Standards of Review

The Lens through which to Evaluate and Argue any Appeal

by John T. Schreiber

ALMOST EVERY APPELLATE COURT OPINION starts its discussion of the issues with a section on the applicable standard of review in that particular appeal. This is far from a cursory repetition or custom. "'[A] standard of review prescribes the degree of deference given by the reviewing court to the actions or decisions under review.'" *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 667 (citation omitted). Even presuming that counsel took the necessary steps to preserve issues in the trial court, the applicable standard of review tells the reviewing court how those issues must be viewed on appeal. "The analysis of a case depends upon the standard of review. It is not surprising therefore that litigants on appeal often argue differing views on the appropriate standard of review." *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 105.

Different standards of review apply depending on the type of decision made by the trial court. Counsel must tailor argument on each of their issues to the particular applicable standard of review. *Sonic Mfg. Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465. Inexperienced counsel on appeal who are unfamiliar with the applicable standard can face questioning from the justices at oral argument such as "but doesn't the abuse of discretion standard apply here counsel?" Such questions may show counsel's lack of familiarity with this concept and result in a concession of lack of merit. See *Sonic Mfg., supra*. A summary of the four main standards of review follow, from most to least deferential, with some examples of the types of instances in which they apply:

SUBSTANTIAL EVIDENCE-FACTUAL DISPUTES

There are generally four different standards of review, one or more of which will apply in any given appeal. See *Bank of America v. Giant Inland Empire R.V. Center, Inc.* (2000) 78 Cal.App.4th 1267, 1276 (applying independent review to trial court's determination of questions of law and substantial evidence standard to factual findings). The first is the substantial evidence standard, embodied in the substantial evidence rule. The rule applies in cases contesting the sufficiency of evidence and arises in any factual dispute, whether express or implied. See *SFPP, L.P. v. Burlington Northern & Santa Fe Ry. Co*. (2004) 121 Cal.App.4th 452, 462. The substantial evidence rule states that the trial court's resolution of controverted or uncontroverted factual issues must be affirmed so long as supported by "substantial evidence "in light of the entire record. *Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874. Under the substantial evidence rule the appellate court must affirm even if the reviewing justices would have decided the case differently had they been presiding at the trial court level and even if other substantial evidence would have supported a different result so long as substantial evidence supports the trial court's decision. *Rupf v. Yan* (2000) 85 Cal. App.4th 411, 429, fn. 5. This creates a "daunting burden" for an appellant seeking reversal of a factual determination made in the trial court. *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.

The rule derives from two rationales: First, appellate courts defer to trial courts' or a jury's resolution of fact issues since the trial judge or jury is in a better position than the appellate court to observe a witness' demeanor and therefore to assess a witness' credibility. Eisenberg, Horvitz, and Wiener, J (ret.), Cal. Prac. Guide: Civil Appeals & Writs (The Rutter Group 2011), Ch. 8-C, "Standards of Appellate Review," ¶ 8:41 (citations omitted). Second, jurisdictional and/or institutional restraints create appellate court deference to such trial court determinations. Trial courts decide questions of fact while appellate courts decide questions of law. *Civil Appeals, supra,* ¶ 8:42 (citing inter alia, *Tupman v. Haberkern* (1929) 208 Cal. 256, 262-263). Appellate courts apply the substantial evidence rule to declarations filed in the trial court, even though the trial court in that instance does not observe the witness' demeanor. *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fn. 3.

Substantial evidence must be of "ponderable legal significance....It must be reasonable, credible, and of solid value." *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633. However, even if the evidence supporting the judgment comes from the testimony of a single witness, even if that witness is a party to the lawsuit, that testimony can comprise substantial evidence. *In re Marriage of Mix* (1975) 14 Cal.3d 604, 614. Uncontradicted testimony in appellant's favor "does not necessarily conclusively establish the pertinent factual matter; the trier of fact is free to reject any witness' uncontradicted testimony; and the court of appeal will affirm so long as the rejection was not arbitrary." *Civil Appeals, supra*, ¶ 8:54. However, uncontradicted expert testimony on a matter solely within the knowledge of experts is conclusive and cannot be disregarded. *Hubert, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal.App.3d 278, 313. Such examples would be the standard of care to be applied to experts such as architects or physicians. *Hubert, supra* (architects); *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 277 (doctors).

Two corollaries to the substantial evidence rule further illustrate the uphill climb facing a party seeking to argue insufficient evidence on appeal. First, the "conflicting evidence" corollary requires the appellate court to resolve all evidentiary conflicts in favor of the respondent and affirm, so long as the evidence favoring respondent suffices to support the judgment. *Johnson v. Pratt & Whitney Canada, Inc.* (1994) 28 Cal.App.4th 613, 622-623. Second, the "conflicting inference" corollary requires that the appellate court presume all reasonable inferences deducible from the facts in support of the party who prevailed in the trial court. *Kuhn*, 22 Cal.App.4th at 1632-1633.

ABUSE OF DISCRETION

The second standard of review is the abuse of discretion standard. That standard applies when the trial court has the discretion to act or not act in a certain way. Civil Appeals, ¶ 8:85. An abuse of discretion arises only when the discretion is exercised in a way that "exceeds the bounds of reason, all of the circumstances before it being considered." *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566. Respondents in appeals involving this standard not surprisingly are eager to point to this language.

