Volume 30 | Issue 1 Article 5

1985

Review of Findings of Fact Based on Documentary Evidence: Is the Proposed Amendment to Rule 52(a) the Correct Solution

Kevin P. Robins

REVIEW OF FINDINGS OF FACT BASED ON DOCUMENTARY EVIDENCE: IS THE PROPOSED AMENDMENT TO RULE 52(a) THE CORRECT SOLUTION?

I. INTRODUCTION

The Supreme Court, pursuant to congressional authorization, developed the Federal Rules of Civil Procedure for the purpose of uniting law and equity practices in the federal court system.[1] The fusion of these two systems, however, has not been completely successful. There exists considerable controversy and confusion among the circuit courts of appeals over the proper standard of appellate review for district courts' findings of fact based on documentary or undisputed evidence in nonjury cases.

Rule 52(a) of the Federal Rules of Civil Procedure, which governs the standard of review for all civil actions tried in district court without a jury or with only an advisory jury, provides that "[f]indings 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 of the credibility of the witnesses."[2] While rule 52(a) literally applies to all findings of fact, some courts, relying on past equity practice, apply a *de novo* standard of review to findings of fact based on documentary or undisputed evidence.[3] These courts refuse to invoke rule 52(a), claiming that the rule does not explicitly state that it is applicable to findings of fact based on documentary evidence.[4] To resolve this conflict, the Advisory Commit-

1. Order of June 3, 1935, 295 U.S. 774 (1935) (pursuant to Act of June 19, 1934, ch. 651, 48 Stat. 1064). The congressional act granted the Supreme Court power to "unite the general rules prescribed by [the Supreme Court] for cases in equity with those in actions at law so as to *secure one form of civil action and procedure for both* . . . ." Act of June 19, 1934, ch. 651, 48 Stat. 1064 (emphasis added). The new rules, however, were to maintain "inviolate the right of trial by jury in accordance with the Seventh Amendment of the Constitution of the United States and without altering substantive rights." Order of June 3, 1935, 295 U.S. at 774.

2. FED. R. CIV. P. 52(a). The Supreme Court has stated that "[a] finding is 'clearly erroneous' when . . . the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). *See also* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969); Commissioner v. Duberstein, 363 U.S. 278, 291 (1960).

3. For a discussion of courts of appeals which apply a *de novo* standard of review to findings of fact based on documentary evidence, see *infra* notes 114-42 and accompanying text.

4. For a discussion of the conflicting standards of review applied by the courts of appeals, see *infra* notes 74-167 and accompanying text.

In discussing the circuits' conflicting approaches to the proper standard of review, most commentators favor application of the clearly erroneous standard

tee for the Rules of Civil Procedure recently proposed an amendment to rule 52(a) which provides that the clearly erroneous standard of rule 52(a) applies whether evidence is oral or documentary.[5]

This note will examine the historical development of the standards of review at law and in equity in order to understand how the controversy began. It will then discuss the impact of rule 52(a) on these prior standards, especially in terms of the appropriate standard of review for documentary evidence. Additionally, this note will examine the various standards of review adopted by the circuit courts of appeals. Finally, the note will analyze the Advisory Committee for the Civil Rules' formal proposal to amend rule 52(a) and the impact that it already has had on some circuit courts of appeals, as well as the effect it will have in the future as it operates to eliminate the confusion over the appropriate standard of review of findings of fact based on documentary evidence.

II. HISTORY OF LAW AND EQUITY REVIEW

A. *Traditional Distinctions Between Law and Equity*

Prior to the establishment of the federal judicial system in the United States, England and most of the colonies separated suits into two forms of actions: actions at law and actions in equity.[6] In actions at law, findings of fact were made by a jury after hearing testimony in open court, whereas in equity, findings of fact were made by a judge on the basis of purely documentary evidence.[7] In actions at law, appellate review was taken by a "writ of error"; in equity, review was taken by an "appeal."[8] Upon a writ of error, appellate review was limited to ques-

---

when the district court's findings are based solely upon documentary evidence. *See* Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules*, 3 VAND. L. REV. 493, 505-06 (1950) (Judge Clark was the reporter to Advisory Committee on Rules for Civil Procedure); Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751, 764-71 (1957); Note, *Rule 52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence*, 49 VA. L. REV. 506 (1963). *But see* 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.04 (2d ed. 1984).

5. Proposed Amendments to the Federal Rules of Civil Procedure 52(a) (July 1984). The amendment to rule 52(a) provides: "Findings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge of the credibility of the witness." *Id.* (emphasis in original).

6. *See* R. POUND, APPELLATE PROCEDURE IN CIVIL CASES 38, 101-02 (1941); Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 96 (1923). In 1787, there were no equity (chancery) courts in Connecticut, Rhode Island, Massachusetts, New Hampshire, and Georgia. Warren, *supra*, at 96.

7. *See* 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 257-59, 354-58 (1926); 3 W. BLACKSTONE, COMMENTARIES *438 (The mode of trial was "by interrogatories administered to the witnesses, upon which their depositions are taken in writing . . . .").

8. A. DOBIE, FEDERAL JURISDICTION AND PROCEDURE § 222, at 903 (1928). A writ of error is a common law writ issued by a higher court to review questions of

tions of law apparent on the record, while on an appeal, review could be had of questions of both law and fact.[9] Moreover, on appeal of a suit in equity, findings of fact and law were reviewed *de novo*, unlike actions at law, where the jury's findings of fact were conclusive on review and only the trial judge's conclusions of law apparent on the record could be reviewed by the appellate court.[10] This distinction between review of actions at law and in equity was justified on the ground that in suits in equity where the evidence was completely documentary, the reviewing court was in the same position as the trial court in terms of examining the evidence on which the factual findings were based.[11]

After the American revolution, the parameters of the American federal judicial system were set forth in the United States Constitution. Article III granted the Supreme Court appellate jurisdiction over questions of law and fact subject to regulation by Congress.[12] Fearing that this provision would endanger the common law right to trial by jury and the conclusiveness of a jury's findings of fact upon writ of error,[13] antifederalists promoted and secured the adoption of the seventh amendment, which protects a jury's findings of fact,[14] but leaves Congress the task of

---

law apparent on the record. *Id.* An appeal is a civil law process whereby the appellant takes steps necessary to have both questions of law and fact reviewed in an appellate court. *Id.* at 905-06.

9. *Id.* at 903-06. *See also* Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321, 327 (1796) ("An appeal is a process of civil law origin, and removes a cause entirely; subjecting the fact as well as the law, to a review and retrial: but a writ of error is a process of common law origin, and it removes nothing for re-examination but the law."). *See also* R. POUND, *supra* note 6, at 298 (in equity, "a party was not precluded from taking a ground in the higher court which he had not suggested below").

10. A. DOBIE, *supra* note 8, § 222, at 906; R. POUND, *supra* note 6, at 298 ("an appeal in equity was a hearing of the case *de novo*").

11. Clark & Stone, *Review of Findings of Fact*, 4 U. CHI. L. REV. 190, 204 (1937). These commentators suggested that depositions "could be examined by the appellate court as fairly and easily as by the trial court . . . ." *Id.*

12. U.S. CONST. art. III, § 2, cl. 2. Article III, § 2 of the Constitution states that "the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." *Id.*

13. Antifederalists feared that placing the jury's verdict in the hands of an unfriendly federal appellate court would nullify the right to a jury trial. To antifederalists, the jury was the symbol of freedom from an arbitrary central government. *See* Clark & Stone, *supra* note 11, at 192 (citing Martin, Secret Proceedings and Debates of the Federal Convention 80-81 (1787); John Dickinson, Letter of Favius on the Federal Constitution 1788; Elbridge Gerry Pamphlets (Boston 1788); Richard Henry Lee, Letters of a Federal Farmer to a Republican (New York October 12, 1787); George Mason, Objections Addressed to the Citizens of Virginia; John Winthrop, Essays of Agrippa, *reprinted in* Mass. Gazette, Dec. 11, 1787).

14. *See* U.S. CONST. amend VII. The seventh amendment provides that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Id.* The Supreme Court has stated that facts found by a jury may only be tried anew upon a grant of a

determining the proper scope of federal appellate review in nonjury settings such as suits in equity.

Acting pursuant to constitutional authorization, Congress subsequently enacted the Judiciary Act of 1789 (Judiciary Act)[15] which provided for review in equity cases by writ of error instead of by the traditional appeal.[16] The Judiciary Act also replaced the equity evidentiary procedure of taking testimony by deposition with an examination of witnesses in open court.[17] As a result, in reviewing findings of fact made by the trial court in equitable actions, the appellate court was forced to rely on whatever credibility or reliability determinations were made by the court below.[18] The net effect of the passage of the Judiciary Act was to limit review in all federal cases, including cases in equity, to questions of law only, making findings of fact conclusive on review, consistent with traditional actions at law.[19]

---

new trial by the trial court as ordered by an appellate court for error in law. Capital Traction Co. v. Hof, 174 U.S. 1, 13 (1899).

15. Judiciary Act of 1789, ch. 20, 1 Stat. 73. This Act was entitled "An Act to Establish the Judicial Courts of the United States." *Id.*

16. *Id.* § 22, 1 Stat. 84. Section 22 provided that "final decrees and judgments in civil actions in a district court . . . may be re-examined, and reversed or affirmed in a circuit court, . . . upon a writ of error . . . ." *Id.* Through this provision, the drafters attempted to allay the fears of critics of the Constitution, who considered the vesting in the Supreme Court of appellate jurisdiction over facts and law violative of the right to trial by jury. *See* Warren, *supra* note 6, at 102. Instead of limiting the writ of error to actions at law, however, the drafters extended it to equity cases even though critics of the Constitution conceded that *de novo* review of law and fact on appeal was proper in equity cases. *Id.*

17. Judiciary Act, ch. 20, § 30, 1 Stat. 88 (1789). The Judiciary Act provided that "the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity . . . as of actions at common law." *Id.* The Judiciary Act only allowed for the taking of depositions when a person 1) lived more than 100 miles from the place of trial; 2) was leaving the United States; or 3) was "ancient or infirm." *Id.* The Judiciary Act further limited equity's powers by providing that the trial court's findings of fact were to appear on the record. *Id.* § 19, 1 Stat. 83. These provisions were a triumph for the antichancery party, which wanted to limit equity powers. This was due in part to pre-Revolution sentiments against English equity courts and the fact that only some of the colonies employed chancery courts. Warren, *supra* note 6, at 96-100.

