 (8th Cir. 1985); *In re $29,000 in U.S. Currency*, 682 S.W.2d 68, 75 (Mo. App. W.D. 1984).

19 *Davis v. American Jet Leasing, Inc.*, 864 F.2d 612, 615 (8th Cir. 1988); *State ex rel. State Highway Comm'n v. Heim*, 483 S.W.2d 410, 413 (Mo. App. S.. 1972).

20 *United States v. Eisenberg*, 807 F.2d 1446, 1455 (8th Cir. 1986); *Weatherly v. Miskle*, 655 S.W.2d 842 (Mo. App. E.D. 1983).

21 *O'Dell v. Hercules, Inc.*, 904 F.2d 1194, 1200 (8th Cir. 1990); *Gant v. Hanks*, 614 S.W.2d 740 (Mo.

App. E.D. 1981).

22 *Collins v. B.F. Goodrich Co.*, 558 F.2d 908 (8th Cir. 1977); *Lietz v. Snyder Mfg. Co.*, 475 S.W.2d 105, 107 (Mo. 1972).

23 *Williams v. Wal-Mart Stores, Inc.*, 922 F.2d 1357, 1364 (8th Cir. 1990); *Fowler v. Park Corp.*, 673 S. W.2d 749, 757 (Mo. banc 1984).

24 *Flanigan v. Burlington N., Inc.*, 632 F.2d 880, 884 (8th Cir. 1980); *In re Estate of Daly*, 907 S.W.2d 200, 204-05 (Mo. App. W.D. 1995).

25 *United States v. Faul*, 748 F.2d 1204, 1211 (8th Cir. 1984); *In re $29,000 in U.S. Currency*, 682 S. W.2d 68, 74 (Mo. App. W.D. 1984).

26 *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1356 (8th Cir. 1980) (attorney fees); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) (Rule 11 sanction); *Washington Univ. v. Royal Crown Bottling*, 801 S.W.2d 458, 469 (Mo. App. E.D. 1990) (attorney fees).

27 *McDowell v. Kawasaki Motors Corp. USA*, 799 S.W.2d 854, 862 (Mo. App. W.D. 1990) (motion for new trial); *Ferren v. Richards Mfg. Co.*, 733 F.2d 526, 528 (8th Cir. 1984) (new trial motion); *Harris v. Arkansas Dep't. of Human Servs.*, 771 F.2d 414, 416-17 (8th Cir. 1985) (motion for reconsideration).

28 *In re Design Classics, Inc. v. West-phal*, 788 F.2d 1384, 1386 (8th Cir. 1986).

29 Rule 73.01(c) provides:

(c) On appellate review:

(1) The court shall review the case upon both the law and the evidence as in suits of an equitable nature.

(2) Due regard shall be given to the opportunity of the trial court to have judged the credibility of witnesses.

(3) The court shall consider admissible evidence which was rejected by the trial court and preserved. The court may order that any proffered evidence which was rejected by the trial court and not preserved, be taken by deposition or by reference to a master under Rule 68.03 and returned to the appellate court.

30 536 S.W.2d 30 (Mo. banc 1976).

31 Federal rule of Civil Procedure 52(a) states:

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

32 470 U.S. 564 (1985).

33 536 S.W.2d at 32.

34 *Id.*

35 *Id.*

36 *Sanders v. Sanders*, 797 S.W.2d 874, 876 (Mo. App. S.D. 1990).

37 470 U.S. at 573.

38 *Id.* at 574.

39 *Id.* at 573.

40 *Id.* at 575.

41 *Id.* at 574.

42 496 U.S. 384 (1990).

43 *Franklin v. Immigration and Natur-alization Serv.*, 72 F.3d 571, 572 (8th Cir. 1995); *All Star Amusement v. Director of Revenue*, 873 S.W.2d 843, 844 (Mo. banc 1994).

44 *Keene Corp. v. Cass*, 908 F.2d 293, 296 (8th Cir. 1990); *Siampos v. Blue Cross and Blue Shield*, 870 S.W.2d 499 (Mo. App. E.D. 1994).

45 *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir. 1988); *Pollard v. Swenson*, 411 S.W.2d 837 (Mo. App. W.D. 1967).

46 *Caudill v. Farmland Indus., Inc.*, 919 F.2d 83, 86 (8th Cir. 1990); *Morse v. Volz*, 808 S.W.2d 424, 429 (Mo. App. W.D. 1991).

47 *See, e.g., Didier v. J.C. Penney Co., Inc.*, 868 F.2d 276, 280 (8th Cir. 1989); *ITT Commercial Fin. v. Mid-Am. Marine*, 854 S.W.2d 371, 376 (Mo. banc 1993). In both the state and federal systems, a trial court order denying a motion for summary judgment is interlocutory and therefore not appealable. *See Eagle v. Morgan*, 88 F.3d 620, 624 (8th Cir. 1966); *Morse v. Volz*, 808 S.W.2d 424, 429 (Mo. App. W. D. 1991).

48 Mo. R. Civ. P. 84.13(a); *Dockery v. Mannisi*, 636 S.W.2d 372 (Mo. App. E.D. 1982).

49 *Sherrill v. Royal Indus., Inc.*, 526 F.2d 507, 509 n.2 (8th Cir. 1975).

50 *City of Mt. Vernon v. Garinger*, 395 S.W.2d 214 (Mo. 1965).

51 *Singleton v. Wulff*, 428 U.S. 106 (1976); *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31 (Mo. banc 1982).

52 *Rowe v. Moss*, 656 S.W.2d 318 (Mo. App. S.D. 1983).

53 *Whiting v. United Farm Agency, Inc.*, 628 S.W.2d 407 (Mo. App. S.D. 1982).

54 *Randolph v. USF Cos.*, 626 S.W.2d 418 (Mo. App. S.D. 1981).

55 Mo. R. Civ. P. 84.05(c); *Reynolds v. Briarwood Dev. Co.*, 662 S.W.2d 905 (Mo. App. E.D. 1983).

56 *Delaney v. Gibson*, 639 S.W.2d 601, 604 (Mo. banc 1982).

57 Mo. R. Civ. P. 84.05(c); *Reynolds*, 662 S.W.2d 905.

58 *Overfield v. Sharp*, 668 S.W.2d 220, 222 (Mo. App. W.D. 1984).

59 *George v. Eaton*, 789 S.W.2d 56 (Mo. App. W.D. 1990).

60 *Witt v. Austin*, 806 S.W.2d 63 (Mo. App. W.D. 1991).

61 *School Dist., etc. v. Transamerica Ins. Co.*, 633 S.W.2d 238 (Mo. App. S.D. 1982); *Grippe v. Momtazee*, 696 S.W.2d 797 (Mo. banc 1985) (appellate court should examine submissibility issue only

after finding that appellant is entitled to the relief requested).

62 737 S.W.2d 499 (Mo. App. S.D. 1987).

63 *Id.* at 502.

64 *Schultz v. McDonnel Douglas Corp*, 105 F.3d 1258, 1259 (8th Cir. 1997).

65 *Littlewind v. Rayl*, 33 F.3d 985, 986 (8th Cir. 1994).

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