



You Can't Squeeze Blood from a Turnip: A Refresher on Kansas Supreme Court Appellate Practice Rules for Trial Attorneys

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The well-worn adage “you can’t squeeze blood from a turnip” is often invoked to highlight the futility of chasing what simply isn’t there. But when it comes to appellate practice in Kansas, this phrase serves as a cautionary reminder. No matter how compelling your argument may be, if it is not supported by the record on appeal or was not properly preserved below, it likely will be deemed abandoned on appeal. This article serves as a refresher on the burden to designate an appellate record, with a focus on Kansas Supreme Court Rules 3.01,¹ 3.02,² and 6.02(a)(5)³ — and what they mean for trial counsel.

Rules 3.01 and 3.02—Ensure the District Court Record Supports Appellate Review

In Kansas state appellate courts,⁴ it is firmly established that “the burden is on a party to designate a record sufficient to present its points to the appellate court and to establish its claims.”⁵ Trial counsel plays a pivotal role in ensuring necessary information is available for inclusion in the record on appeal. Rule 3.01(b)(1) defines “record on appeal” as “that portion of the *entire record* which is required by [the appellate practice] rules or requested by a party.”⁶ In turn, subsection (a) provides the “entire record” consists of:

- “(1) all original papers and exhibits filed in the district court;
- “(2) the court reporter’s notes and transcripts of all proceedings;
- “(3) any other court authorized record of the proceedings ...; and
- “(4) the entries on the appearance docket[.]”⁷

These rules collectively underscore a critical appellate principle: information not included in the district court record generally cannot be considered on appeal. The Supreme Court has consistently enforced this rule. For example, it has refused to consider: an email chain with the presiding district judge attached to a petition for review because it was not a part of the record below;⁸ letters and an affidavit appended to a brief but never formally introduced in the proceedings below or included in the record;⁹ and documents added to the record on appeal that were not presented to the district court.¹⁰

When a case is appealed, the district court compiles the record on appeal, but often much of the burden for what is included falls to appellant’s counsel, as the party asserting error.¹¹ While practices may vary between judicial districts, the Supreme Court Rules do not require a district court clerk to include everything in the district court record in the record on appeal absent requests for additions from counsel. Rule 3.02 governs preparation of the record on appeal. Subsection (c) identifies material that the district court includes in the record on appeal as a matter of course. Under subsection (d), a party may request that additional material be included — specifically, “any part of the *entire record* under Rule 3.01(a).”¹² The Kansas Supreme Court has made clear that litigants asserting error on appeal should “avail themselves of the opportunity to include” pertinent materials beyond those listed in Rule 3.02(c) to satisfy their burden to designate an adequate record.¹³ Trial counsel, therefore, must ensure necessary information is part of the “entire record,” so that it may be included in the record on appeal.

Although ensuring the district court record contains the necessary information is only the first step in designating the record on appeal, its importance cannot be overstated. The success or demise of the appeal often depends on the record developed in the district court.

Rule 6.02(a)(5) — Ensure Issue is Raised and Ruled Upon in the District Court

Closely related to the burden to designate the record is Rule 6.02(a)(5)’s requirement that each issue in an appellant’s brief “*must begin with citation to the appropriate standard of appellate review and a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on*” in the district court.¹⁴ If the issue was not raised below, the brief must

explain why the issue is properly before the court.¹⁵ Over ten years ago, in *State v. Williams*, the Supreme Court recognized its past decisions had not strictly enforced this rule. Going forward, the Court instructed that “[f]uture litigants should consider this a warning and comply with Rule 6.02(a)(5) by explaining why an issue is properly before the court if it was not raised below — or risk a ruling that an issue improperly briefed will be deemed waived or abandoned.”¹⁶ Since *Williams*, Kansas appellate courts have reiterated that “Rule 6.02(a)(5) means what it says and is ignored at a litigant’s own peril.”¹⁷ Despite this explicit warning, failure to comply with Rule 6.02(a)(5) continues to bar appellate review.¹⁸

Once again, successfully navigating Rule 6.02(a)(5) depends largely on the record established by trial counsel. This is because generally, issues not raised before the district court cannot be raised on appeal.¹⁹ Absent the ability to pinpoint where an issue was properly raised and ruled upon below, it is likely counsel will be left with arguing that a limited exception allows the issue to be raised for the first time on appeal.²⁰ The three commonly recognized exceptions are:

- “(1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case;
- “(2) consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights; and
- “(3) the judgment of the trial court may be upheld on appeal despite its reliance on the wrong ground or having assigned a wrong reason for its decision.”²¹

