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MONTANA SUPREME COURT STANDARDS OF REVIEW

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COMMENTARY

Montana, like most appellate courts, requires a separate statement of the standards that apply to the review of the issues presented on appeal.¹ This is not a pro forma requirement and the practitioner who ignores the significance of the standards of review risks losing her case on appeal. The requirement for a statement of standards of review first appeared in the Montana rules in 2007.² Many Montana practitioners, following the practice in the Ninth Circuit, had been formally setting out the standards of review before 2007. In 1993 the Court began including a separate section in its opinions that articulated the applicable standards of review,³ although it had spoken to them repeatedly in the decades prior.

Other authors have warned about an attorney's duty to know and

¹Rule 12(1)(e), Mont. R. App. P. See Rule 28(a)(9)(B), Fed. R. App. P.

²Rule 12(1)(e), Mont. R. App. P. (2007); Supreme Ct. Ord. No. AF 07-0016 (July 3, 2007).

³See *Berry v. KRTV Commcations, Inc.*, 262 Mont. 415, 419, 865 P.2d 1104, 1107 (1993).

understand standards of review.⁴ These warnings are sometimes unheeded.⁵ But no one has set them out in an organized fashion or explained their meaning and significance.⁶

Below I set out the standards of review applicable to various cases and issues before the Montana Supreme Court. I explain what the various standards mean and how the appellate attorney should consider them. I will

⁴Hon. James C. Nelson, *How to Be Ready for Your Day in Court*, Mont. Lawyer, September 1995, at 10 (“It is a critical first step in the appellate process that counsel’s focus be directed to the particular issue being appealed and to the standard of review applicable to that issue.”); see Julia A. Follansbee, *The Ninth Circuit: An Inside Perspective*, Mont. Lawyer, May 1997, at 9, 21 (“Of all the mistakes advocates make, using the wrong standard of review is the most irritating to the Court.”)

⁵See *Mlekush v. Farmers Ins. Exch.*, 2015 MT 302, ¶ 8, ___ Mont. ___, ___ P3d ___. (“The parties dispute the applicable standard of review. Mlekush argues that we should review the District Court’s application of the law for correctness, while Farmers argues that the appropriate standard is whether the District Court abused its discretion. We review a district court’s factual findings for clear error. A district court’s determination whether legal authority exists for an award of attorney fees is a conclusion of law, which we review for correctness. We apply de novo review to mixed questions of law and fact. Thus, although we review a district court’s factual determinations for clear error, ‘whether those facts satisfy the legal standard is reviewed de novo.’ This bifurcated standard of review ‘affords appropriate deference to the trial court’s fact-finding role and responsibility, while providing this Court with the opportunity to review legal conclusions and the application of legal standards de novo.’”) (citations omitted).

⁶A former Ninth Circuit clerk compiled that Court’s standards of review in 1984. Tom Carter, *Standards of Review* (1984). The standards are now available on the Court’s website. http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000368

also point out those few occasions when the Court has been sloppy, inaccurate, or inconsistent in articulating the standards so that both lawyers and judges may avoid those statements. I will also note that some articulations of the standards appear contradictory or erroneous and I will explain why they are not. Three sections, with tables of contents, follow. The first addresses the definitions of the standards. The second addresses the standards applicable to issues on appeal in civil cases. The third section sets out the standards that apply to issues that arise in criminal appeals.

A standard of review is not a standard for decision. Although some of the discussion and the list of cases at the end of this article mention a standard for decision, this article does not attempt to address them. The simplest way to distinguish standard of review from standard of decision is if the standard addresses how much deference the Court gives to the decisions of the court or agency that are now before them. For example, the Court frequently says,

Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The standard of review of a district court's grant of summary judgment is *de novo*, using the same criteria applied by the district court under M.R. Civ. P. 56. Summary judgment is appropriate only when the "pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue of material fact" and the moving party is entitled to judgment as a matter of law. Conclusory statements, speculative assertions, and mere denials are insufficient to

defeat a motion for summary judgment.⁷

In this statement, only “review . . . is de novo” describes the standard of review. The remainder of the paragraph describes the standard for decision, which applies in both the district courts and in the Supreme Court. That said, both need to be articulated and applied in the argument.

