

Supervisory Writs: A Solution to the Conflict Between Appellate Review of Facts and the Right to a Civil Jury Trial

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Though the questions discussed above are significant, perhaps the most important remaining one is the viability of the *Loescher* holding itself. In a four to three decision the court has chosen a new and potentially confusing method for extending liability under article 2317.⁴⁸ In light of the fact that the use of a presumption of negligence under this article could accomplish similar results while retaining familiar negligence concepts and definitions,⁴⁹ the future of the *Loescher* approach is by no means certain.⁵⁰

David Dugas

SUPERVISORY WRITS: A SOLUTION TO THE CONFLICT BETWEEN APPELLATE
REVIEW OF FACTS
AND THE RIGHT TO A CIVIL JURY TRIAL?

Plaintiffs brought an action to recover for the death of their minor daughter who was struck by a car driven by defendant's employee. After a jury verdict in favor of the defendant, plaintiffs appealed, claiming that the trial judge's refusal to give a requested instruction¹ prevented the jury from applying the correct legal principle to the facts. The appellate court held that this refusal was reversible error and remanded the case for a new trial.² The Louisiana Supreme Court agreed that the jury instruction should have been given but *held* that when a court of appeal is in possession of a full record, it

(4) a link in the causal chain of damage done to the plaintiff in order that the defendant be exonerated from liability.

48. The approach is potentially confusing because of the references to negligence concepts that are made while attempting to move beyond those same concepts. See note 44, *supra*.

49. Using article 2317 to raise a presumption of negligence as done in *Dupre v. Traveler's Ins. Co.*, 213 So. 2d 98 (La. App. 1st Cir. 1968), could accomplish essentially the same end as *Loescher* by merely raising the burden of rebuttal. See text at notes 9 & 10, *supra*. Cf. *Simon v. Ford Motor Co.*, 282 So. 2d 126 (La. 1973).

50. An indication as to how the Louisiana Supreme Court may view *Loescher* in the future may be found in recent "slip and fall" cases in which the court did *not* apply article 2317 to determine a storekeeper's liability, but rather used a presumption of negligence. See *Gonzales v. Winn Dixie*, 326 So. 2d 486 (La. 1976). If *Loescher* is extended to other situations in the future, it will almost certainly be used in automobile "latent defect" cases, since the court expressly overruled *Cartwright v. Fireman's Ins. Co.*, 254 La. 330, 223 So. 2d 822 (1969).

1. *Gonzales v. Xerox Corp.*, 320 So. 2d 163, 164 (La. 1975). The requested instruction concerned a motorist's duty to keep a close watch; the general instruction given by the judge dealt with a motorist's duty when approaching small children.

2. 307 So. 2d 153 (La. App. 1st Cir. 1974).

must decide on the merits and may not remand. *Gonzales v. Xerox Corporation*, 320 So. 2d 163 (La. 1975).

The Louisiana Constitution provides that appellate jurisdiction *shall* extend to law and facts.³ Although not given a constitutional basis until 1882,⁴ appellate review of facts was exercised as early as 1816.⁵ Generally appellate courts have examined the facts and have reversed and rendered when the factfinder's conclusions were found to be against the weight of the evidence.⁶ An exception appeared in *Herbert v. Travelers Indemnity Company*⁷ in which the Fourth Circuit, by holding that an appellate court should reverse and render only when a preponderance of the evidence would support no other conclusion, evinced its belief that close factual situations should be subjected to a jury's scrutiny. Appellate review of facts was further limited by *Bienvenu v. Angelle*⁸ which declared that a failure to remand in cases containing erroneous factual conclusions precipitated by improper jury instructions denies the parties their constitutional right to a trial, as well as their statutory right to a trial by jury.⁹ Despite the policy of vigilantly guarding the right to a jury trial expressed in *Bienvenu*, the appellate courts have continued to reverse and render judgments.¹⁰

In the instant case the court considered whether an appellate court has discretion to remand a case when a full record of the trial is available. In specifically overruling *Bienvenu*, the majority ordered the Court of Appeal

3. *Gonzales* was decided under La. Const. art. VII, §§ 10, 29 (1921). For application of these provisions see, e.g., *Crawford v. Bullock*, 209 La. 552, 25 So. 2d 226 (1946). The provisions were carried forward with substantially the same language to the 1974 Constitution. LA. CONST. art. 5, §§ 5, 10.

