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East Valley Bar Association
September 20, 2019
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EVALUATING CASES FOR APPEAL

Threshold question – is there an appealable judgment or order?

- Court of Appeals' jurisdiction is prescribed by statute, A.R.S. § 12-2101.
  - Limited to enumerated judgments and orders
- Rules 54(b) and (c)
- Is there a basis for special action jurisdiction?

What issue will be presented on appeal?

- Nature of issue determines the standard of review.
  - De novo
    - *E.g.*, Questions of law, mixed questions of fact and law, summary judgments, dismissal for failure to state a claim, judgment on the pleadings, constitutional issues, interpretation of statutes and rules, contract interpretation, determination of duty, personal and subject matter jurisdiction, choice of law, immunity, arbitrability, jury instructions, JMOL, legal conclusions
  - Abuse of discretion
    - *E.g.*, any discretionary ruling (unless premised on an error of law), pre-trial rulings generally, denial of motion to amend, disclosure and discovery rulings, evidentiary rulings (unless premised on an error of law), grant or denial of injunctions, grant or denial of new trial, award or denial of attorneys' fees, award or denial of sanctions; confirmation of arbitration award, orders setting aside or granting relief from a judgment, denial of motion to set aside default or default judgment
  - Clearly erroneous
    - Judicial findings of fact
  - Substantial evidence
    - Administrative agency findings
  - Sufficiency of the evidence
    - Jury verdicts, bench trial decision (without findings)
  - Shock the conscience
    - Jury damage awards

Was the issue preserved below?

- Is a post-trial motion needed?
- Is a post-trial motion still timely?

Was the error prejudicial or harmless?

- Rule 61 of Civil Procedure

Is the case a good vehicle for decision of the issue?

- Is the issue reoccurring?
- Might the instant case make bad law?

What are the chances of success?

How much will an appeal cost?

- Is the cost of an appeal justified?

Will a loss on appeal expose the appellant to liability for attorneys' fees?

Arizona Revised Statutes Annotated
Title 12. Courts and Civil Proceedings
Chapter 12. Appeals
Article 1. In General

A.R.S. § 12-2101

§ 12-2101. Judgments and orders that may be appealed

Effective: July 20, 2011
Currentness

A. An appeal may be taken to the court of appeals from the superior court in the following instances:

1. From a final judgment entered in an action or special proceeding commenced in a superior court, or brought into a superior court from any other court, except in actions of forcible entry and detainer when the annual rental value of the property is less than three hundred dollars.

2. From any special order made after final judgment.

3. From any order affecting a substantial right made in any action when the order in effect determines the action and prevents judgment from which an appeal might be taken.

4. From a final order affecting a substantial right made in a special proceeding or on a summary application in an action after judgment.

5. From an order:

(a) Granting or refusing a new trial, or granting a motion in arrest of judgment.

(b) Granting or dissolving an injunction, or refusing to grant or dissolve an injunction or appointing a receiver.

(c) Dissolving or refusing to dissolve an attachment or garnishment.

(d) Granting or denying a petition to restore a person's right to possess a firearm pursuant to § 13-925.

6. From an interlocutory judgment that determines the rights of the parties and directs an accounting or other proceeding to determine the amount of the recovery.

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7. From an interlocutory judgment in any action for partition that determines the rights and interests of the respective parties, and directs partition to be made.

8. From any interlocutory judgment, decree or order made or entered in actions to redeem real or personal property from a mortgage thereof or lien thereon, determining such right to redeem and directing an accounting.

9. From a judgment, decree or order entered in any formal proceedings under title 14. [1]

10. From an order or judgment:

(a) Adjudging a person insane or incompetent, or committing a person to the state hospital.

(b) Revoking or refusing to revoke an order or judgment adjudging a person insane or incompetent, or restoring or refusing to restore to competency any person who has been declared insane or incompetent.

11. From an order or judgment made and entered on habeas corpus proceedings:

(a) The petitioner may appeal from an order or judgment refusing his discharge.

(b) The officer having the custody of the petitioner, or the county attorney on behalf of the state, from an order or judgment discharging the petitioner whereupon the court may admit the petitioner to bail pending the appeal.

