2020 Recent Developments
By the Judiciary CLE By The Hour

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Brief Writing for the Trial Judge

Hon. Michael Pitman
First Judicial District Court

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RECENT DEVELOPMENTS BY THE JUDICIARY CLE BY THE HOUR

STANDARDS OF REVIEW[1]

PRESENTED BY:

JUDGE MICHAEL PITMAN

FIRST JUDICIAL DISTRICT COURT

AND

KENNETH P. HAINES

WEEMS, SCHIMPF, HAINES,
SHEMWELLL & MOORE (APLC)

[1] The Outline of this Presentation is almost exclusively derived from the work of James M. Garner and Thomas J. Madigan of Sher, Garner, Cahill, Richter, Klein & Hilbert from their excellent Paper, Standard of Review of Appeals, presented in 2016 at the Appellate Practice Seminar on Friday Aug. 26, 2016 at the Shearton New Orleans Hotel. To the extent this Outline was derived from that presentation, it is done with the express permission of Thomas J. Madigan with much thanks and gratitude.

I. Standards of Review: Why Are They Important

A. The "standard of review" on appeal can be extremely important because it can be outcome determinative, as recognized by the United States Court of Appeals for the Fifth Circuit. *Chaline v. KCOH, Inc.*, 693 F.2d 477, 480 (5th Cir. 1982).

B. Rule 28 of Federal Rules of Appellate Procedure and Rule 2-12.4(9) of the Uniform Rules for Louisiana Courts of Appeal each require parties on appeal to brief the standard of review. Depending on the issue, room for argument may exist as to which standard of review applies, and the jurisprudence is sometimes unclear as to the definition or application of the standards of review.

II. Defining and Articulating the Standard of Review Can be Challenging

A. The term "standard of review" generally refers to the amount of deference afforded by one tribunal sitting in review of the original factfinding tribunal's decision on a particular issue.

1. Black's Law Dictionary does not define the term "standard of review," nor does it appear any reported Louisiana appellate decision has endeavored to formally define the term "standard of review."

2. The Alaska Supreme Court collected the few decisions that have defined "standard of review," stating that "'standard of review' refers to the degree of deference that an appellate court must accord to the decision of the lower court or administrative agency whose ruling is being reviewed." *Booth v. State of Alaska*, 251 P.3d 369, 271 (Alaska 2011)

3. One commentator described "standard of review" as "the limits of review, or the extent to which, and the manner by which, a court of review will scrutinize the findings of fact, conclusions of law, or rulings of a trial court." Richard H. W. Maloy, "Standards of Review" - Just a Tip of the Icicle, 77 U. Det. Mercy L. Rev. 603, 604 (2000).

B. District courts or trial courts sometimes apply "standards of review" sitting in review of administrative agencies or other factfinders, but higher courts of appeal do not typically apply "standards of review" to the determinations of lower appellate courts. *Id*. See also, David W. Robertson, Allocating Authority Among Institutional Decision Makers in Louisiana State-Court Negligence and Strict Liability Cases, 57 La. L. Rev. 1079, 1083 (1997) ("While I have not found any source spelling this out, the [Louisiana] supreme court's behavior indicates that in all of these contexts there is no constraint on its review of the court of appeal's determination, i.e., that the standard of review here is de novo."

C. Standards of review ensure "that the separate functions of trial and appellate courts in a judicial system are maintained." As one Louisiana appellate court put it: "On appeal, a case is reviewed, not retried." *Quality Transp., Inc. v. Younger Bros.,* 366 So. 2d 1042 (La. App. 1st Cir. 1978).

D. The rationale for respecting the separate functions of the trial and appellate courts includes recognizing that Louisiana's judicial system, created through Louisiana's Constitution, established separate trial and appellate courts, necessarily implying that they serve different functions. Albert Tate, Jr., "Manifest Error" Further Observations on Appellate Review of Facts in Louisiana Civil Cases, 22 La. L. Rev. 605, 606-07 (1962).

E. Not only did Louisiana create separate trial and appellate courts, but Louisiana also created far fewer appellate courts than trial courts, recognizing that the appellate courts are not called upon to serve the same function as trial courts.

