TRIAL TALK

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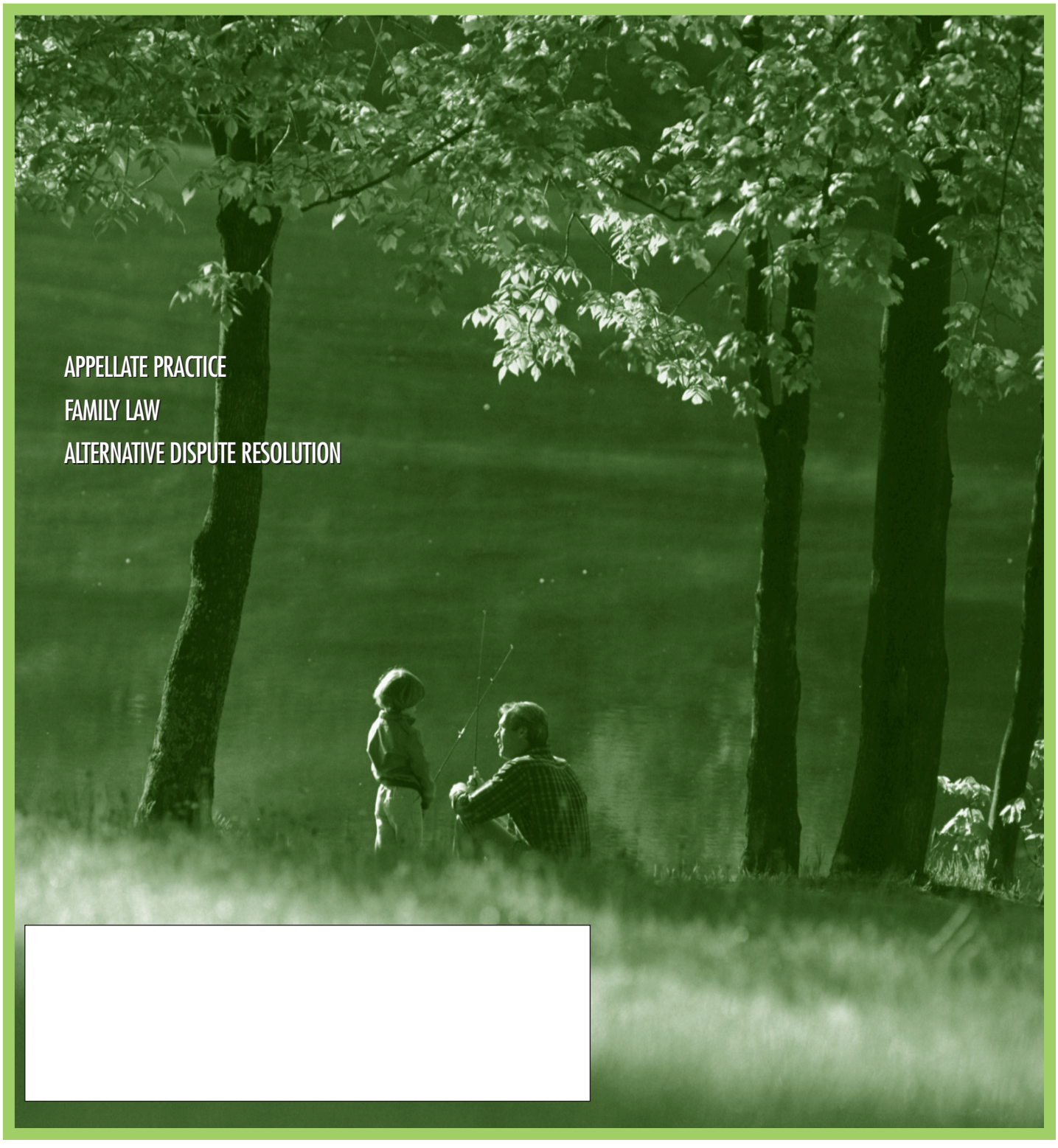

Appellate Standards of Review

By Anthony Viorst, Esq.

