

Identifying procedural defects in an appellant's arguments

How to prevent an egregious reversal when you are the respondent

By Jerry Clausen

Probably no disappointment is greater for a plaintiff's attorney than suffering a defense verdict at trial – unless, perhaps, it is winning a plaintiff's verdict at trial and then seeing it reversed on appeal.

Being a respondent on appeal brings with it many procedural advantages. The most fundamental principle of appellate review is the presumption of correctness. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2013) ¶8:15, p. 8-5.) Under it, all intendments and presumptions are indulged to support the judgment on matters as to which the record is silent, and error must be affirmatively shown. (E.g., *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) In practical application, this means that the appellate court will be looking for ways to affirm the trial court ruling – not ways to overturn it. "Appellate courts *never speculate* that trial court error occurred. Any ambiguity in the record is resolved *in favor* of the appealed judgment or order." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶8:16, p. 815.)

Virtually every attorney knows that, on appeal, the burden is on the appellant to establish that the trial court committed error, that the appellant preserved the error for appeal, and that the error caused sufficient prejudice to warrant reversal. But experience teaches that attorneys who do not regularly handle appeals are sometimes unaware of nuances in these three procedural areas, and that as a consequence they sometimes miss arguments concerning the standard of review, the failure to preserve error for appeal, or the prejudicial effect of an error that could make a difference in preserving a victory in the trial court.

What follows is a discussion of some of these nuances, presented by way of hypothetical examples. The objectives are to demonstrate the importance of effective attacks on procedural infirmities in an appellant's arguments and to sharpen the trial attorney's ability to identify the presence of those infirmities.

Is the standard of review asserted by appellant correct?

Example 1: Plaintiff motorcyclist is struck by another vehicle and injured. He sues the investigating police officer, claiming that at the scene he asked the officer to obtain the other driver's identifying information and that the officer, after assuring him that he would, failed to do so. The officer claims that when he arrived the motorcyclist had already been transported from the scene. The trial judge, citing case law holding that a special relationship may arise when a public employee expressly or impliedly promises to undertake a special duty on a plaintiff's behalf, rules that the officer owed the plaintiff an affirmative duty to obtain the identifying information. The officer challenges this ruling on appeal, asserting that the issue of duty is one of law that is reviewed de novo.

Analysis: It is of course generally true that duty is indeed a question of law that is reviewed de novo. (See, e.g., *Cabral v. Ralph's Grocery Co.* (2011) 51 Cal.4th 764, 770-771.) But whether the appropriate standard of review is de novo in this case actually depends on the precise nature of the officer's contention on appeal. While it is true that the *existence* and *scope* of a defendant's duty of care are legal questions for the court, when the facts giving rise to a duty are disputed, the trier of fact determines the existence of those facts. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1162, fn. 4.) In Example 1, the fact that would give rise to a special relationship (i.e., whether the officer promised at the scene to obtain the other driver's identifying information) was disputed. The trial court impliedly found this fact in favor of the plaintiff when it ruled that the officer owed the plaintiff a duty. This implied factual finding should be reviewed for substantial evidence. (See *Strong v. State of California* (2011) 201 Cal.App.4th 1439, 1452-53 [appellate court will not disturb trial court's determination of facts underlying the existence of special relationship].) On the other hand, the question of whether this factual finding gave rise to the *existence* of a duty was indeed a legal question that should be reviewed de novo.

Comment: Often the appellant will recite only the standard of review for the general type of ruling he or she is challenging on appeal. But the fact is that a ruling may – and indeed often does – embody multiple subsidiary rulings, some of which may be implicit rather than explicit, and different standards of review may apply to those subsidiary rulings. The ruling on duty in Example 1 provides one example. But the same analysis is often applicable in other situations. For example, rulings on motions are typically reviewed either de novo or for abuse of discretion. But if, in ruling on a motion, the court must resolve disputed factual

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issues, the court's findings on those issues are commonly reviewed for substantial evidence. (E.g., *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 257 [ruling on motion for relief from default reviewed de novo, but findings of fact supporting the ruling reviewed for substantial evidence].) The respondent should analyze the component parts of each challenged ruling to determine not only whether the standard of review advocated by the appellant is the correct one but also whether it is the standard applicable to each subsidiary determination called into question by the appellant's challenge.

Was the asserted error preserved for review?

Example 2: A branch manager is terminated by his employer. His employment contract entitled him to a bonus based on the profits generated by the branch. He sues the employer, claiming that the employer refused to pay him a bonus that was fully earned before he was fired. The employer contends that the plaintiff was guilty of unclean hands because he delayed reporting workers compensation claims that would have reduced the branch's profits (and hence the bonus) had they been timely reported.

Defense counsel presents the testimony of a vice-president who explains the complicated formula by which the bonus is calculated. Defense counsel then seeks to call the manager of a different branch, stating that the witness was in a position similar to the plaintiff, will testify as to his understanding of how the bonus works with respect to a branch manager, and will explain what the effect of the bonus was on him. The plaintiff objects on the ground the witness was not included in the employer's disclosure pursuant to rule 26(a) of the Federal Rules of Civil Procedure. (See Fed. Rules Civ.Proc., rule 37(c)(1) [witness not disclosed under rule 26 should be excluded as discovery sanction].) The employer counters that the witness was included in the *plaintiff's* Rule 26 disclosure. The judge excludes the witness – not for failure to disclose under Rule 26 but on the ground that the judge deems the witness's testimony irrelevant. The employer appeals, arguing that the exclusion was error.