18. *See* Wiscart v. Dauchy, 3 U.S. (3 Dall.) 321 (1796). In *Wiscart*, the Court was presented with the question of the appropriate standard of review in equity cases. In holding that all findings of fact were conclusive on review, Chief Justice Elsworth stated that "although the personal attendance of witnesses could easily be procured in the District or Circuit Courts, the difficulty of bringing them from the remotest parts of the union to the seat of the government, was insurmountable, and, therefore, it became necessary, in every description of suits, to make a statement of the facts in the Circuit Court definitive . . . ." *Id.* at 329.

19. *Id.* at 329. The *Wiscart* Court emphasized that "the law directs that in cases of appeal, part shall be decided by one tribunal, and part by another; the facts by the court below, and the law by this court. Such a distribution of jurisdiction has long been established in England." *Id.*

Congress' attempt in the Judiciary Act to apply the rules and procedures of review at law to actions in equity met strong criticism.[20] In 1802, Congress, led by the antifederalist party, enacted legislation providing that "in all suits in equity, it shall be in the discretion of the court . . . to order the testimony of witnesses therein to be taken by depositions . . . ."[21] In 1803, Congress reinstated appeals for equity cases and declared that a "transcript of the libel, bill, answer, depositions, and all other proceedings . . . shall be transmitted to the said supreme court; and . . . no new evidence shall be received in the said court on the hearing of such appeal . . . ."[22] As a result, Congress effectively rejuvenated traditional equity practice.[23]

Review of actions at law and in equity remained distinct until 1865, when Congress enacted legislation permitting waiver of jury trials in actions at law.[24] This legislation gave birth to a hybrid cause of action: in substance the action remained an action at law, but in form it resembled an action in equity.[25] The trial judge made findings of both fact and law,

---

20. Clark & Stone, *supra* note 11, at 194. The authors noted: "The attack of the chancery lawyers upon the system arose from a justifiable pride in the integrity of their own system, goaded on by the ancient rivalry between the two systems of courts [law and equity] . . . ." *Id.*

21. Act of April 29, 1802, ch. 31, § 25, 2 Stat. 156, 166. The antifederalists distrusted the federal judiciary and were opposed to its attempt to converge law and equity. *See* Clark & Stone, *supra* note 11, at 196. So great was the antifederalists' deference to state powers that the Act of 1802 also provided that

> depositions shall be taken in conformity to the regulations prescribed by law for the courts of the highest original jurisdiction in equity, in cases of a similar nature, in that state . . . ; *Provided however*, that nothing herein contained shall extend to the circuit courts which may be holden in those states, in which testimony in chancery is not taken by deposition.

Act of April 29, 1802, ch. 31, § 25, 2 Stat. at 166 (emphasis in original).

22. Act of March 3, 1803, ch. 40, § 2, 2 Stat. 244 (1803 Act). The 1803 Act expressly repealed the sections of the Judiciary Act which came within its purview. *Id.* Discussing the impropriety of the application of the writ of error to equity cases, Chief Justice Taney stated that "the writ of error . . . is inconvenient and embarrassing when used as process to remove decrees in chancery [equity] and admiralty to a superior court." Hemmenway v. Fisher, 61 U.S. (20 How.) 255, 258-59 (1857).

23. *See* The San Pedro, 15 U.S. (2 Wheat.) 132, 140 (1817). The Court interpreted the 1803 Act as a remedy for the defect of the Judiciary Act by providing that, instead of transmitting the lower court's findings to the appellate court, "the evidence (instead of the facts) should accompany the record into the appellate court. . . . The remedy by appeal . . . brings before the supreme court the facts as well as the law." *Id.* at 140. *See also* Note, *supra* note 4, at 508 & n.18.

24. Act of March 3, 1865, ch. 86, § 4, 13 Stat. 500, 501 (1865 Act). The 1865 Act provided that "issues of fact in civil cases in any circuit court of the United States may be tried and determined by the court without the intervention of a jury, whenever the parties, or their attorneys of record, file a stipulation in writing with the clerk of the court waiving a jury." *Id.*

25. R. POUND, *supra* note 6, at 225-26; Clark & Stone, *supra* note 11, at 197-98.

and the reviewing court was freed from the command of the seventh amendment that a jury's finding of fact be conclusive on review.[26] To obviate confusion over the applicable standard of review, Congress provided that the findings of fact by the court had the same effect as those made by a jury, and therefore findings of fact by a judge, at law, were conclusive on review.[27]

B. *Development of "Modern" Federal Equity Practice*

During the early twentieth century, several changes occurred in equity procedure that altered the traditional practice of *de novo* review in equity cases. The major change occurred in 1912, when the Supreme Court promulgated revised rules of equity.[28] In contrast to the earlier procedure, Equity Rule 46 required testimony to be taken in open court, except in certain limited situations.[29] Due to this rule, the trial judge began to make credibility determinations in equity cases, and circuit

26. For a discussion of the seventh amendment, see *supra* note 14 and accompanying text. *See also* Clark & Stone, *supra* note 11, at 198.

27. Act of March 3, 1865, ch. 86, § 4, 13 Stat. 500, 501. The 1865 Act provided that "[t]he finding of the court upon the facts, which finding may be either general or special, shall have the same effect as the verdict of a jury." *Id.* The 1865 Act further provided for review to the Supreme Court "upon a writ of error, or upon appeal . . . ." *Id. See* Boogher v. Insurance Co., 103 U.S. 90, 97 (1880) ("For all purposes of our review the facts as found and stated by the court below are conclusive."); Basset v. United States, 76 U.S. (9 Wall.) 38, 40 (1869) ("[W]hen the court, by permission of the parties, takes the place of the jury, its finding of facts is conclusive, precisely as if a jury had found them by verdict.").

Furthermore, the 1865 Act provided that review of special findings (specific findings of fact) "may also extend to the determination of the sufficiency of the facts found to support the judgment." Act of March 3, 1865, ch. 86, § 4, 13 Stat. at 501. *See Boogher*, 103 U.S. at 97 ("We have often held that the act of 1865 . . . does not permit us to consider the effect of the evidence of the case, but only to determine whether the facts found on the trial below are sufficient to support the judgment . . . ."). Thus, review of special findings did not include a determination of whether the findings of fact were supported by the weight of the evidence, but only whether the facts were sufficient to support the judgment. *See* Clark & Stone, *supra* note 11, at 198.

28. Rules of Practice for the Courts of Equity of the United States, 226 U.S. 627 (1912). The lines of departure from the earlier equity rules were in the direction of simplifying pleadings, speeding actions, and lessening the cost of taking testimony and of taking appeal. *See* J. HOPKINS, FEDERAL EQUITY RULES 34 (8th ed. 1933).

29. Equity R. 46, 226 U.S. 661 (1912). Equity Rule 46 provided that "[i]n all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules." *Id.* Equity Rule 47 provided that "[t]he court, upon application of either party, when allowed by statute, or for *good and exceptional* cause for departing from the general rule, to be shown by affidavit, may permit the deposition of named witnesses . . . ." Equity R. 47, 226 U.S. 661, 661-62 (1912) (emphasis added).

Equity Rule 46 restored the provision of the Judiciary Act whereby testimony was taken in open court in all cases, with limited exceptions. Clark & Stone, *supra* note 11, at 203-04; Note, *supra* note 4, at 510.

courts generally accepted the trial court's findings of fact unless the findings were "clearly wrong."[30] Circuit courts further weakened *de novo* review of findings of fact by refusing to disturb the lower court's findings of fact if the findings were based on conflicting evidence.[31] The courts, however, never applied these rules to cases tried solely on the basis of documentary evidence.[32] Where the evidence was entirely documentary, circuit courts continued to give little or no weight to the trial judge's findings of fact.[33]

30. *See* New York Life Ins. Co. v. Simons, 60 F.2d 30, 32 (1st Cir.), *cert. denied*, 287 U.S. 648 (1932) ("[F]acts found by the District Judge will be accepted by this court, unless the findings appear to be clearly wrong."). *See also* Mitchell v. Investment Sec. Corp., 67 F.2d 669 (5th Cir. 1933) (fully recognizing the rule that though "on an appeal in equity the reviewing court is not bound by the trial court's findings of fact, his findings ought not to be disturbed unless their error is clearly shown . . ."); United States *ex rel.* Charley v. McGowen, 62 F.2d 955, 957 (9th Cir.), *aff'd per curiam*, 290 U.S. 592 (1933) ("[W]here the witnesses testify in person before the trial judge he is in a better position to pass upon the credibility . . . and we will follow the decision of the trial judge unless it is clearly apparent that his decision is erroneous.").

Prior to 1912, oral testimony was occasionally taken in equity cases. In these instances, courts showed deference to the trial judge's or master's findings of fact. *See* Kimberly v. Arms, 129 U.S. 512, 525 (1888) ("[T]he [findings of fact] should have been treated as so far correct and binding as not to be disturbed, unless clearly in conflict with the weight of the evidence . . . ."); Metropolitan Nat'l Bank v. Rogers, 53 F. 776, 779 (3d Cir. 1893) ("[W]e must assume, prima facie, [that the findings of fact] are correct, and as such must be [up]held, unless error, plain and manifest, be shown."). After the promulgation of the Equity Rules in 1912, oral testimony became the rule rather than the exception in actions in equity. *See* Clark & Stone, *supra* note 11, at 204; Note, *supra* note 4, at 510-11 & n.27.

31. *See, e.g.*, Moss v. Equitable Life Ins. Co., 71 F.2d 795, 797 (8th Cir. 1934) (when there is "a decided conflict in the evidence, . . . under the well settled rule of this court, the findings of the Chancellor should not be disturbed"); Fienup v. Kleinman, 5 F.2d 137, 141 (8th Cir. 1925) (findings of fact are presumptively correct when the trial court has considered conflicting evidence); Butte & Superior Copper Co. v. Clark-Montana Realty Co., 248 F. 609, 616 (9th Cir. 1918) ("Upon settled principles, which this court has always recognized, findings so made upon conflicting testimony are conclusive upon this appeal.").