However, the rule is tempered by the limit that "'[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of {the} action....' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion.'" *Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 393 (citation omitted). The standard therefore "measures whether, given the established evidence, the act of the lower tribunal falls within the permissible range of options set by the legal criteria." *Department of Parks & Recreation v. State Personnel Bd.* (1991) 233 Cal.App. 3d 813, 831. If the trial court acts within those parameters, there is no abuse of discretion and the decision must be affirmed. Of course, if there is not substantial evidence to support the decision, the decision also comprises an abuse of discretion. *Department of Parks & Recreation, supra.*

The abuse of discretion standard applies in a variety of different situations. A partial list follows:

- Staying or denying arbitration under CCP §1281.2. *Henry v. Alcove Invest. Inc.* (1991) 233 Cal.App.3d 94, 101.
- Whether to issue or vacate a preliminary or permanent injunction. *Salazar v. Eastin* (1994) 9 Cal.4th 836, 849-850.
- Attorney disqualification motions. *People ex rel. Dep't of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143.
- Attorney's fees awards, based on statute or contract. *PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095.
- Discovery rulings. *National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 492.
- Admissibility of evidence, whether in motions in limine or at trial. *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.
- Dismissal for delay in prosecution under the 2 or 3 year time period, and whether the impossibility exception to the 5-year rule applies. *Gonzalez v. County of Los Angeles* (2004) 122 Cal.App.4th 1124, 1131-1132 (2-3 year statute); *De Santiago v. D and G Plumbing, Inc.* (2007) 155 Cal. App.4th 365, 371 (5-year impossibility exception).
- Bifurcation for trial. *Downey Savs. & Loan Assn. v. Ohio Cas. Ins. Co.* (1987) 189 Cal.App.3d 1072, 1086.
- Whether a class should be certified as a class action. *Harper v. 24 Hour Fitness, Inc.* (2008) 167 Cal.App.4th 966, 974.
- Spousal support. *Marriage of Smith* (1990) 225 Cal.App.3d 469, 480.
- Modification of child support. *Marriage of Bodo* (2011) 198 Cal.App.4th 373, 384.
- Child custody and visitation orders. *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255).
- Set aside relief under CCP §473(b). *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257-258 (but no discretion re attorney affidavit of fault under CCP §473(b)). ▶

• New trial. *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 859.

• Continuance of a hearing or trial. *Lerma v. County of Orange* (2004) 120 Cal. App.4th 709, 716, except for when statute provides otherwise, such as summary judgment under CCP §437c(h).

• Forum non conveniens. *Stanvik v. Shiley, Inc.* (1991) 54 Cal.3d 744, 751.

• Reconsideration pursuant to CCP §1008. *Lucas v. Santa Maria Pub. Airport Dist.* (1995) 39 Cal.App.4th 1017, 1027.

• Costs award. *Seever v. Copley Press, Inc.* (2006) 141 Cal.App.4th 1550, 1557.

INDEPENDENT, OR "DE NOVO" REVIEW-QUESTIONS OF LAW

Counsel seeking to appeal will find more hopeful grounds for those areas in which the appellate court independently reviews the record, in questions of law. Questions of law do not involve the resolution of disputed factual issues. In those cases the appellate court gives no deference to the trial court's decision and simply considers the matter anew. *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799. "The justifications for de novo review are that appellate courts (1) have more time to research and debate an issue and, thus, are well-suited to determining questions of law and (2) need to ensure uniform decisions." *Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 213. Appellate courts apply "de novo" review to:

• Statutory and constitutional interpretation. *Herbst v. Swan* (2002) 102 Cal. App.4th 813, 816 (constitutional); *People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432 (statutory).

• Interpretation of writings, except where the parties presented conflicting extrinsic evidence. *Parsons v. Bristol Develop. Co.* (1965) 62 Cal.2d 861, 865-866. If the parties presented conflicting extrinsic evidence, then the substantial evidence rule applies. *Roden v. Bergen Brunswig Corp.* (2003) 107 Cal.App.4th 620, 625.

• Whether a duty of care is owed. *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674.

• Correctness of a special verdict. *Zagami, Inc. v. James A. Crone, Inc.* (2008) 160 Cal.App.4th 1083, 1092.

• Whether collateral estoppel applies. *Roos v. Red* (2005) 130 Cal.App.4th 870, 878.

• Application of law to undisputed facts. *Crocker Nat'l Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.

• Grant or denial of summary judgment or summary adjudication. *Wiener v. Southcoast Child Care Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.

PRESUMPTION IN FAVOR OF APPELLANT

The fourth main standard of review presumes the truth of the allegations or views the evidence in the light most favorable to appellant. *Civil Appeals, supra*, ¶ 8:115. This standard applies in the following situations:

• Dismissals based on demurrers and judgments on the pleadings. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318 (general demurrer); *Kempton v. City of Los Angeles* (2008) 165 Cal.App.4th 1344, 1347 (judgment on the pleadings).

• Appeals from a judgment JNOV, nonsuit, or directed verdict. The appellate court views the evidence in the light most favorable to the appellant and reverses if substantial evidence supports the jury's verdict. *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 546, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580 (JNOV); *Freeman v. Lind* (1986) 181 Cal.App.3d 791, 799 (nonsuit); *Estate of Fossa* (1962) 210 Cal.App.2d 464, 466 (directed verdict).

• Erroneous or refused jury instructions. Similarly, a party is entitled to a jury instruction based on the law applicable to their theories of the case supported by the pleadings and evidence, the appellate court must construe the evidence in the light most favorable to appellant on the contention that the requested instruction was, since the party is entitled to instruction if the evidence so viewed could establish the elements of the theory presented. *Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358.

• A further word on summary judgments: In applying de novo review, the appellate court "liberally construe[s] the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party." *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 717.

CONCLUSION

This is not a complete list of what standard of review applies to which particular order or judgment, just an illustration of what the standards are and why they apply in a given situation. The different standards highlight the varying amounts of deference given to the trial court's rulings and show why it is so important to consider the applicable standard of review in considering and pursuing an appeal. ◆

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