Analysis: The plaintiff can of course argue that the witness's testimony was indeed irrelevant. And even though the judge expressly based his ruling solely on the ground of irrelevancy, the plaintiff can also argue that the witness was properly excluded because of the employer's failure to disclose him under Rule 26. (*United States v. Best* (9th Cir. 1978) 573 F.2d 1095, 1100-01 [appellate court may affirm lower court ruling even though lower court relied upon wrong ground]; *Ceja v. Department of Transportation* (2011) 201 Cal.App.4th 1475, 1483 [exclusion of evidence will be sustained if proper on any theory].)

But the plaintiff should also argue that any error in excluding the witness was *waived* due to the employer's failure to make an adequate offer of proof. In federal court, a party generally cannot complain on appeal of the exclusion of evidence unless the substance of the evidence was made known to the trial court by an offer of proof or otherwise. (Fed. Rules Evid., rule 103(a)(2).) For an offer of proof to be adequate in federal court, the proponent must explain what it expects to show and the grounds for which it believes the evidence to be admissible so that the trial court is on notice of the purpose for which the evidence is offered. (*Polys v. Trans-Colorado Airlines, Inc.* (10th Cir. 1991) 941 F.2d 1404, 1407.) California's rule is similar: a contention that evidence was erroneously excluded is waived unless the "substance, purpose, and relevance" of the evidence was "made known" to the court by an offer of proof or otherwise. (Evid. Code, § 354(a).) The nebulous offer of proof in Example 2 failed to satisfy these requirements.

Comment: Any time an appellant claims error in the exclusion of evidence the record should be closely examined to determine precisely what was made known to the trial court concerning the proffered evidence. Trial attorneys are sometimes surprised to learn the rigor required for an adequate offer of proof. (See, e.g., *United States ex rel. Veal v. DeRobertis* (7th Cir. 1982) 693 F.2d 642, 647-648 [offer of proof that alibi witnesses would testify murder defendant was "at a place other than the place [where] the shots were fired" provided "absolutely no information" and "fell far short of what is required" for adequate offer of proof].)

Example 3: The plaintiff, a minor, regularly goes to a recreational center after school. She is sexually molested at the center by another participant who is also a minor. She sues the recreational center, contending that it negligently failed to protect her from the other minor even though it knew that he had previously been accused by another girl of sexual misconduct. During cross-examination of the plaintiff's expert by counsel for the recreational center, the expert incorrectly testifies that the mandatory reporting law in effect at the time of the prior molestation required the defendant to report that incident to the appropriate authority. Later, the defendant proffers an instruction stating that in fact the relevant statute did *not* require the defendant to report the incident. It contends the instruction is necessary to correct the inaccurate testimony of the plaintiff's expert.

The judge refuses the instruction on the ground that the plaintiff is not claiming that the defendant is liable for failing to report the prior molestation, but only that it is liable for failing to protect the plaintiff from the alleged assailant. The judge refuses the instruction proffered by the recreational center and instead simply instructs that the mandatory reporting statute is irrelevant to the jury's determination and the jury is not to consider it. On appeal, the defendant asserts that the court's refusal to give the proffered instruction was error.

Analysis: Certain errors are "deemed excepted to" even in the absence of a specific objection. (Code Civ. Proc., § 647.) These include both the giving of an instruction and the refusal to give an instruction.

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But is the error asserted by the recreational center really an instructional error or is it in fact an *evidentiary* error? An expert's opinion on a question of law is inadmissible. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178.) Thus, in Example 3 the original error occurred when the plaintiff's expert testified to her opinion of the meaning and effect of the reporting statute – an obvious question of law. Had this testimony not been given, there would have been no need to "correct" it. Because this testimony was elicited on cross-examination by the *defendant*, there may be an argument (depending on the manner in which it was elicited) that the defendant invited the error and thus waived it. Under the doctrine of invited error, a party who by its own conduct, induces the commission of error may not claim on appeal that the judgment should be reversed because of that error. (*Transport Ins. Co. v. TIG Ins. Co* (2012) 202 Cal.App.4th 984, 1000.)

But even if the defendant did not invite the error, it apparently made no motion to strike it. A contention on appeal that evidence was improperly admitted is waived in the absence of a timely objection or motion to strike. (Evid. Code, § 353.) Thus, even if not invited, there is an argument that the error was waived.

Was the asserted error prejudicial?

Example 4: In Example 3, above, the plaintiff claims, as an alternative theory, that the recreational center is liable for failing to warn parents of the danger posed by the molesting minor. The recreational center argues that it owed no duty to warn and, in any event, an effective warning could not have been given without violating the molesting minor's privacy rights. The trial court rules a duty was owed and instructs the jury that the recreational center is liable if the jury finds it "unreasonably failed to warn." The jury returns a verdict finding that the recreational center was negligent. On appeal, the recreational center argues that even if it owed a duty to warn, the judge's instruction was defective because it failed to specify the scope of an appropriate warning.