32. *See* Paraffine Cos. v. McEverlast, Inc., 84 F.2d 335, 339 (9th Cir. 1936) ("there is no presumption in favor of the trial court's findings" when the evidence is entirely in the form of depositions); Rown v. Brake Testing Equip. Corp., 38 F.2d 220, 223-24 (9th Cir. 1930) ("All the testimony upon the issue having been taken . . . by deposition, the presumption in support of findings based upon conflicting testimony in court does not prevail.").

33. *See, e.g.*, Kaeser & Blair, Inc. v. Merchant's Ass'n, 64 F.2d 575, 576 (6th Cir. 1933) (finding based on exhibits; therefore, the appellate court could not "give to the finding the weight that attaches to a finding of fact where the court has heard witnesses in open court, but must draw its own deductions and conclusions from an examination of the exhibits"); Nashua Mfg. Co. v. Berenzweig, 39 F.2d 896, 897 (7th Cir. 1930) ("Where all the evidence consists of affidavits, pleadings, and exhibits, this court is in the same position as the District Court to make deductions and conclusions."); Photoplay Publishing Co. v. La Verne Publishing Co., 269 F. 730, 732 (3d Cir. 1921) (rule that appellate court must accept trial court's findings of fact did not apply when the evidence was documentary);

C. *Formation of Rule 52(a)*

When the Supreme Court proceeded to unite law and equity under the Federal Rules of Civil Procedure in 1935, the drafters determined that a uniform standard of review was needed for all nonjury cases.[34] After an examination of standards applied by the federal courts, the Advisory Committee on the Rules of Civil Procedure (Advisory Committee) recognized three possible alternatives: 1) to maintain the existing system of review for nonjury cases, and to continue to apply different standards for nonjury actions at law and in equity; 2) to adopt the standard of review for actions at law for both types of nonjury cases, thereby providing that all findings of fact are conclusive upon review; or 3) to prescribe full *de novo* review for all nonjury cases in accordance with traditional equity review.[35] The preliminary draft of the rule adopted the third choice and provided that findings of fact "shall have the same effect as that heretofore given to findings of suits in equity."[36] This

---

see also Clark & Stone, *supra* note 11, at 208 ("reviewing court in equity cases distinguishes . . . between those [findings] based on oral testimony given in open court and those based on written documents and depositions").

34. *See Hearings on the Federal Rules and H.R. 8892 Before the House Comm. on the Judiciary*, 75th Cong., 3d Sess. 122 (1938). At the hearings before the House Judiciary Committee, the Secretary of the Supreme Court's Advisory Committee stated that "[t]he union of law and equity procedure made it necessary for the rules to deal with this question in order that, on appeal in a nonjury case, the question of whether the case was one of a legal or of an equitable nature might not cause trouble." *Id.* (remarks of Edgar B. Tolman, Secretary of the Supreme Court's Advisory Committee on Rules for Civil Procedures). Additionally, the Advisory Committee indicated that "a large measure of the advantage of that union [of law and equity] will thus be lost by retaining a divided practice on appeal unless these rules can declare an effect to the findings [of fact] other than that now existing." FED. R. CIV. P. note to the Supreme Court, at 121 (Preliminary Draft 1936) [hereinafter cited as 1936 Draft]. For a discussion of review of nonjury cases at law, see *supra* notes 24-27 and accompanying text.

35. The 1936 Draft postulated the following three alternatives:

> The first is to retain the present system of review, viz., that in jury-waived cases, the findings of fact shall have the same effect as the verdict of a jury in an action at law; while in equity cases, the findings of fact are reviewable as to the weight of the supporting evidence as well as the sufficiency . . . . The second solution is to provide that the findings of fact in all cases should be reviewed in the same way, and that they should have the same effect as the verdict of a jury . . . . The third is the system here proposed in Rule 68 [now Rule 52(a)], whereby the review in jury-waived cases is made that of the equity practice, thus leaving all cases tried without a jury to be fully reviewed on appeal.

1936 Draft, at 120-21.

36. 1936 Draft at 118. The Advisory Committee reasoned that the third choice—review as in equity—"fulfills the mandate of the statute, while also abolishing the ancient procedural distinctions on review for a natural division which preserves the jury trial intact, but leaves all other trials subject to complete review." *Id.* at 121. In rejecting the first choice—separate review of law and equity—the Advisory Committee stated that "[t]he objection to this is that it perpetrates the very procedural distinctions we are attempting to abolish." *Id.* at 120. The Advisory Committee rejected the second choice—facts conclusive

proposal, however, sharply divided the legal community;[37] as a result, the rule was changed in the 1937 draft to read as it does today.[38] In providing that "[f]indings of fact shall not be set aside unless clearly erroneous,"[39] the Advisory Committee chose a standard which seemed to be a compromise between review at law and in equity. While this standard does not permit appellate courts to conduct *de novo* review of findings of fact consistent with traditional equity practices, it does allow some examination of factfindings, which was not permitted in review of actions at law.[40]

---

review in all nonjury cases—because "[s]uch treatment, though providing for a uniform and simple method of review and fulfilling the mandate of our enabling statute has not met with approval by a majority of the Committee." *Id.* at 120-21.

37. Immediately after the proposed rules were released, a spirited controversy erupted over proposed rule 68 (now, as reworded, rule 52(a)). *See* Chesnut, *Analysis of Proposed New Federal Rules of Civil Procedure*, 22 A.B.A. J. 533, 540-41, 572 (1936). Judge Chesnut did not believe that a desire to promote uniformity in all nonjury cases was sufficient "to justify such a radical change." *Id.* at 540. He asserted that the only way *complete* uniformity could be achieved was to give finality to all findings of fact, when there was substantial evidence to support the findings, as in review at law. *Id.* at 541. Judge Chesnut posited several reasons in support of his position: a judge was as qualified as a jury to determine the facts; a cold record could not duplicate the nature of the case, and the appearance and demeanor of the witnesses; expanded review would reduce the tendency to encourage waiver of jury trials; appeals in nonjury cases would be increased; and the effect would be to increase the size of the record. *Id.* at 540-41. Judge Chesnut admitted, however, that his opinion could be somewhat biased because he was a district judge. *Id.* at 540.

Dean Clark, the Reporter of the Advisory Committee, also came out against the proposed rule and in favor of the extension of at law review to equity cases. *See* Clark & Stone, *supra* note 11, at 215-17. Professor Blume responded to Judge Chesnut by asserting that findings of a judge are not given less weight than the verdict of a jury. Blume, *Review of Facts in Non-Jury Cases*, 20 JUDICATURE 68, 71 (1936). He noted that a jury verdict can be reviewed by the trial judge upon a motion for new trial. *Id.* Professor Blume also asserted that a reviewing court is in a *better position* because the court can give due regard to demeanor evidence and then "study at length a verbatim record of conflicting testimony." *Id.* at 72. Professor Blume characterized the role of the reviewing court in equity as an "examin[ation of] the result in the light of the evidence to see if justice has been done." *Id.* at 72-73. In a reply to Professor Blume, Dean Clark succinctly summarized the case for review at law: "It gives dignity and responsibility to the trial court, it affords all the opportunity needed for the appellate court to reverse for substantial error or failure of justice, it does not keep alive a divided system, and it does not hold out so extensive an invitation for appeals." Clark, Letter to the Editor, 20 JUDICATURE 129, 130 (1936). This controversy may have been one reason that the Advisory Committee ultimately sought a compromise. *See supra* note 36.

38. FED. R. CIV. P. 59 (Proposed Draft 1937) (current version at FED. R. CIV. P. 52(a)) [hereinafter cited as Proposed Rules].

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

40. Prior to 1937, findings of fact in jury or nonjury actions at law were conclusive on review if there was any evidence to support the findings, while equity review was in principle a *de novo* review, although deference was afforded a lower court's findings of fact when based upon oral or conflicting testimony.

Although, on its face, rule 52(a) appears to provide that the clearly erroneous standard governs review of findings of fact in all nonjury cases, the Note of the Advisory Committee on Rules to the final draft of Rule 52 (Advisory Note) and the existing version of rule 52(a) lend much confusion to a seemingly straightforward rule. First, the Advisory Committee stated that the provision requiring application of the clearly erroneous standards "accords with the decisions on the scope of the review in *modern federal equity practice*."[41] In the twentieth century, however, modern federal equity practice dictated that the reviewing court apply full *de novo* review to findings of fact based upon documentary evidence.[42] Second, the Advisory Committee stated that the clearly erroneous provision applied

> to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony, or of a *fact deduced or inferred from uncontradicted testimony*.[43]

Third, the cases cited by the Advisory Committee in the explanatory note support application of both the clearly erroneous and *de novo* standards of review.[44] Although the Advisory Committee explicitly stated

---

For a discussion of review of findings of fact at law and in equity, see *supra* notes 6-27 and accompanying text. The "clearly erroneous" standard appeared to imitate the "clearly wrong" standard developed in equity cases involving oral testimony.

41. FED. R. CIV. P. 52 advisory committee note (emphasis added). For a discussion of federal equity practice up to 1936, see *supra* notes 28-33 and accompanying text.

42. *See, e.g.*, Kaeser & Blair, Inc. v. Merchant's Ass'n, 64 F.2d 575, 576 (6th Cir. 1933) (when evidence was solely in the form of documents the court "must draw its own deductions and conclusions from an examination of the exhibits"); Nashua Mfg. Co. v. Berenzweig, 39 F.2d 896, 897 (7th Cir. 1930) (when evidence is documentary, "this court is in the same position as the District Court to make deductions and conclusions"). *See also* Clark & Stone, *supra* note 11, at 208.

43. FED. R. CIV. P. 52(a) advisory committee note (emphasis added). Professor Wright has interpreted this language to encompass findings of fact based on nondemeanor or documentary evidence. C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2587 (1971). *See also* Note, *supra* note 4, at 514-15 & n.48 (when the emphasized phrase was added "the Committee moved closer to the law type of review than its statement that the rule accorded with 'modern federal equity practice' would indicate").

