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SEEING THE APPELLATE HORIZON: CIVIL TRIAL STRATEGY AND STANDARDS OF REVIEW IN THE EIGHTH CIRCUIT

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I. INTRODUCTION

Some practitioners view the standard of review on appeal as an issue that need not be addressed until after an appellate argument has been drafted. For them, the standard of review is a mere afterthought that results in a paragraph dropped into the beginning of the brief to comply with a rule. For the "farsighted practitioner,"[1] however, the standard of review is just the opposite. It is the filter through which a litigator's best and worst moments at trial are judged. It is the "first question that cries out

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1. Steven Alan Childress & Martha S. Davis, *Federal Standards of Review*, 1.24 (3d ed., Lexis 1999).

for [an] answer,"[2] the blueprint for success on appeal, and the tool that shapes every winning argument. In sum, the standard of review can be either the lawyer's best friend or his worst enemy.

This article does not seek to catalog the infinite number of issues that arise in the appellate context. Instead, its purpose is to identify certain common situations in which the standards of review in the Eighth Circuit shape not only appellate strategy, but civil trial strategy as well. To be sure, the standards of review do not conveniently "fit into a checklist format."[3] Nor are they susceptible of precise definition in every context.[4] They are discussed here within the framework of issues that commonly arise during the course of a trial. They reveal the answer to the "first question" of appellate practice: No trial lawyer can afford to overlook the importance of the standards of review, for they will one day be the lens through which his client's day in court will be examined.[5]

II. STATING THE STANDARD

Most lawyers cringe at the thought of discovering in an appellate opinion that a case has been decided on the basis of an issue never addressed in the brief. Unfortunately, it happens. And the standard of review can be the critical issue left unaddressed.[6] Lawyers must take care to insure that the standard of review is properly addressed and explained in their briefs.

The Federal Rules of Appellate Procedure, as revised in 1993, require the appellant's brief to recite the applicable standard of review. Under Rule 28, a "concise statement of the applicable standard of review" must be included for each issue

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2. Barry Sullivan, *Standards of Review*, in *Appellate Advocacy* 59, 60 (Peter J. Carre, Azike A. Ntephe & Helen C. Trainor eds., ABA 1981).

3. Steven Alan Childress, *A Standards of Review Primer: Federal Civil Appeals*, 125 F.R.D. 319, 321 (1989).

4. "In law as elsewhere words of many-hued meaning derive their scope from the use to which they are put." *Powell v. U.S. Cartridge Co.*, 339 U.S. 497, 529 (1950) (Frankfurter, J., dissenting).

5. "To ignore at trial the reality of review is to ignore the direct decision makers and to tempt Murphy's Law." Childress & Davis, *supra* n. 1, at 1.25.

6. *See e.g. Fox v. Commr. of Internal Revenue*, 718 F.2d 251, 253 (7th Cir. 1983) ("The critical issue in this case is one not discussed by the parties: our standard of review.").

raised on appeal.[7] The statement may appear within the appellant's argument or under a separate heading before the discussion of an issue. This requirement reflects the sound principle that an accurate statement of the standard "generally results in arguments that are properly shaped in light of the standard."[8]

III. PRE-TRIAL RULINGS

In cases big and small, issues on appeal often arise from rulings made before trial. While pre-trial skirmishes do not lend themselves to quiet reflection about a post-trial appeal, a trial lawyer should not forget that the nature of the dispute dictates the eventual level of scrutiny by an appellate court. Often the dispute implicates the "discretion" of the trial judge. If so, the trial judge's ruling, no matter how critical to the scope and course of the trial, will not easily serve as reversible error.

In the heat of battle, for example, a pre-trial ruling on the admissibility of evidence may be perceived as the pivotal issue at trial. Because the scope of the trial can hinge on the admissibility of the evidence, a motion in limine is filed. The parties must vigorously defend their positions at a pre-trial hearing. A trial lawyer is well-advised to remember that the outcome of this pre-trial battle is committed to the sound discretion of the trial court. Although the trial court's discretionary rulings are certainly not unassailable on appeal,[9] the hurdle for reversal is high. As one distinguished appellate judge has pointed out, the lawyer who "blindly challenges on appeal the exercise of discretion might do better to take a leisurely stroll through an uncharted minefield."[10]

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7. Fed. R. App. P. 28(a)(9)(B).