B. If any order or judgment referred to in this section is made or rendered by a judge it is appealable as if made by the court.

Credits

Amended by Laws 1964, Ch. 102, § 2, eff. Apr. 6, 1964; Laws 1973, Ch. 75, § 10, eff. Jan. 1, 1974; Laws 2011, Ch. 304, § 1.

Notes of Decisions (788)

Footnotes

1 Section 14-1101 et seq.

A. R. S. § 12-2101, AZ ST § 12-2101

Current through the First Regular Session of the Fifty-Fourth Legislature (2019)

End of Document

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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
VII. Judgment

16 A.R.S. Rules of Civil Procedure, Rule 54
Formerly cited as AZ ST RCP Rule 58(g)

Rule 54. Judgment; Costs; Attorney's Fees; Form of Proposed Judgments

Currentness

(a) Judgment and Decision Defined. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of earlier proceedings. For purposes of this rule, a "decision" is a written order, ruling, or minute entry that adjudicates at least one claim or defense.

(b) Judgment on Multiple Claims or Involving Multiple Parties. If an action presents more than one claim for relief--whether as a claim, counterclaim, crossclaim, or third-party claim--or if multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines there is no just reason for delay and recites that the judgment is entered under Rule 54(b). If there is no such express determination and recital, any decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Judgment as to All Claims and Parties. A judgment as to all claims and parties is not final unless the judgment recites that no further matters remain pending and that the judgment is entered under Rule 54(c).

(d) Demand for Judgment; Relief to Be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(e) Entry of Judgment After Party's Death. Judgment may be entered on a verdict or decision after a party's death on an issue of fact rendered while the party was alive.

(f) Request for Costs.

(1) *Time for Filing Request if a Motion for Attorney's Fees Is Filed.* If a party seeking costs also seeks an award of attorney's fees, a verified request for an award of taxable costs under A.R.S. § 12-332 must be filed on the same day the party files its motion for attorney's fees under Rule 54(g).

(2) *Time for Filing Request if No Motion for Attorney's Fees Is Filed.* If a party seeking costs does not seek an award of attorney's fees under Rule 54(g), a verified request for costs must be filed within the time set forth below:

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A Crash Course In Appellate Standards of Review

by Randall H. Warner

Attention appellants! What would you say if I told you there was a way to spice up your appeal, to make it more attractive to appellate judges and increase your chances of success? What if I said it does not require special knowledge or training, and is completely legal under the Rules of Appellate Procedure? In fact, the Rules require it. Of course, I am talking about the standard of review, that potent but often neglected portion of an appellate brief.

"What?" you say. "You cannot be serious. The standard of review is a chore, something worth little attention given my time and space constraints."

Oh, but I am serious. The standard of review—which determines how much deference an appellate court will give to the decisions of a lower court or administrative agency[1]—often makes the difference between a losing appeal and one that has a fighting chance. It sometimes is the dispositive issue. And yet many lawyers give it minimal attention, content to give a boilerplate citation and then move on to the argument. An astonishing number of lawyers neglect to discuss the standard of review altogether. The thesis of this article is that the standard of review is worth your time and thought when preparing an appeal brief.

Why the Standard of Review Matters

For one, the Rules require it. Rule 13(a)(6) of the Rules of Appellate Procedure provides, in part: "With respect to each contention raised on appeal, the proper standard of review on appeal shall be identified, with citations to relevant authority, at the outset of the discussion of that contention." Strictly speaking, this requires a discussion of the standard of review immediately preceding the discussion of each contention. However, many practitioners place the entire standard of review discussion in a separate section prior as the Federal Rules permit. (*See Fed. R. App.P. 28(a)(9)(B)*). Either way, the Rule clearly requires a discussion of the standard of review. Though the chances of being dismissed for failure to do so are slim, compliance with the Rules is always a good idea.

Failure to identify the standard of review is perhaps more common among appellees, but the Rules do not discriminate on this subject. Both the appellant's and the appellee's brief must identify the standard of review.[2] Moreover, as discussed below, the appellee has just as much reason to discuss the issue as the appellant.