44. *See* FED. R. CIV. P. 52(a) advisory committee note (citing as direct authority Warren v. Keep, 155 U.S. 265, 267 (1894) (in patent infringement suit in which conflicting evidence was presented, Court held that "[a]s no obvious error or mistake has been pointed to us, the [lower court's and master's] conclusions must be permitted to stand"); Furrer v. Ferris, 145 U.S. 132, 134 (1892) (finding of no negligence, while "not conclusive, it is very persuasive in this court"); Tilghman v. Poctor, 125 U.S. 136, 149-50 (1888) (in reviewing the master's findings of fact based upon conflicting testimony, Court held that the findings "have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been an error or mistake on his part");

that the clearly erroneous test was applicable when the evidence was documentary in an Advisory Note accompanying a proposed amendment to rule 52(a),[45] the amendment and its accompanying Advisory Note were not adopted by the Supreme Court.[46] In light of this ambiguity, the courts have disagreed over the appropriate standard of review for a trial court's findings of fact based solely on documentary evidence.[47]

III. JUDICIAL INTERPRETATION OF RULE 52(A)

A. *Supreme Court Interpretations*

The Supreme Court first addressed the application of the clearly erroneous standard of review in *United States v. United States Gypsum Co.*[48] In *Gypsum*, the government sued defendants for violations of the Sherman Act.[49] The government introduced evidence consisting of license agreements, over 600 documents, and the testimony of twenty-eight witnesses.[50] A three-judge court granted defendants' motion to dismiss.[51]

Kimberly v. Arms, 129 U.S. 512, 525 (1899) (findings of a master should not be disturbed "unless clearly in conflict with the weight of the evidence upon which they were made"); Silver King Coalition Mines Co. v. Silver King Consol. Mining Co., 204 F. 166, 177 (8th Cir.) (where the evidence was evenly balanced, court applied rule that "where a court has considered conflicting evidence, and made a finding or decree, it is presumptively correct, and unless . . . some serious mistake of fact has been made, the finding or decree must be permitted to stand"), *cert. denied*, 229 U.S. 624 (1913)) (citing as comparative authority Kaeser & Blair, Inc. v. Merchants' Ass'n, 64 F.2d 575, 576 (6th Cir. 1933) (reviewing finding of unfair competition based entirely upon exhibits, court concluded that it could not "give to the findings the weight that attaches to a finding of fact where the court has heard witnesses in open court, but must draw its own deductions and conclusions from an examination of the exhibits"); Dunn v. Trefry, 260 F. 147 (1st Cir. 1919) (reviewing finding that domicile was changed, court stated that when there is no conflict of evidence, the rule that the finding stood unless "clearly wrong" was applicable)). *See also* Note, *supra* note 4, at 515-16 & n.51.

45. *See* FED. R. CIV. P. 52 advisory committee note (Proposed Amendments 1955) (reprinted in 5A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 52.01 (2d ed. 1884)). In the 1955 proposed amendments, the Advisory Committee expressly rejected the practice of "de novo" review of cases in which the testimony was by deposition or the evidence was documentary, concluding that the clearly erroneous test was not *modified* by the language which follows it ("due regard shall be given") but was applicable in all cases. *Id.*

46. 5A J. MOORE & J. LUCAS, *supra* note 4, ¶ 52.01[6], [7].

47. For a discussion of the interpretations by the courts of appeals, see *infra* notes 74-167 and accompanying text.

48. 333 U.S. 364 (1948).

49. *Id.* at 366-67. The complaint charged the defendants with 1) conspiring to fix prices on patented gypsum board and unpatented gypsum products, 2) regulating the distribution of gypsum board, and 3) standardizing gypsum board to eliminate competition. *Id.* at 367.

50. *Id.* at 372. The Court noted that the documentary exhibits "present a full picture . . . and are chiefly relied on by the government to prove its case." *Id.*

In reviewing the lower court's findings of fact, the Supreme Court stated that rule 52(a) was applicable to findings and inferences drawn from documents and undisputed facts.[52] The Court explained that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the *definite and firm conviction that a mistake has been committed.*"[53] The Court also stated, however, that the rule intended "to make applicable the then prevailing equity procedure."[54] Notwithstanding this ambiguity, the Supreme Court held that the findings of fact were clearly erroneous and reversed the lower court.[55]

In *Commissioner v. Duberstein*,[56] the Court reiterated the main thrust of the *Gypsum* holding, ruling that "[w]here the trial has been by a judge without a jury, the judge's findings *must stand* unless 'clearly erroneous.' "[57]

Six years later, in *United States v. General Motors Corp.*,[58] the Court, in a footnote, distinguished "paper cases" from those based on oral evidence, stating that the rationale behind rule 52(a) was to defer to "the trial court's customary opportunity to evaluate the demeanor and thus

51. *Id.* at 367. The trial court noted that the government failed to establish its case by a preponderance of the evidence. *Id.* at 388. The court found that the evidence failed to establish a conspiracy to blanket the industry under patent licenses or to control prices. *Id.* at 393.

52. *Id.* at 394. The Court stated that "[i]n so far as this finding and others to which we shall refer are inferences drawn from documents or undisputed facts, . . . Rule 52(a) of the Rules of Civil Procedure is applicable." *Id.*

53. *Id.* at 395 (emphasis added).

54. *Id.* at 395-96. In recounting the practice in equity, the Court stated that "the findings of the trial court, *when dependent upon oral testimony* where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however." *Id.* at 395 (emphasis added). The Supreme Court did not mention the equity practice governing findings dependent upon documentary evidence. For a discussion of equity practice when findings were based on documentary evidence, see *supra* notes 32-33 and accompanying text.

55. *Id.* at 396-99.

56. 363 U.S. 278 (1960). In *Duberstein*, the government sought to establish a new test for determining whether a transfer was a "gift" under the Internal Revenue Code. *Id.* at 284. The Court rejected any type of test, holding that the question of a "gift" depends on a variety of factors, particularly the intent of the parties, which should be decided "on the application of the factfinding tribunal's experience with the mainsprings of human conduct to the totality of the facts of each case." *Id.* at 289.

57. *Id.* at 291 (emphasis added) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.")).

58. 384 U.S. 127 (1966). The suit was brought by the government for alleged Sherman Act violations. *Id.* at 129. The Supreme Court reversed the lower court, which had held that the defendants violated the Sherman Act by conspiring to restrain trade. *Id.* at 141-42.

the credibility of the witnesses . . . ."[59] The Court noted that rule 52(a) "plays only a restricted role [in a paper case]."[60] These statements, however, were purely dicta because the Court held that the district court's finding was not a question of fact but rather a question of law; therefore, the Court concluded that rule 52(a) did not apply.[61]

More recently, the Supreme Court has had two opportunities to discuss rule 52(a).[62] In *Pullman-Standard v. Swint*,[63] employees brought a title VII action against their employer, alleging that the employer practiced racial discrimination in the management of the company's seniority system.[64] The district court found no intent to discriminate,[65] but the Fifth Circuit, after reviewing the *exhibits* upon which the district court reached its conclusion, reversed.[66] On appeal, the Supreme Court held that the question of intent to discriminate was "a pure question of fact, subject to Rule 52(a)'s clearly erroneous standard."[67] In addition, the

59. *Id.* at 141 n.16.

60. *Id.* Of thirty-eight witnesses, only three testified in person. *Id.* The rest of the witnesses testified by deposition, by affidavit, or by form of an agreed-upon narrative of testimony. *Id.*

61. *Id.* The Court, however, further noted that it was not contradicting the trial court's findings of fact, but supplementing the findings to assist "in determining whether they support the court's ultimate legal conclusion that there was no conspiracy." *Id.*

62. *See* Bose Corp. v. Consumers Union of United States, Inc., 104 S. Ct. 1949 (1984); Pullman-Standard v. Swint, 456 U.S. 273 (1982).

63. 456 U.S. 273 (1982).

64. *Id.* at 275. While a prima facie title VII violation generally can be established solely by practices with disparate effects against a particular race, prima facie violations in seniority systems also require a showing of intent to discriminate. *Id.* at 276.

65. *Id.* at 275. In reaching its decision, the district court focused on four factual determinations: (1) whether the system discouraged all employees from transferring; (2) whether the departmental structure of the seniority system was rational in light of general industry practice; (3) whether there was a relationship between the seniority system and other racially discriminatory practices; and (4) whether the system had been maintained free from any illegal purpose. *Id.* at 279-81. The district court found: (1) the system was racially neutral; (2) the basic arrangements of the departments were rationally related to the work; (3) the seniority system was not related to past discriminatory practices by the employer and the union; and (4) the system was "untainted by any discriminatory purpose." *Id.* at 279-81.

66. Swint v. Pullman-Standard, 624 F.2d 525, 529 (5th Cir. 1980). On review, the Fifth Circuit examined each issue before the district court, reached the opposite conclusions, and reversed. *Id.* at 528-36. According to the Fifth Circuit: "An analysis of the totality of the facts and circumstances . . . leaves us with the definite and firm conviction that a mistake has been made." *Id.* at 533. The court also referred to the clearly erroneous standard in a footnote; however, it quoted a prior decision which held that because discrimination was the ultimate issue, the reviewing court "will proceed to make an *independent determination* of [the employees'] allegations of discrimination, though bound by the findings of subsidiary fact which are themselves not clearly erroneous." *Id.* n.6 (quoting East v. Romine, Inc., 518 F.2d 332, 339 (5th Cir. 1975)).

67. 456 U.S. at 287-88.

Supreme Court stated: "Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous."[68] The Court reversed the Fifth Circuit's ruling for failure to apply the clearly erroneous standard.[69]

In *Bose Corp. v. Consumers Union of United States, Inc.*,[70] the Court considered whether rule 52(a) governed review of a district court's finding of actual malice in a defamation suit. Initially, the Court noted that rule 52(a) mandates that a trial judge's findings of fact be presumed correct.[71] The Court also found that the "presumption of correctness that attaches to factual findings is stronger in some cases than in others."[72] Specifically, the court ruled that while the "same 'clearly erroneous' standard applies to findings based on documentary evidence as those based entirely on oral testimony, . . . the presumption has lesser force in the former situation than in the latter."[73]

---

68. *Id.* at 287. The Court rejected dividing "findings of fact into those that deal with 'ultimate' and those that deal with 'subsidiary' facts." *Id.* Review of a so called "ultimate" finding of fact which is a pure question of fact, as was intent to discriminate, is constrained by the clearly erroneous standard. *Id.* at 286-87. The Court indicated that review of so called mixed questions of law and fact, which involve the application of legal standards, is not subject to the limits of rule 52(a). *Id.* at 287-88.