8. Advisory Committee Notes, 1993 Amend., Fed. R. App. P. 28(a)(5).

9. *Kern v. TXO Production Corp.*, 738 F.2d 968, 972 (8th Cir. 1984) (finding an abuse of discretion where the trial court considered an improper factor and failed to evaluate pertinent factors).

10. Ruggero J. Aldisert, *Winning On Appeal* 66 (rev. 1st ed., Natl. Inst. Tr. Advoc. 1996).

A. Abuse of Discretion

The abuse of discretion standard is applied to situations where the "formulation of legal rules [is] difficult or impossible" and the trial court has "superior knowledge of the issues, the record, the proceedings and the personalities."[11] An abuse of discretion "will be found only when the trial court's decision is based on an erroneous view of the law or a clearly erroneous assessment of the evidence."[12] In general, an abuse of discretion[13] occurs when (1) a relevant factor that should have been given significant weight is not considered, (2) an irrelevant or improper factor is considered and given significant weight, or (3) all proper factors, and no improper ones, are considered, but the trial court commits clear error of judgment in weighing those factors.[14] As explained by Judge Richard Arnold, the phrase "abuse of discretion" means "that the court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law."[15] The trial court is thus given a "zone of choice within which [it] may go either way."[16]

B. De Novo *Review*

In contrast to rulings on the admissibility of evidence, the trial court's determination of purely legal issues has no advantage at the appellate level. Such determinations are reviewed *de novo,* which is sometimes referred to in the Eighth Circuit as plenary review. This means the trial court's rulings on

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11. George A. Somerville, *Standards of Appellate Review*, in *Appellate Practice Manual* 20, 20 (Priscilla Anne Schwab ed., ABA Sec. Litig. 1992).

12. *Richards v. Aramark Servs., Inc.*, 108 F.3d 925, 927 (8th Cir. 1997).

13. Discretion has been defined as follows:

> That part of the judicial function which decides questions arising in the trial of a cause, according to the particular circumstances of each case, and as to which the judgment of the court is uncontrolled by fixed rules of law.
>
> The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.

Bouvier's Law Dictionary, vol. 1 884 (3d rev., 8th ed., West 1914)

14. *Richards*, 108 F.3d at 927.

15. *Kern*, 738 F.2d at 970.

16. *Id.* at 971.

purely legal issues are subject to independent appellate review with no deference.[17] The Eighth Circuit may affirm the trial court, however, on any basis supported by the record.[18]

C. Discovery Rulings

The trial court has broad latitude in matters relating to pre-trial discovery. The court's discovery orders are reviewed "very narrowly" by the Eighth Circuit and will be upheld "unless there was a 'gross abuse of discretion resulting in fundamental unfairness in the trial of the case.'"[19] The bottom line is that the trial court, as discovery referee, will not be overturned unless its rulings (even if incorrect) had a demonstrable impact on the outcome of the trial.

D. Preliminary Injunctions

As standards of review do not fit into a tidy checklist of situational rules, the dichotomy between abuse of discretion and *de novo* review is only a starting point for grasping the overall significance of these standards. How, for example, will the Eighth Circuit review the trial court's denial of a motion for preliminary injunction? Is the issue one of law or fact? The short answer is that the denial of a motion for preliminary injunction is reviewed for abuse of discretion.[20] Yet, the trial court's disposition of the motion naturally includes a legal conclusion: whether the moving party is likely to succeed on the merits. This legal issue is independently reviewed *de novo* on appeal.[21] The appellant should always be on alert to the possibility that "[l]egal error can be embedded in an apparently discretionary

17. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982) ("[I]f a district court's findings rest on an erroneous view of the law, they may be set aside on that basis.").

18. *McKay v. WilTel Commun. Sys., Inc.*, 87 F.3d 970, 975 (8th Cir. 1996).

19. *Derby v. Godfather's Pizza, Inc.*, 45 F.3d 1212, 1215 (8th Cir. 1995) (quoting *Wilson v. Beloit Corp.*, 921 F.2d 765, 768 (8th Cir. 1990)); *see Kindead v. Southwestern Bell Telephone Co.*, 49 F.3d 454, 457 (8th Cir. 1995) (holding that the standard of review for the trial court's refusal to compel discovery is gross abuse of discretion).

20. *Couteau Properties Co. v. Dept. of Interior*, 53 F.3d 1466, 1472 (8th Cir. 1995).

