

OVERVIEW of NEW JERSEY STANDARDS FOR APPELLATE REVIEW¹

Once a judge or agency has made such decisions and once the case has been appealed, the appellate court must look at the record and decide whether error has occurred. If it has, it then needs to decide whether the error warrants intervention. Often, it does not.

In deciding whether there was error and whether any error warrants appellate intervention, appellate courts do sometimes use the same standards that the trial court or agency used. ...

But they frequently use different standards, looking at the decision made by a trial judge or agency from a different point of view from that of the judge or agency. An appellate court, after all, only reviews decisions that have already been made; often the appellate court is not in as good a position to make those decisions as the judge or agency was. For that reason, many appellate standards differ from trial-level standards: they have built-in limits that make it difficult.

PLAIN ERROR

A. General Rule

Although an appellate court will consider allegations of error not brought to the trial judge's attention, it frequently declines to consider issues that were not presented at trial. Generally, unless such an issue (even a constitutional issue) goes to the jurisdiction of the trial court or concerns matters of substantial public interest, the appellate court will not consider it. *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973); see cases cited at Pressler, Current N.J. Court Rules, Comment 2 to R. 2:6-2.

If the error has not been brought to the trial court's attention, the appellate court will not reverse on the ground of such error unless the appellant shows harmful error, i.e., error "clearly capable of producing an unjust result." R. 2:10-2.

1. Major portions of this handout are excerpted from the 2005 article "NEW JERSEY STANDARDS FOR APPELLATE REVIEW" by Ellen T. Wry, Director, Central Appellate Research Staff, Appellate Division, New Jersey Superior Court (updated as of July 2005), available at:

<http://www.judiciary.state.nj.us/appdiv/appstand.pdf>

The article is very thorough and covers many specific issues not addressed here. You are well advised to download it and review it in its entirety.

Rule 2:10-2² reads, in full:

Any error or omission shall be disregarded by the appellate court unless it is of such a nature as to have been clearly capable of producing an unjust result, but the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.

Not any possibility of an unjust result will suffice. Stated in terms of its effect in a jury trial, the possibility must be “sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.” *State v. Macon*, 57 N.J. 325, 336 (1971).

B. Corollaries to Plain Error Rule

Frequently, an appellate court, besides invoking the plain error rule, assigns a certain interpretation to counsel's failure to raise the error below: it notes that that failure can be taken to mean that counsel did not consider the error to be significant in the context of the trial. *State v. Macon*, 57 N.J. 325, 333 (1971). One such example is counsel's failure to object to opposing counsel's remarks on summation. *State v. Wilson*, 57 N.J. 39, 50-51 (1970).

Errors created by counsel will not ordinarily be grounds for reversal. *State v. Harper*, 128 N.J. Super. 270, 276-77 (App. Div.), certif. denied, 65 N.J. 574 (1974).

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2. Generally, there may be a difference in the specific standard applied by a federal court or a state court to a specific type of alleged error. For that reason, counsel must carefully examine the appropriate standard of review in the specific jurisdiction. But Rule 2:10-2 establishes a significant difference in the **theory** of appellate review between the New Jersey courts and the federal courts. The rule **requires** that an error be disregarded “unless it is of such a nature as to have been clearly capable of producing an unjust result”. By contrast a federal court may disregard a claim of error if it is convinced that the error is harmless.

There is a significant difference between the “disregard ... unless” formulation of the New Jersey rules and the “disregard ... if” formulation of the federal courts.. The fundamental appellate process is the determination of the nature of the particular error raised on appeal in terms both of the standard of review applicable to it (error/no error) and of its magnitude (harmful/harmless). By virtue of Rule 2:10-2, a New Jersey appellate court will always consider **both** whether a claimed error is in fact error **and** whether it was harmless. While these are conceptually distinct, the actual judicial process in dealing with them is typically seamless. That is to say, the court's consideration of whether or not there was error, initially determined by application of the appropriate standard of review, inevitably involves it in the consideration of whether the error was harmless or not and that analysis is often a seamless process (that is, it considers all at once whether there was a harmful error). A federal appellate court, by contrast, will consider first if there was error and then may, but is not required to, address the issue of whether the error was so harmless that it need not bother with providing a remedy. Often the possibility of a harmless error will not be considered by a federal appeals court unless it is raised by a party to the appeal.