F. Perhaps the rationale most often cited for standards of review that respect the separate functions of trial and appellate courts is the axiom that trial courts actually observe the witnesses and presentation of evidence and "it is impossible for an appellate court to judge what evidence in a particular case was given special weight by the finder of fact." *Coco v. Winston Industries, Inc.*, 341 So. 2d 332, 336 (La. 1976).

III. The Three Major Standards of Review

A. Three major standards of review exist in the various state and federal courts of the United States, and it is generally understood that the decision on which standard to apply varies as a function whether the issue under review is a question of law, a question of fact, or a matter of discretion:

1. **"De novo"** generally applies to questions of law;

2. **"Clearly erroneous"** (in Louisiana, often called manifest error) generally applies to questions of fact; and

3. **"Abuse of discretion"** generally applies to matters of discretion, and issues pertaining to "supervision of litigation" such as discovery rulings and awards of attorney's fees are common issues for "abuse of discretion" review.

   See, e.g., *Pierce v. Underwood*, 487 U.S. 552, 558 (1988) ("For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated by questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."

B. Jurisprudence developed "by a long history of appellate practice" often provides the standard of review. On some issues, statutes or code articles supply the standard of review.

C. Inconsistency and imprecision (and therefore room for argument) exists in the jurisprudence regarding the definition and application of the standards of review, as well as which standards to apply to which issues.

1. In an example of imprecision, one Louisiana Supreme Court Justice wrote in a concurring opinion, "The fact finder's clearly wrong allocation of fault in this case was an abuse of discretion." *Clement v. Frey*, 95-1119 (La. 1/16/1996), 666 So. 2d 607, 612 (Lemmon, J., concurring). This statement begs the question whether a difference even exists between the "clearly wrong" and "abuse of discretion" standards of review, which were recognized by the United States Supreme Court as being two of the three major distinct standards of review.

2. Judge Richard A. Posner, writing of the United States Court of Appeals for the Seventh Circuit, concluded that, in practice, only "deferential" and "plenary" review exist, explaining that any distinctions between the various deferential standards rest in semantics: "[I]t is unclear whether the two rules are different. We suspect they are not; that there is deferential review, and plenary review, and that the verbal distinctions within the deferential category (clear error, substantial deference, abuse of discretion) have little consequence in practice." *Johnson v. Trigg*, 28 F.3d 639, 643 (7th Cir. 1994).

3. Highlighting the inconsistency among courts as to the definitions of standards of review, one former Ohio appellate Judge, surveying the case law on the "abuse of discretion" standard of review, observed the following:

> For instance, **some appellate courts conclude that an abuse of discretion results when the trial court's attitude was unreasonable, arbitrary, or unconscionable**. Some say that a court abuses its discretion only if **no reasonable judge could logically make that decision**. Many federal appellate judges reject complaints about a discretionary order unless they have **"a definite and firm conviction"** that the trial court committed an error of judgment. Some courts rely on a

harmless error analysis to avoid deciding whether a trial court decision was error. Some mechanically assign rulings discretionary status to avoid deciding whether they are error. Furthermore, different panels for the same federal circuit may use different definitions for "abuse of discretion." Judge Richard M. Markus, A Better Standard for Reviewing Discretion, 2004 Utah L. Rev. 1279, 1279–80 (2004) (footnotes omitted).

4. That same former appellate Judge also observed: "Too often, appellate court standards of review for discretionary decisions simply report the appellate panel's personal chagrin with the trial court's action, its indifference to the trial court's resolution of the issue, or its unwillingness to do anything about it." Id.

IV. Frustrations with Articulating A Meaningful Standard of Review

A. Setting aside inconsistent statements of standards or inconsistency in applying different standards to the same issues, articulating a standard of review that is susceptible of providing meaningful guidance to the appellate courts can be difficult.

B. The Louisiana Supreme Court expressed the following frustration with articulating a meaningful standard for review of general damage awards:

> "The standard for appellate review of general damage awards is difficult to express and is necessarily non-specific, and the requirement of an articulated basis for disturbing such awards gives little guidance as to what articulation suffices to justify modification of a generous or stingy award." *Youn v. Mar. Overseas Corp.*, 623 So. 2d 1257, 1261 (La. 1993).