21. *Id.*

decision."[22] Moreover, the trial court's treatment of an issue as one of law or fact is not entitled to deference on appeal.[23]

E. Common Motions to Dismiss

The farsighted trial lawyer should also remember the standards of review for common pre-trial orders involving motions to dismiss. For example, an order of the trial court that grants a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6) will be reviewed *de novo* on appeal.[24] The Eighth Circuit will "construe the allegations in the complaint in the light most favorable" to the plaintiff, and will affirm the dismissal only if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of his claim which would entitle him to relief."[25] Likewise, the Court will review *de novo* an order of the trial court dismissing a complaint for lack of subject matter jurisdiction.[26]

The dismissal of an action under Rule 41(b) for failure to prosecute or to comply with an order of the trial court is reviewed for abuse of discretion.[27] Yet, because dismissals under Rule 41(b) operate as an adjudication on the merits, the Eighth Circuit does not look favorably upon them: "Dismissals with prejudice are drastic and extremely harsh sanctions. Cases should be dismissed with prejudice only where the plaintiff has intentionally delayed the action or where the plaintiff has consistently and willfully failed to prosecute his [or her] claim."[28]

F. Summary Judgment

The Eighth Circuit reviews the trial court's grant of

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22. Somerville, *supra* n. 11, at 21.

23. *Stevens v. Employer-Teamsters Joint Council*, 979 F.2d 444, 458 (6th Cir. 1992).

24. *Dover Elevator Co. v. Ark. St. Univ.*, 64 F.3d 442, 445 (8th Cir. 1995).

25. *Carney v. Houston*, 33 F.3d 893, 894 (8th Cir. 1994) (*per curiam*) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

26. *Gopher Oil Co. v. Bunker*, 84 F.3d 1047, 1050 (8th Cir. 1996).

27. *Wright v. Sargent*, 869 F.2d 1175, 1176 (8th Cir. 1989) (considering whether trial court's exercise of its inherent power to dismiss was an abuse of discretion).

28. *Miller v Benson*, 51 F.3d 166, 168 (8th Cir. 1985) (quoting *Sterling v. U.S.*, 985 F.2d 411, 412 (8th Cir. 1993)).

summary judgment *de novo*, viewing the evidence in the light most favorable to the non-moving party and affirming only if there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law.[29] Sitting in diversity, the Eighth Circuit applies the substantive law of the applicable state.[30]

G. Jury Selection: The Batson *Challenge*

Occasionally, the trial court's denial of a *Batson* challenge to a peremptory strike of a potential juror will be an issue on appeal.[31] The trial court's findings on the issue of purposeful discrimination largely turn on credibility determinations and are afforded great deference by the Eighth Circuit.[32] Thus, the trial court's finding that the exclusion of a juror was not motivated by racial discrimination will only be reversed if the court's "findings were clearly erroneous."[33]

IV. RULINGS AT TRIAL

A. Evidentiary Rulings

The standard of review for evidentiary issues decided during trial is, of course, the same as the trial court's ruling on a motion in limine.[34] The Eighth Circuit will only reverse the

29. *Bryan v. Norfolk & W. Ry. Co.*, 154 F.3d 899, 901 (8th Cir. 1998); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

30. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

31. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court held that the exercise of peremptory challenges to exclude African-Americans from the jury in a criminal case violated the Equal Protection Clause of the Fourteenth Amendment. The Court extended the reasoning of *Batson* to civil cases in *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991).

32. *Doss v. Frontenac*, 14 F.3d 1313, 1317 (8th Cir. 1994).

33. *Id.* at 1316.

34. The 2000 amendment to Rule 103(a) of the Federal Rules of Evidence allows a party to appeal the pre-trial denial of a motion in limine, even if the party does not object to the introduction of the evidence at trial. This represents a departure from Eighth Circuit practice and procedure. The Eighth Circuit had previously held that a motion in limine does not preserve error for appellate review. *Peerless Corp. v. U.S.*, 185 F.3d 922, 925 (8th Cir. 1999) (reaffirming that when "a motion to exclude evidence is made in limine and is

evidentiary rulings of the trial court upon a finding that the court engaged in a "clear and prejudicial" abuse of discretion.[35] An abuse of discretion occurs when the trial court excludes evidence of a critical nature, so that there is no reasonable assurance that the jury would have reached the same conclusion had the evidence been admitted.[36] Even if the admission of evidence is found to be an abuse of discretion, the Eighth Circuit will affirm the trial court if there is substantial evidence other than the questioned evidence that supports the jury's verdict.[37]