69. *Id.* at 293. The Court reasoned that the Fifth Circuit failed to apply the clearly erroneous standard because 1) acknowledgement of rule 52(a) by the Fifth Circuit came late in the opinion, after it had disagreed with the district court's findings; and 2) instead of remanding, the Fifth Circuit reversed, which indicated that it made its own determinations concerning intent. *Id.* at 290-92.

Only Justice Marshall, in a dissenting opinion, referred to the fact that the district court's findings were entirely based on documentary evidence. *Id.* at 301 (Marshall, J., dissenting) (discussing whether a remand was appropriate). Justice Marshall found that the usual deference for the district court's findings of fact was not required since the findings were entirely based on documentary evidence. *Id.*

70. 104 S. Ct. 1949 (1984). In *Bose*, the Court held that *de novo* appellate review on the issue of actual malice in a defamation action was a requirement of federal constitutional law. *Id.* at 1965. The Court asserted that independent review was necessary "in order to preserve the precious liberties established and ordained by the Constitution." *Id.* at 1965.

71. *Id.* at 1959 (quoting *Gypsum*, 333 U.S. at 395) ("finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court *on the entire evidence* is left with the definite and firm conviction that a mistake has been committed") (emphasis added by the *Bose* Court).

72. *Id.* The Court based this proposition on the requirement that special deference be given to a trial judge's credibility determinations. *Id.*

73. *Id.* The Court noted that the presumption tends to increase with the length of the trial since "trial judges have lived with the controversy for weeks or months instead of just a few hours." *Id.*

The Court also stated that while the clearly erroneous standard has varying degrees, the difference between independent (*de novo*) review and the clearly erroneous standard is "much more than a mere matter of degree." *Id.* In discussing the impact of independent review, the Court commented that "independent

B. *Circuit Court Interpretations*

Notwithstanding the several statements by the Supreme Court, the circuit courts of appeals have continued to apply different standards of review to a trial judge's findings of fact based upon documentary evidence.[74] The three standards of review used by the appellate courts are the following:

> 1) The "clearly erroneous" standard of review, whereby all findings of fact by a judge are presumptively correct whether the evidence is oral or documentary;[75]
> 2) *De novo* review, whereby the appellate court is free to review the entire record and make its own findings of fact when evidence is documentary;[76]
> 3) The "modified clearly erroneous" standard of review, whereby less deference is given to findings of fact based on documentary evidence than is given to oral evidence under the clearly erroneous standard.[77]

---

review assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact." *Id.* The Court asserted that the constitutional values in the first amendment require independent review. *Id.* at 1960.

74. *See* Burlington N. Inc. v. Weyerhaeuser Co., 719 F.2d 304, 307 (9th Cir. 1983) ("clearly erroneous standard of review applies to findings of fact even when the district court relies solely on a written record"); Onaway Transp. Co. v. Offshore Tugs, Inc., 695 F.2d 197, 200 (5th Cir. 1983) (while the clearly erroneous standard applies, "the degree of deference to be accorded a district court's findings of fact is lower when the case is submitted wholly on documents . . . ."); *In re* Multidistrict Litig. Involving Frost Patent, 540 F.2d 601, 603 (3d Cir. 1976) ("Since we are in just as good a position as the district court to evaluate documentary evidence, we have undertaken an independent and comprehensive review of this evidence.").

75. *See* United States v. United States Gypsum Co., 333 U.S. at 395 ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."); Constructura Maza, Inc. v. Banco de Ponce, 616 F.2d 573, 576 (1st Cir. 1980) ("The presumption of correctness reflected in the 'clearly erroneous' rule applies not only when the district court's findings are based upon its assessment of conflicting testimony, but also when, as here, much of the evidence is documentary . . . ."); Case v. Morrisette, 475 F.2d 1300, 1307 (D.C. Cir. 1973) ("[W]e must also measure the findings by the 'clearly erroneous' test even when they are based on inferences drawn from the documents or undisputed facts.").

76. *See* Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979) ("Since the district court findings were based solely on a review of the state court record, we are not bound by the 'clearly erroneous' standard of review under Rule 52(a), Fed. R. Civ. P., but may make our own independent factual determination."); *In re* Multidistrict Litig. Involving Frost Patent, 540 F.2d 601, 603 (3d Cir. 1976) ("Since we are in just as good a position as the district court to evaluate documentary evidence, we have undertaken an independent and comprehensive review of this evidence.").

77. *See Bose Corp.*, 104 S. Ct. at 1959 ("The same 'clearly erroneous' standard applies to findings based on documentary evidence . . . , but the presumption has lesser force . . . ."); Marcum v. United States, 621 F.2d 142, 145 (5th

1. *Clearly Erroneous Standard*

Courts in the First,[78] Fourth,[79] Sixth,[80] Eighth,[81] Eleventh,[82] and the District of Columbia[83] Circuits presently adhere to the principle that all findings of fact are only reviewable under the clearly erroneous standard, regardless of whether the evidence is documentary or oral.

In *Constructora Maza, Inc. v. Banco de Ponce*,[84] the First Circuit re-

Cir. 1980) ("[W]here the evidence before the trial court consisted solely of depositions and other written matter, . . . the burden of showing clear error is not so heavy as in the case where the court has the opportunity to assess the credibility of witnesses by personal observation."); Green v. Russell County, 603 F.2d 571, 573-74 (5th Cir. 1979) ("Although . . . the burden of establishing clear error is not so heavy as in the normal case, our review of the factual findings is nevertheless governed by the clearly erroneous standard.").

78. *See* Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573 (1st Cir. 1980) (court applied the clearly erroneous standard when much of the evidence was documentary).

79. *See* Marino Sys., Inc. v. J. Cowhey & Sons, Inc., 631 F.2d 313 (4th Cir. 1980) (court rejected application of full appellate review to question of infringement of a patent based wholly on documentary evidence and a comparison of the structures of certain devices); Nalle v. First Nat'l Bank, 412 F.2d 881 (4th Cir. 1969) (findings only reviewable under the clearly erroneous standard even though most of the evidence was documentary).

80. In the Sixth Circuit, there is a conflict among decisions over the appropriate standard of review of findings of fact based on documentary evidence. *Compare* United States v. Jabara, 644 F.2d 574, 577 (6th Cir. 1981) (applying the clearly erroneous standard in a criminal case where there was no oral testimony) *and* Ingram Corp. v. Ohio River Co., 505 F.2d 1364, 1369 (6th Cir. 1974) (in admiralty case, court adhered to rule that "the clearly erroneous rule should control even where the entire record consisted of depositions, Coast Guard records, and other written material") *and* United States Steel Corp. v. Fuhrman, 407 F.2d 1143, 1146 (6th Cir. 1969) ("We conclude that Rule 52(a) applies to the findings of fact of the District Judge in the present case notwithstanding that he heard no live testimony at the trial.") *with* Lydle v. United States, 635 F.2d 763, 765 n.1 (6th Cir. 1981) (court acknowledged in dicta the disagreement within the circuit over the standard of review and noted that "where the trier of fact has observed no witnesses, the 'clearly erroneous' test is inapplicable;" the court "is in as good a position as the district court to review a purely documentary record and to arrive at conclusions of mixed law and fact") *and In re* Clemens, 472 F.2d 939, 941 n.1 (6th Cir. 1972) ("This is, in substance, a 'paper case,' and the clearly erroneous test of Rule 52(a) . . . is inapplicable.").

81. Hoefelman v. Conservation Comm'n., 718 F.2d 281 (8th Cir. 1983) (factual determinations based upon conflicting depositions are only reviewable under the clearly erroneous standard).

82. Dothan Coca-Cola Bottling Co. v. United States, 745 F.2d 1400 (11th Cir. 1984) (clearly erroneous standard applied to findings of fact based upon documents and transcripts of evidence presented in an earlier action). For further discussion of *Dothan*, see *supra* notes 176-85 and accompanying text.

83. Permian Corp. v. United States, 665 F.2d 1214 (D.C. Cir. 1981) (applying the clearly erroneous standard to a finding that certain documents were protected by a work product privilege); Case v. Morrisette, 475 F.2d 1300, 1307 (D.C. Cir. 1973) ("[W]e must also measure the findings by the 'clearly erroneous' test even when they are based on inferences drawn from documents or undisputed facts.").

84. 616 F.2d 573 (1st Cir. 1980).

viewed findings of fact based almost entirely on documentary evidence.[85] The district court, sitting by designation in a bankruptcy proceeding, held that certain transfers by plaintiff to defendant were voidable preferences.[86] The First Circuit reviewed two elements of a voidable preference: whether plaintiff was insolvent at the time of transfer and whether the defendant had reasonable cause to believe plaintiff was insolvent.[87] After determining that both of these elements were questions of fact, the First Circuit held that the clearly erroneous standard applied "when, as here, much of the evidence is documentary and the challenged findings are factual inferences drawn from undisputed facts."[88] Furthermore, the court recognized that because the question of whether defendant had reasonable cause to believe plaintiff was insolvent was a highly fact-sensitive question, its role was only to determine "whether there is sufficient basis in fact for the district court's findings."[89] The court concluded that the district court's findings of fact were not clearly erroneous.[90]

Similarly, in *Hoefelman v. Conservation Commission*,[91] the Eighth Circuit also concluded that the clearly erroneous standard of rule 52(a) governed appellate review of factfindings based on documentary evidence. In *Hoefelman*, the district court had found that age was a bona fide occupational qualification for pilots; therefore, it concluded that the defendant had not violated the Age Discrimination in Employment Act (ADEA) when it prohibited plaintiff from flying.[92] Based upon conflicting depositions of two experts, the district court determined that there was no other way to discover whether a pilot was able to fly safely except by reference to age.[93] In reviewing this finding of fact, the Eighth Circuit relied upon the Supreme Court decision in *Pullman-Standard v. Swint* to hold that a trial judge's factual determinations based on conflicting dep-

85. *Id.* at 576. The court did not indicate the exact type of evidence presented in the case.