The second reason to devote thought to the standard of review is that your judges will. Believe it or not, appellate court judges think about the standard of review. They sometimes argue about it.[3] Often, the outcome of an appeal will depend on what the court deems the standard of review to be. The standard of review is your opportunity to frame the case in a way which improves your chances on appeal.

Not surprisingly, appellate court judges like to decide questions of law more than questions of fact. Interesting legal issues are what pull appellate judges out of bed in the morning. They are what appellate judges think about and write about. That is why they became appellate judges.

More significantly, deciding legal issues is the appellate judge's job. That is what the standard of review is all about. It is a body of law which separates questions on which appellate courts are expert from those they are ill-equipped to decide, and accords them greater latitude in resolving the former. Of course, the appellate court's job is also to correct errors, but here, too, the standard of review dictates which errors it can correct. The more an issue is outside an appellate court's expertise, the more deference it will accord to the trial court's or administrative agency's decision, and the more egregious an error must be before the court can reverse.

Four Basic Standards of Review

If you search the lawbooks for the standard of review on a given issue, you might think there are dozens that apply in various circumstances. One reason for this is that a handful of similar concepts are sometimes confused with the standard of review on appeal. These concepts are discussed below. The other reason is that the basic standards of review have undergone various verbal formulations over the years.

Commentators have been quick to point out that not all discretionary decisions are created equal; different degrees of discretion may be accorded depending on the issue.

Notwithstanding these formulations, there are only four basic standards of review in Arizona: *de novo*, clearly erroneous, substantial evidence and abuse of discretion.[4] *De novo* review applies generally to questions of law,[5] clearly erroneous to a trial court's findings of fact,[6] substantial evidence to an administrative agency's findings of fact,[7] and abuse of discretion to one of the many judgment calls a trial court or agency must make during the course of a proceeding.[8]

De Novo *Review*

De novo is a completely non-deferential standard of review; the appellate court decides the question afresh without regard to how it was resolved by the trial court.[9] *De novo* review applies almost exclusively to questions of law.[10] This includes mixed questions of law and fact,[11] conclusions based on undisputed facts[12] and findings which combine fact and law where there is a legal error."[13] The granting of a motion for summary judgment is a legal issue subject to *de novo* review.[14]

Distinguishing questions of law from questions of fact is where the rubber meets the road. There are, of course, obvious cases: interpretation of a statute is an issue of law; determining whether an event occurred in space and time is an issue of fact.[15] In other cases, it is not so easy. As Justice O'Connor has noted, the distinction between questions of fact and questions of law "is sometimes as much a matter of allocation as it is of analysis";[16] that is, it turns on whether the issue is the kind for which deference is appropriate. Thus, certain "constitutional facts," like the voluntariness of a confession, are reviewed *de novo* because of the courts' independent obligation to decide constitutional questions.[17] Although courts have elucidated guidelines for determining whether an issue is one of law or fact,[18] the only sure way to know is to consult past decisions on a particular issue.

"Clearly Erroneous" and "Substantial Evidence"

When reviewing a trial court's findings of fact, an appellate court will reverse only if the findings are "clearly erroneous."[19] Courts have defined this standard in various ways. Some say that a finding is not clearly erroneous if the trial court's interpretation of the evidence is plausible, or where there are two permissible

views of the facts.[20] Others hold that a finding must be upheld unless the reviewing court has a "definite and firm conviction" that a mistake was made.[21] One federal court noted that, to be clearly erroneous, a decision must be more than "maybe or probably wrong," it must "strike us with the force of a five-week-old, unrefrigerated dead fish."[22] While there may be cases in which arguing these definitional differences is critical, for most purposes it is enough to know that "clearly erroneous" review is deferential.

The factual findings of an administrative agency are reviewed under the "substantial evidence" standard.[23] Substantial evidence is defined as evidence from which a reasonable mind might draw a conclusion.[24] Some commentators have suggested there is a difference between the clearly erroneous standard applicable to a trial court's findings, and the substantial evidence standard applicable to an agency's findings,[25] but the two appear to be the same in Arizona.[26] As Division Two noted in one case, "[a] finding of fact cannot be 'clearly erroneous' if there is substantial evidence to support it."[27] Under both standards, the appellate court is likely to defer to the fact-finder.