4. La. Const. art. 81 (1879), as amended by La. Acts 1882, No. 125 (giving appellate review of facts to the supreme court). La. Const. arts. 85, 98 (1913) (extending appellate review of facts to the courts of appeal).

5. *Abat v. Doliolle*, 4 Mart. (O.S.) 316 (La. 1816) (noting the change of procedure from trial de novo on appeal with recall of witnesses to the use of recorded testimony).

6. E.g., *Brown v. Louisiana Ry. & Nav. Co.*, 147 La. 829, 86 So. 281 (1920); *Barker v. Phoenix Ins. Co.*, 220 So. 2d 720 (La. App. 2d Cir. 1969); cf. *Brown v. Kaiser Aluminum & Chem. Corp.*, 250 So. 2d 99 (La. App. 4th Cir. 1971).

7. 193 So. 2d 330 (La. App. 4th Cir. 1966).

8. 254 La. 182, 223 So. 2d 140 (1969).

9. In holding that appellate courts must remand in certain instances, the court relied exclusively on two cases, both of which were decided before appellate review of facts became a constitutional mandate. *Robinson v. Landrum*, 10 La. Ann. 539 (1855); *Beal v. M'Kiernan*, 6 La. 407 (1834).

10. E.g., *D'Amico v. Shell Oil Co.*, 293 So. 2d 279 (La. App. 4th Cir. 1974); cf. *Brown v. Kaiser Aluminum & Chem. Corp.*, 250 So. 2d 99 (La. App. 4th Cir. 1971) (not a jury trial). *Contra*, *Reeves v. Gulf States Util. Co.*, 312 So. 2d 118 (La. App. 1st Cir. 1975).

to reverse and render and rejected the view of those few cases which have limited the strict rule of appellate review of facts.¹¹ While basing its decision primarily upon the constitutional provisions extending appellate jurisdiction to facts,¹² the court found further support in Louisiana Code of Civil Procedure article 2164, which provides that "[t]he appellate court shall render any judgment which is just, legal, and proper upon the record on appeal." A footnote to the majority opinion explained that article 2164 embodies articles 905 and 906 of the 1870 Code of Practice,¹³ which required the appellate court to render the judgment which the lower court should have rendered¹⁴ and allowed remand only for the limited purpose of receiving necessary testimony.¹⁵

The court also cited the benefits of judicial economy in support of its reaffirmation of broad appellate review of facts. According to the court, remanding when there is a full record will only crowd the dockets and slow the judicial process.¹⁶ Justice Dixon, in dissent, attacked the majority's reliance on judicial economy and cited Louisiana Code of Civil Procedure article 1978, which allows recorded testimony of the first trial to be used at the second trial, in arguing that a jury is more expeditious than an appellate court.¹⁷

Although the Code of Civil Procedure recognizes the right to a jury trial,¹⁸ the Louisiana Constitution does not guarantee one,¹⁹ and the federal

11. 320 So. 2d at 166.

12. La. Const. art. VII, §§ 10, 29 (1921).

13. 320 So. 2d at 163 n.1; *see also* LA. CODE CIV. P. art. 2164, comments (c) & (d).

14. La. Code of Practice art. 905 (1870).

15. *Id.* art. 906. *See, e.g.,* White v. White, 161 La. 718, 109 So. 399 (1926); Williamson v. Enterprise Brick Co., 178 So. 197 (La. App. 1st Cir. 1938). Cases under the Code of Civil Procedure are in accord. *E.g.,* Subdivision Planning Eng'rs, Inc. v. Manor Dev. Corp., 290 So. 2d 375 (La. App. 4th Cir. 1974).

16. 320 So. 2d at 166. Remanding to the court of appeal in the instant case seemingly ignored the supreme court's own jurisdiction over facts; however, the court might justify the procedure with the belief that the court of appeal was more familiar with the record.

