A DETAILED LOOK AT STANDARD OF REVIEW

By Madeleine Fischer[1]

> To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of this court recently stated during oral argument, strike us as wrong with the force of a five-week-old, unrefrigerated dead fish.
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> – *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc*., 866 F.2d 228 (7th Cir. 1988), *cert. denied*, 493 U.S. 847, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989).

Many of Louisiana's hurricane survivors suffered a similar experience when they opened refrigerators which had been without power for weeks. Is that what we have to go through to get a case reversed? Better to throw that refrigerator out!

While we cannot turn back time and reverse a hurricane, the savvy appellant who uses the standard of review to select the key issues and to organize his brief is more likely to succeed in securing a reversal of the case. Similarly, the standard of review is often the appellee's best friend. The standard of review is the appellate court's "measuring stick."[2] Thus, appropriate consideration of the standard of review is essential to writing an effective brief.

Deferential Review v. *De Novo* Review

"Standards of review" describe the level of scrutiny by which an appellate court reviews the actions of the court below. Standards of review vary from the highest level of scrutiny, *de novo* review, in which the appellate court reviews the evidence anew with no deference to what the trial court did, to the most lax scrutiny, usually abuse of discretion in which the trial court's actions are accorded great leeway and are rarely reversed. In general, issues of law require *de novo* review, while greater deference is accorded to factual findings of the trial judge or jury, and the greatest latitude of all is afforded to matters which shape the day to day conduct of the case such as case management, discovery rulings, and evidentiary rulings. A good rule of thumb is that decisions which include consideration of credibility of witnesses and/or conduct of

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[2] Godbold, *Twenty Pages and Twenty Minutes - Effective Advocacy on Appeal*, 4 Fifth Circuit Reporter 161, 169 (Jan. 1987).

attorneys receive deference due to the fact that the trial court or jury have the opportunity to view this firsthand, and the appellate court does not.[3]

As an appellant, the brief writer should normally give precedence to errors of law which, if proven, are the most likely to result in reversal. The appellee on the other hand will seek to recharacterize the issues as fact issues or matters within the discretion of the trier of fact.

"Hidden" De Novo Issues in Otherwise Deferential Review Standards

While factual questions are normally reviewed under a deferential standard, if the trial court has applied the wrong legal rule, has incorrectly instructed the jury as to a principle of law, or has erroneously excluded consequential evidence, those findings of fact may be accorded no weight whatsoever, and the appellate court may review the record *de novo*.

A ready example of this in Louisiana jurisprudence is the case of *McLean v. Hunter*, 495 So.2d 1298 (La. 1986). The case involved a claim of medical malpractice against Dr. Raymond Hunter for alleged improper diagnosis and treatment of Elaine MacLean's periodontal disease. The trial court excluded the testimony of Dr. Bruce Lovelace, a periodontist, as to the standard of care exercised by dentists engaged in the practice of general dentistry in Baton Rouge, Louisiana. The trial court also excluded the testimony of two periodontists as to the standard of care exercised by periodontists in Baton Rouge, Louisiana. The plaintiff, Ms. McLean, proffered testimony of Dr. Lovelace, but did not proffer the testimony of the two periodontists. The First Circuit Court of Appeal found that the trial court erred in excluding Dr. Lovelace's testimony, but that the error was not prejudicial because the jury could have reached the same result without committing manifest error. The First Circuit also held that Ms. McLean could not complain about the exclusion of the two periodontists' testimony, since the pertinent testimony was not proffered.

The Louisiana Supreme Court granted writs. It agreed with the defendant that Ms. McLean had no grounds to complain regarding the exclusion of the two expert witnesses whose testimony had not been proffered (heed well, trial lawyers), but that as to the exclusion of Dr. Lovelace, the trial court erred, and the error was prejudicial to the plaintiff's case.

> While we admit that the jury could have rendered a verdict in favor of Dr. Hunter had it been allowed to hear the proffered testimony, we are unable to state with any degree of certainty that the jury would have rendered such a verdict had it been allowed to hear that testimony. On the

[3] "[O]nly the factfinder is cognizant of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said." *Hebert v. Rapides Parish Police Jury*, 06-2001 (La. 4/11/07), 974 So.2d 635, 654.