B. Motion for Directed Verdict

As the Eighth Circuit's decision in *Country Shindig Opry, Inc. v. Cessna Aircraft Co*,[38] indicates, the standard by which the Eighth Circuit reviews a trial court's ruling on a motion for directed verdict is the same as its review of a motion for judgment notwithstanding the verdict:

> To assess whether a ruling on a motion for a directed verdict was proper, the courts consider the evidence in the light most favorable to the prevailing party, assuming as true all facts that the prevailing party's evidence tended to prove and giving him the benefit of all favorable inferences that reasonably may be drawn from the proven facts. *Brown v. Missouri Pacific Railroad*, 703 F.2d 1050, 1052 (8th Cir. 1983). If, in light of the above, reasonable jurors could differ as to the conclusions that could be drawn from the evidence, the court must deny the motion for a directed verdict.[39]

Importantly, in reviewing the trial court's ruling, the Eighth

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overruled, if the evidence is thereafter admitted at trial without objection, 'the error if any, has not been preserved for review'" (quoting *Huff v. Heckendorn Mfg. Co.*, 991 F.2d 464, 466 (8th Cir. 1993))).

35. *King v. Ahrens*, 16 F.3d 265, 268 (8th Cir. 1994) (quoting *Cummings v. Malone*, 995 F.2d 817, 823 (8th Cir. 1993)); *see Lamb Engr. & Const. v. Nebraska Pub. Power*, 103 F.3d 1422, 1432 (8th Cir. 1997) (holding that "great deference" should be afforded to the trial court's rulings on the admissibility of evidence) (quoting *U.S. v. Jackson*, 914 F.2d 1050, 1053 (8th Cir. 1990)).

36. *King*, 16 F.3d at 268 (quoting *Adams v. Fuqua Indus., Inc.*, 820 F.2d 271, 273 (8th Cir. 1987)).

37. *Buchanna v. Diehl Mach., Inc.*, 98 F.3d 366, 372 (8th Cir. 1996).

38. 780 F.2d 1408 (8th Cir. 1986).

39. *Id.* at 1411.

Circuit will not consider the record as a whole. It will only review the evidence favoring the nonmoving party.[40]

Likewise, if a party appeals the trial court's denial of a motion for judgment as a matter of law, the Eighth Circuit's review is *de novo* but "deferential to the jury's verdict."[41] The Court will "resolve all factual conflicts in favor of the nonmoving party, giving that party the benefit of all reasonable inferences and assuming as true all facts favoring that party which the evidence tended to prove."[42] Thus, the Court will affirm the denial of a motion for judgment as a matter of law "if a reasonable jury could differ as to the conclusions that could be drawn [from the evidence]."[43]

C. Jury Instructions

1. Deferential Review

The Eighth Circuit applies "a deferential standard when reviewing a [trial] court's jury instructions, reversing only for an abuse of discretion."[44] If the appellant challenges the trial court's failure "to give a requested instruction, the omission is error only if the requested instruction is correct, not adequately covered by the charge given, and involves a point so important that failure to give the instruction seriously impaired the party's ability to present an effective case."[45] Stated another way, the Eighth Circuit considers whether the instructions, "taken as a whole and viewed in light of the evidence and the applicable law, fairly and adequately submitted the issues in the case to the jury."[46] This standard of review has been described as the "harmless error rule," under which "the appellant generally has

40. *Dace v. ACF Indus., Inc.*, 722 F.2d 374, 376 (8th Cir. 1983).

41. *Three River Telco v. TSFL Holding Corp., Inc.*, 300 F.3d 924, 927 (8th Cir. 2002) (quoting *Manning v. Metro. Life Ins. Co.*, 127 F.3d 686, 689-690 (8th Cir. 1997)).

42. *Id.*

43. *Id.*

44. *Thomlison v. City of Omaha*, 63 F.3d 786, 790-791 (8th Cir. 1995); *see also Hoselton v. Metz Baking Co.*, 48 F.3d 1056, 1062 (8th Cir. 1995).

45. *Thomlison*, 63 F.3d at 791.

