University of Dayton Law Review

Volume 11 | Number 1 Article 7

10-1-1985

Civil Procedure: The De Novo Standard of Review Applied to District Court Interpretations of State Law

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CIVIL PROCEDURE: THE *De Novo* STANDARD OF REVIEW APPLIED TO DISTRICT COURT INTERPRETATIONS OF STATE LAW—*McLinn v. F/V Fjord*, 739 F.2d 1395 (9th Cir. 1984).

I. INTRODUCTION

It is a settled rule of civil procedure that upon appellate review, a question of fact must not be set aside unless it is "clearly erroneous."[1] The United States Supreme Court has held that a finding of fact is "clearly erroneous" when, although there is evidence to support it, the appellate court, upon review of the entire evidence, is left with the firm conviction that a mistake has been made.[2] In contrast, conclusions of law are not insulated by the "clearly erroneous" standard. Rather, conclusions of law are freely reviewable by the appellate court.[3] The reviewing court is required to make its own independent determinations regarding legal standards and their application to the facts at issue.[4]

Confusion has arisen in the federal appellate courts as to what standard of review is to be applied to a district court's determinations concerning state law when there has been no definitive interpretation of that law by the highest court of the state.[5] The standard most often articulated by the United States Courts of Appeals[6] has been labeled the "deferential standard," which requires that great weight be given

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1. FED. R. CIV. P. 52(a). Rule 52(a) provides: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.*

2. United States v. Gypsum Co., 333 U.S. 364, 395 (1948) (a mistake which would support reversal under a clear error standard would occur when findings are not supported by substantial evidence). *See also* Krasnov v. Dinan, 465 F.2d 1298, 1302 (3rd Cir. 1972) (reversal is proper when findings are contrary to the clear weight of the evidence or where findings bear no rational relationship to the supporting data). *See generally* 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.03[1], at 52-22 (2d ed. 1985) ("It is well-settled that the reviewing court may not set aside a finding of fact merely because it would have viewed the facts differently, or given greater weight to certain evidence than the trial court.").

3. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520, 526 (1961). *See also* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588, at 750, 752–53 (1971).

4. C. WRIGHT & A. MILLER, *supra* note 3, § 2588, at 750, 752–53.

5. The confusion is apparent from the varying articulations of the standard for appellate review enunciated between different circuits and within the same circuit. *See, e.g.*, Waegemann v. Montgomery Ward & Co., 713 F.2d 452, 454 (9th Cir. 1983) (clearly wrong standard); South Pasadena v. Goldschmidt, 637 F.2d 677, 679 (9th Cir. 1981) (substantial deference is owed); Scandanavian Airlines Sys. v. United Aircraft Corp., 601 F.2d 425, 427 (9th Cir. 1979) (entitled to great weight); Aurora v. Bechtel Corp., 599 F.2d 382, 386 (10th Cir. 1979) (extraordinary force); Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202, 204 (10th Cir. 1977) (review is governed by clearly erroneous rule).

6. McLinn v. F/V Fjord, 739 F.2d 1395, 1404 (9th Cir. 1984).

to the federal district judge's conclusions on state law, due to his or her knowledge and expertise in the law of his or her state.[7] Another standard, frequently articulated by the United States Courts of Appeals is the "clearly erroneous" standard, which requires the appellate court to follow the district court's interpretation of state law unless it is "clearly wrong."[8] The wording of the standard would indicate that it is the same standard of review that is applied to findings of fact under Federal Rule of Civil Procedure 52.[9]

In response to the confusion, the Court of Appeals for the Ninth Circuit, in *McLinn v. F/V Fjord*,[10] announced with certainty the standard of review that the federal appellate courts should apply to district court decisions on state law. In the *McLinn* decision, the court departed from its previous use of the "deferential" and the "clearly erroneous" standards,[11] and declared that questions of state law were to be reviewed under an independent *de novo* standard.[12]

This casenote will examine the reasons behind the *McLinn* decision, and how those reasons override concerns for *stare decisis*. Despite the appearance of a radical departure from precedent, the application of a *de novo* standard of review is not truly revolutionary in practice. The note will demonstrate that the *McLinn* decision primarily presents a change in appellate focus and terminology, rather than a change in Ninth Circuit appellate procedure. Finally, the casenote will explore the practical ramifications posed by the Ninth Circuit's adoption of the *de novo* standard of review.

II. FACTS AND HOLDING

McLinn v. F/V Fjord[13] is an admiralty case involving a personal injury action and a wrongful death action which arose from a collision between two skiffs off the coast of Kodiak Island, Alaska.[14] The plaintiffs asserted an *in personam* liability claim against two of the defendants pursuant to an Alaska statute.[15] The Supreme Court of Alaska,

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7. Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967). Under the so-called "deferential" standard, the United States court of appeals must accept the district judge's decision unless it is clearly wrong. Harris v. Hercules, Inc., 455 F.2d 267, 269 (8th Cir. 1972); Kirby v. United States, 329 F.2d 735, 737 (10th Cir. 1964).

