

On the Transition From the Trial Court to the Appellate Court (or the Importance of the Standard of Review)

by Justice Martin Tangeman

INTRODUCTION

Three years ago I was appointed to the Court of Appeal for the Second Appellate District, Division Six, after sitting for 14 years on the San Luis Obispo County Superior Court. I am occasionally asked about my thoughts and observations regarding the differences between these respective roles. While my time on the appellate court thus far has been brief, and I have much to learn, certain fundamental differences have become evident. Some differences were expected, but others were unanticipated. Included in the latter category is the lesser role played by the appellate court in determining the outcome of a case on appeal, as compared to the trial court's role. That subject is the focus of this article.

THE SEARCH FOR ERROR

Someone once said that trial judges are embarked on a search for the truth; whereas appellate justices are embarked on a search for error. When I first heard this, I discounted it. After all, it seemed to diminish the importance of my new role as an appellate justice. Experience, however, has shown me the truth and wisdom of this adage. I believe it is a lesson worthy of sharing with trial and appellate lawyers. It is an important distinction, and informs both lawyers and judges alike of the limits of appellate authority to change the outcome in a given case.

To state the most obvious point, the trial judge sits alone and is granted authority to render decisions without convincing (or even consulting) anyone else. One notable exception, of course, occurs in deciding factual issues in the context of a jury trial. Even then, however, trial judges can sometimes exercise their authority as a "13th juror," can order judgment notwithstanding the verdict or a new trial, or can act to increase or decrease jury awards. In contrast, the power of a single appellate justice is minimal to nonexistent. Yes, we can file dissents in hopes of having some future impact on the legal analysis used by the California Supreme Court or other appellate courts, but the immediate outcome of the case before us remains completely unaffected by our words and pronouncements.

STANDARD OF REVIEW SETS THE LIMITS ON THE APPELLATE COURT

Even when we act with the majority, however, our power as an appellate court is circumscribed. By way of example, I suggest that nothing is more important to defining the significant distinctions between the respective roles of trial judge and appellate justice as the applicable standard of review. As succinctly stated by Presiding Justice Arthur Gilbert in *People v. Jackson* (2005) 128 Cal.App.4th 1009, 1018 (*Jackson*):

"However convoluted the

facts, or complex the issues, the standard of review is the compass that guides the appellate court to its decision. *It defines and limits the course the court follows in arriving at its destination.* Deviations from the path, whether it be one most or least traveled, leave writer and reader lost in the wilderness." (Italics added.)

To better illustrate my point, a brief review of the most common standards of review is instructive, including, the substantial evidence standard, the abuse of discretion standard, and *de novo* review.

Substantial Evidence Standard

When the question posed in an appeal is whether substantial evidence supports the judgment or order, our authority as appellate justices is severely circumscribed. As a reviewing court, we ask only whether the record contains evidence that supports the trial court's findings. The evidence need not be convincing, dispositive or even determinative. It need only be reasonable in nature, credible and of solid value. (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 51.) In criminal cases, we review the entire record in the light most favorable to the prosecution to determine whether it contains evidence which is reasonable, credible and of solid value. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) If so, we must affirm.

Despite this clear limit on our authority sitting as an appellate panel, appellants often

ask us to reverse a trial court because (at least in their view) overwhelming evidence of a convincing nature supports their version of the truth; but our response is consistent—the issue is not whether some evidence or inference supports the losing party, but whether substantial evidence exists in the record to support the judgment or order. We do not reweigh the evidence or resolve evidentiary conflicts (*People v. Yeoman* (2003) 31 Cal.4th 93, 128), and the testimony of a single witness, even an interested party, is sufficient to support the trier of fact's findings (*People v. Young* (2005) 34 Cal.4th 1149, 1181). After all is said and done, the trier of fact is "not required" to "accept defendant's [or anyone else's] version of what occurred." (*People v. Garcia* (1969) 275 Cal. App.2d 517, 522.) Thus, we are required to uphold a trial court's judgment or order when the record contains supporting evidence, even when, in our opinion as a reviewing court, the evidence can be more reasonably reconciled with a contrary finding. (*Id.* at p. 521.)

Here, then, the power of the trial court is abundantly clear, for only it (or the jury) has the power to weigh and decide credibility issues. Once that decision is made the outcome is, at least in the great majority of cases, preordained. It is the rare case indeed in which there is no reasonable or credible evidence supporting the trial court's findings.

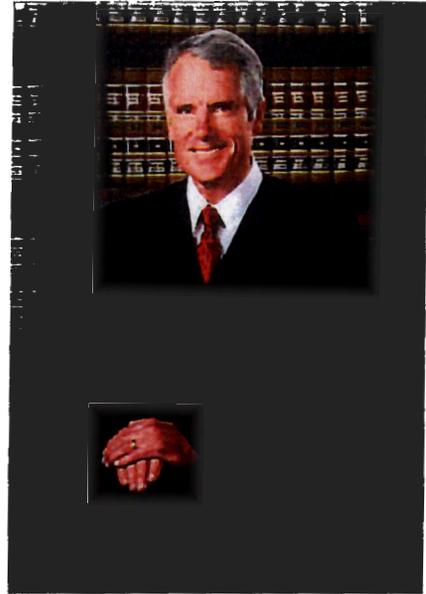
Abuse of Discretion Standard

A similar outcome awaits appellants seeking to reverse a trial court's ruling based on the abuse of discretion standard. We are required to give abundant

deference to the trial court under this standard of review. One has only to articulate that standard to realize the extent of the burden facing those appellants who seek to convince an appellate court to overturn the trial court's judgment or order where this standard of review is applicable. In these cases, our function is limited to an examination of the ruling and to ask whether it exceeds the bounds of reason, or is arbitrary, whimsical or capricious. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.)