Abuse of Discretion

"Abuse of discretion" is also a deferential standard of review. However, whereas "clearly erroneous" and "substantial evidence" apply to findings of fact, "abuse of discretion" applies to those numerous judgment calls a trial court must make during the course of litigation.[28] Thus, discovery issues are reviewed for abuse of discretion,[29] as are a variety of pretrial procedural motions as well as motions for a new trial.[30]

Evidentiary issues are reviewed for abuse of discretion because the trial court is in the best position to engage in the balancing of interests necessary to make evidentiary rulings.[31] In some instances, however, the court has declared certain types of evidence to be inadmissible *per se*.[32] In that circumstance, the question is a legal one reviewed *de novo*: as a matter of law, is this type of evidence admissible at all? Similarly, interpretation of the Rules of Evidence is a legal issue which is reviewed *de novo*.[33]

Commentators have been quick to point out that not all discretionary decisions are created equal; different degrees of discretion may be accorded depending on the issue.[34] On routine procedural matters—a motion to continue, for example—the trial court has virtually unfettered discretion. Where the discretionary judgment touches on an important substantive right, it is likely to receive closer appellate scrutiny, notwithstanding the abuse of discretion label.

In *Grant v. Arizona Public Service Co.*, the Supreme Court suggested four circumstances in which an appellate court may find an abuse of discretion.[35] The first is where an error of law is committed in the process of reaching a discretionary decision.[36] Arguably, this is not an abuse of discretion at all, but rather *de novo* review of the legal ruling. The second, according to *Grant*, is where the discretionary conclusion is reached without consideration of the evidence.[37] This category might be broadened to include any situation in which the trial court did not follow proper procedure in reaching its discretionary conclusion.[38] Third, the court may find an abuse of discretion where some other substantial error of law occurred in addition to the matter over which the court has discretion.[39] Finally, the court may find an abuse of discretion if there is no substantial basis for the trial court's ruling.[40] This latter circumstance is the pure "abuse of discretion," in which the trial court made a decision that was simply beyond the range of acceptable discretion.

Related Concepts

It is important to distinguish the standard of review from some related concepts which are sometimes considered part of it. The first is the way evidence is viewed on appeal. For example, in reviewing findings under the clearly erroneous standard, the facts are viewed in the light most favorable to sustaining the findings.[41] In reviewing a grant of summary judgment, the facts are viewed in the light most favorable to the party opposing summary judgment.[42] How the evidence is viewed on appeal works hand-in-hand with the standard of review and should be cited as part of it where appropriate.

Second, the substantive legal standard applicable to a given issue is sometimes confused with the standard of review. For example, the standard of review of a motion to dismiss has been described as follows:

> On review of a motion to dismiss for failure to state a claim, the material allegations of the complaint are taken to be true. In our review, this court will affirm the trial court's grant of the motion to dismiss for failure to state a claim if [the plaintiff] could not be entitled to relief "under any facts susceptible of proof under the claims stated."[43]

This statement is accurate, but it really identifies the substantive standard for a motion to dismiss rather than the standard of review. Because motions to dismiss are reviewed *de novo*, the appellate court applies the same substantive standard as the trial court.

Finally, the standard of review on appeal should be distinguished from the standard by which courts review legislation. We all recall from law school the various "tests" used to determine whether a statute is constitutional: strict scrutiny, rational basis, etc. These tests are sometimes referred to as the "standard of review."[44] Though analytically akin to appellate standards of review—both deal with the degree of deference afforded to other decision-makers—constitutional standards of review apply in different circumstances.

Improving Your Chances on Appeal

By now, it should be obvious that an appellant's chances of success depend to a great extent on the standard of review; they are far better if the issue on appeal is subject to *de novo*

review than if it is subject to one of the deferential standards of review. Of course, the converse is true for appellees. This simple truth should be the starting point for any appeal. Before sitting down to write an appeal brief—indeed, before even initiating the appeal—the lawyer should ask two questions: (1) What is the standard of review? (2) How can I frame the issues on appeal so that they are subject to *de novo* review, or, in the case of the appellee, so that they are subject to a deferential standard of review? The lawyer who can frame the issues in such a manner will increase the chances of succeeding on appeal many-fold.

