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When error is not enough

Prejudicial error – a Constitutional standard – is the only basis upon which the Court of Appeal can reverse a lower court's decision

By Herb Fox

For a judge to err is human, but errors alone do not make or break the outcome of an appeal. It is *prejudicial* error – a Constitutional standard – that is the only basis upon which the Court of Appeal can reverse a lower court's decision. In fact, in nearly all circumstances, appellate courts are required by law to disregard trial court errors that do not substantially affect the rights of the parties, i.e., are harmless. (Cal. Const. Art. VI, §13; Code Civ. Proc. § 475; *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108.)

Whether an error is prejudicial or harmless is therefore as important to the outcome of an appeal as is the existence of the error. For that reason, our appellate courts often grapple with the burdens and nature of prejudice – what it is and which party must prove it – if it must be proven at all.

For a most recent example of such issues, see *TriCoast Builders, Inc. v. Fonnegra*, S273368 (Court of Appeal opinion published at 74 Cal.App.5th 239), where the Supreme Court is considering whether an appellant must prove "actual prejudice" when a trial court denies a request for relief from a jury waiver pursuant to Code of Civil Procedure section 631, and the losing party did not seek immediate writ review, but instead appealed from an adverse judgment after a bench trial. The Supreme Court's Opinion is likely to be issued in the Spring of 2024.

In short, in an appeal it is not sufficient to obtain a reversal simply by showing that the judge made a mistake. Appellants must demonstrate how and why the error was prejudicial, requiring reversal. Respondents will therefore typically provide assurances in their brief that, if the reviewing court finds error, it also finds the error to be harmless, requiring affirmance. Further, some errors raised a rebuttable presumption of prejudice, placing the burden on the respondent to dispel the prejudice. A third category is reversible error per se, where the lower court's rulings or conduct so impaired a party's right to a fair trial that nothing more need be shown.

What is prejudicial error?

Prejudicial error has two components. First, the lower court must have made an error. Second, the appealing party must have "sustained and suffered substantial injury, and that a different result would have been probable" if such error had not occurred. (Code Civ. Proc., § 475.) That code section goes on to state that there is "no presumption that error is prejudicial, or that injury was done if error is shown." As will be seen, however, that directive is not literally true.

Adding muscle to Code of Civil Procedure section 475 is article VI, section 13 of the California Constitution, which provides, "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

And a narrower but oft-used statutory framework applies to erroneous evidentiary rulings. Evidence Code sections 352 and 353 preclude reversal for the erroneous admission or exclusion of evidence unless the error "resulted in a miscarriage of justice." (See, e.g., *Zuniga v. Alexandria Care Center, LLC* (2021) 67 Cal.App.5th 871, 889 [exclusion of expert testimony was a miscarriage of justice in a PAGA claim, justifying reversal].)

A "miscarriage of justice" has occurred if, upon the appellate court's examination of the entire cause, including the evidence, it concludes that it is "reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800.)

Note that this test is one of the few occasions when an appellate court will consider the strength of the evidence adduced at trial. A review of the evidence for the purpose of ascertaining whether an error was prejudicial is not the same as the substantial evidence standard of review, where the appellate court does not reweigh the evidence and looks only to the evidence supporting the prevailing party, giving no credit to conflicting evidence offered by the appealing party. (*GHK Associates v. Mayer Group* (1990) 224 Cal.App.3d 856, 872.)

A "reasonable probability" that the case does "does not mean more likely than not, but merely probability sufficient to undermine confidence in the outcome." (*Rodriguez v. Parivar, Inc.* (2022) 83 Cal.App.5th 739, 756-757.) Under the reasonable-probability standard, reversal is required when there exists "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result." (*Ibid.*)

Who must prove prejudice?

Except where prejudice is presumed or the error is reversible per se, it is the appellant's burden to affirmatively convince the appellate court that the error was prejudicial. (See, e.g., *Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833; *Brokopp v. Ford Motor Co.* (1977) 71 Cal.App.3d 841, 853-854.) In most situations, an appellant cannot succeed by simply pointing to the error without also demonstrating prejudice. (*Santina v. General Petroleum Corp*oration (1940) 41 Cal.App.2d 74, 77.)

What is proof of prejudice?