A. Introduction

Colorado Appellate Rule 28(k), which took effect on June 22, 2006, requires that the appellant articulate the applicable standard of review. This subsection of Rule 28, in its totality, states as follows:

> **(k) Standard of Review; Preservation.** For each issue raised on appeal, the party raising such issue must provide, under a separate heading placed before discussion of the issue: (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record where the issue was raised and ruled on, if the issue involves (i) admission or exclusion of evidence, (ii) giving or refusing to give a jury instruction, or (iii) any other act or ruling for which the party seeking relief must record an objection or perform some other act to preserve appellate review. A citation of where the issue was preserved for appellate review shall include, if applicable, the record reference where an objection, offer of proof, motion in limine, motion for directed verdict, or other relevant motion was made and ruled on. For each issue, the responding party must provide, under a separate heading placed before discussion of the issue, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Generally, a trial court's purely legal rulings are reviewed on appeal under a de novo standard, while rulings that involve factual findings are entitled to more deference. This article will discuss the standard of review applicable to common issues that arise on appeal in civil cases.

B. Different Standards of Review

The de novo standard of review governs purely legal rulings. Under the de novo standard, an appellate court will review the legal issue "anew; afresh; a second time."[1] Rulings that require fact-finding generally use either the "clearly erroneous" or "abuse of discretion" standards. Under the clearly erroneous standard, the appellate court will uphold a trial court's findings unless they are so clearly erroneous as to not find support in the record.[2] Under the abuse of discretion standard, the appeals court will not disturb a trial court's ruling unless it is manifestly arbitrary, unreasonable or unfair.[3] The rationale for applying these different appellate standards has been described as follows:

> Findings of fact are generally reviewed under a clear error or abuse of discretion standard, whereas conclusions of law are generally reviewed under a de novo standard. The reasons are straightforward. De novo means "anew; afresh; a second time." *Black's Law Dictionary* 392 (5th ed.1979). Indeed, appellate courts can and should review anew the question of whether a trial court reached the correct conclusion of law, or the right of appeal would be essentially meaningless. On the other hand, the appellate courts defer to the factual findings of the trial court because the trial judge is in the courtroom, and is charged with the duty to find facts. Appellate courts may not undertake fact-finding.[4]

C. Pretrial Issues

When a trial court dismisses a complaint under C.R.C.P. 12(b)(5), for failure to state a claim upon which relief can be granted, the standard of review is de novo.[5] Under this standard, an appellate court, like the trial court below, may consider only those matters stated in the complaint and must accept all allegations of material fact as true and view the allegations in the light most favorable to the plaintiff.[6] In contrast with a review of the sufficiency of the complaint, an appellate court reviews the grant or denial of a motion to amend the complaint under an abuse of discretion standard.[7]

Pretrial discovery rulings are within the discretion of the trial court, and will only be reversed for abuse of that discretion. These include rulings regarding adequacy of pretrial disclosures, and the allowance of late witness endorsements.[8] The grant or denial of a protective order is committed to the discretion of the trial court,[9] as is the grant or denial of a continuance of the trial.[10]

Like a motion to dismiss, a motion for summary judgment will be reviewed de novo on appeal.[11] Under this standard, an appellate court will construe all facts in the light most favorable to the nonmoving party.[12]

D. Trial Issues

Rulings on challenges for cause to prospective jurors are reviewed for an abuse of discretion.[13] However, a ruling on a *Batson* challenge, made in response to opposing counsel's use of a peremptory challenge, is subject to de novo review.[14]

A trial court's ruling regarding the admission or exclusion of evidence is reviewed for an abuse of discretion.[15] This standard applies to all evidentiary rulings, including those relating to expert testimony.[16] When a trial court admits evidence that has been challenged under Colorado Rule of Evidence 403, an appellate court "must afford the evidence the maximum probative value attributable by a reasonable fact finder and the minimum unfair prejudice to be reasonably expected."[17]

The trial court's rulings regarding jury instructions are subject to an abuse of discretion standard.[18] However, an instruction that is legally incorrect will merit reversal of the judgment, unless the error is cured by the instructions as a whole, such that it can be considered harmless.[19]

E. Post-Trial Challenges

A party is not required to file a motion for judgment notwithstanding the verdict under C.R.C.P 59 in order to preserve his or her right to challenge the sufficiency of the evidence on appeal.[20] When an appellant challenges the verdict reached by the jury, on the grounds that the evidence was insufficient, an appellate court will review the sufficiency of the evidence. The standard of review is whether, after viewing the evidence and the inferences from it in the light most favorable to the appellee, reasonable persons could not reach the same conclusion as the jury reached.[21]

Under this standard, the court will uphold jury findings as to liability if there is any competent evidence to support the verdict:

> . . . [Q]uestions of negligence and proximate cause are issues of fact to be determined by the jury, and the appellate courts are bound by the jury's findings when there is competent evidence in the record to support those findings. (Citations omitted). Only if the facts are undisputed and reasonable minds could draw but one inference from them is causation a question of law for the court. (Citation omitted).
>
> It is the jury's sole province to determine the weight of the evidence and the credibility of witnesses, and to draw all reasonable inferences of fact therefrom. As a result, a jury's verdict will not be disturbed if there is any support for it in the record. (Citation omitted).[22]

Damage awards are treated somewhat differently from liability determinations. When a party challenges the damages determination reached by the jury, that determination will not be reversed unless the verdict is so grossly excessive or inadequate as to indicate passion or prejudice.[23] Under this standard, the amount of damages will not be disturbed unless it is completely without support in the record.[24] However, appellate courts are sometimes called upon to review a trial court's order of remittitur, which is "[t]he process by which a court reduces or proposes to reduce the damages awarded in a jury verdict."[25] Where a trial court orders a remittitur, its ruling will not be disturbed absent an abuse of discretion.[26]

When the claim of insufficient evidence is based upon an argument that a witness was incredible, appellate courts will add another layer to their analysis. Under such circumstances, the appellant must show that the witness' testimony was incredible as a matter of law, because the witness testified as to facts that the witness physically could not have observed or events that could not have happened under the laws of nature.[27] Testimony that is merely biased, inconsistent or conflicting is not incredible as a matter of law.

F. Harmless Error and Plain Error

Even where a trial court has made an erroneous ruling, the error may be deemed harmless. C.R.C.P. 61 defines a harmless as an error that "does not affect the substantial rights of the parties." This means that if the appellate court concludes that the error did not contribute to the verdict, the judgment will be affirmed.[28]

The harmless error analysis is limited to those situations in which the appellant has preserved the issue by making a contemporaneous objection at trial.[29] In contrast, when no contemporaneous objection is made, any error is reviewed under a "plain error" standard of review.[30] A plain error is one that so undermines the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment.[31] In civil cases, an unpreserved error is generally non-reviewable. A plain error review is only available in civil cases under rare, unusual or special circumstances.[32]

G. Special Rules of Statutory Construction

The interpretation of a statute is a question of law that an appellate court reviews de novo.[33]

Rules of statutory interpretation include the following: 1) all statutes are presumed to comply with the state and federal constitutions;[34] 2) If statutory language is clear, an appellate court applies its plain and ordinary meaning;[35] 3) statutes in derogation of the common law are strictly construed;[36] 4) statutes should be construed so as to give "consistent, harmonious, and sensible effect to the statutory scheme as a whole"[37]; and 5) a statutory interpretation that leads to an illogical or absurd result will not be followed.[38]

Applying these rules, appellate courts have found that the Colorado Governmental Immunity Act is in derogation of the common law and must be strictly construed,[39] that the plain language of the Premises-Liability Act precludes common law defenses,[40] and that the Collateral Source statute, when viewed in its entirety, precludes any setoff for disability benefits paid by plaintiff's employer.[41]

H. Conclusion

When trying or appealing a case, it is helpful to keep the standards of appellate review in mind. Purely legal rulings, subject to the de novo standard of review, have the best chance of success on appeal. Therefore, a trial lawyer should preserve these issues at the trial level and, in the event of an unfavorable judgment, should consider raising them at the appellate level. Fact-related rulings, subject to an abuse-of-discretion standard, are more difficult to overturn. Nonetheless, objections to these rulings should be preserved, and rulings that are clearly contrary to fact or law should be subjected to appellate-court scrutiny.

Anthony Viorst practices law in Denver, where he specializes in the fields of civil and criminal appeals, personal injury, and medical malpractice. Mr. Viorst has served as an appellate specialist in civil and criminal cases. He has argued and won numerous cases before the Colorado Supreme Court and Court of Appeals.

End Notes

1 *Valdez v.People*, 966 P.2d 587, 598 (Colo. 1998) (*citing* BLACK'S LAW DICTIONARY, 392 (5th ed. 1979)) (Kourlis, J., dissenting).

2 *Lyon v. Amoco Prod. Co.*, 923 P.2d 350, 353 (Colo. App. 1996).

3 *Beauprez v. Avalos*, 42 P.3d 642, 652 (Colo. 2002).

