HEYL, ROYSTER, VOELKER & ALLEN, P.C.

STANDARDS OF REVIEW IN THE APPELLATE COURT

Peoria County Bar Association
Brown Bag Series

March 28, 2018

PRESENTED BY:

BRAD A. ELWARD
PEORIA OFFICE
BELWARD@HEYLROYSTER.COM

ANNE L. MERGEN
PEORIA OFFICE
AMERGEN@HEYLROYSTER.COM

Peoria
300 Hamilton Boulevard
PO Box 6199
Peoria, IL 61601
309.676.0400

Champaign
301 N. Neil Street
Suite 505
PO Box 1190
Champaign, IL 61820
217.344.0060

Chicago
33 N. Dearborn Street
7th Floor
Chicago, IL 60602
312.853.8700

Edwardsville
105 W. Vandalia Street
Mark Twain Plaza III
Suite 100
PO Box 467
Edwardsville, IL 62025
618.656.4646

Rockford
120 W. State Street
PNC Bank Building
2nd Floor
PO Box 1288
Rockford, IL 61105
815.963.4454

Springfield
3731 Wabash Avenue
PO Box 9678
Springfield, IL 62791
217.522.8822

HEYL ROYSTER

heylroyster.com

STANDARDS OF REVIEW IN THE APPELLATE COURT

Every issue raised in an appeal is scrutinized under a standard of review, which in its most basic sense, is the level of deference that the reviewing court affords to the lower court's ruling. The standard of review may change from issue to issue and several may be used to fully assess the issues raised in your appeal.

In 1997, the Illinois Supreme Court amended Rule 341 to require each brief to include a statement of the applicable standard of review:

> The appellant must include a concise statement of the applicable standard of review for each issue, with citation to authority, either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument. Ill. S.Ct. R. 341(h)(3).

The purpose of this amendment was to ensure this critical litmus test was at the forefront of the parties' minds and of the reviewing court. Often, the standard of review is an afterthought thrown into the brief at the last minute, and little use is made of it in the arguments.

NOTE: The Appellate Court, Third District, requires a party to include this statement in a freestanding section entitled "Standard of Review." See Third District Administrative Order Forty-Eight.

I. WILL THE COURT REVIEW YOUR CASE AT ALL?

Mootness and the harmless error doctrine determine when a reviewing court will decline to review a case or a particular issue. Essentially, these doctrines are standards of non-review. Where either of these doctrines could apply, a litigant is well served by considering these issues and arguing in favor of or against their application.

II. MOOTNESS

A case becomes "moot when its resolution could not have any practical effect on the existing controversy." *LaSalle Nat'l Bank, N.A. v. City of Lake Forest*, 297 Ill. App. 3d 36, 43 (2d Dist. 1998). In other words, "an issue is moot if an actual controversy no longer exists between the parties and the interests and rights of the parties are no longer in controversy." *LaSalle Nat'l Bank*, 297 Ill. App. 3d at 43. Courts apply this doctrine to avoid issuing "advisory opinions on moot or abstract questions." *In re Hernandez*, 239 Ill. 2d 195, 201 (2010). The Illinois Supreme Court has stated, "if it is apparent that this court cannot grant effectual relief, the court should not resolve the question before it merely for the sake of setting precedent to govern future cases." *Hernandez,* 239 Ill. 2d at 201.

However, reviewing courts can hear a moot case where one of three narrowly tailored exemptions apply, including (1) public interest, (2) capable of repetition yet evading review, and (3) collateral consequences. See *In re Alfred H.H.*, 233 Ill. 2d 345, 355 (2009) (providing an extensive explanation of these three recognized exemptions).

III. HARMLESS ERROR DOCTRINE

Under this standard of review (or more accurately non-review), the reviewing court "will grant reversal based on evidentiary rulings only when the error was substantially prejudicial and affected the outcome of the trial." *Bachman v. General Motors Corp.*, 332 Ill. App. 3d 760, 785 (4th Dist. 2002) (holding the exclusion of evidence showing how air bag deployment could cause an accident, if error, was harmless because the jury found the air bag did not deploy prematurely). In other words, "where it appears that an error did not affect the outcome of the trial, or where the reviewing court can see from the entire record that the error did not result in substantial prejudice, the judgment will not be disturbed." *Bachman*, 332 Ill. App. 3d at 785; see also *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 34 (1st Dist. 2008) (Exclusion of video evidence of the plaintiff doing carpentry work for another employer, if error, was not sufficiently prejudicial to warrant a new trial where the plaintiff admitted doing such work). The party seeking reversal has the burden to establish prejudice. *Bachman*, 332 Ill. App. 3d at 785.

