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The Challenge Of Substantial Evidence Appeals

The standard of review that governs an appeal is an important consideration at each phase in the appellate process. The standard of review dictates how much, if any, deference the appellate court will give to the trial court's ruling. In any one appeal, several different standards of review may apply depending on the issues presented in the appeal. This article discusses the challenges when the issue on appeal is a factual issue and the standard of review is the substantial evidence standard.

What is the substantial evidence standard of review?

When the issue on appeal is a factual issue, the standard of review is the substantial evidence rule. "When the trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination." *Bowers v. Bernards*, 150 Cal. App. 3d 870, 872-73 (1984). Substantial evidence is not just any evidence to support the factual finding. The evidence must be reasonable in nature, credible and of solid value. *Id.* at 873. Thus, where there is conflicting evidence, the appellate court will affirm the trial court's factual findings so long as they are supported by substantial evidence.

In reviewing for substantial evidence, the appellate court defers to the trial court's resolution of credibility issues and resolves all conflicts in favor of the successful party. *Nestle v. City of Santa Monica*, 6 Cal. 3d 920, 925 (1972). "Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact. If the evidence so viewed is sufficient as a matter of law, the judgment must be affirmed." *Estate of Teel*, 25 Cal. 2d 520, 527 (1944).

In a substantial evidence appeal, the appellate court presumes that the record contains evidence to sustain every finding of fact made by the trial court. *Leming v. Oilfields Trucking Co.*, 44 Cal. 2d 343, 356 (1955). "It is not the province of such court to search the record in order to ascertain whether it contains evidence which will support a contention made by either party to an appeal." *Id.* It is the appellant's burden to establish that there is no substantial evidence to support the challenged factual finding. *Foreman & Clark Corp. v. Fallon*, 3 Cal. 3d 875, 881 (1971). To satisfy that burden, the appellant must set forth in its opening brief all material evidence upon the point, not merely its own, and by failing to do so, the appellant forfeits the contention. *Id.*

When an appellant's opening brief fails to state all material evidence fairly, the appellate court has the discretion to deem the issue waived and may presume the record contains evidence to

sustain every finding of fact. *County of Solano v. Vallejo Redevelopment Agency*, 75 Cal. App. 4th 1262, 1273 (1999).

Waiver Of Issues Governed By The Substantial Evidence Standard

Substantial evidence appeals present a challenge for the appellate advocate. In order to avoid waiving the issue on appeal, the appellant must set forth all evidence, favorable and unfavorable, on the issue in the appellant's opening brief. This requirement seems contrary to the role of a zealous advocate who strives to present the case in the most favorable light and would like to emphasize the facts that support a reversal. However, failure to abide by this important rule of appellate procedure will result in very harsh consequences.

In a recent case, *Doe v. The Roman Catholic Archbishop of Cashel & Emily*, 177 Cal. App. 4th 209 (2009), the Second Appellate District strictly enforced the substantial evidence waiver rule. In that case, the plaintiff appealed from the trial court's order quashing service of summons on the defendant, the Archdiocese of Cashel & Emily in Ireland. The appellate court held as follows: "We hold that plaintiff has waived the issue by his failure to fairly and completely set forth, discuss, and analyze the relevant facts under the applicable substantial evidence standard of review." *Doe*, 177 Cal. App. 4th at 212.

The appellate court recognized that the waiver rule as "fundamental principle of appellate review." *Id.* at 218. The court chastised the appellant because his opening brief set forth only appellant's version of the evidence -- the facts that supported the assertion of personal jurisdiction. The appellant failed to mention that the trial court had sustained evidentiary objections to much of his evidence and failed to discuss the trial court's factual findings. The court concluded that "because plaintiff has failed in his obligations concerning the discussion and analysis of a substantial evidence issue, we deem the issue waived." *Id.* However, the court went on to alternatively hold that the motion to quash was properly granted. *Id.* at 219-221.

Avoiding Waiver Of A Substantial Evidence Issue

In the *Doe* case, there was only one issue on appeal, *i.e.* the factual determination of whether the defendant had sufficient minimum contacts with California to support the assertion of personal jurisdiction over the defendant. By failing to follow the procedural requirements of a substantial evidence appeal, counsel for the appellant waived the only issue on appeal. This is a very harsh result. However, it contains lessons for all appellate practitioners.

First, it is very important to carefully consider the standard of review when making the decision to file an appeal. Substantial evidence appeals are difficult to win because of the deference given to the trial court's duties as the finder of fact. In making the decision to file an appeal, appellate counsel must be realistic about the state of the record and the requisite deference that the appellate court will give to the trial court's factual findings.

Second, appellate counsel must use great care drafting the “Facts” section of the appellant’s opening brief in any appeal that has an issue governed by the substantial evidence rule. The fair presentation of the evidence requires a level of objectivity that may be difficult to obtain if appellate counsel was also the counsel in the trial court.

Third, and finally, the trial court’s factual findings and the evidence that the trial court relied upon must be thoroughly addressed in the appellant’s opening brief. It is the appellant’s burden to explain in detail why the record does not support the factual findings of the trial court. A substantial evidence appeal requires both a bold forthrightness about the record and technical precision in order to preserve the issue and make the case for reversal.

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