> contrary, the proffered testimony may indeed have changed the outcome of the trial.[4]

Given that the jury verdict was tainted by the trial court's consequential error in excluding the testimony of Dr. Lovelace, the jury verdict was not entitled to any presumption of regularity. The Supreme Court held that in these circumstances the Court of Appeals should not have applied the "manifestly erroneous" standard. That standard, it said, "applies only to jury verdicts which follow properly conducted trials. The standard should not be applied when the jury verdict is tainted by error."[5] The Louisiana Supreme Court reversed and remanded the case to the First Circuit to consider all the evidence in the record, including the proffered testimony of Dr. Lovelace, and to make an independent *de novo* determination of whether the plaintiff had proven her case without affording any deference to the jury verdict.

Another example of a case where legal error upset deferential review is *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416 (5th Cir. 2006). Here, the Brazos River Authority sued the manufacturer of a system designed to reduce the salt content of water. The Brazos River Authority contended that the system not only did not work, but caused fires. The trial court barred evidence of similar fires under Federal Rule of Evidence 404(b) which provides that evidence of other acts of a person is not admissible to prove that a person acted in conformity with those other acts on the occasion at issue.

The Fifth Circuit found that the trial court's action in excluding evidence of other fires was error. The appellate court agreed that the propensities of a particular person to act in a certain way was not at issue in this case, which involved the properties and functions of an inanimate object. "The rule talks about the character of a 'person,' and there is no person whose character BRA is trying to prove."[6]

The Fifth Circuit then examined whether the exclusion of the evidence of other fires was prejudicial, including whether that evidence might have been excluded under other grounds such as that the other fires were not sufficiently similar to the fire at issue or that evidence of other fires would have been unduly prejudicial. Concluding that the evidence of other fires was relevant and would not have been excluded under any other ground, the Fifth Circuit reversed. The standard of review for evidentiary rulings was abuse of discretion, but if the trial court applied the wrong legal rule, the standard of review was *de novo*.

There are many other situations in which a deferential standard of review may be traded for *de novo* review by involving legal error. In *Steering Committee v. Exxon Mobil Corp*., 461 F.3d 598 (5th Cir. 2006), the Fifth Circuit noted that while denial of

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[4] 495 So.2d at 1303-04.

[5] *Id.* at 1304.

[6] 469 F.3d at 463.

class certification is reviewed for abuse of discretion, if a trial court applies an incorrect legal standard, it by definition abuses its discretion and such errors are reviewed de novo.

An unusual mixture of standards occurs when punitive damages are at issue. Ordinarily, questions of excessiveness of damages are subject to a clearly erroneous standard. However, if there is a question as to whether an award of punitive damages is constitutionally excessive, *de novo* review is appropriate.[7]

"Clear Error" v. "Abuse of Discretion" v. "Manifest Error" Is There a Difference, and How Do You Show Either One to Win?

De Novo

Louisiana courts and the Fifth Circuit are generally in accord on the *de novo* standard of review. Questions of statutory interpretation are reviewed *de novo*, and if the law is unambiguous it will be applied as written.[8] A grant of summary judgment is reviewed *de novo*.[9] The peremptory exception of no cause of action in Louisiana, and its counterpart in federal law, the Rule 12(b)(6) motion to dismiss, are both reviewed *de novo*.[10]

Factual Findings

Review of factual findings in jury and judge tried cases are treated differently by Louisiana courts and federal courts.

Louisiana

Findings of fact, whether by a jury or judge, are generally reviewed by the same standard in Louisiana which is stated in the alternative as "manifestly erroneous" or "clearly wrong". In fact, although these two terms are frequently recited on either side of the word "or", they mean the same thing.[11] In order to reverse a fact finder's

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[7] *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 436, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001). *Accord Mosing v. Domas*, 02-0012 (La. 10/15/02), 830 So.2d 967.

[8] *Holly & Smith Architects, Inc. v. St. Helena Congregate Facility, Inc.*, 06-0582 (La. 11/29/06), 943 So.2d 1037, 1045.