8. *See, e.g.*, Pacific Mut. Life Ins. Co. v. American Guar. Life Ins. Co., 722 F.2d 1498, 1500 (9th Cir. 1984); Loveridge v. Dreagoux, 678 F.2d 870, 872 (10th Cir. 1982); Universal Elec. Co. v. A.O. Smith Corp., 643 F.2d 1240, 1247 (6th Cir. 1981).

9. *See supra* note 1 and accompanying text.

10. 739 F.2d 1395 (9th Cir. 1984).

11. *Id.* at 1397.

12. *Id.*

13. 739 F.2d 1395 (9th Cir. 1984).

14. *Id.* at 1397.

15. *Id.* The Alaska statute reads in pertinent part:

however, had not provided a definitive interpretation of the statute.[16] The district judge, who originally heard the case, held that the statute did not apply to the circumstances of the case, and denied the plaintiffs damages.[17]

On appeal, the three-judge appellate panel for the Court of Appeals of the Ninth Circuit believed the controlling factor for their decision was the standard of review to be applied to a district judge's conclusions on state law.[18] As a result, the panel unanimously requested *en banc* review.[19] The appellate panel indicated that it would affirm if the "deferential" standard, which permits reversal only for clear error, applied,[20] but that it would reverse the district court's decision under an independent, *de novo* standard.[21] The *en banc* court, in considering which standard of review to apply, noted that the Court of Appeals for the Ninth Circuit had reviewed previous district court conclusions on state law under a "deferential" standard, accepting the district judge's construction of state law unless clearly wrong.[22] The court went on, however, to denounce its past practice and to adopt the rule that questions of state law are reviewable under the same independent *de novo* standard as are questions of federal law.[23] The majority reasoned that the application of any standard which provided less than full, independent *de novo* review of legal issues would be an abdication of its appellate responsibility.[24]

The Ninth Circuit majority was met with severe criticism by the dissent. According to the dissent, the decision to apply a *de novo* standard of review was not only a major departure from Ninth Circuit appellate practice, but it was contrary to all reported decisions by other circuits, and it was adverse to the views of scholarly authorities.[25] The dissent stated that it agreed with the majority position that an appel-

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> The owner of a watercraft is liable for injury or damage caused by the negligent operation of his watercraft whether the negligence consists of a violation of a state statute, or neglecting to observe ordinary care in the operation of the watercraft as the rules of common law require. The owner is not liable, however, unless his watercraft is used with his express or implied consent . . . .

ALASKA STAT. § 05.25.040 (1981).

16. *McLinn*, 739 F.2d at 1397.

17. *Id.* The district court held, as a matter of law, that the Alaska statute did not impose liability on the defendants because the skiff they operated was not a "watercraft" as defined by the Alaska Code. *Id. See* ALASKA STAT. § 05.25.100(4) (1981).

18. *McLinn*, 739 F.2d at 1397.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 1398.

25. *Id.* at 1403 (Schroeder, J., dissenting).

late court may freely review questions of law and that it is not confined to the "clearly erroneous" standard which applies to questions of fact.[26] Nevertheless, the dissent argued that the standard of review for district court interpretations of state law should be one of "substantial deference"[27] in which special weight is given to the district judge's decision.[28]

III. BACKGROUND

Unresolved questions of state law traditionally have been problematic to the federal courts. Prior to 1938, under the doctrine of *Swift v. Tyson*,[29] the federal courts asserted the power to create general federal common law, absent a specific state statute on point.[30] The power to create federal common law was curtailed by the United States Supreme Court in *Erie Railroad Co. v. Tompkins*.[31] The Court in *Erie* declared that there was no general federal common law, and overturned the *Swift* doctrine.[32] In essence the *Erie* decision provides that a federal court's function is not to choose the rule that it would adopt if it were free to do so, but to choose the rule that it believes the state court would be likely to adopt in the future.[33]

Confusion has arisen in the federal appellate courts as to the standard of review to be applied to district court interpretations of state law, particularly in situations where the highest state court has not provided definitive guidance.[34] From the uncertainty, four different standards for review have emerged.[35] As a result, the circuits have applied different standards of review to district court determinations on state law. Furthermore, different standards of review have been applied to appellate cases within the same circuit.[36]

Some federal appellate courts indicate that a district court's interpretation of state law will be accepted unless it is shown to be clearly wrong.[37] Under this standard, the appellate court is bound by the dis-

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26. *Id.* at 1405.

27. *Id.* at 1406.

28. *Id.* The dissent claimed that the purpose of the "substantial deference" standard is to prevent hasty, arbitrary decisions by appellate courts on issues of local law with which the appellate court is much less familiar than is the district judge. *Id.*

29. 41 U.S. 1 (1842).

30. *Id.* at 19.

31. 304 U.S. 64 (1938).

32. *Id.* at 78.

33. *Id. See also* C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 59, at 271–78 (3d ed. 1976).

34. *See supra* notes 5–9 and accompanying text.

35. *See infra* notes 37–43 and accompanying text.

36. *See supra* note 5. *See also infra* note 44 and accompanying text.