R. 2:10-2 that provides that “the appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.” This means that even when no party to the appeal raises a particular issue, the appellate court may raise it on its own “where upon the total scene it is manifest that justice requires consideration of an issue central to a correct resolution of the controversy and the lateness of the hour is not itself a source of countervailing prejudice.” *Center for Molecular Medicine and Immunology v. Twp. of Belleville*, 357 N.J. Super. 41, 48 (App. Div. 2003) (quoting *In re Appeal of Howard D. Johnson Co.*, 36 N.J. 443, 446 (1962)).

DISCRETIONARY RULINGS

A. General Rule

Certain decisions made by the court in the course of a trial are said to be addressed to the court's discretion and will be reversed on appeal only if an “abuse” or “mistaken exercise” of that discretion is shown. This is commonly called the “abuse of discretion” standard.

The abuse of discretion standard was explained by the Appellate Division in *Gillman v. Bally Mfg. Corp.*, 286 N.J. Super. 523, 528 (App. Div.), certif. denied 144 N.J. 174 (1996), as follows: “the trial court's exercise of discretion ... may be disturbed only if it is `so wholly insupportable as to result in a denial of justice.’ *Goodyear Tire and Rubber Co. v. Kin Properties, Inc.*, 276 N.J. Super. 96, 106, 647 A.2d 478 (App. Div.), certif. denied, 139 N.J. 290 (1994) (quoting *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 N.J. 474, 484, 323 A.2d 495 (1974)). `In reviewing the exercise of discretion it is not the appellate function to decide whether the trial court took the wisest course, or even the better course, since to do so would merely be to substitute our judgment for that of the lower court. The question is only whether the trial judge pursues a manifestly unjust course.’ *Gittleman v. Central Jersey Bank & Trust Co.*, 103 N.J. Super. 175, 179, 246 A.2d 757 (App. Div. 1967), rev'd on other grounds, 52 N.J. 503, 246 A.2d 713 (1968).”]

Sometimes this standard is stated in terms of a “clearly erroneous” concept (i.e., that the court will not be reversed unless its decision was clearly erroneous). See e.g. *State v. Simon*, 161 N.J. 416, 444 (1999) (trial court decision to be upheld unless “there was an abuse of discretion which renders the lower court's decision clearly erroneous”); *Graham v. Gielchinsky*, 126 N.J. 36, 363 (1991) (“ we are satisfied that the trial court's exercise of discretion was not so clearly erroneous as to have had the capacity to bring about an unjust result”). Note that the term “clearly erroneous” may also be used in reviewing factual findings. See below.

B. Exception

If a judge makes a discretionary decision, but acts under a misconception of the applicable law, the appellate court need not give the usual deference. The court instead must adjudicate the controversy in the light of the applicable law in order that a manifest

denial of justice be avoided. *State v. Steele*, 92 N.J. Super. 498, 507 (App. Div. 1966); *Kavanaugh v. Quigley*, 63 N.J. Super. 153, 158 (App. Div. 1960).

C. Examples of Discretionary Decisions:

1. **Mistrial:** Decision to grant or deny motion for mistrial. *State v. Winter*, 96 N.J. 640, 647 (1984); *State v. DiRienzo*, 53 N.J. 360, 383 (1969); *Greenberg v. Stanley*, 30 N.J. 485, 503 (1959).

2. **Adjournment:** Decision to deny a motion for an adjournment. *State v. D'Orsi*, 113 N.J. Super. 527, 532 (App. Div. 1970), certif. denied, 58 N.J. 335 (1971).

3. **Reading to Jury:** Decision to read or refuse to read certain testimony to jury. *State v. Wolf*, 44 N.J. 176, 185 (1965).

4. **Photos:** Decision to admit photos. *State v. Conklin*, 54 N.J. 540, 545 (1969).

5. **Sequestration:** Decision to sequester jury. *Pessini v. Massie*, 115 N.J. Super. 555, 562 (Law Div. 1971), aff'd sub. nom. *Eberhardt v. Vanarelli*, 121 N.J. Super. 293, 295 (App. Div. 1972); R. 1:8-6(b).

6. **Dispersal of Jury:** Decision to allow jury to disperse for lunch or the night. R. 1:8-6.

