Editor-in-Chief
Jeffrey I. Ehrlich
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Appellate Reports

SUPREME COURT RESOLVES SPLIT OF AUTHORITY ABOUT THE STANDARD OF REVIEW WHEN STANDARD OF PROOF IS CLEAR-AND-CONVINCING EVIDENCE

Conservatorship of O.B. (2020) _ Cal.5th _ (California Supreme Court)
Who needs to know about this case? Lawyers handling appeals involving punitive damages and cases in which the clear-and-convincing standard of proof applies.
Why is it important? It resolves a split of authority about the proper standard of review in any case involving the clear-and-convincing standard of proof. It holds that appellate review must take this standard into account.

The mother and elder sister of a young adult diagnosed with autism (O.B.) petitioned to be appointed her limited conservators. The appointment of a conservator requires a showing in the trial court of clear and convincing evidence that a conservatorship is warranted. The trial court's order granting the petition was affirmed. The Supreme Court granted review to resolve a longstanding split of authority on the proper standard of appellate review of the sufficiency of the evidence in cases where the clear-and-convincing evidence standard applies.

The clear-and-convincing standard of proof in the trial court requires a showing that it is "highly probable" that the facts to which the standard applies are true. It is an intermediate standard of proof, falling between the default preponderance- of-the-evidence standard in civil cases, which simply requires proof that the existence of fact is more probable than its non-existence, and the demanding beyond-a-reasonable-doubt standard used in criminal cases.

The clear-and-convincing standard applies to various determinations where particularly important individual interests or rights are at stake, such as the termination of parental rights, involuntary commitment, and deportation. Other findings requiring clear-and-convincing proof include whether a civil defendant is guilty of the "oppression, fraud, or malice" that allows for the imposition of punitive damages (Civ. Code, § 3294, subd. (a)); whether a conservator can withdraw life-sustaining care from a conservatee; whether conditions necessary for the nonconsensual, nonemergency administration of psychiatric medication to a prison inmate have been satisfied; and whether a publisher acted with the intent ("actual malice") that must be shown for a plaintiff to prevail in certain kinds of defamation cases.

A split of authority developed in California about how an appellate court should review the sufficiency of the evidence when the clear-and-convincing standard of proof applies. One line of authority held that the standard was fundamentally a trial-court construct, which had no application on appeal. For example, in *Crail v. Blakely* (1973) 8 Cal.3d 744, 750, the Supreme Court stated, "The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal."

A contrary line of authority held that appellate review needed to take the relevant standard of proof into account. In *In re Angelia P.* (1981) 28 Cal.3d 908, 924, the Court stated that review of the sufficiency of an order terminating parental rights required the appellate court to "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find [that termination of parental rights is appropriate based on clear and convincing evidence]."

Based on logic, the policy interests that are often implicated when the clear-and-convincing standard applies, and precedent, the Court held that reviewing courts must take the standard of proof in the trial court into account. The Court adopted the following standard: "In general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof."

This approach does not provide reviewing courts with a liberal license to substitute their views for the conclusions drawn by the trier of fact on matters such as witness credibility and the resolution of conflicts in the evidence. As "in criminal appeals involving a challenge to the sufficiency of the evidence, an appellate court reviewing a finding made pursuant to the clear and convincing standard does not reweigh the evidence itself. In assessing how the evidence reasonably could have been evaluated by the trier of fact, an appellate court reviewing such a finding is to view the record in the light most favorable to the judgment below; it must indulge reasonable inferences that the trier of fact might have drawn from the evidence; it must accept the factfinder's resolution of conflicting evidence; and it may not insert its own views regarding the credibility of witnesses in place of the assessments conveyed by the judgment. . . . [Ultimately], the question before a court reviewing a finding that a fact has been proved by clear and convincing evidence is not whether the appellate court itself regards the evidence as clear and convincing; it is whether a reasonable trier of fact could have regarded the evidence as satisfying this standard of proof."

Short(er) takes

Sexual harassment in professional relationships; Civ. Code 51.9; Harvey Weinstein: *Judd v. Weinstein* (9th Cir. 2020) _ F.3d _ .

Ashley Judd sued Harvey Weinstein for sexual harassment under Civil Code section 51.9. The district court dismissed Judd's claim for failure to state a claim. Reversed.

Civil Code section 51.9 prohibits a sexual harassment in a wide variety of business relationships outside of the workplace. Under the version of the statute at issue in the appeal, a plaintiff was required to plead four elements to state a claim:

> (1) There is a business, service, or professional relationship between the plaintiff and defendant. Such a relationship may exist between a plaintiff and a person, including, but not limited to, any of the following persons:
>
> (A) Physician, psychotherapist, or dentist. ...