THE THREE STANDARDS OF REVIEW OF ISSUES BEFORE THE MONTANA SUPREME COURT.

Like other appellate courts, the Montana Supreme Court tends to adhere to three basic standards. These are *de novo* review, abuse of discretion, and clear error. There are, however, gradations within those standards. Some issues, for example, are reviewed for “slight” abuse of discretion. In some cases, the Court describes its scope of review as “plenary.” In what follows, I define the standard of review and the Court’s variations on each theme.

De Novo Review

All standards of review are rooted in the amount of deference shown the court or administrative agency from which the appeal is taken. *De novo* review, which is sometimes described as review for correctness, shows no

⁷*Davis v. State, Dep't of Pub. Health & Human Servs.*, 2015 MT 264, ¶ 7, ___ Mont. ___, ___ P.3d ___. (citations omitted).

deference to the court below.⁸ Under the *de novo* standard, the Supreme Court considers the issue as if the tribunal below had made no decision. If the Supreme Court disagrees with the district court (and the appellant was substantially prejudiced) it will reverse the district court's judgment.

The power to review *de novo* comes from the Supreme Court's inherent and supreme power to interpret the law. It also applies where the Supreme Court is in as good a position as the tribunal below to determine the case. For example, when the district court or workers compensation court has decided the case on the papers filed before it,⁹ the Court will engage in *de novo* review.

⁸The "review for correctness" standard is misleading. It suggests that the district court may have been right in its interpretation. Whether the district court was correct or not is immaterial to the standard of review of conclusions of law. *Baertsch v. Cnty. of Lewis & Clark*, 256 Mont. 114, 119, 845 P.2d 106, 109 (1992) ("We are not bound by the trial court's conclusions and remain free to reach our own.") The Supreme Court has the last say on interpretation of law. Conceptually, it is better to think of the correctness standard as the Supreme Court's review to determine if the district court agreed with it.

⁹See e.g. Rule 56, Mont. R. Civ. P.; Mont. Code Ann. § 46-21-201(5) (2013); *Currey v. 10 Minute Lube*, 226 Mont. 445, 448, 736 P.2d 113, 115 (1987) ("In cases where depositions are the evidence, 'this court, although sitting in review, is in as good a position as the Workers' Compensation Court to judge the weight to be given such record testimony, as distinguished from oral testimony, where the trial court actually observes the character and demeanor of the witness on the stand.'"); accord, *Banco v. Liberty Nw. Ins. Corp.*, 2012 MT 3, ¶ 8, 363 Mont. 290, 268 P.3d 13.

The Court also refers to its “plenary” power of review. Although other appellate courts treat “plenary review” as synonymous with *de novo* review,¹⁰ it appears that the Montana Supreme Court sometimes attaches more significance to the phrase.¹¹ That is, under plenary review, the Court will examine all the circumstances that arose in the court below with respect to the issue on appeal.¹² The Court will, understandably, exercise plenary power over matters that are its alone to consider, such as whether or not an

¹⁰See *United States v. Waites*, 198 F.3d 1123, 1126 (9th Cir. 2000).

¹¹See *State v. Pound*, 2014 MT 143, ¶ 20, 375 Mont. 241, 246, 326 P.3d 422 (stating, “This Court exercises *de novo* plenary review of a district court’s decision on constitutional issues”). *Pound* may be lazy drafting. If the Court treats plenary review as somewhat broader than *de novo* review, then the phrase should be “plenary, *de novo*” or “plenary and *de novo*.” *But see State v. Ring*, 2014 MT 49, ¶ 12, 374 Mont. 109, 321 P.3d 800 (stating “our standard of review is plenary to the extent that a discretionary ruling is based on a conclusion of law. In such circumstances, we review a district court’s decision *de novo*, to determine whether the court interpreted the law correctly”) (citation omitted).