By way of example, consider the following two statements regarding the applicable standard of review in a case.

> The Agency found against Appellant, and the Court must reverse that finding if it is not supported by substantial evidence.
>
> In finding against Appellant, the Agency applied the wrong legal standard. Although the Agency's findings are reviewed to determine whether substantial evidence supports them, this Court reviews the legal issue *de novo*.

The first statement permits review only under the deferential "substantial evidence" standard. This is better than no appeal at all, but not by much. The court of appeals is likely to affirm, holding that there is substantial evidence in the record to support the agency's findings. The second statement (assuming the record supports it) gives the appellate court an opportunity to rule on a legal issue. Ultimately, the court may not agree with you on the legal issue, but you have at least improved your chances.

Perry v. County of Maricopa[45] offers a good example. The trial court there denied a motion to lengthen the time in which to serve the lawsuit, a ruling which is typically within the trial court's discretion. On appeal, the plaintiff argued that the trial court misinterpreted the law in exercising its discretion. The court of appeals agreed, concluding that "the trial court abused its discretion in denying appellant's motion for enlargement of time by applying the wrong legal standards."[46]

Framing the appeal so that it includes a legal issue has three effects. First, you have raised an issue over which the court has greater latitude. Second, your judges are more likely to take an interest in your case, thereby increasing the likelihood of reversal. Third, if the judges become sympathetic to your client on the facts, you have given them a legal hook for ruling in accordance with their sympathies.

This later point cannot be underestimated. Appellate judges want to do what is right. If you have done a good job on the facts, they will be persuaded that your client deserves to win. However, if the trial court found against your client, the appellate court's hands are tied by the highly deferential "clearly erroneous" standard of review. You must provide the court a rationale for reversing. The worst thing you can do is convince the court you are right on the facts, and then provide it no legal basis on which to rule in your favor.

The opposite is true for the appellee. Whereas the appellant needs to give the court a legal issue on which to base a reversal, the appellee needs to give the court an out: a way to dispose of the case without having to make a substantive legal ruling. Sometimes judges do not want to decide a legal issue, for any number of reasons. The case may not be the right facts on which to decide the issue, or perhaps there is not enough consensus among other judges. Or the court might feel the trial court reached the right result on the facts. A good appellee's brief will always give the court a way to resolve the case by deferring to the trial court, should it want to do so. To use the example above, the appellee's standard of review statement might say:

> The Agency found against Appellant, and the Court must affirm that finding if it is supported by substantial evidence. The record supports the Agency's finding

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Daniel T. Garrett, J.D., C.P.A., has over ten years experience in State and Local Taxation. Mr. Garrett has served as General Counsel for the Arizona Department of Revenue and as Chief Tax Hearing Officer for the City of Phoenix.

Mr. Garrett's primary area of practice is Arizona, Municipal and Multistate Sales and Use Taxation.

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even under the legal standard argued by Appellant.

The appellee's brief should always remind the court of its obligation to be deferential in matters of fact and trial court discretion. The Criminal Appeals Division of the Attorney General's office is particularly good at this. In most criminal appeals, the State's best argument is that the jury found the defendant guilty and that finding is entitled to deference. The Attorney General makes absolutely sure the court knows that reversal will overturn a decision reached by a jury.

Pre-Appeal Planning

The standard of review has important implications for pre-appeal planning as well. Although the standard of review is a good place to start when preparing an appeal brief, the time to start thinking about it is during trial court litigation, when it appears you may ultimately file an appeal. At that point, you should look at the case and think about the grounds you might have for appeal. Do you have any legal issues which might form the basis for a reversal or on which a sympathetic appellate court might hang its hat? In almost every case there are legal issues which could form the basis for an appeal; it behooves the potential appellant to think about what those issues are before the appeal clock starts running.