Proof of prejudice can be more difficult, if not amorphous, than demonstrating the error. Appellate courts, once faced with a trial court error, will often push the envelope to find the error to be harmless. The task is to prove what would

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have happened – especially in a jury trial – rather than what did happen. Long ago our Supreme Court recognized that, "No precise formula can be drawn for deciding whether there has been a miscarriage of justice." (*Alarid v. Vanier* (1958) 50 Cal.2d 617, 625.) Prejudicial error is a "relative concept, and whether a slight or gross error is ground for reversal depends on the circumstances in each case." (*Cassim v. Allstate Insurance Co.* (2004) 33 Cal.4th 780, 800.)

Case law concerning specific types of errors can be helpful in guiding attorneys on factors of prejudice for particular types of error.

For example, if the error was an incorrect or omitted jury instruction, the factors suggesting prejudice include the state of the evidence, the effect of other instructions, the effect of counsel's arguments, and any indications by the jury itself that it was misled, such as questions from the jury suggesting confusion, requests for rereading the erroneous instruction; the length of deliberations, and the existence or absence of unanimity or the closeness of the vote. *(Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069-1070; *Soule v. General Motors Corporation* (1994) 8 Cal.4th 548, 580-581.)

If the error was improper argument by opposing counsel, the factors may include the brevity or repetition of the improper argument and whether the jury was admonished to disregard the argument. (*Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1124.)

If the error was an improper verdict form, the reviewing court will consider the special verdict form and jury instructions as a whole, and the particular circumstances of the case, and decide whether the question was erroneous or misleading. (*Id*. at p. 1124.)

Presumption of prejudice: Jury misconduct

Notwithstanding the language of Code of Civil Procedure section 475, there are a handful of errors that do result in a presumption of prejudice. The most common of such errors is jury misconduct, in which case the appellate court must independently examine the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. (*Hasson v. Ford Motor Company* (1982) 32 Cal.3d 388, 415-417.)

Another example of presumed prejudice is where the trial was tainted by such judicial bias that appellant could not have received a fair trial. (*Haluck v. Ricoh Electronics, Inc*. (2007) 151 Cal.App.4th 994, 1007.)

When prejudice is presumed, the burden falls on the respondent to disprove prejudice. Under those circumstances, the burden shifts to the respondent to also provide an adequate appellate record so to allow the appellate court to consider that rebuttal. (*Lankster v. Alpha Beta Company* (1993) 15 Cal.App.4th 678, 681.) The respondent must make "an affirmative evidentiary showing that prejudice does not exist because it is not reasonably probable that a result more favorable" to the appellant in the absence of the error. (*Id.* at p. 682.)

Reversible error per se: Structural and constitutional error

Finally, there is reversible error per se, where the error permeates the judicial process so deeply that prejudice need not (and often cannot) be proven, and reversal is mandated as a matter of law without regard for the strength of the evidence or other circumstances. (*Aulisio v. Bancroft* (2014) 230 Cal.App.4th 1516, 1527.) Such errors are sometimes referred to as "structural error" affecting "the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.) Such errors are reversible per se because their effects are "unmeasurable and def[y] analysis by harmless error standards." (*Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 261.)

Examples of reversible errors per se include:

- Denying a party the right to testify or to offer evidence. (*Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 291);
- Denying a party the right to cross-examination. (*Fremont Indemnity Company v. Workers' Compensation Appeals Board* (1984) 153 Cal.App.3d 965, 971);
- A punitive damages award absent evidence of the defendant's ability to pay. (*Adams v. Murakami* (1991) 54 Cal.3d 105; 111-116);
- The erroneous denial of *all* evidence relating to a claim or excluding essential expert testimony without which a claim cannot be proven. (*Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1114); and,
- The erroneous sustaining of a demurrer without leave to amend. (*Deeter v. Angus* (1986) 179 Cal.App.3d 241, 251.)

All of which brings us to the *TriCoast Builders* case now pending in the California Supreme Court. There is a split in California courts as to whether and when the denial of a motion for relief from the failure to pay jury fees, resulting in the loss of the right to a jury trial in a civil case, constitutes reversible error per se or instead requires proof of prejudice.

If proof of prejudice is required, how does an appellant decide whether a jury would have decided the case differently than the court? At issue is not the pure Constitutional right to a jury, but instead the discretion afforded the trial court to grant or deny a motion for relief when a party fails to timely pay jury fees. (Code Civ. Proc. § 631.) At press time, the matter has been fully briefed and argument will soon be held.



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