¹²See *In re A.S.*, 2004 MT 62, ¶ 9, 320 Mont. 268, 270, 87 P.3d 408, 411. In *A.S.*, the Court held that it would exercise plenary review when a parent claimed that her lawyer was ineffective in a case in which her parental rights were terminated. Compare, *State v. Turner*, 2000 MT 270, ¶ 47, 302 Mont. 69, 83, 12 P.3d 934, 943, a death penalty case in which the Court described its review as *de novo* but did not go into as great an examination of the performance of counsel as it did in *A.S.* and its progeny. See also *State v. Northcutt*, 2015 MT 267, ¶ 5, ___ Mont. ___, ___ P.3d ___; *State v. Charlie*, 2010 MT 195, ¶ 21, 357 Mont. 355, 239 P.3d 934, where the Court applied plenary review to claims that the defendant was absented from critical stages of the trial and essentially conducted its own investigation into the circumstances.

appellant has waived its right to appeal.¹³

In equity, under Mont. Code Ann. § 3-2-204(5),

In equity cases and in matters and proceedings of an equitable nature, the supreme court shall review all questions of fact arising upon the evidence presented in the record, whether the same be presented by specifications of particulars in which the evidence is alleged to be insufficient or not, and determine the same, as well as questions of law, unless for good cause a new trial or the taking of further evidence in the court below be ordered. Nothing herein shall be construed to abridge in any manner the powers of the supreme court in other cases.

The Court has not, however, assumed the duty conferred upon it by the statute. In *McCann Ranch, Inc. v. Quigley-McCann*, 276 Mont. 205, 208, 915 P.2d 239, 241 (1996), *overruled on other grounds*, *Hansen v. 75 Ranch Co.*, 1998 MT 77, ¶ 40, 288 Mont. 310, 957 P.2d 32, the Court held that it was also bound by Rule 52(a), Mont. R. Civ. P., which required that findings of fact be upheld unless they were clearly erroneous.¹⁴

The Montana Supreme Court tends to reject arguments that it should defer to an administrative agency's particular expertise when it reviews the

¹³*Tempel v. Benson*, 2015 MT 84, ¶ 7, 378 Mont. 401, 403, 346 P.3d 342, 343.

¹⁴*McCann* overlooked Rule 1, Mont. R. Civ. P., which holds that the Rules of Civil Procedure apply to the district courts. *But see In re Marriage of Glanville*, 272 Mont. 22, 24, 899 P.2d 527, 528 (1995) (applying a less stringent standard to § 3-2-204(5) than that of Rule 52(a)).

agency's conclusions of law in a contested case.¹⁵ It has said, however, that it will give "respectful consideration" to the agency's long-standing interpretation and application of a statute that the agency regularly applies.¹⁶ But this is a somewhat empty promise, considering the Court's assertion that it will not abdicate its role as the final arbiter of the meaning of a statute.

The current view is this: an agency's interpretation of a statute is not entitled to deference merely because it is within the purview of the agency. Rather, the agency's "long and continued contemporaneous and practical interpretation of a statute" will serve as a non-binding extrinsic aid to the construction and interpretation of the statute. In addition, where it appears that people and entities who regularly appear before the agency have relied and continue to rely on the agency interpretation, the court will take that fact into consideration.¹⁷ But even these will not prevent the Court from concluding that the agency's interpretation was wrong. Although this

¹⁵*City of Great Falls v. Montana Dep't of Pub. Serv. Regulation*, 2011 MT 144, ¶¶ 9-11, 361 Mont. 69, 254 P.3d 595.

