

Trial attorneys need to understand appeals standards of review

By: Kimberly Alderman November 27, 2013 9:56 am

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After a case has concluded at the circuit court level, losing litigants often consult their trial attorney concerning their chances on appeal.

But many trial attorneys do not handle appeals, so are unfamiliar with the processes and reasoning employed by the Wisconsin appellate courts.



In order to counsel their clients on the strength of a potential appeal, trial attorneys should cultivate at least a cursory knowledge of the standards of review employed by Wisconsin appellate courts.

Importantly, the type of review applied to a particular issue will no doubt serve as a strong indicator of the possibility that the issue is successful on appeal.

Degree of deference

The standard of review used by an appellate court dictates the degree of deference the appellate court will give the circuit court in the review of its decision. The amount of deference provided is set by statute and precedent, and is dependent on the type of issue the court is reviewing.

For purposes of determining the standard of review, issues are divided into three categories: (1) questions of fact; (2) questions of law, and (3) discretionary decisions.

Questions of fact

Appellate courts will provide the most deference to the trial court on questions of fact. This is due to the belief that the trier of fact is in a better position to make factual findings than a reviewing court.

The degree of deference allowed will be dependent on whether the case is tried to the court or to a jury.

If the case is tried to a jury: The most deferential standard of review belongs to findings of fact made by a jury. The high degree of deference is based on the predominant role that the jury plays in the American judicial system. For a civil case, a jury finding of fact will stand if there is any credible evidence to support it. In discussing the magnitude of this standard of review, the court has stated, "[w]hen there is any credible evidence to support a jury's verdict, 'even though it be contradicted and the contradictory evidence be stronger and more convincing, nevertheless the verdict . . . must stand.'" *Marquez v. Mercedes-Benz USA, LLC*, 341 Wis.2d 119, 815 N.W.2d 314, 326 (2012).

If the case is tried to the court: An appellate court only will overturn a trial court's finding of fact if the finding is clearly erroneous. *State v. Jenkins*, 303 Wis.2d 157, 736 N.W.2d 24, 34 (2007); Wis. Stat. 805.1(2). A finding of fact is clearly erroneous when it is "against the great weight and clear preponderance of the evidence." *Phelps v. Physicians Ins. Co.*, 319 Wis.2d 1, 768 N.W.2d 615, 628 (2009) (internal citations omitted). This standard also heavily favors the trial court's findings.

Questions of law

If a question needs to be answered by applying relevant legal principals, it is a question of law.

Whereas appellate courts defer to the trier of fact when considering questions of fact, questions of law are within the province of the appellate courts. Therefore, trial court decisions concerning questions of law are given far less deference.

For most questions of law, the reviewing court will employ a de novo standard of review. *Olson v. Town of Cottage Grove*, 309 Wis.2d 365, 749 N.W.2d 211 (2008). In reviewing a decision de novo, the reviewing court places no weight on the trial court's conclusions. *Trinity Evangelical v. Tower Ins. Co.*, 261 Wis.2d 333, 354, 661 N.W.2d 798 (2003).

Essentially, the reviewing court will look at the issues and make its own, independent determination on the applicable law and necessary result.

Mixed questions of law and fact

In some instances, it can be difficult to distinguish between questions of law and questions of fact.

A mixed question of law and fact requires both a determination of the facts at hand, as well as an application of relevant law to those facts. *State v. Gollon*, 115 Wis.2d 592, 600, 340 N.W.2d 912 (Ct. App. 1983). As such, they are subject to a two-step standard of review. Apply the clearly erroneous standard of review, discussed supra, to the facts. Apply the de novo standard of review, discussed supra, to the legal conclusions.

DOR v. Exxon Corp., 90 Wis.2d 700, 713, 281 N.W.2d 94 (1979). In instances where the legal conclusion and factual findings are significantly intertwined, the reviewing court will give weight to the circuit court’s legal conclusion. *Leasefirst v. Hartford Rexall Drugs, Inc.*, 168 Wis.2d 83, 89, 483 N.W.2d 585 (Ct. App. 1992).

Discretionary decisions

In the course of a case, trial courts must make many discretionary decisions. Examples of discretionary decisions include extending deadlines or admitting particular evidence. Typically, reviewing courts allow trial courts wide latitude in making these decisions.

Discretionary decisions are reviewed for erroneous exercise of discretion. *Industrial Roofing v. Marquardt*, 299 Wis.2d 81, 726 N.W.2d 898, 906 (2007).

In reviewing a lower court’s determination using this standard, a reviewing court will ask if the lower court (1) examined the relevant facts, (2) applied a proper standard of law, and (3) used a “demonstrated rational process to reach a conclusion that a reasonable judge could reach.” *Id.* (internal citations omitted).

This is sometimes called applying a “deferential standard.” If the record shows that the lower court satisfied those three requirements, its discretionary determination will not be overturned.

Counseling clients

When counseling your client on the merits of an appeal, it is important to take the appropriate standards of review into consideration, as these are the lenses through which the appellate court will view the issues presented.

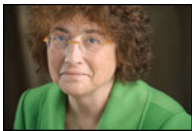
Use the standards of review to gauge your client’s chances of success. For example, if the main issue your client would like to argue on appeal is a question of fact, it is important to inform him that he will face a very difficult battle.

Alternatively, you could encourage your client to consider adding issues concerning questions of law, as the less deferential standard of review means that your client stands a better chance of success.

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