But even if one of these exceptions supports review, an appellate court has no obligation to consider it.²² A 10,000-foot view of the rules surrounding K.S.A. 60-404’s contemporaneous objection requirement is illustrative of the burden trial counsel faces.²³ K.S.A. 60-404 generally precludes appellate review over an evidentiary challenge absent a timely and specific objection on the record.²⁴ It requires “any pretrial objection to the admission or exclusion of evidence must be preserved by contemporaneously objecting at trial, which can be accomplished through a standing objection.”²⁵ Relatedly, if the district court “grants a motion in limine to exclude evidence at trial, the party limited by the motion must make a sufficient proffer of the excluded evidence to preserve the issue for appeal.”²⁶ Additionally, “[t]he contemporaneous objection rule is not satisfied by objecting on one ground at trial and arguing another ground on appeal[.]”²⁷

While the contemporaneous objection requirement is a common bar to appellate review, Rule 6.02(a)(5) applies to



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most issues raised for the first time on appeal, including, but certainly not limited to constitutional challenges²⁸ and statutory arguments.²⁹ For example, in *In re Adoption of Baby Girl G.*, the Supreme Court declined to consider the constitutionality of a statute for the first time in a petition for review, reasoning the argument was not raised in the district court as required by Rule 6.02(a)(5) or the Court of Appeals, as required by Rule 8.03,³⁰ the rule governing Supreme Court Review of Court of Appeals decisions.³¹

More recently, in *Schutt v. Foster*, the Supreme Court held the Court of Appeals erred as a matter of law in considering an issue when the appellant failed to brief a preservation exception in her opening brief and instead addressed the preservation exceptions in her reply brief.³² A review of *Schutt* highlights the importance of complying with Rule 6.02. The district court awarded the landlord late fees after the tenant missed rent payments, and the tenant appealed. For the first time on appeal, the tenant challenged the late fees on several grounds, including that the lease's late-fee provision was unconscionable under the Residential Landlord Tenant Act, K.S.A. 68-2540 *et seq.* The landlord argued the tenant's challenges were unpreserved because they were not argued in the district court. Further, the landlord argued the tenant failed to comply with Rule 6.02(a)(5) by not explaining in her opening brief why the newly raised issues were properly before the panel. In her reply brief, the tenant argued exceptions to the preservation rule applied. Based on these exceptions, the Court of Appeals proceeded to the merits of the tenant's arguments and held the late fees were unconscionable under K.S.A. 58-2544(a). The Landlord petitioned for review, arguing, among other things, that the Court of Appeals erred by reaching the merits of the tenant's unpreserved unconscionability claim. The Supreme Court addressed only the preservation issue, holding the Court of Appeals abused its discretion in reaching the merits of the tenant's arguments because Foster failed to comply with Rule 6.02. The Supreme Court also reiterated that appellant must preserve exceptions under Rule 6.02 in their opening brief; raising the argument in a reply brief is too late.³³

Rationale Behind Preservation Rule

The Kansas Supreme Court and Court of Appeals have both explained that the preservation rule “is not simply a ‘gotcha’ from the appellate courts.”³⁴ Instead, it “encourages

litigants to fully present their cases to the trial court” where the “issues and claims are then tested by the adversarial process further refining and defining the facts and law in dispute.”³⁵ The Court of Appeals has further explained, “[the appellate courts] allow routine claims of exceptions, [] those exceptions will swallow the rule and effectively render it meaningless.”³⁶ Considering potential appellate issues while trying a case is undoubtedly daunting. But if your case ends up on appeal, failure to properly preserve an issue will lead to an uphill — likely losing — battle under 6.02(a)(5). ♦



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References

1. Supreme Court Rule 3.01 (2025 Kan. S. Ct. R. at 19).
2. Supreme Court Rule 3.02 (2025 Kan. S. Ct. R. at 20).
3. Supreme Court Rule 6.02 (2025 Kan. S. Ct. R. at 35).
4. This article is specific to Kansas state courts.
5. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013) (internal quotations omitted).
6. Supreme Court Rule 3.01(b) (emphasis added).
7. Supreme Court Rule 3.01(a). See also *State v. Brownlee*, 302 Kan. 491, 505, 354 P.3d 525 (2015).
8. *Matter of Adoption of T.M.M.H.*, 307 Kan. 902, 916-917, 416 P.3d 999 (2018).
9. *State v. Warren*, 302 Kan. 601, 614, 356 P.3d 396 (2016). See also *Edwards v. Anderson Engineering, Inc.*, 284 Kan. 892, 895, 166 P.3d 1047 (2007) (“The court will not consider appended items which are not found in the record.”); Kansas Supreme Court Rule 6.02(b) (2025 Kan. S. Ct. Rule at 35) (“The appendix is for the court's convenience and is not a substitute for the record itself.”)
10. *State v. Brownlee*, 302 Kan. 491, 503, 504-505, 354 P.3d 525 (2015).
11. *Kelly v. VinZant*, 287 Kan. 509, 526, 197 P.3d 803, 814 (2008) (“An appellant has the burden to designate a record sufficient to establish the claimed error; without such a record, the claim of error fails.”) (internal citation omitted). See also *Nold v. Binyon*, 272 Kan. 87, 96, 31 P.3d 274, 281 (2001) (“The appellants bear