4 *Valdez v. People*, 966 P.2d 587, 598 (Colo. 1998) (*citing* BLACK'S LAW DICTIONARY, 392 (5th ed. 1979)) (Kourlis, J., dissenting).

5 *Mapes v. City Council of City of Walsenburg,* ___ P.3d ___, 2006 WL 1914069, (Colo. App. July 13, 2006).

6 *Town of Alma v. Azco Const., Inc.*, 10 P.3d 1256, 1259 (Colo. 2000).

7 *Matter of Est. of Blacher*, 857 P.2d 566, 568-69 (Colo. App. 1993).

8 *J.P. v. Dist. Ct.*, 873 P.2d 745, 751-52 (Colo. 1994).

9 *Leidholt v. Dist. Ct.*, 619 P.2d 768, 773 (Colo.1980).

10 *Todd v. Bear Valley Vill. Apts.*, 980 P.2d 973, 979 (Colo. 1999).

11 *W. Elk Ranch, L.L.C. v. U.S.*, 65 P.3d 479,481 (Colo.2002); *Grynberg v. Karlin*, 134 P.3d 563, 565 (Colo.App.2006).

[12] *Nat. Energy Res. Co. v. Upper Gunnison River Water Conserv. Dist.*, 142 P.3d 1265 (Colo.2006).

[13] *Freedman v. Kaiser Found. Health Plan*, 849 P.2d 811, 814 (Colo. App. 1992).

[14] *Valdez v. People*, 966 P.2d 587, 597 (Colo. 1998).

[15] *Ehrlich Feedlot, Inc. v. Oldenburg*, 140 P.3d 265, 272 (Colo. App. 2006).

[16] *People v. Shreck*, 22 P.3d 68, 73 (Colo. 2001).

[17] *Bonser v. Shainholtz,* 3 P.3d 422, 424 (Colo. 2000) (citing *People v. Gibbens*, 905 P.2d 604, 607 (Colo. 1995)).

[18] *Williams v. Chrysler Ins. Co.*, 928 P.2d 1375, 1377-78 (Colo. App. 1996).

[19] *Waneka v. Clyncke,* 134 P.3d 492, 494 (Colo. App. 2005).

[20] C.R.C.P. 59(b).

[21] *Woznicki v. Musick*, 119 P.3d 567, 570 (Colo. App. 2005).

[22] *Morales v. Golston*, 141 P.3d 901, 906 (Colo. App. 2005).

[23] *Miller v. Rowtech, LLC*, 3 P.3d 492, 495 (Colo. App. 2000).

[24] *Id*.

[25] *Garhart ex rel. Tinsman v. Columbia/-Healthone, LLC*, 95 P.3d 571, 582 (Colo. 2004) (*quoting* BLACK'S LAW DICTIONARY 1298 (7th ed. 1999)).

[26] *Walford v. Blinder, Robinson & Co., Inc*., 793 P.2d 620, 627 (Colo. App. 1990).

[27] *People v. Rincon*, 140 P.3d 976, 982 (Colo. App. 2005); *Halliburton Servs. v. Miller*, 720 P.2d 571, 577-78 (Colo. App. 1986).

[28] *People v. Montoya*, 141 P.3d 916, 920 (Colo. App. 2006).

[29] *People v. Vigil*, 127 P.3d 916, 930 (Colo. 2006).

[30] *People v. Elie*, 148 P.3d 359, 364 (Colo. App. 2006).

[31] *Id*.

[32] *Robinson v. City and County of Denver,* 30 P.3d 677, 684 (Colo. App. 2000).

[33] *State ex rel. Salazar v. Cash Now Store, Inc.*, 31 P.3d 161, 164 (Colo.2001).

[34] *Meyer v. Lamm*, 846 P.2d 862, 876 (Colo. 1993).

[35] *Williams v. Kunau*, 147 P.3d 33, 36 (Colo. 2006).

[36] *Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997).

[37] *Gallegos v. Colorado Ground Water Comm'n*, 147 P.3d 20, 28 (Colo. 2006).

[38] *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004).

[39] *City of Colo. Springs v. Powell*, 48 P.3d 561, 565 (Colo. 2002).

[40] *Vigil v. Franklin*, 103 P.3d 322, 330 (Colo. 2004).

[41] *Van Waters & Rogers, Inc. v. Keelan*, 840 P.2d 1070, 1074 (Colo. 1992).