46. *Gray v. Bicknell*, 86 F.3d 1472, 1485 (8th Cir. 1996)

the burden of establishing the prejudicial effect of the trial court's refusal to give a requested instruction."[47]

2. Failure to Object

If a party fails to object to the trial court's denial of a proposed instruction, the Eighth Circuit will reverse only if the failure to give the proposed instruction amounts to plain error.[48] As many appellants have learned, the plain error exception is a narrow gate. The Eighth Circuit applies the doctrine only in exceptional cases when strict criteria are met.[49] Plain error will only be found if the trial court's ruling "is error affecting substantial rights, the error is plain, and the error seriously affects the fairness, integrity or public reputation of judicial proceedings."[50] The Eighth Court has also defined plain error as an error that is "clear" or "obvious."[51]

The Eighth Circuit's treatment of jury instructions demands special vigilance at the jury instruction conference in keeping with Rule 51.[52] If the conference is held in chambers, counsel should insist that a court reporter be present. Lawyers must not be lulled into a conciliatory mode at this late stage of the trial. They must make an objection to each instruction approved by the trial court that they believe to be improper, and must proffer alternative instructions when necessary. This can be a tedious process, particularly when the trial is long and the parties are relieved to have the evidentiary phase of the trial completed, but it must be done.[53]

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47. *Bersett v. K-Mart Corp.*, 869 F.2d 1131, 1135 (8th Cir. 1989).

48. *Farmland Indus. v. Frazier-Parrott Commodities, Inc.*, 871 F.2d 1402, 1408 (8th Cir. 1989) (holding that only a plain error analysis is necessary where a party "never objected on the record" to the trial court's failure to give the requested instructions).

49. *Bd. of Waterworks Trustees v. Alvord, Burdich & Howson*, 706 F.2d 820, 824 (8th Cir. 1983).

50. *Caviness v. Nucor-Yamato Steel Co.*, 105 F.3d 1216, 1220 (8th Cir. 1997) (internal quotations omitted).

51. *Starks v. Rent-A-Center*, 58 F.3d 358, 363 (8th Cir. 1995).

52. "No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection." Fed. R. Civ. P. 51.

53. *See Starks*, 58 F.3d at 362 (noting that in the Eighth Circuit, a "concern that the trial judge would prefer no objection or the view that the objection would be futile does not relieve parties from making an objection to preserve errors for review").

D. Closing Argument

The Eighth Circuit will not reverse the trial court's rulings on the propriety of closing argument absent an abuse of discretion.[54] Furthermore, a statement made in closing argument does not constitute reversible error unless it is "plainly unwarranted and clearly injurious."[55] Thus, in challenging a trial court's ruling on the propriety of closing argument, a complaining party must do more than establish that counsel's argument was improper. That party must also "make a concrete showing of prejudice resulting from the argument."[56] As with other discretionary rulings, a finding that the trial court committed error does not justify reversal. The hurdle for challenging an improper closing argument is indeed high. The appellant must establish a nexus between the improper argument and the verdict actually reached by the jury.

E. Findings of Fact

1. Bench Trial

The lens through which a trial court's findings of fact are examined on appeal is codified in Rule 52.[57] The strength of the lens, however, is not so clear in practice. Rule 52 provides that "[f]indings 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."[58] Judge Learned Hand offered perhaps the best assessment of the "clearly erroneous"

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54. *Kostelec v. State Farm Fire and Cas. Co.*, 64 F.3d 1220, 1228 (8th Cir. 1995).

55. *Boardman v. Natl. Med. Enters.*, 106 F.3d 840, 844 (8th Cir. 1997) (quoting *Vanskike v. Union P. R. R. Co.*, 725 F.2d 1146, 1149 (8th Cir. 1984)).

56. *Vanskike*, 725 F.2d at 1149; *see Lovett v. Union P. R.R. Co.*, 201 F.3d 1074, 1082-83 (8th Cir. 1999) (finding that the defendant's closing argument "may have been improper," but affirming a verdict for the defendant because the plaintiff "failed to demonstrate that she was prejudiced").

57. *See* Aldisert, *supra* n. 10, at 57 (noting that standards of review "determine the power of the lens through which the appellate court may examine a particular issue in a case").