The standard of review on appeal also affects which issues you present to the trial court and how you frame those issues. If you believe you are going to succeed on motion, you should frame the issues if possible so that the judge's ruling is based on an exercise of discretion, rather than an issue of law, thus improving your chances should your opponent appeal. Conversely, if you will likely be appealing the case, you might raise legal issues which you think the trial judge will not buy, but which would form the basis for a stronger appeal. Motions for reconsideration can be particularly useful in this regard by forcing the court to rule on a legal issue it may have avoided ruling on initially.

Conclusion

There is a reason why the Rules of Appellate Procedure require parties to identify the standard of review. At some point, the five justices on the Arizona Supreme Court thought the standard of review matters, and therefore lawyers ought to brief it. If it matters to them as judges, it should matter to you as an appellant or appellee. Regardless of which you represent, giving careful thought to the standard by which your issues on appeal will be reviewed is time well spent.

***Randall H. Warner**, an attorney with the Phoenix firm of Roshka Heyman & DeWulf, PLC, practices commercial and appellate litigation.*

ENDNOTES:

1. For a comprehensive treatment of standards of review, *see* Steven Alan Childress & Martha S. Davis, *Federal Standards of Review* (2nd ed. 1992) (hereinafter "Childress & Davis").
2. *See* ARCAP 13(b)(1); which provides that the appellee's brief shall conform to the requirements of ARCAP 13(a).
3. *See, e.g., State v. Magner*, 191 Ariz. 392, 401, 956 P.2d 519, 528 (App. 1998) (Voss, J., dissenting); *Hutcherson v. City of Phoenix*, 188 Ariz. 183, 197, 933 P.2d 1251, 1265 (App. 1996) (Grant, J., dissenting), *vacated*, 192 Ariz. 51, 961 P.2d 449 (1998); *White v. Lewis*, 167 Ariz. 76, 93 n.1, 804 P.2d 805, 822 n.1 (App. 1990) (Lankford, J., dissenting)

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Clay v. Arizona Interscholastic Association, Inc., 157 Ariz. 350, 354, 757 P.2d 1059, 1063 (App. 1988) (Roll, J., dissenting), *vacated*, 161 Ariz. 474, 779 P.2d 349 (1989).