17. 320 So. 2d at 167.

18. LA. CODE CIV. P. art. 1731 ("The right of trial by jury is recognized."); *see, e.g.,* Champagne v. American Southern Ins. Co., 295 So. 2d 437 (La. 1974); Hill v. Green, 275 So. 2d 407 (La. 1973).

19. Hubert, *Trial by Jury under the New Code of Civil Procedure*, 35 TUL. L. REV. 520, 522 (1961); *cf.* LA. CONST. art. I, § 17; La. Const. art. I, § 3 (1921) (limited to criminal trials). But LA. CONST. art. I, § 4 provides: "In every expropriation, a party has the right to trial by jury to determine compensation." Since the right to a jury trial in expropriation cases is of constitutional dimension, it is arguable whether *Gonzales* will preclude a remand in such cases.

constitutional right to a civil jury trial²⁰ has never been extended to civil suits in state courts.²¹ While litigants in Louisiana do have a statutory right to a jury trial when they properly request one,²² they are subjected on appeal to the constitutional and statutory scheme of appellate review of facts. Under that scheme, when an error is committed at trial²³ it is correctible on appeal if there is a complete record, and allowing a discretionary remand is inconsistent with appellate review of facts. On remand, it is not necessary to recall the witnesses.²⁴ Thus, the jury, in a second trial, would not be able to assess the credibility of the original witnesses, and if appealed again, the second record would be substantially the same as the first.²⁵ Therefore a discretionary remand after the record is complete does not properly balance the right to a civil jury trial with the scheme of appellate review of facts.

Similarly, complete application of appellate review of facts cannot afford the proper balance since a full application of such a scheme would cast the trial court in the role of court stenographer for the appellate courts. The purpose or function of trial courts seems uncertain in a system which apparently would not accord them a conclusive role in fact finding²⁶ and this uncertainty might cause participants in such proceedings to lose interest and respect for the court. To partially alleviate this problem, the Louisiana appellate judiciary has created self-imposed limitations on the scope of its review of facts. The prejudicial error rules allow reversal only of those factual conclusions deemed "manifestly erroneous,"²⁷ thus preserving the significance attached to demeanor evidence and to the trial court's assess-

20. U.S. CONST. amend. VII.

21. *Walker v. Sauvinet*, 92 U.S. 90 (1875) (reviewing Louisiana procedure); *Melancon v. McKeithen*, 345 F. Supp. 1025 (E.D. La. 1972), *aff'd*, 409 U.S. 943 (1973) (where the Court in dicta said that even assuming the seventh amendment applied to states, the Louisiana practice would not be unconstitutional). *Cf. Booth v. Home Indem. Co.*, 244 F.2d 568 (5th Cir. 1957).

22. LA. CODE CIV. P. art. 1731; *e.g.*, *Hall v. Green*, 275 So. 2d 407 (La. 1973); *Block v. Fitts*, 259 La. 555, 250 So. 2d 738 (1971).

23. *E.g.*, *Pfister v. Phoenix of Hartford Ins. Co.*, 290 So. 2d 362 (La. App. 4th Cir. 1974) (improper jury instruction); *Link v. Shreveport Rys.*, 153 So. 77 (La. App. 2d Cir. 1934) (impaneling an improper jury).

24. LA. CODE CIV. P. art. 1978; *Hirst v. Lord*, 9 Or. App. 316 (La. App. 1912).

25. *See Note*, 41 TUL. L. REV. 922, 925 (1967). *Cf. Bryant v. Saint Paul Fire & Marine Ins. Co.*, 272 So. 2d 448 (La. App. 2d Cir. 1973).

26. The trial court is the proper forum for resolving factual issues. *Reeder v. Allstate Ins. Co.*, 235 So. 2d 111 (La. App. 4th Cir. 1970). "Trial courts exist, and there must be reasons for them." Robertson, *The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana*, 29 LA. L. REV. 78, 88 (1968).