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(B) Attorney, holder of a master's degree in social work, real estate agent, real estate appraiser, accountant, banker, trust officer, financial planner loan officer, collection service, building contractor, or escrow loan officer.

(C) Executor, trustee, or administrator.

(D) Landlord or property manager.

(E) Teacher.

(F) A relationship that is substantially similar to any of the above.

(2) The defendant has made sexual advances, solicitations, sexual requests, or demands for sexual compliance by the plaintiff that were unwelcome and persistent or severe, continuing after a request by the plaintiff to stop.

(3) There is an inability by the plaintiff to easily terminate the relationship without tangible hardship.

(4) The plaintiff has suffered or will suffer economic loss or disadvantage or personal injury as a result of the conduct described in paragraph (2).

(The statute was amended in 2019 to add, *inter alia*, "director or producer" to the list in paragraph (1). The Court did not express a view on whether the amendment clarified or changed existing law.)

The statute imposes liability for sexual harassment in any "business, service, or professional relationship" that is "substantially similar" to the enumerated examples. Weinstein argued that his relationship with Judd could not be "substantially similar" to any of the enumerated examples because they are so idiosyncratic that there appears to be no rhyme or reason explaining the examples included in the statute. The court disagreed.

It is clear that each of the enumerated examples consists of a relationship wherein an inherent power imbalance exists such that, by virtue of his or her "business, service, or professional" position, one party is uniquely situated to exercise coercion or leverage over the other. This is the key element common to every example in the statute. The potential for abuse of one's "business, service, or professional" position that characterizes the enumerated relationships in section 51.9 also exists in the producer-actor relationship.

Under the facts alleged, the relationship between Judd and Weinstein was characterized by a considerable imbalance of power substantially similar to the imbalances that characterize the enumerated relationships in section 51.9. That is, by virtue of his professional position and influence as a top producer in Hollywood, Weinstein was uniquely situated to exercise coercive power or leverage over Judd, who was a young actor at the beginning of her career at the time of the alleged harassment. Moreover, given Weinstein's highly influential and "unavoidable" presence in the film industry, the relationship was one that would have been difficult to terminate "without tangible hardship" to Judd, whose livelihood as an actor depended on being cast for roles.

Unfair competition law (Bus. & Prof. Code § 17200); False Advertising Law; Consumer Legal Remedies Act; reasonable-consumer test; prescription pet food: *Moore v. Mars Petcare US, Inc.* (9th Cir. 2020) __ F.3d __.

Consumers who purchased pet food that required a prescription from a veterinarian to purchase brought a class action under the UCL, False Advertising Law, and Consumer Legal Remedies Act seeking injunctive relief, restitution, and damages against four pet food manufacturers, two veterinary clinic chains, and a pet food retailer. They alleged that the prescription requirement and advertising lead reasonable consumers falsely to believe that such food has been subject to government inspection and oversight, and has medicinal and drug properties, causing consumers to pay more or purchase the product when they otherwise would not have. The district court granted Defendants' motions to dismiss. Reversed.

Whether a business practice is deceptive or misleading under these California statutes is governed by the 'reasonable consumer' test." Plaintiffs "must show that members of the public are likely to be deceived. This requires more than a mere possibility that Defendants' label might conceivably be misunderstood by some few consumers viewing it in an unreasonable manner. Rather, the reasonable consumer standard requires a probability that a significant portion of the general consuming public or of targeted consumers, acting reasonably in the circumstances, could be misled.

California laws prohibit not only advertising that is false, but also advertising that, although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public. Whether a practice is deceptive is usually a question of fact that is not appropriate for resolution on demurrer or a motion to dismiss. Several themes emerge from the cases construing these statutes.

First, literal truth can sometimes protect a product manufacturer from a misleading claim, but it is no guarantee, whereas there is no protection for literal falseness.

Second, qualifiers in packaging, usually on the back of a label or in ingredient lists, can ameliorate any tendency of the label to mislead. But if a back-label ingredients list conflicts with, rather than confirms, a front-label claim, the plaintiff's claim is not defeated.

Third, brand names *by themselves* can be misleading in the context of the product being marketed. For example, a product called "One a Day" gummy vitamins, which required two gummies per day for a full dosage, was held to be misleading.

Under these guidelines, the labeling of "prescription pet food" does appear deceptive and misleading. Common sense dictates that a product that requires a prescription may be considered a medicine that involves a drug or controlled substance. This conforms to general understandings of prescription drugs for humans and pets. Moreover, the brand name of "prescription pet food" itself could be misleading. A reasonable consumer being told about "prescription pet food" may be surprised to learn that there are no drugs or controlled ingredients in the pet food by nature of brand names like "Prescription Diet" or an "Rx" symbol on the food packaging.

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of Advocate magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*