37. *See, e.g.*, King v. Horizon Corp., 701 F.2d 1313, 1315 (10th Cir. 1983); Loveridge v.

trict judge's decision, unless clear error is determined.[38] Other appellate courts have announced that "great weight" or "deference" should be afforded to a district judge's determination of state law.[39] The practical reason asserted for giving great weight to the district court's decision is that the appellate court can benefit greatly from the district judge's past experience and day-to-day familiarity with state law issues.[40] Other courts articulate a hybrid standard, under which appellate courts give great weight to the district judge's interpretation of state law, reversing only upon finding that the district court's decision was clearly erroneous.[41] In a minority of decisions, district court conclusions on state law have been reviewed under a *de novo* standard.[42] Under *de novo* review, the appellate court is neither compelled to adhere to the district judge's interpretation of state law, nor does it give great weight to his or her interpretation. Rather, the appellate court makes its own independent determination of state law issues based upon recognized sources that are available to the parties and that may be argued before the district court as well as before the appellate court.[43]

Prior to the *McLinn v. F/V Fjord* decision, the Court of Appeals for the Ninth Circuit applied three different standards of review to district court conclusions on state law questions. A review of the Ninth Circuit cases indicates that the "clearly erroneous" standard, the "substantial deference" standard, and a hybrid standard of review had been

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Dreagoux, 678 F.2d 870, 877 (10th Cir. 1982); Walgreen Ariz. Drug Co. v. Levitt, 670 F.2d 860, 863 (9th Cir. 1982).

38. McLinn v. F/V Fjord, 739 F.2d 1395 (9th Cir. 1984). The dissent in *McLinn* explained that an articulation of the standard of review as "clearly erroneous" connotes that a district court's decision on a legal issue binds the appellate court just as a district court's finding of fact binds the appellate court under Federal Rule of Civil Procedure 52. *Id.* at 1405. (Schroeder, J., dissenting). The result has been a tendency by the appellate courts to accord presumptive validity to the district court's legal conclusions. For example, in Monte Carlo Shirt, Inc. v. Daewoo Int'l (Am.) Corp., 707 F.2d 1054, 1056–57 (9th Cir. 1983), the Court of Appeals for the Ninth Circuit stated: "Our review of the district court's interpretation of state law . . . is limited: we may not overrule unless it is 'clearly wrong.' " *Id.* at 1056–57. *See also* Smith v. Sturm, Ruger & Co., 524 F.2d 776, 778 (9th Cir. 1975).

39. *See, e.g.*, Kaufman & Broad Homes Sys. v. International Broth. of Firemen & Oilers, 607 F.2d 1104, 1108 (5th Cir. 1979); Scandinavian Airlines Sys. v. United Aircraft Corp., 601 F.2d 425, 427 (9th Cir. 1979); Ritzau v. Warm Springs W., 589 F.2d 1370, 1377 (9th Cir. 1979); Adolph Coors Co. v. A & S Wholesalers, Inc., 561 F.2d 807, 816 (10th Cir. 1977).

40. *See* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2588, at 752–53 (1971).

41. *See, e.g., In re* Winters, 586 F.2d 1363, 1366 (10th Cir. 1978); C. R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 856 (9th Cir. 1977).

42. *See, e.g.*, Yamaguchi v. State Farm Mut. Auto Ins. Co., 706 F.2d 940, 946 n.5 (9th Cir. 1983); United States v. Rosales, 584 F.2d 870, 872 (9th Cir. 1978); Phoenix Title & Trust Co. v. Stewart, 337 F.2d 978, 985 (9th Cir. 1964), *cert. denied*, 380 U.S. 979 (1965).

43. *McLinn*, 739 F.2d at 1400.

applied.[44] Two recent decisions by the court indicate a departure from deferring to district court decisions on state law issues. In *Bank of California v. Opie,*[45] the appellate court stated that the district court's interpretation of state law was "entitled to little or no special deference" because the state authority offered "little more than general guidance in the case . . . ."[46] In *Insurance Co. of North America v. Howard,*[47] the court of appeals relied on *Opie* to conclude that a district court decision was entitled to "no deference whatsoever" because the district court had neither cited nor discussed any state law pertaining to the issue it decided.[48]

The *McLinn* court, while rejecting the "substantial deference" standard, also abrogated the use of the "clearly erroneous" standard.[49] The Ninth Circuit, however, was not the first circuit to do so. Several years prior to the *McLinn* decision, the Eighth Circuit similarly abandoned use of the "clear error" standard.[50] However, unlike the Ninth Circuit, the Eighth Circuit replaced its "clear error" standard with the "substantial deference" standard.[51] To date, the Eighth Circuit is the only other circuit to express concern over the confusion caused by application of the "clear error" standard. The balance of the circuits continues to apply all three standards of review to district court decisions on state law.

The majority in *McLinn* recognized the problems caused by the

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44. *See, e.g.,* Donaldson v. United States, 653 F.2d 414, 416 (9th Cir. 1981) (clearly erroneous); United States v. Crain, 589 F.2d 996, 1001 n.8 (9th Cir. 1979) (great weight); C. R. Fedrick, Inc. v. Borg-Warner Corp., 552 F.2d 852, 856 (9th Cir. 1977) (hybrid: "[a]nalysis by a district judge of the law of the state in which he sits . . . is entitled to great weight. . . . That determination 'will be accepted on review *unless shown to be clearly wrong.*' ") (quoting Owens v. White, 380 F.2d 310, 315 (9th Cir. 1967)).