58. Fed. R. Civ. P. 52(a) (emphasis added).

standard:

> It is idle to try to define the meaning of the phrase "clearly erroneous"; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded.[59]

Following the lead of the United States Supreme Court in *United States v. United States Gypsum Co.*,[60] the Eighth Circuit has adopted the familiar test that findings of fact will only be reversed if the Court is "left with the definite and firm conviction that a mistake has been committed."[61] Yet, the Court has struggled with the precise formula for arriving at a "firm conviction" about the evidence, sometimes merging the clearly erroneous standard with the substantial evidence test, much to the confusion of many appellate lawyers.[62]

While the Court will apply Rule 52 to pay its "due regard" to the trial court, the Court does not regard the findings of the trial court with the same deference it pays to a jury verdict. As Judge Mehaffy explained in *Jackson*, the Court is afforded "greater latitude" when reviewing the trial court's findings of fact:

> The clearly erroneous concept . . . affords a greater latitude [of review] than would an appeal from a jury verdict. *In the latter it is a question of substantial evidence.* In the former, there is still the qualitative factor of the truth and right of the case—the impression that a fundamentally wrong result has been reached.[63]

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59. *U.S. v. Aluminum Co. of Am.*, 148 F.2d 416, 433 (2d Cir. 1945).

60. 333 U.S. 364, 395 (1948).

61. *Chakeles v. Commr. of Internal Revenue*, 79 F.3d 726, 728 (8th Cir. 1996).

62. *Akeyo v. O'Hanlon*, 75 F.3d 370, 373 (8th Cir. 1996) (holding that a factual finding that is supported by substantial evidence in the record is not clearly erroneous); *Jackson v. Hartford Accident and Indemnity Co.*, 422 F.2d 1272, 1275 (8th Cir. 1970) ("We have no right to set aside a finding of fact of the trial court unless there is no substantial evidence to sustain it, unless it is against the clear weight of the evidence, or unless it was induced by an erroneous view of the law") (quoting *Christensen v. Great Plains Gas. Co.*, 418 F.2d 995, 998 (8th Cir. 1969)).

63. *Jackson*, 422 F.2d at 1278 (emphasis in original) (quoting *Oil Screw Noah's Ark v. Bentley & Felton Corp.*, 322 F.2d 3, 5-6 (5th Cir. 1963)).

Therefore, "evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge's finding."[64] But even with this distinction, the lesson for the practitioner is that a trial court's findings of fact, though not unassailable, will only be reversed for a clear and definite mistake.[65] The Eighth Circuit "will not retry issues of fact" because the "power of a trial court to decide doubtful issues of fact is not limited to deciding them correctly."[66] The Court will affirm the trial court even if it is "quite possible" that a different conclusion would have been reached applying *de novo* review.[67]

2. *Jury Trial*

In our system of justice, the province of the jury is sacred. This sentiment is reflected in the Eighth Circuit's review of jury verdicts. Factual findings by the jury will not be reversed if the verdict is supported by "substantial evidence" in the record.[68] Thus, a jury's verdict will be affirmed unless, viewing the evidence in the light most favorable to the prevailing party, a reasonable jury could not have found for that party.[69]

F. Mixed Questions of Law and Fact

A mixed question of law and fact involves the application of an established rule of law to specific facts.[70] Generally, mixed questions of law and fact "that require the consideration of legal concepts and the exercise of judgment about the values underlying legal principles" are reviewed *de novo*.[71] An example of this type of review is found in *Cooper Tire*, in which the

64. *Id.* (quoting *Orvis v. Higgins*, 180 F.2d 537, 540 (2nd Cir. 1950)).

65. The ability to challenge a trial court's factual findings on appeal is even less clear in the Seventh Circuit, where one panel stated that a trial court's finding is clearly erroneous only if it "strike[s] us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

66. *Cleo Syrup Corp. v. Coca-Cola Co.*, 139 F.2d 416, 417 (8th Cir. 1943).

67. *SquirtCo. v. The Seven-Up Co.*, 628 F.2d 1086, 1091 (8th Cir. 1980).

68. *Harris v. Union Elec. Co.*, 787 F.2d 355, 362 (8th Cir. 1986).

69. *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 53 F.3d 899, 904 (8th Cir. 1995).

70. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982).

71. *Cooper Tire & Rubber Co. v. St. Paul Fire & Marine Ins. Co.*, 48 F.3d 365, 369 (8th Cir. 1995).