IV. THE STANDARDS OF REVIEW

Under Illinois law, the standards of review from least to most deferential are as follows:

- *De novo*
- Clear error
- Manifest weight of the evidence
- Abuse of discretion

The standard applied matters to reviewing judges and often it will determine the outcome of an appeal. It most cases the standards are clear and the analysis of which applies is routine. In those cases, it is imperative that a brief outline the proper standard to maintain credibility. However, the appellate districts can vary substantially in their application of these standards. Therefore, in cases where standard is unclear, litigants should be prepared to argue for the preferred standard that benefits their client. Even where the standard is clear, litigants should be prepared to argue for a favorable application of that standard.

A. *De Novo*

"A *de novo* review entails performing the same analysis a trial court would perform," *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (4th Dist. 2011) giving no deference to the lower court's

decision or justification. *Shulte v. Flowers,* 2013 IL App (4th) 120132, ¶ 17. As a general rule this standard applies to pure questions of law. *Gonnella Baking Co. v. Clara's Pasta Di Casa, Ltd.*, 337 Ill. App. 3d 385, 388 (1st Dist. 2003). The fourth district explained the rationale for this standard, stating if "all the trial court did was apply the law to an uncontested set of facts, we would have no reason to defer to the trial court's decision, because the trial court is in no better position than we to apply the law." *Shulte*, 2013 IL App (4th) 120132, ¶ 17. However, the trial court judges and juries are in a better position to make factual determinations, as they are present when the evidence is presented and are able to hear directly from witnesses. *Barth v. State Farm Fire & Cas. Co.*, 371 Ill. App. 3d 498, 509 (4th Dist. 2007). This standard of review may also apply to facts if the reviewing court is addressing a question of law because the uncontroverted facts are susceptible to only one inference. *Baumgardner v. Illinois Workers' Compensation Comm'n,* 409 Ill. App. 3d 274, 279 (1st Dist. 2011).

This standard applies to questions of law, such as:

- Review of a summary judgment - *Traveler's Ins. Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 292 (2001) or ruling on a motion to dismiss - *People v. Giraud*, 2012 IL 113116, ¶ 6

- Interpreting contract and insurance provisions - *Traveler's Ins. Co.,* 197 Ill. 2d at 292

- Constitutional - *Hooker v. Illinois State Bd. of Elections*, 2016 IL 121077, ¶ 21 or statutory interpretation - *People v. Giraud*, 2012 IL 113116, ¶ 6

- Legal questions as to jurisdiction, standing, and mootness - *People v. Chatman*, 2016 IL App (1st) 152395, ¶ 27

- Motions for directed verdicts and motions for judgments n.o.v. - *Lawlor v. North Am. Corp. of Illinois*, 2012 IL 112530, ¶ 37

B. Clear Error

This standard lies between the manifest weight of the evidence standard and a *de novo* standard, providing some deference to the agency's decision. *AFM Messenger Service, Inc. v. Dep't of Employment Security*, 198 Ill. 2d 380, 392 (2001). "[W]hen the decision of an administrative agency presents a mixed question of law and fact, the agency decision will be deemed 'clearly erroneous' only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.'" *AFM Messenger*, 198 Ill. 2d at 395 (citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Also, while the clearly erroneous standard is largely deferential, the reviewing court need not "blindly defer to the agency's decision." *AFM Messenger,* 198 Ill. 2d at 395. The reasoning behind this standard is to give deference to the experience and expertise of administrative agencies.

The Supreme Court has limited the application of this standard to administrative review. In *Samour, Inc. v. Bd. of Election Comm'rs of the City of Chicago*, 224 Ill. 2d 530, 542 (2007) (where

the Illinois Supreme Court "limited the application of that standard to reviewing administrative decisions on mixed questions of fact and law.") In other civil cases, courts apply a dual standard, reviewing legal issues *de novo* and factual issues under a manifest weight of the evidence standard. *Samour,* 224 Ill. 2d at 542.