¹⁶ *Mont. Power Co. v. Mont. Pub. Serv. Comm'n*, 2001 MT 102, ¶¶ 24-25, 305 Mont. 260, 26 P.3d 91 (quoting *Doe v. Colburg*, 171 Mont. 97, 100, 555 P.2d 753, 754 (1976)); accord, *Molnar v. Fox*, 2013 MT 132, ¶ 27, 370 Mont. 238, 301 P.3d 824.

¹⁷*Montana Power Co.*, 2001 MT 102, ¶ 24.

approach seems impractical and to some degree unfair, it nevertheless gives respect to the legislative branch, which has written the law, and the judicial branch, which reads it. It balances the scales between the legislature and the executive, who, without that balance, might be inclined to second-guess the legislature's judgment by applying the law in a manner that the legislature did not intend. But the Court's most recent pronouncement on the subject, *Cruson v. Missoula Elec. Co-op, Inc.*,¹⁸ has thrown this jurisprudence into question. Without any further analysis, the Court said,

In deciding whether the Board's legal conclusions are correct, we review the record of all prior proceedings. *See Mont. Dep't of Corr.*, ¶ 24. "We apply a deferential standard of review to an agency's interpretation in matters of its expertise." *Somont*, ¶ 18 (citing *Gypsy Highview*, 221 Mont. at 16, 716 P.2d at 623 (deferring to the Board's conclusion as to unsafe working conditions because the Board had expertise in the area and was in better position to determine safety)).¹⁹

It is not clear if *Cruson* articulates a parallel line of decisions governing review of agency decisions or if it simply applies a shorthand "deferential standard of review" that encompasses the *Montana Power* criteria.

¹⁸ *Cruson v. Missoula Elec. Co-op, Inc.*, 2015 MT 309, ____ Mont. ____, ____ P.3d ____.

¹⁹*Cruson*, ¶ 31.

ABUSE OF DISCRETION

According to a hyperbolic comment by Mark Hermann, a former Ninth Circuit law clerk and experienced appellate attorney, “Abuse of discretion’ means ‘summarily affirm.’”²⁰ I describe the abuse of discretion standard to my students in this way: when a judge exercises discretion he may decide a question before him in favor of the party and be correct, or he may decide the same question against the party, and be correct. Of course, the judge is not “correct” in any objective sense. The formulation means that he simply will not be reversed on appeal in the absence of an abuse of discretion.

The definition of abuse of discretion is imprecise.

The test for abuse of discretion is whether the trial court acted arbitrarily without employment of conscientious judgment or exceeded the bounds of reason resulting in substantial injustice.²¹

The Court goes on,

A decision is arbitrary if it appears to be ‘random, unreasonable, or seemingly unmotivated, based on the existing record.’²²

²⁰<http://abovethelaw.com/2011/03/inside-straight-standard-of-review-decides-cases/> (accessed September 25, 2015).

²¹*Jarvenpaa v. Glacier Elec. Coop., Inc.*, 1998 MT 306, ¶ 13, 292 Mont. 118, 970 P.2d 84 (citation omitted); *C. Haydon Ltd. v. MT Min. Properties, Inc.*, 286 Mont. 138, 146, 951 P.2d 46, 51 (1997).

²²*In re Petition to Transfer Territory from Poplar Elementary Sch. Dist. No. 9*, 2015 MT 278, ¶ 10, ___ Mont. ___, ___ P.3d ___; *In re Petition to Transfer From Dutton*, 2011 MT 152, ¶ 7, 361 Mont. 103, 259

The abuse of discretion standard is better understood in terms of what appellate courts consider to be limits on their power. That is, even if the appellate judge thinks she would have decided the question differently from the district judge, she will not, under the abuse of discretion standard, reverse the court below on that ground.

Within this imprecise definition we do find, however, that the Court considers some actions to be abuses of discretion. “A court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”²³

There are some confusing definitions of the standard. For example, in awarding attorney’s fees to a spouse or former spouse in a dissolution case, the Court has said, “A district court has abused its discretion if substantial evidence does not support its award of attorney’s fees.”²⁴ This is the definition of clear error.²⁵ What the Court is trying to say, I think, is that if substantial evidence does not support an award of fees, then the award is

P.3d 751 (citing *Silva v. City of Columbia Falls*, 258 Mont. 329, 335, 852 P.2d 671, 675 (1993)).