7. **Further Deliberation:** Decision to send jury back for further deliberations after it has announced a deadlock. *State v. Williams*, 39 N.J. 471, 484 (1963), cert. denied, 374 U.S. 855 (1963), 382 U.S. 964 (1965).

8. **Equitable Distribution:** Although what assets are available for distribution and valuation of assets are subject to sufficient credible evidence rule, issue of manner of allocation of assets and amount of award is addressed to judge's discretion. *Borodinsky v. Borodinsky*, 162 N.J. Super. 437, 443-44 (App. Div. 1978).

9. **Excluding or Admitting Evidence Under N.J.R.E. 403:** N.J.R.E. 403 specifically allows a judge, in his or her discretion, to exclude otherwise admissible evidence under specified circumstances. Most other evidence rules do not permit an exercise of discretion, so are not reviewed under this standard. But a ruling under N.J.R.E. 404 (b) whether to admit other crime evidence is reviewed under the abuse of discretion standard. *State v. Erazo*, 126 N.J. 112, 131 (1991); *State v. Ramseur*, 106 N.J. 123, 266 (1987).

10. **Dismissal of Criminal Case After Multiple Mistrials:** Judge may dismiss an indictment after two or more mistrials, but his or her discretion must be governed by the factors set out in *State v. Abbati*, 99 N.J. 418, 436 (1985).

11. **Grant or Denial of Attorneys Fees:** Judge has broad discretion as to when, whether and under what circumstances fees may be given. *Enright v. Lubow*, 215 N.J. Super. 306, 313-14 (App. Div.), certif. denied, 108 N.J. Super. 193 (1987).

12. Admission of Prior Crimes Evidence: Determinations on the admissibility of other-crime evidence are left to the discretion of the trial court. Such a decision will be reversed only for an abuse of discretion. *State v. Marrero*, 148 N.J. 469, 483 (1997); *State v. Ramseur*, 106 N.J. 123, 266 (1987).

13. Motion for Recusal: Whether a judge should disqualify himself or herself is a matter within the sound discretion of the judge. *Jadlowski v. Owens-Corning*, 283 N.J. Super. 199, 221 (App. Div. 1995). A judge cannot be considered partial or biased merely because of rulings that are unfavorable toward the party seeking recusal. *State v. Marshall*, 148 N.J. 89, 186-87 (1997).

14. Dismissal of Indictment: A decision on whether to dismiss an indictment is addressed to the sound discretion of the trial judge and will be reversed only for an abuse of discretion. *State v. Welek*, 10 N.J. 355, 364 (1952).

JURY VERDICT ALLEGEDLY AGAINST WEIGHT OF EVIDENCE

A. General Rule

Rule 2:10-1 reads in its entirety:

In both civil and criminal actions, the issue of whether a jury verdict was against the weight of the evidence shall not be cognizable on appeal unless a motion for a new trial on that ground was made in the trial court. The trial court's ruling on such a motion shall not be reversed unless it clearly appears that there was a miscarriage of justice under the law.

Thus, first, an appellate court will not consider an argument that a jury verdict is against the weight of the evidence unless the appellant moved for a new trial on that ground. *R. 2:10-1*; *Fiore v. Riverview Medical Center*, 311 N.J. Super. 361 (App. Div. 1998); *State v. Perry*, 128 N.J. Super. 188, 190 (App. Div. 1973), *aff'd*, 65 N.J. 45 (1974).

Second, the standard on appeal for review requires that the appellant show that "there was a miscarriage of justice under the law." *R. 2:10-1*.

To decide if there was a miscarriage, the appellate court defers to the trial court with respect to "intangibles" not transmitted by the record (e.g., credibility, demeanor, "feel of the case") but otherwise makes its own independent determination of whether a miscarriage of justice occurred. *Carrino v. Novotny*, 78 N.J. 355, 360 (1979); *Baxter v. Fairmont Food Co.*, 74 N.J. 588, 597-98 (1977); *Dolson v. Anastasia*, 55 N.J. 2, 6-8 (1969).

The "weight of the evidence" standard is not used in non-jury trials. *Fanarjian v. Moskowitz*, 237 N.J. Super. 395, 406 (App. Div. 1989). For the standard used in non-jury

trials (whether there was “sufficient credible evidence”), see the section on Findings of Fact by a Court Sitting Without a Jury, below.