45. 633 F.2d 977 (9th Cir. 1981).

46. *Id.* at 980.

47. 679 F.2d 147 (9th Cir. 1982).

48. *Id.* at 150.

49. *McLinn,* 739 F.2d at 1397.

50. Luke v. American Family Mut. Ins. Co., 476 F.2d 1015, 1019–20 (8th Cir. 1972), *cert. denied,* 414 U.S. 856 (1973). The Court of Appeals for the Eighth Circuit pointed out that it had often stated that where the trial judge arrived at a permissible conclusion with respect to the law of his or her state, the conclusion is binding on appeal. *Id.* at 1019 n.6. The court further noted that the legal effect of the principle on questions of first impression was to preclude appellate consideration of an issue involving a significant question of law. *Id.* The Eighth Circuit abandoned this approach because it believed it to be an abdication of appellate responsibility. *Id.* at 1019–20.

51. *Id.* at 1019 n.6. The court explained the new standard to mean that the appellate court was not bound by the district judge's initial decision on state law. The appellate court was to accord great weight to the district judge's view on state law, but the parties were entitled to a review of the trial court's determinations on state law just as they were on any other legal question in the case. *Id.* The "deferential" standard is the same standard that the United States Court of Appeals for the Fifth Circuit most frequently applies to review district court decisions. *See, e.g.,* Freeman v. Continental Gin Co., 381 F.2d 459, 466 (5th Cir. 1967).

"clear error," the "deferential," and the hybrid standards and consequently abandoned them.[52] The majority explained that because those standards provided for less than a full, independent review of state law issues, they did not serve the appellate function, which entitles every party to complete, considered, and impartial review of the trial court's decision.[53] The *McLinn* court determined that the only standard of review that appropriately served the appellate function was the *de novo* standard; thus, it adopted that standard of review for the Ninth Circuit.[54]

IV. ANALYSIS

The United States Court of Appeals for the Ninth Circuit in *McLinn v. F/V Fjord*[55] rejected the "clear error" and the "deferential" standards for appellate review, because it concluded that it could carry out its role within the federal court structure only by reviewing all questions of law, whether they were issues of state or federal law, under the independent *de novo* standard.[56] The majority justified adoption of the *de novo* standard of review on two grounds. First, the court asserted that the basic policy concerns behind the application of a different standard of review to questions of law than that which is applied to questions of fact supported *de novo* review of all legal issues.[57] Second, the court asserted that the basic structural differences between trial courts and appellate courts mandated *de novo* review, because appellate courts are better suited than are trial courts to decide questions of law.[58] Moreover, the *McLinn* court explained how the "clear error" and the "deferential" standards failed to serve the appellate function within the federal court structure because they afforded less than complete independent review.[59]

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52. *McLinn*, 739 F.2d at 1398.

53. *Id.* The impropriety of a rule which precludes appellate consideration of an issue involving a significant question of law was pointed out in the concurring opinion by Justice Frankfurter in Bernhardt v. Polygraphic Co., 350 U.S. 198, 209 (1956), where he stated: "[T]he defendant is entitled to have the view of the Court of Appeals on Vermont law and cannot, under the Act of Congress, be foreclosed by the District Court's interpretation." *See also* Huddleston v. Dwyer, 322 U.S. 232, 236 (1944) ("It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where . . . [it] controls [the] decision.").

54. *McLinn*, 739 F.2d at 1397. *See generally* Kurland, *Mr. Justice Frankfurter, The Supreme Court and the Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 216–18 (1957).

55. 739 F.2d 1395 (9th Cir. 1984).

56. *McLinn*, 739 F.2d at 1397–98. The court in *McLinn* stated: "[A] decision to give less than full independent de novo review to the state law determinations of the district courts would be an abdication of our appellate responsibility." *Id.* at 1398.

57. *Id.* at 1398.

58. *Id.*

59. *Id.*

A. The Structural Relationship Between Trial Courts and Appellate Courts

The parties to a civil action may appeal "as a matter of right" from the final judgment of a district court to the federal court of appeals under Federal Rule of Appellate Procedure 3.[60] The standards of review that are applied to trial court decisions have been developed to protect a party's right to appeal by recognizing the structural differences between trial courts and appellate courts.[61] Federal Rule of Civil Procedure 52(a),[62] which allows the appellate court to overturn the trial court on questions of fact only if clear error is determined, recognizes that the trial court is in a unique position to admit evidence, hear testimony, and evaluate the demeanor and credibility of witnesses.[63] On the other hand, as the *McLinn* court observed, questions of law are freely reviewable by the appellate court under a *de novo* standard, because appellate courts have structural advantages over trial courts in deciding questions of law.[64] First, appellate judges are not encumbered by the time consuming process of hearing evidence; therefore, they are better able to concentrate on legal questions.[65] Second, there are three members to an appellate panel whose collaborative judgment is brought to bear on every case.[66] The *McLinn* court concluded that *de novo* review of questions of law, and "clear error" review of questions of fact served the same policy concern: to minimize judicial error by assigning to the court which is better positioned to decide each type of issue the primary responsibility for doing so.[67]

McLinn emphasized that the same policy concerns for judicial accuracy and thoroughness apply to questions of state law as they do to questions of federal law.[68] Questions of federal law,[69] as well as trial

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60. FED. R. APP. P. 3. Rule 3 provides: "An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal . . . ." *Id. See also* 28 U.S.C. § 1291 (1982) which provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ." *Id. See generally* 15 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3901, at 398 (1976).