²³*State v. Ziolkowski*, 2014 MT 58, ¶ 11, 374 Mont. 162, 321 P.3d 816.

²⁴*In re Marriage of Dennison*, 2006 MT 56, ¶ 23, 331 Mont. 315, 132 P.3d 535

arbitrary and therefore an abuse of discretion. But what if substantial evidence does not support some element of the award of fees? The answer is that there will be an abuse of discretion only if the judge relied upon that element in making the award of fees. If the award is not based on a finding of fact that is not supported by substantial evidence, there can be no abuse of discretion. In the same vein, if the award is based on several findings of fact, any one of which is supported by substantial evidence and any one of which warrants an award of fees, then the absence of substantial evidence to support the other findings is immaterial.

The deference shown the trial court is premised upon the idea that the judge below is better aware of the circumstances of the case at the time of his decision than is the appellate court. Thus the Supreme Court will defer to the judge on issues of case management, admissibility of evidence, trial management, and other instances in which the judge considers and weighs the circumstances of the case and of the parties.

Like the *de novo* standard, the abuse of discretion standard has gradations. These range from “slight” to “manifest.” These measures, too, are imprecise.²⁶ They may be thought of as predictions of the probability of

²⁶“A manifest abuse of discretion is one that is obvious, evident, and unmistakable.” *Ditton v. Dep’t of Justice Motor Vehicle Div.*, 2014 MT 54, ¶ 15, 374 Mont. 122, 127, 319 P.3d 1268. But it must also be “so significant as

reversal on abuse of discretion grounds or the application of a policy independent of the standard of review that renders it more or less strict.

CLEAR ERROR OR CLEARLY ERRONEOUS

This is the strictest standard of review and it is generally reserved for review of the trial court's or agency's findings of fact. Once again, its definition is imprecise:

A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if this Court is left with a definite and firm conviction that the District Court made a mistake.²⁷

“Evidence is substantial if a reasonable mind might accept it as adequate to support a conclusion.”²⁸ A caveat accompanies these principles. The reviewing court, under the clearly erroneous standard, may conclude that there is substantial evidence to support the finding but nevertheless

to materially affect the substantial rights of the complaining party.” *Willing v. Quebedeaux*, 2009 MT 102, ¶ 19, 350 Mont. 119, 204 P.3d 1248; *O'Connor v. George*, 2015 MT 274, ¶ 17, ___ Mont. ___, ___ P.3d ___.

²⁷*In the Matter of J.M.W.E.H.*, 1998 MT 18, ¶ 27, 287 Mont. 239, 954 P.2d 26.

²⁸*State v. Barrick*, 2015 MT 94, ¶ 11, 378 Mont. 441, 443, 347 P.3d 241, 243; *State v. Coluccio*, 2009 MT 273, ¶ 40, 352 Mont. 122, 214 P.3d 1282.

conclude that the court below committed clear error.²⁹

The Supreme Court accords the trial judge and jury the greatest deference under this standard because they, not the appellate court, are in a position to view the witnesses, hear the evidence, resolve conflicts among the evidence, and consider the evidence in relation to other evidence in the trial or hearing.³⁰ A judge's express finding about the credibility of a witness will virtually insulate her findings of fact from being overturned.³¹

²⁹"We have long recognized that '[s]ubstantial evidence and clearly erroneous are not synonymous[.]' *Interstate Prod. Credit Ass'n v. DeSaye*, 250 Mont. 320, 323, 820 P.2d 1285, 1287 (1991). Thus, the court may determine that '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948); *DeSaye*, 250 Mont. at 323, 820 P.2d at 1287." *Heavirland v. State*, 2013 MT 313, ¶ 16, 372 Mont. 300, 311 P.3d 813.