Analysis: As noted earlier, error in the giving of an improper instruction is deemed excepted to even if the appellant did not request an alternative instruction. (Code Civ. Proc., § 647.) But this rule preserves only the contention that a challenged instruction *misstates the law*. Where an instruction correctly states the law and the challenge on appeal is that it is "too general" or is "incomplete," the appellant must have requested an additional or qualifying instruction for the challenge to be preserved. (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 948, overruled on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) The recreational center's argument is that the instruction failed to specify the scope of the duty – not that it specified it incorrectly. This argument was waived unless the center requested an instruction accurately describing the scope of the duty.

Furthermore, unless the record discloses that the jury based its finding of negligence solely on the duty-to-warn theory, any error in the instruction is harmless. As noted at the outset, the primary rule of appellate review is the presumption of correctness, which requires that all intendments and presumptions be indulged to support the judgment on matters as to which the record is silent. (*Denham v. Superior Court*, *supra*, 2 Cal.3d 557, 564.) "When two independent bases exist to support a jury's verdict, one of which is lawful and one is not, a reviewing court presumes the jury's verdict rested on a lawful basis unless the record affirmatively shows otherwise." (*Gombiner v. Swartz* (2008) 167 Cal.App.4th 1365, 1376.) If the jury's finding of negligence did not specify which of the plaintiff's two theories (duty to protect or duty to warn) it was based on, it should be presumed on appeal that it was based on the theory that was free of error.

Example 5: A driver on a busy, high-speed county roadway strikes a pedestrian in a crosswalk at an uncontrolled intersection. The pedestrian sues the county, contending that the intersection was in a dangerous condition because a hill or "vertical curve" before the intersection limited the approaching driver's ability to see pedestrians until he was "on top of" the intersection. The plaintiff seeks to introduce evidence of measures the county could have taken to ameliorate the danger, such as the posting of advance pedestrian warning signs and a flashing beacon to draw drivers' attention to the signs. The judge sustains an objection to this evidence.

Later, the county's attorney asks plaintiff's expert, "In order to correct the sight distance limitation, wouldn't the county have had to flatten the hill?" On redirect by the plaintiff's attorney, the judge permits the expert to testify concerning the warning signs and flashing beacon, ruling that that the county "opened the door" to this evidence. The county appeals, arguing that it did not open the door because its question was limited to methods to *eliminate* the sight distance limitation – which could not have been accomplished by mere warnings.

Analysis: On appeal the plaintiff may of course argue that the county's cross-examination did indeed open the door to the challenged evidence. (*McKeon v. Santa Claus of California, Inc.* (1964) 230 Cal.App.2d 359, 363.) This in effect is a form of invited error. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 390, p. 448 [if appellant offers inadmissible matter in evidence, he or she cannot complain of its admission].)

But the plaintiff may also argue that the judge's original ruling excluding the evidence of warnings was erroneous. This is an argument that the "error" in admitting this evidence later was not prejudicial: if the evidence should have been admitted in the first instance the county could not possibly have been prejudiced by the fact that it was later admitted on the theory (whether correct or not) that the county had opened the door to its admission. Ordinarily a respondent may not assert that the trial court committed error

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against her unless she herself filed an appeal. (See 9 Witkin, Cal. Procedure, *supra*, §§ 329, 332, pp. 376-377, 382-383.) Code of Civil Procedure section 906, however, provides an exception to this general rule. It permits a nonappealing respondent to request review of an intermediate trial court ruling "for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal …." (*Ibid.*)

Thus, in *Kasel v. Remington Arms Co.* (1972) 24 Cal.App.3d 711, the plaintiff appealed a judgment for a gun manufacturer. He contended that the trial court incorrectly instructed on strict product liability. The appellate court agreed. The court then took up the gun manufacturer's contention that the trial court had earlier incorrectly ruled that California law rather than Mexican law applied. Citing section 906, the appellate court rejected the plaintiff's contention that the gun manufacturer was precluded from raising this issue because it had not appealed. A determination of the issue, the court explained, went to prejudice: since Mexico did not recognize strict liability, then if Mexican law applied, the plaintiff could not have recovered on that theory and hence could not have been prejudiced by an incorrect instruction on it. (*Id.* at p. 728; see also *Erikson v. Weiner* (1996) 48 Cal.App.4th 1663, 1671 [nonappealing respondent's contention that trial court erred in considering late-filed affidavit on motion for new trial went to issue of whether defendant was prejudiced by denial of the motion because defendant "should not prevail on a theory that requires the support of an inadmissible affidavit"].)

Conclusion

Before delving into the merits of an appellant's points on appeal, a respondent should determine the procedural sufficiency of those points. An appellant may seek to obtain a more favorable standard of review, or may seek to avoid a claim of failure to preserve the error, by mischaracterizing the nature of the error on appeal. On the other hand, thorough research and analysis of the issue of prejudice may prevent even the most egregious error from resulting in a reversal.


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