61. *McLinn*, 739 F.2d at 1398.

62. FED. R. CIV. P. 52(a).

63. *Id.* The language of Rule 52(a) reflects upon the unique position of trial courts to make credibility determinations: "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Id.*

64. *McLinn*, 739 F.2d at 1398.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. The *de novo* standard of review is applied to a trial court's determinations of federal law questions. *See* Harsh Inv. Corp. v. Blalac, 732 F.2d 426, 429 (9th Cir. 1983); United States v.

court determinations of foreign law,[70] are always reviewed *de novo*. *McLinn* pointed out that there is no justification to impose a lesser appellate duty when a court reviews a question of state law than is applied when a court reviews questions of federal or foreign law. The appellate function as to questions of law are the same in each case, and the same structural advantages which support *de novo* review of questions of federal and foreign law, support *de novo* review of questions of state law.[71] To emphasize the impropriety of appellate review under any standard other than the *de novo* standard, the majority noted that if the parties were to proceed in state court to appeal a state law issue, they would have the right to *de novo* review of the trial judge's determination by an appellate panel having the same structural advantages as those possessed by the United States Courts of Appeals.[72] *McLinn* demonstrated that the effect of denying *de novo* review to district court decisions was to place a greater burden on an appellant who seeks review in the federal forum than he or she would have if he or she had proceeded in state court.[73]

To support the position that the structural differences between trial courts and appellate courts mandate the application of a *de novo* standard of review, the *McLinn* court relied on several cases in which the United States Supreme Court had chosen not to review questions of state law which had been reviewed previously by an intermediate appellate court.[74] One case cited by the majority was *Butner v. United States*[75] where the Court of Appeals for the Fourth Circuit had reversed the district court on an issue of state law.[76] The Supreme Court affirmed the appellate court stating: "We decline to review the state-law question."[77] The *McLinn* court emphasized the importance of what the Supreme Court was doing in *Butner*. The Court was *not* giving weight or deference to the district judge's decision, nor to the decision by the court of appeals; it was simply not reviewing a state law question that had been fully reviewed and determined by the intermediate

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Twin Engine Beech Airplane, 533 F.2d 1106, 1109 (9th Cir. 1976).

70. *See* FED. R. CIV. P. 44.1. Rule 44.1 provides that the trial court's determination of foreign law is to be viewed "as a ruling on a question of law." *Id. See also* C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2446, at 415 (1971). Wright and Miller interpret the rule to mean that "the determination [of foreign law] . . . is freely reviewable and is not limited by the 'clearly erroneous' test." *Id.*

71. *McLinn*, 739 F.2d at 1398.

72. *Id.* at 1401.

73. *Id.*

74. *Id.*

75. 440 U.S. 48 (1979).

76. *Id.* at 51.

77. *Id.* at 57-58.

appellate court.[78] *McLinn* asserted that the Supreme Court practice necessitated *de novo* review by the federal appellate courts. The court of appeals is the first level of appellate review of the trial court's conclusions of law.[79] Parties have a statutory right to appeal state law questions.[80] In order for the right to appeal to be meaningful, the appellate court must exercise its mandatory appellate jurisdiction by giving full, independent review to the trial court's decision.[81] The *de novo* standard, which permits the appellate court to exercise complete, independent review, is the only standard under which the appellate court may carry out its role in the federal court structure.[82]

B. *The* De Novo *Standard of Review*

One effect of the *McLinn* court's decision to adopt a *de novo* standard of review for the Ninth Circuit was to do away with the confusion that had arisen from the use of the "clear error" and "deferential" labels.[83] More importantly, the decision protects a party's right to appeal,[84] by ensuring full, independent, and impartial review of a district court decision concerning state law. *McLinn* enunciated a clear and precise standard for the Ninth Circuit to follow.[85] Therefore, no longer can there be any variations in the review standards applied to appellate cases within the Ninth Circuit as had existed under the "clear error" and "deferential" standards. Furthermore, adoption of the *de novo* standard alleviated the dangers posed by the use of the "clear error" and the "deferential" standards. Formerly, there had been a tendency by the appellate court to interpret the "clear error" and the "deferential" standards to mean that the court was bound by the legal conclusion of the trial court.[86] The result had been that in several decisions,

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78. *McLinn*, 739 F.2d at 1399.

79. FED. R. APP. P. 3.

80. *McLinn*, 739 F.2d at 1399–1400.