C. Judge Learned Hand described the futility in trying to define the term "clearly erroneous":

> "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." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 433 (2d Cir. 1945)

D. In an example of difficulty in applying a standard of review, the Louisiana Supreme Court stated as follows with respect to the issue of reviewing JNOV determinations:

> "Although the standard of review is clear, the application of that standard is not so easy." *Davis v. Witt*, 2002-3102 (La. 7/2/03), 851 So. 2d 1119, 1131.

E. Although inconsistencies, imprecision, and difficulties in application exist in Louisiana jurisprudence regarding the standards of review, here are basic descriptions of each standard from recent Louisiana Supreme Court jurisprudence:

1. **De novo**: "A de novo review means the court will render judgment after its consideration of the legislative provision at issue, the law and the record, without deference to the legal conclusions of the tribunals below." The supreme court expressly recognized that questions of law are reviewed de novo, adding that "[t]his court is the ultimate arbiter of the meaning of the laws of this state." *City of Bossier City v. Vernon*, 2012-0078 (La. 10/16/12), 100 So. 3d 301, 303.

2. "**Manifest error-clearly wrong**": The standard of review we must apply to a trial court's or a jury's findings of fact is well settled. A reviewing court may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." This court has stated a two-part test for the reversal of a factfinder's determinations: 1) the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and 2) the appellate court must further determine that the record establishes that the finding is clearly wrong or manifestly erroneous. We are

cognizant of the fact that we must do more than merely review the record for some evidence that supports the lower court's finding. Rather, the reviewing court must review the entire record before it and determine whether the jury's finding was clearly wrong or manifestly erroneous. *Thompson v. Winn Dixie Montgomery, Inc.*, 2015-0477 (La. 10/14/15), 181 So. 3d 656, 666, reh'g denied (Dec. 7, 2015) (citing *Read v. Willwoods Cmty*., 14–1475 (La.3/17/15), 165 So.3d 883, 888) (applying manifest error-clearly wrong standard to allocation of fault).

3. **"Abuse of Discretion"**: "Generally, an abuse of discretion results from a conclusion reached capriciously or in an arbitrary manner. The word "arbitrary" implies a disregard of evidence or of the proper weight thereof. A conclusion is "capricious" when there is no substantial evidence to support it or the conclusion is contrary to substantiated competent evidence." *Wise v. Bossier Par. Sch. Bd.*, 2002-1525 (La. 6/27/03), 851 So. 2d 1090, 1094.

V. Legal Error and the Fact Finding Process

A. "Where legal error interdicts the fact finding process, the manifest error standard no longer applies and, if the record is complete, an appellate court should make its own de novo review of the record." *Lam ex rel. Lam v. State Farm Mut. Auto. Ins. Co.*, 2005-1139 (La. 11/29/06), 946 So. 2d 133, 135.

B. This axiom regarding the standard of review often serves as the basis of an appellant's argument to avoid the "manifest error" standard of review.

C. Louisiana has a unique, "mixed" judicial system with a strong civilian heritage, which complicates the already complicated area of "standards of review." Article V of the Louisiana Constitution grants jurisdiction over both law and facts to the Louisiana Supreme Court and the Louisiana courts of appeal. La. Const. art. V §§ 5(C) and 10(B).

D. "Unlike in other states and in the federal system, Louisiana appellate courts are constitutionally authorized to review the factual record of a case and issue a contrary judgment." Benjamin D. Jones, Conflicting Results: The Debate in Louisiana Courts over the Proper Method of Appellate Review for the Inconsistent Verdicts of Bifurcated Trials, 56 Loy. L. Rev. 995, 998 (2010).

E. The Louisiana Supreme Court has attributed this unique appellate fact finding

feature of Louisiana law to its civilian heritage. *Rosell v. ESCO*, 549 So. 2d 840, 844 n.2 (La. 1989)

F. Civil law systems, however, traditionally lack "trials" as we know them, much less jury trials, therefore, making deferential standards of review a foreign concept to a traditional civil law system. Indeed, the institutions responsible for receiving evidence in civil law systems typically do not make decisions.