Eighth Circuit reversed the trial court's determination that an employee had breached the terms of an ERISA plan.[72]

Notwithstanding the general application of *de novo* review to mixed questions of law and fact, the Eighth Circuit has recognized that the determination of citizenship for purposes of diversity jurisdiction "is a mixed question of law and fact, but mainly fact, which may not be set aside by an appellate court unless clearly erroneous."[73] Moreover, in *Boe v. United States*,[74] the Court found that the appellant was not entitled to a trial *de novo* on the issue of negligence, even though the appellant argued that the issue of negligence was a mixed question of law and fact. The Court affirmed on the basis that the trial court's findings of fact were not clearly erroneous.[75]

G. Motion for Judgment as a Matter of Law

The trial court's denial of a motion for judgment as a matter of law is reviewed *de novo*.[76] Accordingly,

> [i]n determining whether there exists sufficient evidence to support the jury verdict, we must view the evidence in the light most favorable to the prevailing party, remembering that "judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party."[77]

72. *Id.* at 367-69; *see also Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 609-11 (8th Cir. 1997) (reviewing *de novo* the issue of whether a school district had offered a "free appropriate public education" within the meaning of the Individuals with Disabilities Education Act).

73. *Holmes v. Sopuch*, 639 F.2d 431, 434 (8th Cir. 1981).

74. 352 F.2d 551 (8th Cir. 1965).

75. *Id.* at 552-553.

76. *Keenan v. Computer Assoc. Intl., Inc.*, 13 F.3d 1266, 1268 (8th Cir. 1994).

77. *Porous Media Corp v. Pall Corp.*, 110 F.3d 1329, 1337-38 (8th Cir. 1997) (quoting *Keenan*, 13 F.3d at 1269).

V. POST-TRIAL RULINGS

A. Motion for New Trial

1. Generally

The trial court's denial of a motion for new trial under Rule 59 is reviewed for abuse of discretion.[78] If the trial court denies the motion because the verdict is not against the weight of the evidence, the denial of the motion is "virtually unassailable" on appeal.[79] If the trial court grants a motion for new trial, it "must adequately articulate its reasons for overturning a jury verdict" so that the Eighth Circuit "can exercise a meaningful degree of scrutiny and safeguard parties' right to a jury trial."[80] In applying the abuse of discretion standard, the Court will closely guard the role of the jury:

> On a motion for new trial, the district court is entitled to interpret the evidence and judge the credibility of witnesses, but it may not usurp the role of the jury by granting a new trial simply because it believes other inferences and conclusions are more reasonable. . . . A new trial is appropriate if the verdict is against the weight of the evidence and if allowing it to stand would result in a miscarriage of justice.[81]

2. Excessive Damages

The Eighth Circuit's determination of whether the damages awarded in a diversity case are excessive is governed by state law.[82] A verdict is excessive under Arkansas law, for example, only if "the amount shocks the conscience of the court or

78. *Id.* at 1338.

79. *Id.* (quoting *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 656 (8th Cir. 1995)).

80. *Van SteenBurgh v. Rival Co.*, 171 F.3d 1155, 1160 (8th Cir. 1999) (citations omitted).

81. *Id.* (citations omitted).

82. *Sanford v. Crittenden Meml. Hosp.*, 141 F.3d 882, 884 (8th Cir. 1998).

demonstrates that the jurors were motivated by passion, prejudice or undue influence."[83]

B. Attorney's Fees

Before the dust has settled on many trials, the parties find themselves in disagreement on whether the trial court has the authority to award attorney's fees. The Eighth Circuit reviews the trial court's award of fees and costs for abuse of discretion.[84] Factual findings concerning the fee issue, however, will not be disturbed unless they are clearly erroneous. Applicable legal issues decided by the trial court are subject to plenary review.[85]

VI. CONCLUSION

No trial can be perfect. Indeed, litigants are "entitled to a fair trial but not to a perfect one."[86] Likewise, the lens through which the trial record is viewed on appeal is not always crystal clear. Nevertheless, every trial must be viewed as a momentous event from beginning to end, and lawyers should not limit their view of the landscape to the trial itself; they must see the "appellate horizon,"[87] which will be colored by the applicable standards of review. As Justice White once pointed out, standards of review are therefore "of far more than academic interest."[88] They truly are the lawyer's best friend, or his worst enemy.

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83. *Id.* (quoting *White v. Mitchell*, 568 S.W.2d 216 (Ark. 1978)).

84. *Pinkham v. Mary Ellen Enters., Inc.*, 84 F.3d 292, 294 (8th Cir. 1996).

85. *Id.*

86. Somerville, *supra* n. 11, at 20.

87. Childress & Davis, *supra* n. 1, at 1.24.

88. *Schwimmer v. Sony Corp. of Am.*, 459 U.S. 1007, 1009 (1982) (White, J., dissenting from denial of certiorari) (characterizing standard of review as "influential, if not dispositive").