81. *Id.* at 1400. The majority in *McLinn* emphasized that the situation is different when the Supreme Court refuses to review an issue of state law than it is when a federal appellate court does so. *McLinn* explained that the structure of the federal court system is such that the Supreme Court may make the jurisprudential decision to conserve its discretionary power to review a state law issue, because the intermediate appellate panel has exercised its mandatory appellate jurisdiction, giving full, independent review on all legal issues. *Id.* at 1399. The majority argued that when an intermediate appellate court defers to the decision of the district judge, the right to appeal becomes a meaningless right because there has been no independent review of the state law issue. *Id.* at 1399–1400.

82. *Id.* at 1399.

83. *See supra* notes 34–43 and accompanying text.

84. *See supra* notes 79–82 and accompanying text.

85. *McLinn*, 739 F.2d at 1397. The court stated: "Today we adopt as the law of the circuit the rule that questions of state law are reviewable under the same independent de novo standard as are questions of federal law." *Id.*

86. *Id.* at 1405 (Schroeder, J., dissenting). The dissent in *McLinn* explained that the articu-

the appellate court looked only to whether plausible support existed for the district judge's decision, thus affording it presumptive validity.[87] When validity is presumed, the right to appellate review is severely curtailed because there can be no full, independent review by the appellate court unless clear error is determined.[88]

The appellate courts interpreted the "clear error" standard to mean that they were bound by the district court's decision because of the fact that the standard was so similar to the "clearly erroneous" standard of review applied to questions of fact under Federal Rule of Civil Procedure 52(a).[89] Pursuant to Rule 52(a), an appellate court is bound by the trial court's conclusions of fact unless they are clearly erroneous.[90] Blind adherence to district court decisions on state law under the "clear error" standard undermined the appellate court's role within the federal court structure, because it usurped the court's power to conduct full, independent, and impartial review.[91] The *de novo* standard articulated by *McLinn* will prevent any tendency for appellate courts to adhere blindly to district court decisions, because the standard requires that full, independent review be conducted.

The *de novo* standard announced in *McLinn* seemed to be a revolutionary break with precedent. In reality, however, the standard was not a drastic change in appellate procedure. In spite of the fact that a majority of appellate opinions paid lip service to the use of the "clear error" and "deferential" standards, in practice, the appellate courts conducted independent review to determine whether the district court's conclusions were in fact "clearly wrong."[92] The paradox resulted be-

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lation of the standard of review as "clearly erroneous" connotes that a district court's decision on a legal issue binds the appellate court just as a district court's finding on a factual issue binds the appellate court. *Id.* The result had been a tendency in some decisions to accord presumptive validity to the district court's conclusions on state law issues. *See, e.g.*, Monte Carlo Shirt, Inc. v. Daewoo Int'l (Am.) Corp., 707 F.2d 1054, 1056–57 (9th Cir. 1983); Smith v. Sturm, Ruger & Co., 524 F.2d 776, 778 (9th Cir. 1975). *See generally* C. WRIGHT, LAW OF THE FEDERAL COURTS § 58, at 240–41 (2d ed. 1970).

87. *See supra* notes 37–38 and accompanying text.

88. *See supra* note 53 and accompanying text.

89. FED. R. CIV. P. 52(a).

90. *Id.*

91. *McLinn*, 739 F.2d at 1401. *See also* Kurland, *supra* note 54, at 217–18.

92. *See, e.g.*, Pacific Mut. Life Ins. Co. v. American Guar. Life Ins. Co., 722 F.2d 1498 (9th Cir. 1984). In *Pacific Mutual*, the court announced that "[a] district court's determination of state law will be accepted on review unless it appears to be clearly erroneous." *Id.* at 1500. The court then proceeded to conduct an independent, detailed review of the state statute at issue, comparing the district judge's interpretation to its own to determine whether the district court decision was "clearly wrong." *Id.* at 1500–01. In Nemmers v. City of Dubuque, 716 F.2d 1194 (8th Cir. 1983), the Court of Appeals for the Eighth Circuit asserted that it should give great weight to the district court's conclusions on local law. Nonetheless, it ultimately determined that the Iowa Supreme Court would have held differently and, therefore, reversed the district court's decision. *Id.* at 1200.

cause the "clear error" standard was ill-suited to describe the appellate review process concerning issues of law. Appellate courts cannot apply the "clear error" standard to questions of law as they can to questions of fact. Under Rule 52(a), the appellate court reviews the entire evidence to determine whether a mistake has been made regarding the factual issues.[93] Under the "clearly erroneous" standard for findings of fact, a court looks at the hard evidentiary data to determine the presumable conclusions supported by that data. On the other hand, issues of law cannot be examined under the same "clear error" standard, because they are not based on objective, evidentiary data. Rather, conclusions of law, when there has been no definitive interpretation by the highest state court, are based on the trial judge's subjective interpretation of state law. To review conclusions of law, the appellate court must consult all of the relevant sources behind the legal issue which include: relevant statutes, legislative history, treatises, restatements, and published opinions. Only by conducting its own independent examination and by making its own independent analysis can the appellate court determine if the trial court's conclusions of law were clearly wrong. Thus, in order to carry out the "clear error" standard of review for legal issues, appellate courts had to conduct independent review of those issues due to their subjective nature. The *McLinn* court, in adopting the *de novo* standard, applied the appropriate label to the appellate process. Use of the *de novo* label will ensure that the appellate court will not review questions of law as if they were questions of fact.