86. *Id.* at 575.

87. *Id.* The court noted that several circuits characterize these elements as mixed questions of law and fact; however, it relied on an earlier Supreme Court decision to characterize the question as a factual one. *Id.* at 576 n.2 (citing Kaufman v. Tredway, 195 U.S. 271 (1904)).

88. *Id.* (citing Commissioner v. Duberstein, 363 U.S. 278, 291 (1960)).

89. *Id.* at 578. The First Circuit commented that its "task [was] not to make this factual determination *de novo* . . . ." *Id.*

90. *Id.* at 577-79.

91. 718 F.2d 281 (8th Cir. 1983).

92. *Id.* at 282-83. *See* Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1982). The defendant instituted a policy of prohibiting pilots from flying its aircraft when they reached sixty. 718 F.2d at 282. As a result, the plaintiff, who was sixty, was transferred to a position of equal grade, salary, and benefits, though he no longer flew. *Id.*

93. *Id.* at 283. The district court found that aging detrimentally affected a person's psychomotor functions, which are important to pilots. *Id.*

ositions should "not be overturned unless they are clearly erroneous."[94] The court commented that the *Pullman* decision "laid to rest" most of the uncertainty among the circuits as to the appropriate standard of review where evidence is documentary,[95] and that "[i]t is the particular province of the district court to find facts."[96] After reviewing the record, the Eighth Circuit concluded that the findings of the district court were not clearly erroneous.[97]

Recently, in *Burlington Northern, Inc. v. Weyerhaeuser Co.*,[98] the Ninth Circuit held that the clearly erroneous standard applied to review of findings of fact based on documentary evidence.[99] In *Burlington*, the court considered whether a shipment of logs was transported in interstate or intrastate commerce.[100] After examining the depositions and pretrial materials, the district court held that the shipments were intrastate in nature.[101] On appeal to the Ninth Circuit, appellant contended that the court should apply a "more careful scrutiny" to the district court's finding of fact because the district court relied solely on a written record.[102] The Ninth Circuit rejected this argument, stating that even where the district court relied completely on a written record, the clearly erroneous standard governed its review of findings of fact.[103] Examining the record, the court found substantial evidence to support the district court's findings of fact and affirmed.[104]

---

94. *Id.* at 285 (citing Pullman-Standard v. Swint, 456 U.S. 273, 284 n.14 (1982)). The Eighth Circuit determined that in *Pullman*, "[t]he Supreme Court made clear that Rule 52 applies to all findings of fact of the district court." *Id.* at 284.

95. *Id.* (citing Pullman-Standard v. Swint, 456 U.S. 273 (1982)). The court noted seemingly contradictory positions within the Eighth Circuit. *Id.* at 284 n.3 (citing for comparison Swanson v. Baker Indus., 615 F.2d 479, 483 (8th Cir. 1980) (although under applicable state law the construction of a contract was a question of law, court stated that "[w]here the construction of a contract rests upon documentation and factual findings . . . , we review the district court's construction free of Fed. R. Civ. P. 52(a)"); Worthen Bank & Trust Co. v. Franklin Life Ins. Co., 370 F.2d 97, 99-100 (8th Cir. 1966) (even when a case was submitted upon pleadings, answers and exhibits, the reviewing court could not try the case *de novo*)).

96. *Id.* at 285 (citing Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950).

97. *Id.* at 286.

98. 719 F.2d 304 (9th Cir. 1983).

99. *Id.* at 307.

100. *Id.* Plaintiff, a railroad company, asserted that the shipments by the defendant were intended for out-of-state locations, and that for this reason, interstate tariff rates applied. *Id.*

101. *Id.* at 306. The trial judge, focusing on the retention of control by the defendant over the loss during shipment, held that the defendant did not have the requisite specific intent to ship the logs out of state. *Id.*

102. *Id.* at 307.

103. *Id.*

104. *Id.* at 307-10. The Ninth Circuit had previously reviewed a district court's findings of fact based on documentary evidence in a habeas corpus case

In reaching its decision in *Burlington*, the Ninth Circuit relied upon its previous decision in *Lundgren v. Freeman*.[105] In *Lundgren*, Judge Duniway, speaking for the majority, stated that rule 52(a) "should be construed to encourage appeals that are based on a conviction that the trial court's decision has been unjust; it should not be construed to encourage appeals that are based on the hope that the appellate court will second-guess the trial court."[106] Judge Duniway asserted that rule 52(a) was designed to enable an appellate judge to determine whether justice was done, not to decide issues of fact in the first instance.[107] The Ninth Circuit, therefore, held that the clearly erroneous standard applied.[108]

Several commentators also adhere to the view that the clearly erroneous standard embodied in rule 52(a) is applicable to review of findings of fact based on documentary evidence.[109] First, they contend that disregard of the trial court's findings by appellate courts imperils the confidence of litigants and the public in the decisions of the district court.[110] Second, they suggest that the number of appeals, with con-

---

under the clearly erroneous standard. *See* Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir. 1982). The court held that the findings that petitioner "engaged in no outlandish behavior . . . are based on 'the fact finding tribunal's experience with the mainspring of human conduct,' . . . and on its experience in conducting trials and observing defendants' behavior." *Id.* at 1036 (quoting Commissioner v. Duberstein, 363 U.S. 278, 289 (1960)). The Ninth Circuit rejected the *de novo* standard of review as applied in other circuits. *Id.* at 1036 n.5.

105. 307 F.2d 104 (9th Cir. 1962).

106. *Id.* at 114. The court stated that "[t]he purpose of 'appeal' in equity cases was to enable a higher court to search the record to see if justice was done." *Id.*

107. *Id.* Additionally, Judge Duniway reasoned that one of the main purposes of findings of fact—giving the appellate court an understanding of the trial court's decision—would be rendered moot by *de novo* review. *Id.*

108. *Id.* at 115. The court relied on *Duberstein* as suggesting that the clearly erroneous standard applied to review of findings of fact based on undisputed facts. *Id.* For a discussion of *Duberstein*, see *supra* notes 56-57 and accompanying text.

Having reached this conclusion, the *Lundgren* court reconciled its holding with prior decisions in the circuit that had reached the opposite result. The court reasoned that cases which had held that no weight need be given to a trial court's findings of fact appeared to be cases in which the court reviewed inferences drawn from an application of a legal standard, not cases which involved pure findings of fact. 307 F.2d at 115. The court distinguished a finding of fact as "a finding based upon the 'fact-finding tribunal's experience with the mainsprings of human conduct.' " *Id.* A trial court's conclusion of law, to which a reviewing court need not give any weight, is one based on the application of a legal standard. *Id.*

109. *See* C. WRIGHT & A. MILLER, *supra* note 43, § 2587; Chesnut, *supra* note 37, at 540-41, 572; Clark, *supra* note 4, at 505-06; Clark & Stone, *supra* note 11, at 215-17; Wright, *supra* note 4, at 764-71; Note, *supra* note 4.

110. C. WRIGHT & A. MILLER, *supra* note 43, § 2587, at 748. The authors assert that even where the appellate court is in as good a position as the trial court, "it should not disregard the trial court's finding, for to do so impairs confidence in the trial courts . . . ." *Id.* The authors quote an Eighth Circuit decision which recognized that any doubt over whether the district court decides fact

comitant expense and delay, would multiply with *de novo* review.[111] Third, they argue that deference should be given to the trial judge.[112] Finally, they contend that the clearly erroneous standard promotes uniformity and thereby fulfills the intent of the Advisory Committee.[113]

2. *De Novo Review*

In reviewing findings of fact based on documentary evidence, the Second and Third Circuits have consistently applied a *de novo* standard of review.[114] The leading case supporting the application of the *de novo* review to findings of fact based on documentary evidence is *Orvis v. Hig-*

questions will be "detrimental to the orderly administration of justice, [and] impair[s] the confidence of litigants and the public in the decisions of the district courts . . . ." *Id.* (quoting Pendergrass v. New York Life Ins. Co., 181 F.2d 136, 138 (8th Cir. 1950)). *See also* Wright, *supra* note 4, at 781 ("I doubt whether there will be much satisfaction with the judgments of trial courts among a public which is educated to believe that only appellate judges are trustworthy ministers of justice.").

111. *See* Clark & Stone, *supra* note 11, at 217 (right of appeal should be restricted to protect appellate courts from "a plethora of cases" and to reduce, not increase, records); Wright, *supra* note 4, at 780 ("It is literally marvelous that, at a time when the entire profession is seeking ways to minimize congestion and delay in the courts, we should set on a course [*de novo* review] which inevitably must increase congestion and delay.").

112. Chesnut, *supra* note 37, at 540 ("Surely the findings of fact by a judge ought to have no less weight than the findings of a jury, especially as the parties have by preference stipulated that he shall make the findings."); Wright, *supra* note 4, at 781 ("If trial judges are carefully selected, as in the federal system, it is hard to think of any reason why they are more likely to make errors of judgment than are appellate judges.").

113. *See* Clark, *supra* note 4, at 506. Judge Clark, reporter to the Advisory Committee, sought a balance between an individual's rights and a workable procedure for review; however, appellate courts which apply *de novo* review emphasize only preservation of rights, and thus apply an unduly rigid interpretation of the rule. *Id.* The result is a "rule now so overturned that when the appellate court wishes to apply the policy of nonreviewability of the original rule, it finds it necessary to utter an apology for seeming to violate the rule of the case law." *Id. See also* Wright, *supra* note 4, at 770 ("That Rule 52 required application of the 'clearly erroneous' test to all findings, regardless of the nature of the evidence, should thus have been apparent to anyone who understands the difference between a hypothetical and a conjunctive proposition."); Note, *supra* note 4, at 532-33 ("this interpretation [clearly erroneous standard for review of all findings of fact] has the virtue of promoting uniformity, a primary objective of the drafters").