[9] *Gray v. American Nat. Property & Cas. Co.*, 07-1670 (La. 2/26/08), ___ So.2d ____, 2008 WL 501088, *4; *Nasti v. CIBA Specialty Chemicals Corp.*, 492 F.3d 589, 592 (5th Cir. 2007).

[10] *Fink v. Bryant*, 01-0987 (La. 11/28/01), 801 So.2d 346, 349; *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002).

[11] *Arceneaux v. Domingue*, 365 So.2d 1330, 1333 (La.1978).

determination of fact, an appellate court must review the record in its entirety and (1) find that a reasonable factual basis does not exist for the finding, and (2) further determined that the record establishes that the fact finder is manifestly erroneous/clearly wrong. The appellate court may not re-weigh the evidence or substitute its own factual findings because it would have decided the case differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be manifestly erroneous/clearly wrong.[12]

Louisiana's identical treatment of factual findings of judges and juries derives from the fact that the Louisiana Constitution extends the jurisdiction of the appellate courts in civil cases to both law and fact.[13] While Louisiana appellate courts still must first find manifest error, once they do, the appellate court then conducts a *de novo* review of the record (provided it is complete) and decides the case in its entirety.[14] This is in complete contrast to the result in federal court, where a finding of error usually results in a remand to the trial court. The Seventh Amendment to the United States Constitution guarantees a jury trial in civil cases and thus prohibits federal appellate courts from engaging in fact-finding in those circumstances.

Federal

In contrast to Louisiana's single standard, federal courts apply different standards of review to jury trials and bench trials.

Bench trials -- Rule 52(a)(6) sets the standard of review for findings of fact in a judge tried case:

> Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

The leading case on the clearly erroneous standard is *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985). In that case, the trial court found that the plaintiff had been passed over for employment because of her sex. The United States Fourth Circuit Court of Appeals reversed the trial court's finding of discrimination, stating that three of the trial court's findings were clearly erroneous.

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[12] *Detraz v. Lee*, 05-1263 (La. 1/17/07), 950 So.2d 557, 562.

[13] La. Const. art. V, §5(C).

[14] Bryan J. DeTray, *Fun with Civil Law: Appellate Fact-Finding in Louisiana State and Federal Courts*, 50 La.B.J. 422 (2003).

The United States Supreme Court reversed the Fourth Circuit finding that it had incorrectly applied the clearly erroneous standard of review. The Supreme Court set forth several general principles as guidelines:

- a finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

- If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse it even though convinced that had been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the trial court's choice between them cannot be clearly erroneous.

- This is so even when the trial court's findings do not rest on credibility determinations but are based instead on physical or documentary evidence or inferences from other facts.

- When findings are based on determinations regarding the credibility of the witness, even greater deference to the trial court's findings must be accorded. Where documents or objective evidence contradict a witness's story or the story itself is internally inconsistent or implausible on its face, the Court of Appeals may find clear error even in a finding purportedly based on credibility determination. But 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.[15]

Jury trials The sufficiency of the evidence in a jury trial may not be challenged on appeal unless a motion for judgment as a matter of law under Federal Rule 50 was made in the trial court.[16] Assuming such a motion has been made in the trial court, the appellate court uses the same standard to review the verdict for legal sufficiency of the evidence that the trial court used in first passing on the motion. A verdict must be upheld unless there is no legally sufficient evidentiary basis for a reasonable jury to find as the jury did. The appellate court must view the evidence and all reasonable inferences in the light most favorable to the jury's determination.[17] The standard of review applied to a

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15 *Anderson*, 105 S.Ct. at 1511-12.

16 *U.S. for use of Wallace v. Flintco Inc.*, 143 F.3d 955, 960 (5th Cir. 1998)

17 *Denton v. Morgan*, 136 F.3d 1038, 1044 (5th Cir. 1998).

jury verdict gives more weight to the jury verdict that is given even to the trial judge's findings of fact under the clearly erroneous standard.[18]

If no motion has been made under rule 50, the appellant is relegated to the plain error standard.[19] Under this standard, the appellate court will only reverse if the judgment complained of will result in a manifest miscarriage of justice. Applying plain error, the question before the appellate court is not whether there was substantial evidence to support the jury's verdict, but whether there was *any* evidence to support the jury's verdict.[20]