27. *Canter v. Koehring Co.*, 283 So. 2d 716 (La. 1973).

ment of the credibility of witnesses.²⁸ Appellate courts also accord the fact finder great discretion in awarding damages.²⁹ Such limitations serve to reduce the workload of appellate courts as well as clarifying the trial courts' function. The *Bienvenu* holding added an additional limitation on appellate review of facts that reflected a concern for protecting the traditional right to a jury trial.³⁰

In overruling *Bienvenu*, the supreme court did not alter the "manifest error" rule³¹ since an appellate court will still have to find "manifest error" before it can reverse and render. *Gonzales* does, however, sweep away the *Bienvenu* attempt to protect the right to a jury trial. The constitutional duty of appellate review of facts should not completely engulf the statutory right to a jury trial.³² Since neither full application of appellate review of facts nor total protection of the right to a jury trial by remand is workable, the judiciary should attempt to reconcile the two objectives by eliminating, where possible, those errors that force the appellate court to give the trial no purpose other than completing a record that can be reviewed on appeal.

Supervisory writs³³ provide a means to achieve such a result. At present, courts deny writs absent a showing of irreparable injury, *i.e.*, when adequate remedy is unavailable on appeal.³⁴ After *Gonzales*, however, there will always be an "adequate" remedy on appeal since the appellate courts can correct all errors either by reversing and rendering if there is a complete record, or remanding if there is not. Therefore, to afford protection to the right to a jury trial,³⁵ a new approach to granting supervisory writs should be considered.

28. *Id.* at 724; Comment, *Appellate Review of Facts in Louisiana Civil Cases*, 21 LA. L. REV. 402, 425 (1961).

29. LA. CIV. CODE art. 1934(3); *Gaspard v. LeMaire*, 245 La. 239, 158 So. 2d 149, *reh'g* 245 La. 264, 158 So. 2d 157 (1963).

30. The right to a jury trial is traditional in the sense that it is constitutionally guaranteed in federal courts, and guaranteed by statute in Louisiana.

31. The manifest error rule is not discussed in the instant case.

32. *Cf.* *Champagne v. American Southern Ins. Co.*, 295 So. 2d 437 (La. 1974); *Hill v. Green*, 275 So. 2d 407 (La. 1973).

33. LA. CONST. art. V, § 10; La. Const. art. VII, § 29 (1921), *as amended by* La. Acts 1958, No. 561; LA. CODE CIV. P. art. 2201.

34. *E.g.*, *La Fleur v. Fidelity & Cas. Co.*, 300 So. 2d 508 (La. App. 3d Cir. 1974); *see also* *Tate, Supervisory Powers of the Louisiana Courts of Appeal*, 38 TUL. L. REV. 429 (1964).

35. The appellate courts' protection of the right to a civil jury trial can be seen in cases where courts have reviewed denials of jury trials through their supervisory jurisdiction. "[A] litigant's right to a jury trial is fundamental, and if doubt exists, it should be resolved against a loss of the right." *Block v. Fitts*, 259 La. 555, 250 So. 2d 738 (1971).

Obviously, every error which can adversely affect the trial proceedings should not warrant invoking the court's supervisory jurisdiction or the appellate courts will be flooded with writ applications that will disrupt otherwise orderly trial proceedings.³⁶ However, judicial efficiency can support granting of writs when appeal could not cure the error, such as an abuse of discovery,³⁷ or when the appeal could only cure by remand,³⁸ such as when the record will be incomplete due to an exclusion of evidence.³⁹ Writs in the latter situation insure the appellate court a complete record to review⁴⁰ while protecting the right to a proper jury trial.

Those errors which under *Gonzales* can be corrected on appeal by reversing and rendering⁴¹ create the most difficult problem in deciding whether supervisory writs are proper. The probability of the error affecting the verdict might be one factor guiding the court's exercise of supervisory jurisdiction. Another relevant consideration includes the possibility that the lower court can correct the error itself prior to the completion of its proceedings. In estimating the substantiality of the error, the appellate court should assume the party now requesting writs will receive an adverse decision on the merits, and if it feels the error will require according no weight at all to the jury's conclusions,⁴² supervisory writs should be granted. For example, denying one party the right to present expert testimony relating to causation or negligence in order to rebut contradictory

36. Cf. *Tate*, *supra* no 34, at 448.

37. See LA. CODE CIV. P. art. 1452: ". . . the court may render any . . . order which justice requires to protect the party or witness from annoyance, embarrassment, oppression, or undue expense"; *Nicholson v. Holloway Planting Co.*, 284 So. 2d 898 (La. 1973).