114. *See* Taylor v. Lombard, 606 F.2d 371 (2d Cir. 1979); *In re* Multidistrict Litig. Involving Frost Patent, 540 F.2d 601 (3d Cir. 1976).

In the past, the Eighth Circuit had supported the application of *de novo* review to findings of fact based on documentary evidence. *See* Swanson v. Baker Indus., 615 F.2d 479, 483 (8th Cir. 1980) (construction of a contract which rests upon documentation and factual findings can be reviewed free of the clearly erroneous standard). More recently, however, the Eighth Circuit interpreted *Pullman-Standard v. Swint* as requiring application of the clearly erroneous standard to all findings of fact. *See* Hoefelman v. Conservation Comm'n, 718 F.2d 281

gins,[115] a Second Circuit decision written by Judge Frank.[116] In *Orvis*, decedent's estate was assessed an estate tax on the corpus of decedent wife's trust.[117] Plaintiff, executor of decedent's estate, sued defendant, collector for the Internal Revenue Service, for a refund of that portion of the estate tax allocable to the trust. Defendant defended the collection of taxes on the ground that reciprocal trusts had been created by decedent and his wife.[118] The district court found that the settlors of the trusts did not intend them to be reciprocal.[119] Before reviewing the findings of fact in the case, Judge Frank made the following statements with respect to the standards of review applicable to findings of fact made by a district judge in a nonjury trial:

> a) If he decides a fact issue on written evidence alone, we are as able as he to determine credibility, and so we may disregard his finding.
> b) Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own, (1) if the written evidence or some undisputed fact renders the credibility of the oral testimony extremely doubtful, or (2) if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance.
> c) But where the evidence supporting his finding as to any fact issue is entirely oral testimony, we may disturb that finding only in the most unusual circumstances.[120]

(8th Cir. 1983). For a discussion of *Hoefelman*, see *supra* notes 91-97 and accompanying text.

For a discussion of the arguments in favor of *de novo* review, see generally J. MOORE & J. LUCAS, *supra* note 4, ¶ 52.04.

115. 180 F.2d 537 (2d Cir.), *cert. denied*, 340 U.S. 810 (1950).

116. *Id.* at 538. Judge Frank was considered the leading advocate of *de novo* review, which several commentators have labeled as the "Frank" position. *See, e.g.*, C. WRIGHT & A. MILLER, *supra* note 43, § 2587, at 749; Note, *supra* note 4, at 520-24.

117. 180 F.2d at 537.

118. *Id.* If the trusts were reciprocal, then they would be treated as though the decedent were settlor for his wife's trust, and he would retain life income. *Id.* at 541.

119. *Id.* at 540. The Second Circuit commented that the trial judge "relied on no positive testimony . . . but relied merely on negative testimony as to the absence of an expressed intention to act reciprocally . . . ." *Id.*

120. *Id.* at 539-40. In establishing these categories, the court expressed reliance upon *Gypsum* and federal equity practice. *Id.* at 539 (citing *Gypsum*, 333 U.S. at 384-96). The court focused upon an assertion in *Gypsum* that where testimony is in conflict with documents, the testimony carries little weight. *Id.* (citing *Gypsum*, 333 U.S. at 394-96). Before and after *Orvis*, *Gypsum* was cited almost exclusively in support of the clearly erroneous standard of review. *See* Note, *supra* note 4, at 521.

In *Orvis*, while the evidence was in the form of oral testimony, Judge Frank asserted that the trial judge's evaluations of credibility were unimportant, and drew an opposite inference than that of the trial court, while assuring that the testimony which the court relied upon was completely credible.[121] While the court stated that on an issue relating to intent, the appellate court was in as good a position to evaluate the testimony as the trial judge,[122] the court ultimately held that the trial judge's findings were "clearly erroneous."[123] It is difficult to ascertain the actual standard of review used by the *Orvis* court due to this ambiguity in its analysis.

More recently, the Second Circuit applied *de novo* review in *Taylor v. Lombard*.[124] In *Taylor*, petitioner was found guilty of assault in state court. Subsequently, he unsuccessfully moved to dismiss on the ground that several prosecution witnesses had perjured themselves with the knowing acquiescence of the prosecutor.[125] Petitioner filed a petition for writ of habeas corpus, which the district court denied.[126] On appeal, the Second Circuit decided that it could make its own factual determination concerning whether the prosecutor knowingly acquiesced to perjured testimony, free of the clearly erroneous standard, "[s]ince the district court findings were based solely on a review of the state court record . . . ."[127] The Second Circuit reversed, finding that the prose-

121. *Id.* at 540-41. The court decided that since the evidence consisted mostly of undisputed testimony, the trial court's credibility determinations were not critical to its findings of fact. *Id.* at 540.

122. *Id.* at 541. The court conditioned this assertion on the assumption that the witnesses spoke the truth. *Id.* Although the Eighth Circuit constantly reiterated that the witnesses spoke the truth, the court nevertheless disregarded witnesses' testimony that either party acted with the other party's intention in mind. *Id.* at 540.

123. *Id.* The Court stated that "the undisputed facts are such that we have a 'definite and firm conviction' that the trial judge was mistaken . . . ." *Id.* In dissent, Judge Chase believed that the trial judge's findings of fact were not clearly erroneous, commenting that "[t]his is a typical instance for the application of Civil Rule 52(a). Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient." *Id.* at 542 (Chase, J., dissenting).

124. 606 F.2d 371 (2d Cir. 1979). *See also* Jack Kahn Music Co. v. Baldwin Piano & Organ, 604 F.2d 755, 758 (2d Cir. 1979) (without referring to rule 52(a), court held that where a preliminary injunction was granted on a "paper record," the appellate court had the power of full review).

125. 606 F.2d at 372. The key to the trial was the credibility of the petitioner and his story versus the prosecutor's witnesses. *Id.* at 374. The alleged perjurers included the assaulted person and his wife. *Id.* at 375. Petitioners' evidence of perjury consisted of a third party affidavit and testimony at a post-trial hearing that the victim's wife had informed the prosecutor of certain facts prior to trial, which contradicted her testimony at trial. *Id.* at 374.

126. *Id.* at 372. The district court judge found that petitioner's claims had no factual basis and dismissed the petition for writ of habeas corpus. *Id.*

127. *Id.* at 372. The court, however, posited another reason which allowed *de novo* review: "Where we are confronted with a claimed error of constitutional magnitude we must review the record to make our own determination . . . ."

cutor knowingly acquiesced to perjury, and that disclosure of the perjured testimony at trial could have resulted in a different verdict.[128]

The Third Circuit has consistently applied *de novo* review to findings of fact based on documentary evidence.[129] In *Government of the Virgin Islands v. Gereau*,[130] defendants were convicted of first degree murder, at which time they moved for a new trial.[131] The trial judge reviewed *de novo* the record compiled at a posttrial hearing before a master and denied defendants' motion for a new trial.[132] On appeal, defendants asserted that the trial judge's findings of fact were unsupported by the evidence of record.[133] In selecting the proper standard of review, the Third Circuit distinguished between cases tried solely on the basis of documentary evidence where the facts in the documents were stipulated and where the facts were disputed.[134] The Third Circuit affirmed all but

---

Id. at 375. The court stated that "[i]t is well established that a prosecutor's knowing use of perjured testimony violates the due process clause of the Fourteenth Amendment." *Id.* at 374.

128. *Id.* at 372. The court held that disclosure of the truth by the prosecution's witnesses during the trial could have influenced the jury's assessment of credibility and would have tended to corroborate petitioner's contentions. *Id.* at 375.

129. *See* Davis v. United States Steel Supply, 27 E.P.D. ¶ 32,148 (3d Cir. 1981) ("We have thus consistently held for at least the past quarter century . . . that the Rule 52(a) 'clearly erroneous' standard does not apply to wholly documentary cases where the record discloses no oral testimony."), *vacated on other grounds*, 688 F.2d 166 (3d Cir. 1982) (*en banc*), *cert. denied*, 460 U.S. 1014 (1983).

Recently, some members of the Third Circuit have questioned the validity of the line of cases supporting *de novo* review in light of the Supreme Court decision in *Pullman*. *See* Bittner v. Borne Chemical Co., 691 F.2d 134 (3d Cir. 1982). In *Bittner*, petitioners in a bankruptcy action contended that the bankruptcy court based its valuation of claims on incorrect findings of fact. *Id.* at 138. Writing for the majority, Judge Gibbons commented that although the bankruptcy findings were based on undisputed documentations or stipulated evidence, the *Pullman* decision suggested that "[o]nly when the trial court's factual findings are clearly erroneous should an appellate court intervene." *Id.* Nevertheless, the court stated that "even treating the matter originally, we would draw the same inferences . . . ." *Id.* In *dicta*, however, the *Bittner* court indicated that the practice within the Third Circuit of applying *de novo* review may be ending as a result of *Pullman*. *Id.*

130. 523 F.2d 140 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

131. *Id.* at 142. Defendants' motion requesting a new trial was based on the ground that all the jurors had not freely assented to the verdict. This motion was supported by affidavits of two jurors; however, the trial judge found that the affidavits were made out of fear. *Id.* at 142-43. The chief judge of the district subsequently ordered a posttrial hearing to inquire into allegations that the jury was tampered with during deliberations. *Id.* at 143.

132. *Id.* at 143-44.

133. *Id.* at 144. Defendants also asserted that the government had the burden of proving that none of the alleged incidents were prejudicial, and that this burden was not sustained. *Id.* The court assumed that the government had the burden but concluded that the burden was met. *Id.* at 154.