Abuse of Discretion

The abuse of discretion standard applies to many issues in both Louisiana and federal courts. Discovery, evidentiary and procedural rulings are usually judged by an abuse of discretion standard.[21] A motion for new trial is also governed by the abuse of discretion standard.[22]

In the area of damages, while both Louisiana and federal courts apply an abuse of discretion standard, the two jurisdictions approach the issue in different ways. In the Fifth Circuit, review of a jury award consists of reviewing the trial court's denial of a motion for new trial or remittitur. The trial court has a wide range of discretion in acting on such a motion, and the standard of review is abuse of discretion. There is no abuse of discretion unless there is a complete absence of evidence to support the verdict. A jury award will be given great deference and will not be disturbed unless it is entirely disproportionate to the injury.[23]

Under Louisiana law when a challenge is made to the amount of an award, the first step for an appellate court is to determine whether the trial court or jury abused its

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[18] *Overman v. Fluor Constructors, Inc.*, 797 F.2d 217, 219 (5th Cir. 1986).

[19] *U.S. for use of Wallace v. Flintco Inc.*, 143 F.3d 955, 963-64 (5th Cir. 1998).

[20] *Id.*

[21] *McKethan v. Texas Farm Bureau*, 996 F.2d 734 (5th Cir. 1993), *cert. denied*, 510 U.S. 1046, 114 S.Ct. 694, 126 L.Ed.2d 661 (1994); *DeCorte v. Jordan*, 497 F.3d 433, 440 (5th Cir. 2007); *MTU of North America, Inc. v. Raven Marine, Inc.*, 475 So.2d 1063 (La. 1985).

[22] *Cates v. Creamer*, 431 F.3d 456, 460 (5th Cir. 2005) ("the broad discretion allowed to the trial court is tempered by the deference due to a jury"); *Lawson v. Mitsubishi Motor Sales of America, Inc*., 05-0257 (La. 9/6/06), 938 So.2d 35.

[23] *Green v. Administrators of Tulane Educational Fund*, 284 F.3d 642., 660 (5th Cir. 2002).

discretion considering the particular facts and circumstances of the particular plaintiff's injuries. If no such abuse is found, there is no need for the appellate court to review prior awards in similar cases.[24] However, if an abuse is found, the appellate court exercising its fact-finding function may review similar cases, and then may lower (or raise) the award to the highest (or lowest) point which is reasonably within the discretion afforded the trier of fact.[25]

What Errors Can Be Noticed by the Appellate Court on the Face of the Pleadings?

Federal appellate courts have discretion to correct unobjected-to (forfeited) errors that are "plain" and affect substantial rights. The Fifth Circuit has held that this rule applies not only in criminal cases but also in civil cases.[26] Louisiana courts do not recognize the plain error rule even in criminal cases.[27]

But what of errors that are neither objected to below nor raised as points for appeal? Both Louisiana and federal appellate courts will dismiss appeals where it is apparent that the appellate court lacks subject matter jurisdiction for any reason.[28]

Additionally, under the Fifth Circuit's Local Rule 42.2, the Fifth Circuit may, upon initial review of a brief, determine that the appeal is frivolous and entirely without merit and dismiss the appeal.

CONCLUSION

Appellate brief writers who are thoroughly familiar with applicable standards of review can use that knowledge to select the strongest issues for their briefs. Using the court's "measuring stick" as an organizational tool will be welcomed by reviewing courts.

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[24] *Miller v. LAMMICO*, 07-1352 (La. 1/16/08), 973 So.2d 693.

[25] *Wainwright v. Fontenot*, 00-0492 (La. 10/17/00), 774 So.2d 70, 74 *citing Coco v. Winston Indus., Inc.*, 341 So.2d 332, 334 (La. 1977).

[26] *Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1424 (5th Cir 1996).

[27] *State v. Howard*, 98-0064 (La. 4/23/99), 751 So.2d 783, *cert. denied*, 528 U.S. 974, 120 S.Ct. 420, 145 L.Ed.2d 328 (1999).

[28] *Simon v. Wal-Mart Stores, Inc.*, 193 F.3d 848, 850 (5th Cir. 1999); *Food Town, Inc. v. Town of Plaquemine*, 118 So.2d 879 (La. 1960).