³⁰*Meine v. Hren Ranches, Inc.*, 2015 MT 21, ¶ 20, 378 Mont. 100, 109, 342 P.3d 22, 29; see *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002), *aff'd*, 540 U.S. 644 (2004). As the Ninth Circuit puts it, "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish." *Hayes v. Woodford*, 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) (internal quotation omitted).

³¹"[I]t is within the province of the District Court to determine the credibility of witnesses and the weight to be given their testimony, and we will not disturb those determinations on appeal. *In re B.J.T.H.*, 2015 MT 6, ¶ 16, 378 Mont. 14, 340 P.3d 557; *In Matter of J.A.B.*, 2015 MT 28, ¶ 25, 378 Mont. 119, 127, 342 P.3d 35, 42. It is tempting to say that findings of credibility are unreviewable, but it is conceivable that a judge could engage in a manifest abuse of discretion in making that finding. For example, the judge's finding that members of a particular race are not trustworthy

PLAIN ERROR

When a party fails to raise an issue in the tribunal below, whether by motion or by objection, the issue is generally considered to be waived on appeal.³² The Court, however, will engage in review for plain error. The current standard was articulated in *State v. Finley*:³³

this Court may discretionarily review claimed errors that implicate a criminal defendant's fundamental constitutional rights, even if no contemporaneous objection is made and notwithstanding the inapplicability of the § 46–20–701(2), MCA, criteria, where failing to review the claimed error at issue may result in a manifest miscarriage of justice, may leave unsettled the question of the fundamental fairness of the trial or proceedings, or may compromise the integrity of the judicial process.³⁴

Since *Finley*, claims of plain error have been presented in scores of cases. A quick survey of those cases shows that the Court is not miserly in conducting plain error review.

The Court will, apparently with less hesitation, grant plain error

witnesses would be an abuse of discretion.

³²Mont. Code Ann. § 46–20–104(2) (2013); .

³³*State v. Finley*, 276 Mont. 126, 915 P.2d 208 (1996), *overruled on other grounds*, *State v. Gallagher*, 2001 MT 39, ¶ 21, 304 Mont. 215, 19 P.3d 817.

³⁴*Finley*, 276 Mont. at 137, 915 P.2d at 215.

review in cases of civil commitment.³⁵

CONSIDERING AND APPLYING THE STANDARDS

By now it should be apparent that the standard of review is critical to the prospects of an appellant's and, conversely, an appellee's success. Claims of insufficient evidence are rarely successful. A determination that the court below has abused its discretion is only slightly more common. Whenever you can do so reasonably, cast the issue in a form that triggers the broadest scope of review. For example, rulings on the admissibility of evidence are governed by an abuse of discretion standard and rarely result in reversal. If, however, the trial judge's ruling is based on an incorrect interpretation of the rule of evidence, review is *de novo*.

Concepts of prejudice also find their way into the standards of review and you must be conscious of this when you brief and argue your case. Even where you satisfy the standard of review, the "no harm, no foul" rule is in effect.

You should also be conscious that one standard of review is often

³⁵*In re N.A.*, 2013 MT 255, ¶¶ 12, 26-39, 371 Mont. 531, 309 P.3d 27 (reviewing untimely request for jury trial).

nested within another. For example, a ruling on a motion to dismiss based on the running of the statute of limitations will be reviewed *de novo* because this is a mixed question of law and fact. The calculation of the time period, however, will be reviewed under a clearly erroneous standard. The determination of when the statute began to run will be reviewed for abuse of discretion. In another case, *McClue v. Safeco Ins. Co. of Illinois*, 2015 MT 222, 380 Mont. 204, 354 P.3d 604, 606, the Supreme Court observed that, although rulings on summary judgment are reviewed *de novo*, the district court's ruling that the non-movant's expert's testimony was not admissible was reviewed for an abuse of discretion.