B. Right to Appeal:

If a new trial was denied, movant can appeal denial as of right. If new civil trial was granted, opponent can appeal only by leave, since this is an interlocutory order. If a new trial is granted to a criminal defendant, the State has a right to seek leave to appeal. *State v. Sims*, 65 N.J. 359, 363 (1974). (The standards for deciding whether to grant leave are also set out in that case.)

C. Result of Reversal:

Where the appellate court decides that verdict in a criminal case is against the weight of the evidence, acquittal is not mandated. This is true even though a reversal based on insufficient evidence does require acquittal. *Tibbs v. Florida*, 457 U.S. 31, 42-43 (1982).

FINDINGS OF FACT BY A JUDGE SITTING WITHOUT A JURY

A. General Rule:

When error in a finding of fact of a judge or administrative agency is alleged, the scope of appellate review is limited. The court will only decide whether the findings made could reasonably have been reached on “sufficient” or “substantial” credible evidence present in the record, considering the proof as a whole. The court gives “due regard” to the ability of the factfinder to judge credibility. *Close v. Kordulak Bros.*, 44 N.J. 589, 599 (1965).

The classic statement of the standard of appellate review in civil non-jury cases can be found in the case of *Rova Farms Resort v. Investors Ins. Co.*, 65 N.J. 474, 483-484 (1974):

Considering first the scope of our appellate review of judgment entered in a non-jury case, as here, we note that our courts have held that the findings on which it is based should not be disturbed unless “***they are so wholly insupportable as to result in a denial of justice,” and that the appellate court should exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter. ***That the finding reviewed is based on factual determinations in which matters of credibility are involved is not without significance. ***Findings by the trial judge are considered binding on appeal when supported by adequate substantial and credible evidence. ***It has otherwise been stated that “our appellate function is a limited one: we do not disturb the factual findings and legal conclusions of the trial judge unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice,” ***and the appellate

court therefore ponders whether, on the contrary, there is substantial evidence in support of the trial judge's findings and conclusions. ***[Citations omitted].

The classic statement in criminal cases can be found in *State v. Johnson*, 42 N.J. 146, 162 (1964):

[The appeals court] must review the record ... not initially from the point of view of how it would decide the matter if it were the court of first instance. It should give deference to those findings of the trial judge which are substantially influenced by his opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy. (See the discussion by Brochin and Sandler, *supra*, on the "credibility" factor, 12 Rutgers L. Rev., at pp. 484-490).

The aim of the review at the outset is rather to determine whether the findings made could reasonably have been reached on sufficient credible evidence present in the record. This involves consideration of the proofs as a whole; the appraisal is not to be confined simply to those offered by the plaintiff, for the question is not simply whether there was enough evidence to withstand a defense motion at the end of the plaintiff's case or of the entire case. When the reviewing court is satisfied that the findings and result meet this criterion, its task is complete and it should not disturb the result, even though it has the feeling it might have reached a different conclusion were it the trial tribunal. That the case may be a close one or that the trial court decided all evidence or inference conflicts in favor of one side has no special effect.

But if the appellate tribunal is thoroughly satisfied that the finding is clearly a mistaken one and so plainly unwarranted that the interests of justice demand intervention and correction (see e.g., the expressions in *Capone v. Norton*, 11 N.J. Super. 189, 193-194 (App. Div. 1951), affirmed 8 N.J. 54 (1951); *Trusky v. Ford Motor Co.*, 19 N.J. Super. 100, 103-105 (App. Div. 1952); and *Greenfield v. Dusseault*, *supra* (60 N.J. Super., at p. 444)), then, and only then, it should appraise the record as if it were deciding the matter at inception and make its own findings and conclusions. While this feeling of "wrongness" is difficult to define, because it involves the reaction of trained judges in the light of their judicial and human experience, it can well be said that that which must exist in the reviewing mind is a definite conviction that the judge went so wide of the mark, a mistake must have been made. This sense of "wrongness" can arise in numerous ways -- from manifest lack of inherently credible evidence to support the finding, obvious overlooking or under-evaluation of crucial evidence, a clearly unjust result, and many others.