38. By correcting the error at trial, the appellate court will eliminate the need for a remand after the case is appealed and may eliminate the need for an appeal altogether.

39. See *White v. White*, 161 La. 718, 109 So. 2d 399 (1926); *Martin v. Garlotte*, 285 So. 2d 875 (La. App. 1st Cir. 1973).

40. A more liberal granting of supervisory writs will decrease erroneous verdicts based on an incomplete record in those few cases tried before a jury.

41. These errors should not include what a party feels is a wrong conclusion of facts by the jury. Such errors are clearly correctible on appeal. *E.g.*, *Carter v. New Orleans Pub. Serv., Inc.*, 305 So. 2d 481 (La. 1974). This category instead should contain errors such as wrongful exclusion of evidence when the proffered testimony is included in the record, or an improper jury instruction. Although correctible on appeal, the jury cannot properly decide all the issues which a litigant has a right to demand. LA. CODE CIV. P. art. 1934. *E.g.*, *Hill v. Green*, 275 So. 2d 407, 409 (La. 1973) "Absent any specification of restrictions all issues shall be tried by the jury when trial by jury is properly requested."

42. *E.g.*, *Deshotel v. Aetna Cas. & Sur. Co.*, 269 So. 2d 850 (La. App. 3d Cir. 1972).

evidence⁴³ removes the jury's opportunity to judge the witnesses' credibility which might be the determining factor in the ultimate verdict.⁴⁴ Similarly, where the jury receives an improper instruction,⁴⁵ the right to have the jury apply the correct principles of law to the facts will be abridged if the error remains uncorrected during trial.

Concededly, some writ applications, filed on frivolous grounds, will to some extent disrupt trial proceedings. However, most attorneys will be aware of possible adverse reactions by the trial judge in such cases and will accordingly limit their writ applications to meritorious claims. Therefore, in those cases where an error has destroyed any possibility of a proper jury trial, the appellate courts, by being more lenient in granting supervisory writs, can protect the right to a jury trial without hampering judicial efficiency or invading the province of the jury until it is absolutely necessary.⁴⁶

Edward R. Greenlee

A NEW STANDARD OF FAULT FOR THE REPORTORIAL PRIVILEGE

Following a highly publicized divorce proceeding, Mary Alice Firestone obtained a \$100,000 libel award against *Time* magazine for publishing a misstatement¹ of the trial judge's remarks² concerning the grounds for the

43. *E.g.*, *Herbert v. Travelers Indem. Co.*, 193 So. 2d 330 (La. App. 4th Cir. 1966).

44. Appellate courts recognize the trial court's unique ability to judge credibility of witnesses. *E.g.*, *Andrews v. Williams*, 281 So. 2d 120 (La. 1973). Even though proffered testimony may be included in the record, in such a situation there can be no determination of credibility based on demeanor.

45. *E.g.*, *Gonzales v. Xerox Corp.*, 320 So. 2d 163 (La. 1975); *Bienvenu v. Angelle*, 254 La. 182, 223 So. 2d 140 (1969).

46. There was an unsuccessful attempt to eliminate appellate review of facts at the 1974 constitutional convention. Fear was expressed that removing appellate review of facts would increase jury trials. Constitutional convention Vol. IX, 30th day, pp. 50-93. Granting more supervisory writs will probably not result in more jury trials since the facts are still reviewable on appeal.

1. The *Time* article read: "DIVORCED. By Russell A. Firestone, Jr., 41, heir to the tire fortune: Mary Alice Sullivan Firestone, 32, his third wife, a onetime Palm Beach schoolteacher; on grounds of extreme cruelty and adultery; after six years of marriage, one son: in West Palm Beach, Fla. The 17-month intermittent trial produced enough testimony of extramarital adventures on both