The *McLinn* decision not only remedies the problems created by use of the "clear error" standard; it also eliminates the difficulties inherent in use of the "deferential" standard of review. Under the "deferential" standard, great weight was given to the district judge's conclusions on state law issues.[94] As the majority in *McLinn* pointed out, it is difficult to determine whether a shift from "clear error" to "great weight" would require that more or less deference be given to district court decisions.[95] The flaw in the "deferential" standard lies in the fact that appellate courts, when they defer to the decision of the district court, cannot provide parties with full, independent, and impartial determinations on the legal issues involved in the case. There cannot be deference to district court decisions and full, independent review, be-

93. The mistake standard, which was enunciated in United States v. Gypsum Co., 333 U.S. 364 (1948), has been interpreted to mean that "where the evidence would support a conclusion either way, a choice by the trial judge between two permissible views of the weight of the evidence is not clearly erroneous." Chaney v. City of Galveston, 368 F.2d 774, 776 (5th Cir. 1966).

94. *See supra* notes 37–39 and accompanying text.

95. *McLinn*, 739 F.2d at 1401.

cause the concepts are mutually exclusive.[96] If great weight is given to a district judge's decision, merely because it is his or her decision, there has been no independent determination of the state law by the appellate tribunal, and the right to appeal has not been fulfilled. Therefore, the "deferential" standard, like the "clear error" standard, fails to serve the purpose of appellate review.

Use of the *de novo* standard of review avoids the problems inherent in according great weight to district court decisions, while it employs the reasoning behind the "deferential" standard of review. The "deferential" standard is based on the presumption that the district judge has special expertise in state law due to his or her day-to-day familiarity with legal issues of the state in which he or she sits.[97] The fact that the state judge is an expert in the law of his or her state does not support use of a review standard that binds appellate courts to the trial judge's decision. Even though the district judge is an expert in interpreting and applying the law of the state, he or she is no less an expert in determining federal law and no deference is given to district court decisions on federal law.[98] Moreover, both trial court decisions and appellate court review must be based on recognized sources that are available to the parties and that can be argued and contested before the district court as well as before the appellate tribunal.[99] The sources include: statutes, legislative history, treatises, restatements, and published opinions. Neither district court nor federal appellate court decisions can be based on undefined, special knowledge or feelings that a district judge might have for the law of his or her state. *McLinn* asserts that such subjective and elusive bases for decision cannot be articulated by the trial judge, argued by the parties, or reviewed by the appellate court. Therefore, such variables cannot form the basis for giving great weight to district court decisions on state law.[100]

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96. *Id.*

97. *Id.* at 1405.

98. *Id.* at 1400. One commentator points out that the very essence of the *Erie* doctrine is that a federal judge can find, if not make, the law almost as well as a state judge. Kurland, *supra* note 54, at 217. Kurland goes on to observe that if judicial expertise in the law of the state is really the test, review of a district court's rulings on state law would be permitted only when the appellate bench is also made up of judges from the same state or jurisdiction. However, no such limitation has been proposed. *Id.*

99. *McLinn*, 739 F.2d at 1400.

100. The *McLinn* majority points out that one danger in using a review standard based on a presumption that the district judge has special knowledge of state law issues is the fact that such a presumption invites investigation into the credentials and experience of each district judge. *McLinn*, 739 F.2d at 1400. Such an investigation has occurred in several appellate cases, and when it has been determined that the district judge lacked experience or credentials, a *de novo* standard of review was applied. *See, e.g.*, Yamaguchi v. State Farm Mut. Auto Ins. Co., 706 F.2d 940, 946 n.5 (9th Cir. 1983) (appellate court refused to accord deference to the trial court's

The *de novo* standard ensures that appellate review of legal issues will be based on recognized sources, while it allows the appellate court to benefit from the district judge's knowledge and expertise on state law issues. The *de novo* standard shifts the reviewing court's focus from the district judge's *conclusions* of state law to the district judge's *reasoning* behind those conclusions.[101] By affording consideration to the district judge's reasoning, rather than to his or her conclusions, the danger of blind adherence to the district court decision is avoided, and full, independent review based on recognized legal sources is carried out.

C. *Practical Effects of* McLinn v. F/V Fjord

The dissent in *McLinn v. F/V Fjord* argued that the practical effect of the decision would be to pervert and to cripple the federal appellate process.[102] The dissent's argument asserted that review based on a *de novo*, rather than a "deferential" standard, would increase the workload of the federal appellate courts, thus slowing and impeding the appellate process.[103] The majority countered that the appellate court, because it is the first level of appellate review, bears the responsibility of preserving a party's statutory right to appeal questions of state law. In order to fulfill that duty, the appellate court must provide full and impartial review.[104] The appellate court's responsibility within the federal court structure outweighs any desire to conserve judicial resources or to promote administrative efficiency.[105] While the possibility for an increase in appeals exists, in practice, the *de novo* standard should not have the effect that the dissent predicts, because most appellate courts, even while they claim to review under a "clear error" or "deferential" standard, conduct full, independent review proceedings.[106] Thus, there should be no great encumbrance to appellate efficiency.