C. Manifest Weight of the Evidence

"A verdict is against the manifest weight of the evidence only where the opposite result is clearly evident or where the jury's findings are unreasonable, arbitrary and not based upon any of the evidence." *Lawlor*, 2012 IL 112530, ¶ 38. "Questions of fact, whether determined by a jury or by the circuit court in a nonjury case, are reviewed under the deferential, manifest weight of the evidence standard." *Joel R. by Salazar v. Bd. of Educ. of Mannheim School District 83*, 292 Ill. App. 3d 607, 613 (1st Dist. 1997). A decision may be against the manifest weight of the evidence where the "opposite conclusion is clearly apparent or the fact-finder's finding is palpably erroneous and wholly unwarranted, is clearly the result of passion or prejudice, or appears to be arbitrary and unsubstantiated by the evidence." *Salazar,* 292 Ill. App. 3d at 613. Thus, the factual findings of the trial judge or jury will not be disturbed unless a contrary finding is clearly evident. *Barth,* 371 Ill. App. 3d at 509.

This standard applies to findings of fact, such as:

- Findings of fact - *Salazar*, 292 Ill. App. 3d at 613
- Decision on a Motion for a new trial - *Lawlor*, 2012 IL 112530, ¶ 38

D. Abuse of Discretion

This standard is the most deferential available under Illinois law. In determining whether there has been an abuse of discretion, the reviewing court does not substitute its judgment for that of the trial court or even determine if the lower court wisely exercised its discretion. *Alm v. Loyola University Medical Center*, 373 Ill. App. 3d 1 (1st Dist. 2007). Rather, "abuse of discretion will be found only when the trial court's decision was arbitrary, fanciful or unreasonable or where no reasonable man would take the view adopted by the trial court." *People v. Chambers*, 2016 IL 117911, ¶ 68 (internal citations omitted). This standard typically applies to questions related to the Court's case management.

This standard is high, but not insurmountable, especially if a litigant can demonstrate the trial court misapplied the law. Keep in mind "[i]f the court's decision rests on an error of law, however, then it is clear that an abuse of discretion has occurred, as it is always an abuse of discretion to base a decision on an incorrect view of the law." *Thompson v. Gordon*, 356 Ill. App. 3d 447, 461 (2d Dist. 2005). Also, a trial court "abuses its discretion if it ignores recognized legal principles." *Save the Prairie Society v. Greene Development Group, Inc.*, 323 Ill. App. 3d 862, 867 (1st Dist. 2001).

This standard applies to questions within the sound discretion of the trial court, such as:

- Whether to admit evidence - *Thompson,* 356 Ill. App. 3d at 461
- A decision granting or denying a preliminary injunction - *Save the Prairie*, 323 Ill. App. 3d at 867
- A ruling on a f*orum non conveniens* motion - *Ruch v. Padgett*, 2015 IL App (1st) 142972, ¶ 36
- A decision to allow punitive damages - *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶ 93
- Whether to continue a case - *In re Marriage of Heindl*, 2014 IL App (2d) 130198, ¶ 36
- Decision to award or deny sanctions - *In re Marriage of Vancura*, 356 Ill. App. 3d 200, 202 (2d Dist. 2005)

V. CONCLUSION

Persuasive litigants will do more than simply articulate the proper standard in the standard of review section of their appellate brief. Instead, the goal should be to frame the entire argument (both in the brief and in later oral argument) around the proper standard of review. This framing is very helpful when the standard of review is favorable. However, litigants with a favorable standard of review should be careful to avoid arguing to a higher standard in an attempt to persuade. When a litigant faces a challenging standard of review, framing an argument around that standard is more difficult, but will likely be critical to crafting a persuasive argument.

Additional Resources:

Griffin, Hugh C., and Hugh S. Balsam, "The Standard of Review in Civil Cases in Illinois: More Than Meets the Eye," Appellate Law Review, Vol. 8, p. 1 (2002-2003).

Levenstam, Barry, and Nicole C. Berg, "Threshold Appellate Issues: Whether to review and Standards of Review," IICLE *Illinois Civil Appeals: State and Federal* (2015).

Storm, Timothy J., "The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court," 34 So. Ill. U.L.J. 73 (2009).