4. For a further discussion of which standard of review applies in various circumstances, *see Arizona Appellate Handbook* § 3.5.2.5.1
5. *See Stallings v. Spring Meadows Apartment Complex Ltd. Partnership*, 185 Ariz. 156, 158, 913 P.2d 496, 498 (1996); *Canon School Dist. No. 50 v. W.E.S. Construction Co., Inc.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994).
6. *See Scottsdale Princess Partnership v. Maricopa County*, 185 Ariz. 368, 372, 916 P.2d 1088, 1092 (App. 1995).
7. *See Carondelet Health Services v. Arizona Health Care Cost Containment System*, 187 Ariz. 467, 469, 930 P.2d 544, 546 (App. 1996).
8. *See, e.g., Schwartz v. Superior Court*, 186 Ariz. 617, 619, 925 P.2d 1068, 1070 (App. 1996) (denial of motion to quash subpoena reviewed for abuse of discretion); *Hancock v. McCarroll*, 188 Ariz. 492, 495, 937 P.2d 682, 685 (App. 1996) (order consolidating actions reviewed for abuse of discretion).
9. *See State v. Buccini*, 167 Ariz. 550, 557, 810 P.2d 178, 185 (1991). The *de novo* standard applies as well to a trial or appellate court's review of an administrative agency decision on questions of law. *Carondelet Health Services*, 187 Ariz. at 469, 930 P.2d at 546.
10. *See Stallings v. Spring Meadows Apartment Complex Ltd. Partnership*, 185 Ariz. 156, 158, 913 P.2d 496, 498 (1996); *Canon School Dist. No. 50 v. W.E.S. Construction Co., Inc.*, 177 Ariz. 526, 529, 869 P.2d 500, 503 (1994).
11. *See State v. Altieri*, 191 Ariz. 1, 3, 951 P.2d 866, 868 (1997); *but see Magner*, 191 Ariz. at 396-97, 956 P.2d at 523-24 (court applied "mixed" standard of review to mixed question of law and fact). The "mixed question of law and fact" is an elusive concept. Frequently, courts use it to refer to what is clearly a legal issue: the application of facts to of law. *See, e.g., Baker v. Clover*, 177 Ariz. 37, 864 P.2d 1069 (App. 1993) (review of grant of summary judgment). The sometimes use the term as well to refer to the heightened review of findings which implicate constitutional rights. *See, e.g., State v. Hackman*, 189 Ariz. 505, 508, 943 P.2d 865, 868 (App. 1997).
12. *Estate of Craig*, 174 Ariz. 228, 239, 848 P.2d 313, 324 (App. 1992).
13. *Lee Development Company v. Papp*, 166 Ariz. 471, 476, 803 P.2d 464, 469 (App. 1990).
14. *See Chicago Ins. Co. v. Manterola*, 191 Ariz. 344, 346, 955 P.2d 982, 984 (App. 1998). The standard of review is the same whether summary judgment turns on a question of law, or on a question concerning the sufficiency of evidence. *L. Harvey Concrete, Inc. v. Agro Const. & Supply Co.*, 189 Ariz. 178, 179, 939 P.2d 811, 813 (App. 1997). In the latter situation, however, there may be a *de facto* tendency among appellate judges to defer to the trial court's familiarity with the facts.
15. *See State v. Rickard-Hughes*, 182 Ariz. 273, 274, 895 P.2d 1036, 1038 (App. 1995) (whether drug use took place in Arizona is an issue of fact); *Melvin v. Stevens*, 10 Ariz. App. 357, 360, 458 P.2d 977, 980 (App. 1969) (whether conversation took place is a question of fact).
16. *Miller v. Fenton*, 474 U.S. 104, 113-14, 106 S. Ct. 445, 451 (1985).
17. *Id.*
18. *See id.*
19. *See Scottsdale Princess Partnership*, 185 Ariz. at 372, 916 P.2d at 1092.
20. *See Higdon v. Evergreen International Airlines, Inc.*, 149 Ariz. 452, 453, 719 P.2d 1068, 1069 (1986).
21. *See State v. Lupe*, 181 Ariz. 211, 213, 889 P.2d 4, 6 (App. 1994).
22. *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).
23. *See Carondelet Health Services*, 187 Ariz. at 469, 930 P.2d at 546.
24. *See In re Mustonen's Estate*, 130 Ariz. 283, 285, 635 P.2d 876, 878 (App. 1981).
25. *See* Childress & Davis § 2.07, at 2-45.
26. *See, e.g., Scottsdale Princess Partnership*, 185 Ariz. at 379, 916 P.2d at 1095 (equating "clearly erroneous" with "unsupported by substantial evidence").
27. *Moore v. Title Ins. Co. of Minnesota*, 148 Ariz. 408, 413, 714 P.2d 1303, 1308 (App. 1985).
28. *See, e.g., Schwartz*, 186 Ariz. at, 619, 925 P.2d at 1070 (denial of motion to quash subpoena reviewed for abuse of discretion); *Hancock*, 188 Ariz. at 495, 937 P.2d at 685 (order consolidating actions reviewed for abuse of discretion).
