

## CRITICALLY EXAMINING THE ABUSE OF DISCRETION STANDARD

By: Darrell L. Heckman

Identifying the appropriate standard of review is the determinative issue in many appeals. Where the standard of review is de novo, the appellate court does not give deference to the trial court's decision, but decides afresh the merits of the legal issue. The classic example is an appeal from a summary judgment.

When the standard of review is "abuse of discretion," the appellate court is deferential to the trial court and will not overturn the trial court's exercise of its discretion, unless such discretion was abused, which occurs when the exercise of discretion is unreasonable or arbitrary. This standard works well for truly discretionary issues, such as whether or not to grant a continuance, or an extension of time, or to restrict voir dire or cumulative evidence. The mischief comes not from the word abuse, but from the word discretion. Unfortunately, Ohio has been giving lip service to an obviously false standard for at least 60 years.

In Ohio the Supreme Court announces the law of the case in the syllabus. Cassidy v. Glossip (1967)12 Ohio St.2d 17, 231 NE.2d 64, syllabus paragraph 6. Paragraph 2 of the syllabus of the case of Klever v. Reid Bros. Express (1951) 154 Ohio St. 491, 96 NE.2d 781 holds:

"An abuse of discretion... connotes more than an error of law." This holding has never been overruled and has been cited with approval by the Supreme Court in Pembaur v. Leis (1982) 1 Ohio St.3d 89, 437 NE.2d 1199, Blakemore v. Blakemore (1983) 82 Ohio St.2d 339, 695 NE.2d 1140 and Landis v. Grange Mutual Insurance Company (1998) 82 Ohio St.3d 339, 695 Ne.2d 1140. At the appellate level the statement that "an abuse of discretion is more than an error of law" has been used uncritically literally hundreds of times. For example, a random selection of Ohio appellate decisions issued the week of October 4, 2010 (the week I started this article) showed no fewer than 5 decisions repeating this mantra.

Smith v. Burroughs (2010) Ohio App Lexis 4081;  
MacFarlane v. MacFarlane (2010) Ohio App Lexis 4147;  
State v. Butcher (2010) Ohio App Lexis 4122;  
Jackson v. Jackson (2010) Ohio App Lexis 1152; and  
State v. Stout (2010) Ohio App Lexis 4082.

While a trial court does have discretion to act or not in instances such as granting or denying a continuance a court has absolutely no discretion as to whether or not to follow the law. Yet the straightforward holding in Klever, supra, and its abundant progeny is that an abuse of discretion is more than an error of law.

Ironically the mantra also states that while an abuse of discretion is more than an error of law, an abuse of discretion does exist if the court's decision is unreasonable. It is never

reasonable to commit an error of law. Therefore an abuse of discretion is not “more” than an error of law.

Thankfully despite never overruling Klever, the Supreme Court has recently stated the obvious. In State v. Futtrall (2009) 123 Ohio St.3d 498, 918 NE.2d 497, the court held paragraph 6 “When a court’s judgment is based on an erroneous interpretation of the law, an abuse of discretion standard is not appropriate.” This holding belongs in a syllabus overruling Klever if we are not to continuously have the Klever holding repeated, which as previously mentioned, happened 5 times during the week of October 11, 2010 alone.

A recent opinion is State v. Boles (2010) 187 Ohio App.3d 345, 932 NE.2d 345, wherein Judge Fain of the Second District Court of Appeals excellently laid out the proper consideration for appellate review as follows:

[16] Although it does not affect the outcome of this appeal, we take issue with the proposition that a trial court may, without abusing its discretion, commit an error of law.

[17] We have traced this offensive formulation—that, “abuse of discretion” means more than an error of law—as far back as Steiner v. Custer (1940), 137 Ohio St. 448, 451, 19 O.O. 148, 31 NE.2d 855, which, in turn, cites Black’s Law Dictionary (2d Edition) 11 as authority. The definition of “abuse of discretion” in Black’s Law Dictionary (8<sup>th</sup> Edition 2004) offers no support for the offensive formulation:

[18] “1. An adjudicator’s failure to exercise sound, reasonable, and legal decision-making. 2. An appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.”

[19] Interestingly, the definition of “abuse of discretion” in Black’s Law Dictionary (4<sup>th</sup> Edition 1968), which was the edition of Black’s Law Dictionary extant when this author was in law school, not only does not support the offensive formulation, it contradicts it:

[20] “Abuse of discretion” is synonymous with a failure to exercise a sound, reasonable and legal discretion\*\*\**it is a strict legal term indicating that appellate court is simply of opinion that there was a commission of an error of law in the circumstances*\*\*\*And it does not imply intentional wrong or bad faith, or misconduct, nor any reflection on the judge but means the clearly erroneous conclusion and judgment – one is that clearly against logic and effect of such facts as are presented in support of the application or against the reasonable and probable deductions to be drawn from the facts disclosed upon the hearing; an improvident exercise of discretion; \*\*\**an error of law.*\*\*\*

[21] “A discretion exercised to an end or purpose not justified by and clearly against reason and evidence. Unreasonable departure from considered precedents and settled judicial custom, constituting error of law. The term is commonly employed to justify an interference by a higher court with the exercise of discretionary power by a lower court and is said by some authorities to imply not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. The exercise of an honest judgment, however erroneous it may appear to be, is not an abuse of discretion. Where a court does not exercise a discretion in the sense of being discreet, circumspect, prudent, and exercising cautious judgment, it is an abuse of discretion. Difference in judicial opinion is not synonymous with ‘abuse of discretion’ as respects setting aside verdict as against evidence.”

[22] We can only speculate that the origins of the offending formulations lay in an attempt to make the following point too succinctly:

[1] [23] When a pure issue of law is involved in appellate review, the mere fact that the reviewing court would decide the issue differently is enough to find error. By contrast, where the issue on review has been confided to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.

[24] We know, all too well, that the offending formulation can be found in a plethora of appellate opinions, including decisions of the Ohio Supreme Court. But we are not aware of any Ohio appellate decisions in which it is declared part of the holding that a trial court may, in the exercise of the discretion, commit an error of law.

[25] The author of this opinion will admit that on numerous occasions, he has been too lazy to delete a quotation or paraphrase of the offending formulation from a staff attorney’s draft. We are confident, however, that in none of those opinions is it part of the holding that a trial court may, in the exercise of its discretion, commit an error of law.

[2] [26] No court—not a trial court, not an appellate court, nor even a supreme court – has the authority, within its discretion, to commit an error of law.

No court should ever hold that abuse of discretion is more than an error of law and the Ohio Supreme Court should formally say so in syllabus law.