



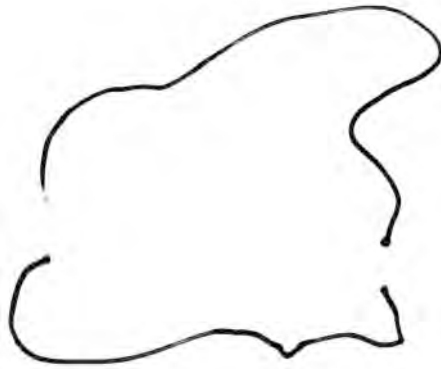
STANDARDS OF REVIEW ILLUSTRATED

Luther Munford

QUESTION PRESENTED

Is this figure “circular”?

THE FACTS



Luther Munford is a member of the firm of Phelps Dunbar LLP, in Jackson, Mississippi. For a more authoritative view of this subject see Steven A. Childress and Martha S. Davis, FEDERAL STANDARDS OF REVIEW (3rd ed. 1999).

THE LAW

A “circle” is a “closed plane curve every point of which is equidistant from a fixed point within the curve.”¹ “Circular” means “having the form of a circle.”²

TRIAL COURT RULINGS

*Discretion Exercised*³

Yes

The “form” of a circle does not refer to “form” in the Platonic sense – i.e., the hypothetical perfect circle.

No

The lines are not equidistant from a fixed point.

*Abuse of Discretion – Error of Law*⁴

Yes

A circle is a “rectangle with all four sides equal” and this looks like such a rectangle.⁵

¹ WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 241 (1987).

² *Id.* at 242.

³ “Discretion” means that the “court has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law.” *Kern v. TXO Production Corp.*, 738 F.2d 968, 970 (8th Cir. 1984) (R. Arnold, J.). For authorities that discuss when the abuse of discretion standard should apply to a trial court decision, and when it should not apply, see *Pierce v. Underwood*, 487 U.S. 552, 561; 108 S.Ct. 2541, 2548 (1988); Henry Friendly, *Indiscretion about Discretion*, 31 EMORY L.J. 747 (1982); Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 638 (1971).

⁴ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402; 110 S.Ct. 2447, 2459 (1990) (discretion abused when decision rests on erroneous view of the law). See also *Hooten v. State*, 492 So.2d 948, 950 (Miss. 1986) (Hawkins, J. dissenting) (collecting authority).

⁵ A “rectangle with all four sides equal” is a square. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1144 (1987).

Standards of Review Illustrated

*Abuse of Discretion — Failure to Consider Relevant Factors*⁶

No

The artist is not credible.

*Clearly Erroneous Factual Finding*⁷

Yes

It is a closed plane curve.

Finding Unsupported by the Evidence

No

The artist has great skill and obviously did not intend to create a circle.

*No Findings*⁸

It goes without saying that the figure is not “circular.”

⁶ *Piper Aircraft v. Reno*, 454 U.S. 235, 257; 102 S.Ct. 252, 266 (1981) (discretion not abused when all relevant factors considered and balance is reasonable). Cf. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823-24 (1971) (administrative discretion not abused when relevant factors considered and no clear error in judgment is made).

⁷ Fed. R. Civ. P. 52(a)(6); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395; 68 S. Ct. 525, 542 (1948) (“although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed”). See also *Anderson v. Bessemer City*, 470 U.S. 564, 574; 105 S. Ct. 1504, 1511-12 (1985) (deference required even when finding is based on physical or documentary evidence); *Parts & Elec. Motors, Inc., v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988) (“strikes us as wrong with the force of a five-week-old, unrefrigerated dead fish”).

⁸ *DeMarco v. United States*, 415 U.S. 449, 450; 94 S. Ct. 1185, 1186 (1974) (appellate court must remand when trial court made no findings). See also *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92; 102 S.Ct. 1781, 1791-92 (1982) (when appellate court sets aside findings infected with legal error, it is to remand to the district court rather than make findings itself).

Luther Munford

*Plain Error*⁹

[Reader's choice]

*Harmless Error*¹⁰

With luck, those readers who bill clients for their time in tenths of an hour can still place a two minute telephone call and make up for the four minutes it took to read this illustration.



⁹ Fed. R. Civ. P. 51(d)(2); Fed. R. Evid. 103(d); Fed. R. Crim. P. 52(b); *United States v. Olano*, 507 U.S. 725, 732; 113 S. Ct. 1770, 1776 (1993) (“plain error” is one that seriously affects the fairness, integrity or public reputation of judicial proceedings). See generally 3B C. Wright, N. King and S. Klein, FEDERAL PRACTICE AND PROCEDURE § 856 (2004); 9C C. Wright and A. Miller, FEDERAL PRACTICE AND PROCEDURE § 2558 (2008); 21 C. Wright and K. Graham, FEDERAL PRACTICE AND PROCEDURE § 5043 (2005). Cf. Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 VAND. L. REV. 1023 (1987).

¹⁰ 28 U.S.C. § 2111 (appellate court to disregard “errors or defects which do not affect the substantial rights of the parties”); Fed. R. Civ. P. 61; Fed. R. Crim. P. 52(a); *McDonough Power Equip. Inc v. Greenwood*, 464 U.S. 548, 556; 104 S.Ct. 848, 850 (1984) (error harmless unless it can “truly be said to affect the fairness of a trial”); *Kotteakos v. United States*, 328 U.S. 750, 765; 66 S. Ct. 1239, 1248 (1946) (error harmless if, considering the case as a whole, the court can conclude that the error did not have substantial influence on the outcome). See generally 3B C. Wright, N. King and S. Klein, FEDERAL PRACTICE AND PROCEDURE § 856 (2004); 11 C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE & PROCEDURE § 2883 (1995).