29. *See Weaver v. Synthes, Ltd. (USA)*, 162 Ariz. 442, 445, 784 P.2d 268 (App. 1989) (order striking pleadings for discovery misconduct).
30. *See, e.g., MacCollum v. Perkinson*, 185 Ariz. 179, 185, 913 P.2d 1097, 1103 (App. 1996) (motion to amend); *G.E. Capital Corp. v. Osterkamp*, 172 Ariz. 185, 188, 836 P.2d 398, 401 (App. 1992) (motion to set aside entry of default); *Hutcherson v. City of Phoenix*, 192 Ariz. 51, 53, 961 P.2d 449, 451 (1998) (motion for new trial). *But see Purvis v. Hartford Accident and Indemnity Co.*, 179 Ariz. 254, 257-58, 877 P.2d 827, 830-31 (App. 1994) (whether party has a right to intervene under Rule 24(b) is reviewed *de novo*). For a discussion of the factors which determine whether a matter is subject to abuse of discretion review, *see Pierce v. Underwood*, 487 U.S. 552, 557-63, 108 S. Ct. 2541, 2546-49 (1988).
31. *See Gordon v. Liguori*, 182 Ariz. 232, 235, 895 P.2d 523, 526 (App. 1995); *State v. Wood*, 180 Ariz. 53, 59, 881 P.2d 1158, 1166 (1994).
32. *See, e.g., State v. Lopez*, 181 Ariz. 8, 9, 887 P.2d 538, 539 (1994) (testimony recalled through hypnosis is always inadmissible).
33. *See Patterson v. Maricopa County Sheriff's Office*, 177 Ariz. 153, 156, 865 P.2d 814, 817 (App. 1993) (interpretation of rule involves legal question which is reviewed *de novo*).
34. *See* Childress & Davis § 4.01, at 4-13. My appreciation goes to Judge Jefferson Lankford for suggesting this point.
35. 133 Ariz. 434, 456, 652 P.2d 507, 529 (1982). For different descriptions of the circumstances under which abuse of discretion will be found, *see* Childress & Davis § 4.01, at 4-3; W. Wendell Hall, "Standards of Review in Texas," 29 St. Mary's L.J. 351, 363 (1988).
36. *Grant*, 133 Ariz. at 456, 652 P.2d at 529. *See, e.g., Maldonado v. Arizona Dept. of Economic Security*, 182 Ariz. 476, 479, 897 P.2d 1362, 1365 (App. 1994) (court applied a wrong standard which excessively constrained its discretion); *Perry v. County of Maricopa*, 167 Ariz. 458, 461, 808 P.2d 343, 346 (App. 1991) (court applied wrong legal standard in denying motion to enlarge time).
37. *Grant*, 133 Ariz. at 456, 653 P.2d at 529.
38. *See, e.g., DePasquale v. Superior Court*, 181 Ariz. 333, 336, 890 P.2d 628, 631 (App. 1995) (trial court abused discretion in changing child custody without holding hearing); *Lenze v. Synthes, Ltd.*, 160 Ariz. 302, 306, 772 P.2d 1155, 1159 (App. 1989) (trial court abused its discretion in imposing discovery sanction without holding hearing).
39. *Grant*, 133 Ariz. at 456, 653 P.2d at 529.
40. *Id.*
41. *See State v. Garcia*, 187 Ariz. 527, 528, 931 P.2d 427, 428 (App. 1996).
42. *See L. Harvey Concrete, Inc. v. Agro Const. & Supply Co.*, 189 Ariz. 178, 180, 939 P.2d 811, 813 (App. 1997).
43. *Knoell v. Cerkevenik-Anderson Travel, Inc.*, 181 Ariz. 394, 397, 891 P.2d 861 (App. 1994) (citations omitted), *vacated*, 185 Ariz. 546, 917 P.2d 689 (1996).
44. *See, e.g., Kenyon v. Hammer*, 142 Ariz. 69, 78, 688 P.2d 961, 970 (1984).
45. 167 Ariz. 458, 808 P.2d 343 (App. 1991).
46. 167 Ariz. at 461, 808 P.2d at 346.

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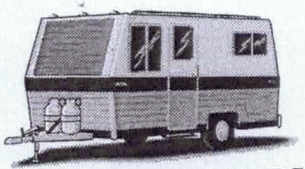

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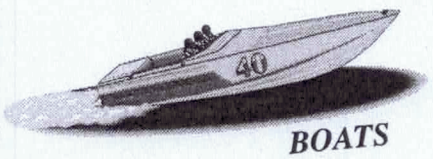

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Arizona Revised Statutes Annotated
Rules of Civil Procedure for the Superior Courts of Arizona (Refs & Annos)
VII. Judgment

16 A.R.S. Rules of Civil Procedure, Rule 61

Rule 61. Harmless Error

Currentness

Unless justice requires otherwise, an error in admitting or excluding evidence--or any other error by the court or a party--is not grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.

Credits

Added Sept. 2, 2016, effective Jan. 1, 2017.

Notes of Decisions (228)

16 A. R. S. Rules Civ. Proc., Rule 61, AZ ST RCP Rule 61
Current with amendments received through 08/15/19

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