I, for one, have never heard it argued that a trial judge acted in a whimsical manner, and it is hard to imagine such a case. Proving that a trial judge acted capriciously would also seem to set a very high standard. And if you have ever argued an appeal involving this standard of review before Division Six, you have likely had these questions posed to you: "Counsel, are you arguing that no reasonable trial judge would have ever made such a ruling? That this judge acted so arbitrarily as to exceed the bounds of reason?"

It is the rare case in which an appellate court will overturn a trial judge's ruling on the grounds that it was so irrational that it exceeded "the bounds of reason." Thus, when this standard applies, the power to determine the outcome rests primarily in the hands of the trial judge, and we have little ability to change that outcome. (Of course, there is a notable exception when it can be successfully argued that the trial court was unaware that it had any discretion to act, or acted in a manner beyond its legal authority, either of which confers



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power upon the appellate court to find an abuse of discretion! These exceptions are, however, necessarily limited in their application.)

De Novo Standard

When we are presented with a question which is purely one of law, we will examine the question *de novo*, or independently. Thus, only when the correct standard is the non-deferential *de novo* standard, where the appellate court exercises its independent judgment, does the power of the appellate court equal that of the trial court. I suppose under these circumstances that trial judges would say that our authority not only equals but exceeds theirs, simply because we have "the last word." But even then, we cannot act alone in reaching this decision but must convince (or be convinced by) at least one colleague. And even when we are charged with the duty to exercise our independent judgment, the trial judge's ruling will be carefully considered, because

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it "often is most helpful and illustrates the important role trial courts play in shaping the law. We are not averse to using all the help we can get." (*Jackson, supra*, 128 Cal.App.4th at p.1018.)

IN SUMMARY

In summary, I have concluded that in those cases in which we employ the substantial evidence standard or the abuse of discretion standard, which together constitute the majority of cases we see on appeal, the real power to determine the outcome rests primarily in the trial court. It is there that the search for truth is conducted and the truth is determined. In those cases our review is limited to a search for error, and we are constrained to provide abundant deference to the trial court, because a judgment or order of the trial court is presumed to be correct, and all presumptions and intend-ments are in favor of the judgment or order. (*Verio Healthcare, Inc. v. Superior Court* (2016) 3 Cal.App.5th 1315, 1327.) If the issue is one of credibility or the exercise of discretion, we have a very limited role to play.

This is not to minimize the important role of the appellate courts, especially when our task is to interpret statutory and constitutional mandates and decide purely legal issues. But the great majority of cases are not decided on purely legal issues, but rather on the application of law to disputed facts. And where the facts are disputed, our role is a limited one. In those cases, the real power to decide the outcome of a case lies with the trial courts. Bearing this lesson in mind, I will

offer some modest suggestions to appellate advocates.

As noted above, the standard of review is often determinative in the success or failure of an appeal. It is, therefore, crucial that advocates not only understand the applicable standard, but that they clearly articulate that standard at the outset of any legal discussion contained in the appellate briefs. Because it "is the compass that guides the appellate court to its decision" (*Jackson, supra*, 128 Cal.App.4th at p.1018), this bears special emphasis in any article, like this one, that discusses the standard of review.

Those who neglect the importance of articulating the applicable standard in their briefs face the prospect of defeat without consideration of the merits of their claims. As recently stated by a panel of appellate justices in affirming a civil judgment without discussing the merits: "[Appellant's] counsel fails to articulate the standard of review on appeal, in and of itself a potentially fatal omission. Arguments should be tailored according to the applicable standard of appellate review." [Citation.] *Failure to acknowledge the proper scope of review is a concession of a lack of merit.*" (*Ewald v. Nationstar Mortgage, LLC* (2017) 13 Cal.App.5th 947, 948, italics added.)

PRACTICE TIP FOR TRIAL ATTORNEYS

So my advice to advocates is this: don't underestimate the importance of getting it right at the trial court level. Don't count on an appellate court to come to your aid in reaching a different, or "better," decision. If you do file an appeal, be sure to begin your

legal analysis with a reference, supported by legal citations, to the applicable standard of review. Better yet, give careful consideration to the standard of review before you file an appeal in order to save yourself and your clients from the substantial costs, both personal and financial, of appellate litigation. Because in most cases, i.e., those in which the substantial evidence or abuse of discretion standards apply, it matters not whether appellate justices would have made the decision you advocated for at trial.

For it is the trial court that has the last word in deciding credibility issues. That is where the real power lies in substantial evidence cases. Likewise, given the broad discretion conferred on trial courts in the multitude of cases involving the exercise of discretion, it is the trial court that wields the power to determine the outcome, as long as it falls within the considerably wide "bounds of reason." It is of crucial importance, then, that these fundamental distinctions in legal authority between trial and appellate courts be recognized and respected. ■

The Honorable Martin J. Tangeman sits as an appellate justice on the Second Appellate District, Division Six. In 2015, he was appointed to the appellate court by Governor Edmund "Jerry" Brown. In 2001, Justice Tangeman was appointed to the bench as a Superior Court Judge. Prior to his appointment, he was a partner at Sinsheimer, Schiebelhut and Baggett. In 2012, he was awarded the Frank J. Pentangelo Award by the San Luis Obispo County Bar Association for his contributions to the Bar Bulletin.