The dissent also postulated that the *McLinn* decision will promote frivolous appeals, because litigants will believe that district court deci-

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decision because the trial judge was sitting by designation).

101. *McLinn*, 739 F.2d at 1400–03. The majority observed that respect for the views of the district court judge is "inherent in the adversary system which assigns to the appellant the duty to establish the errors in the trial court's decision." *Id.* at 1400. The court went on to explain that the district court's "reasoned explanation for a holding on a question of state law will be given full, thorough, and respectful consideration, just as it is on questions of federal law." *Id.* at 1403.

102. *Id.* (Schroeder, J., dissenting).

103. *Id.*

104. *See supra* notes 79–82 and accompanying text.

105. *McLinn*, 739 F.2d at 1400. The majority stated: "The application of the 'clear error' or the dissent's 'great weight' standard certainly cannot be justified by any desire to conserve judicial resources or to promote administrative efficiency." *Id.*

106. *See supra* notes 92–94 and accompanying text.

sions will be overturned more easily and more frequently.[107] The dissent's argument fails because it is based on the premise that under a *de novo* standard, appellate courts will be more likely to disagree with district court decisions. The dissent's argument misperceives the rationale behind the *de novo* standard. *De novo* review is not based on the premise that appellate judges possess greater wisdom than trial judges. Rather, *de novo* review is based on the fact that the appellate process and the structure of the appellate system mandate full, independent review of legal issues.[108] Parties to a civil action may appeal the final judgment of a district court as a matter of right.[109] Appellate courts must independently review all issues of law. To preserve the right to appeal, there must be full and impartial review of all legal issues.

The final criticism posed by the dissent predicts that the *McLinn* decision will serve as a "disincentive" to district court judges to explore and explain thoroughly the authorities bearing on the issues of state law.[110] The criticism is clearly at odds with the practical effect that the *de novo* standard will have. Under a "clear error" standard, a district judge, if so inclined, could have dispensed with thorough exploration of legal issues, safe in the knowledge that his or her decision was insulated from reversal unless it were blatantly erroneous. Under the *de novo* standard, where deference is afforded to the district judge's reasoning rather than to his or her conclusions, there should be greater incentive for a district judge to perform a thorough examination of state law authorities and more reason for a detailed explanation of the reasoning behind his or her conclusions on legal issues.[111] As the majority indicated, it is inconceivable that the highly competent district judges, upon application of the *de novo* standard, would be dissuaded from considering issues of state law as fairly and as fully as they consider questions of federal law.

V. CONCLUSION

McLinn v. F/V Fjord[112] eliminates the confusion in the Ninth Circuit as to the standard of review to be applied to district court conclusions on questions of state law.[113] Under the *de novo* standard of review, the Court of Appeals for the Ninth Circuit must conduct a full, independent, and impartial review of all legal issues, thus preserving

107. *McLinn*, 739 F.2d at 1406 (Schroeder, J., dissenting).
108. *See supra* notes 60–92 and accompanying text.
109. *See supra* note 60 and accompanying text.
110. *McLinn*, 739 F.2d at 1403 (Schroeder, J.,dissenting).
111. *Id.*
112. 739 F.2d 1395 (9th Cir. 1984).
113. *See supra* notes 85–9 and accompanying text.

the parties' statutory right to appeal.[114] By following the *McLinn* rule, an appellate court, being the first level for review of district court decisions, will fulfill its role within the federal court structure. That role is to review issues of law independently and impartially.[115]

To date, at least thirteen decisions by the Court of Appeals for the Ninth Circuit have applied the *de novo* standard to review a district court's decision on state law issues.[116] Adherence to the *McLinn* standard ensures that the federal forum, at least in the Ninth Circuit, provides the appellant with the same broad scope of review that he or she would receive in the state forum.[117] Since the appellate function is the same in each forum, the scope of review must be the same.[118] The appellate function is to provide full, independent review of all questions of law. The *de novo* standard facilitates independent review; therefore, it preserves the parties' statutory right to a meaningful appeal.

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114. *See supra* notes 78–82 and accompanying text.

115. *See supra* notes 55–82 and accompanying text.

116. *See, e.g.*, Milgard Tempering, Inc. v. Selas Corp. of America, 761 F.2d 553, 555 (9th Cir. 1985) (cited *McLinn* and stated: "We review district court interpretations of state law *de novo*."); Meckert v. Transamerica Ins. Co., 742 F.2d 505, 506 (9th Cir. 1984) (cited *McLinn* and stated: "We review the district court's determination of the issue *de novo*."); Jewel Co., v. Pay Less Drug Stores, 741 F.2d 1555, 1560 (9th Cir. 1984) (cited *McLinn* and stated: "We review the district court's construction of California law *de novo*."). *See also* Perry v. O'Donnell, 749 F.2d 1346, 1348 (9th Cir. 1984); Kline v. Johns-Manville, 745 F.2d 1217, 1220 (9th Cir. 1984); Mingo v. Heckler, 745 F.2d 537, 538 (9th Cir. 1984).

117. *See supra* note 72 and accompanying text.

118. *See supra* notes 69–72 and accompanying text.