Note that in both the civil and criminal spheres, courts sometimes talk in terms of whether the factual determination was "clearly erroneous." See e.g. *Halliwell v. Halliwell*,

326 N.J. Super. 442, 461 (App. Div. 1999). This is the typical statement of the standard used in the federal courts for factual findings. A factual finding in the federal courts is clearly erroneous when, although there is evidence to support it, the reviewing court ... is left with a definite and firm conviction that a mistake has been committed.” United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The term isn’t often used in the state courts, but it is not incorrect. Nonetheless, the more detailed analysis of Johnson and Rova Farms is better, since that term is also used at times to describe situations where an abuse of discretion is found.

B. Prerequisite

Trial judges must make findings of fact which are sufficiently clear and complete to permit review. Otherwise the court will remand, for such findings of fact, to the agency (Katz v. Township of Howell, 67 N.J. 51, 63 (1975); In re Plainfield-Union Water Co., 11 N.J. 382, 396 (1953)) or to the court. If the findings are bad enough and the record sparse, the court may order a whole new trial. Hewitt v. Hollahan, 56 N.J. Super. 372, 382-84 (App. Div. 1959).

REVIEW OF ADMINISTRATIVE AGENCY RULINGS

I. Factual Determinations

The basic rule as to appellate review of fact-finding by administrative agencies may be found in Jackson v. Concord Co., 54 N.J. 113, 117 (1969). There, the Court said the appeals court’s role was to determine:

whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering the proofs as a whole with due regard to the opportunity of the one who heard the witnesses to judge of their credibility and with due regard also to the agency’s expertise where such expertise is a pertinent factor.

Overall, the standard of review requires that the agency’s decision be deferred to unless it is arbitrary, capricious, or unreasonable, or unsupported by substantial credible evidence in the record as a whole or inconsistent with its statutory mission. See Brady v. Board of Review, 152 N.J. 197, 210-211 (1997).

II. Rulemaking

As stated by Judge Pressler, “As a general proposition all legislative and legislative type actions, including rule promulgation, are presumed reasonable and required to be sustained if not arbitrary or unreasonable to effectuate the Legislature’s purpose in granting the agency authority.” Pressler, Current N.J. Court Rules, Comment 8.1 to R. 2:10-2. Stated another way, as long as the rules are within the scope of the agency’s

authority and are of a legislative (rulemaking) character, there is a rebuttal presumption of validity.

III Agency Interpretation of its Own Statutes and Rules

Deference is given by courts to the interpretation and implementation of a statute by the agency responsible for enforcing it as well as to the agency's interpretation of its own statutes. *National Waste Recycling Inc. v. MCI*, 150 N.J. 209, 228 (1997). However, while an appellate court respects the agency's expertise, ultimately the interpretation of statutes is a judicial, not administrative, function and the court is in no way bound by the agency's interpretation. *Mayflower Securities Co. v. Bureau of Sec.*, 64 N.J. 85, 93 (1973).

REVIEW OF LEGAL DETERMINATIONS

As explained by Judge Pressler, "the appellate court owes no deference to the trial court's `interpretation of the law and the legal consequences that flow from established facts...' and, hence, that its review of legal issues is *de novo*. *Manalapan Realty v. Township Committee*, 140 N.J. 366, 378 (1995). Thus the appellate court is not bound by the trial court's application of law to the facts or its evaluation of the legal implications of facts where credibility is not in issue." Pressler, *Current N.J. Court Rules*, Comment 3.1 to R. 2:10-2. This standard is called a "plenary" or "de novo" standard of review.

HARMLESS ERROR

Not every error that occurs during a trial will result in a reversal of a verdict or judgment. No relief will be granted if the error is "harmless error." An error will be found "harmless" unless there is a reasonable basis to conclude that the error contributed to the verdict. Harmless error will be disregarded by the appellate court. See *State v. Macon*, 57 N.J. 325, 337-38 (1971).

This is true even if the error is of constitutional dimension. *State v. Macon*, 57 N.J. 325, 338 (1971); *State v. Slobodian*, 57 N.J. 18, 23 (1970). However, the standard for determining whether constitutional error warrants reversal differs from the usual standard. In the ordinary case, the appellant bears the burden of showing both that there was an error and that the error had a real capacity to influence the result in the case. In a case of constitutional error, however, the appellant need only show that such error occurred. The burden then shifts to the prosecution to show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. Scherzer*, 301 N.J. Super. 363, 441 (App. Div 1997). This is often referred to as the "harmless beyond a reasonable doubt" standard.