134. *Id.* at 144. The court stated that if the facts were agreed to, then it could, within limits, substitute its own factual conclusions. *Id.* (citing Demirjian v. Commissioner, 457 F.2d 1, 4 (3d Cir. 1972). However, if the facts were in

two findings on the ground that it was "in as good a position to determine the question as [was] the district court."[135] The court noted that all the findings which it affirmed had "adequate and reasonable support in the record."[136] As a result, the court affirmed the denial of motion for a new trial.[137]

Shortly after its decision in *Gereau*, the Third Circuit again applied *de novo* review in *In Re Multidistrict Litigation Involving Frost Patent*.[138] In *Frost Patent*, the district court found that the defendant had proved fraud on the patent office by clear, unequivocal and convincing proof as was required and therefore held the Frost patent invalid.[139] The defendant met this demanding burden of proof by relying primarily upon uncontested documents.[140] Focusing on its ability to evaluate documentary evidence as well as the district court, the Third Circuit undertook an "independent and comprehensive review of this evidence,"[141] and upheld the district court's finding of fraud.[142]

3. *Modified Clearly Erroneous Standard*

While adhering to the clearly erroneous standard, the Fifth, Seventh and Tenth Circuits have held that the burden of establishing clear error is not as heavy when the evidence is entirely documentary as when the evidence includes oral testimony.[143] Under this modified standard of review, courts, while still constrained by the clearly erroneous standard, can undertake a more in-depth review and more readily find the

---

dispute and not material, then the clearly erroneous standard of review applied. *Id.* at 144-45 & n.12 (citing United States v. United Steelworkers, 271 F.2d 676, 685, 688 (3d Cir.), *aff'd*, 361 U.S. 39 (1959)).

135. *Id.* at 145-46 (quoting Universal Athletic Sales Co. v. Salkeld, 511 F.2d 904, 907 (3d Cir. 1975)). The court found the case to be distinguishable from both *Demirjian* and *Steelworkers*. *Id.* at 145 & n.12. Although the court spoke of the "as good a position" reviewing standard rather than *de novo* review, the practical outcome—an independent determination by the reviewing court—was the same. *Id.* at 145-46.

136. *Id.* at 146 n.14.

137. *Id.* at 155.

138. 540 F.2d 601 (3d Cir. 1976).

139. *Id.* at 603.

140. *Id.* The district court held that the reliance on uncontested documents by itself met the burden of clear and convincing proof. *Id.* The Third Circuit held that this reliance, in and of itself, was insufficient to establish clear and convincing proof. *Id.*

141. *Id.* The court reasoned that independent review was justified, "since we are in just as good a position as the district court to evaluate documentary evidence . . . ." *Id.*

142. *Id.* While affirming the finding of fraud, the court held the Frost patent to be invalid only in part. *Id.* at 611.

143. *See, e.g.*, Onaway Transp. Co. v. Offshore Tugs, Inc., 695 F.2d 197 (5th Cir. 1983); Jennings v. General Medical Corp., 604 F.2d 1300 (10th Cir. 1979); Oscar Gruss & Son v. First State Bank, 582 F.2d 424 (7th Cir. 1978).

trial court's findings of fact to be clearly erroneous.[144]

In *Onaway Transportation Co. v. Offshore Tugs, Inc.*,[145] the Fifth Circuit expressed its view on the applicable standard of review for a district judge's findings of fact based on documentary evidence. In *Onaway*, plaintiff brought suit alleging that defendant overcharged for towing services.[146] The case was submitted to the district court solely on the basis of deposition testimony and other documentary evidence.[147] Reviewing these documents, the district court held that plaintiff had agreed to a higher price.[148] The court commented that while constrained by the "clearly erroneous" standard of review, "the judge has not gained the unique advantage in evaluating the evidence which normally comes from observing the demeanor of witnesses appearing before the court" when the case is submitted wholly on documentary evidence.[149] The court stated, however, that while the degree of deference may be lowered, as other Fifth Circuit cases had held,[150] it was still restricted from reversing the findings of fact unless "upon reviewing 'the entire evidence' we are 'left with the definite and firm conviction that a mistake has been committed.' "[151] The court concluded that such a mistake had been committed by the district judge.[152]

144. *See* C. WRIGHT & A. MILLER, *supra* note 43, § 2587, at 741; Clark, *supra* note 4, at 505-06; Wright, *supra* note 4, at 764-70; Note, *supra* note 4, at 519-20.

145. 695 F.2d 197 (5th Cir. 1983).

146. *Id.* at 198. Plaintiffs hired defendant's tugs to aid one of its ships that was experiencing mechanical troubles and probably had run aground. *Id.* The dispute concerned the price at which the plaintiff had agreed to employ defendant's services. *Id.* On the day the ship was rescued, the parties entered into a contract which specified a price that was normally charged for servicing ships that are afloat. *Id.* On the following day, the parties engaged in conversation which defendants alleged resulted in a second contract for the higher price that is charged to rescue ships which are aground. The issue presented was whether a binding contract had been made upon the initial lower price. *Id.* Defendants argued that no contract had been formed because it did not know, at the time of its making, that plaintiff's ship was aground. *Id.* at 199-200.

147. *Id.* at 199.

148. *Id.* The district court, on the basis of documentary evidence, made a finding of fact that defendant was unaware that plaintiff's ship was aground until the day after service was rendered, at which time the defendant claimed a higher fee. *Id.* at 199-200.

149. *Id.* at 200. The court indicated that the degree of deference to a district court's findings of fact is lower when the case is submitted wholly on documents. *Id.*

150. *See, e.g.*, Green v. Russell County, 603 F.2d 571 (5th Cir. 1979). In *Green*, the case was tried entirely on depositions, affidavits and documents. *Id.* at 573. The court indicated that while it was bound by the clearly erroneous standard, "the burden of establishing clear error is not so heavy as in the normal case . . . ." *Id.* The court, however, did not state that it must have a "definite and firm conviction" of error.

151. 695 F.2d at 200 (quoting McAllister v. United States, 348 U.S. 19, 20 (1954)).

152. *Id.* Upon reviewing defendant's daily boat logs, the court concluded that defendant knew that plaintiff's ship was aground prior to rendering services.

In *Oscar Gruss & Son v. First State Bank*,[153] the Seventh Circuit applied a modified form of the clearly erroneous standard. In *Gruss*, defendant obtained treasury bills which the deliverer had stolen from plaintiff.[154] The issue in dispute was whether defendant was a bona fide purchaser of the treasury bills, so as to afford it protection under the Uniform Commercial Code.[155] The district court found that defendant was a bona fide purchaser and thus protected.[156] On appeal, the Seventh Circuit first held that the question of notice, which was integral to the question of good faith, was a question of fact, not law.[157] The court then indicated that where, as in the present case, evidence is virtually undisputed and the findings of fact are based on documentary evidence, while the clearly erroneous standard applies, the "force of the rule may be 'less inhibiting.' "[158] The court concluded, however, that the district court's findings of fact were entitled to some deference and could not be set aside unless the "appellate court can 'come to a definite and firm conviction that no error [was] committed in the findings . . . .' "[159] Contrary to the district court, the Seventh Circuit was "inclined to the view that the defendant had notice;" it did not reverse the finding, however, because the court did not have a "definite and firm conviction" that the district court had erred in making its findings.[160]

The Tenth Circuit also seemed to deviate from the clearly errone-

---

Id. See also Marcum v. United States, 621 F.2d 142, 145 (5th Cir. 1980) (while noting that the burden was lessened when evidence was documentary, a finding is clearly erroneous where from "our view of the same evidence from the same vantage point as the trial court leaves us 'with a definite and firm conviction that a mistake has been committed' ") (quoting *Gypsum*, 333 U.S. at 395).

153. 582 F.2d 424 (7th Cir. 1978).

154. *Id.* at 427-28. The deliverer transferred the treasury bills to defendant to pay off an unauthorized loan. *Id.* at 428. At the time the defendant redeemed the bills, plaintiff had not reported them missing to any authorities. *Id.*

155. *Id.* The Uniform Commercial Code (UCC) defines a bona fide purchaser as one who purchases for value in good faith and without notice of any adverse claims upon delivery. U.C.C. § 8-302 (1978). Section 8-301 provides that a bona fide purchaser acquires the security free of any adverse claims. *Id.* § 8-301.

156. 582 F.2d at 429.

157. *Id.* at 430. The court determined that the question of whether a party acted without notice and with good faith "turned on the particular facts involved." *Id.*

158. *Id.* at 431.

159. *Id.* (deletion by *Gruss* court) (quoting Mercantile Nat'l Bank of Chicago v. Howmet, 524 F.2d 1031, 1035 n.3 (7th Cir. 1975), *cert. denied*, 424 U.S. 957 (1976)).

160. *Id.* at 432. The reason that the Seventh Circuit did not find the trial judge's findings of fact to be clearly erroneous was that no finding was made as to whether defendant had constructive notice. *Id.* at 432-33. Thus, while the trial judge's findings were insufficient, the findings were not necessarily erroneous. *Id.* The court did conclude that the burden of proof was improperly placed on the plaintiff and remanded for two further findings: 1) whether the bank had constructive notice; and 2) whether the trial judges placed the full burden on

ous standard in *Jennings v. General Medical Corp.*[161] The district court in *Jennings* entered judgment for plaintiff in a breach of contract action,[162] having made findings of fact based upon its interpretation of the contract and of various registration forms under the Securities Act of 1933.[163] In reviewing the district court's findings, the Tenth Circuit found that findings of fact based on documentary evidence carried less weight than those based on oral evidence, reasoning that it was "equally capable of examining documents, depositions and stipulations, and drawing its own conclusions."[164] The court, however, stated that it would not substitute its judgment for that of the district court unless the district court's findings were clearly erroneous.[165] Proceeding to examine the documentary evidence, the Tenth Circuit acknowledged that several interpretations of the contract were possible,[166] but substituted its determination for that of the district court.[167]

---

plaintiff or only the burden after defendant's prima facie case was presented. *Id.* at 433-34.

See also Clark v. Universal Builders, Inc., 706 F.2d 204, 206 (7th Cir. 1983) (court constrained to give substantial deference to the district court's findings under the clearly erroneous test even though the district court partially relied on documentary evidence) (citing *Pullman-Standard*, 456 U.S. 273 (1982)); Atari, Inc. v. North Am. Philips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir. 1982). In *Atari*, plaintiff sued defendant for copyright infringement and filed a motion for a preliminary injunction. 672 F.2d at 610. The district court denied plaintiff's motion, concluding that plaintiff failed to show a likelihood of success in the suit on the merits. *Id.* at 610. On review of the denial of the preliminary injunction, the Seventh Circuit indicated that since the determination of copyright infringement was based on an "ocular comparison" of plaintiff's and defendant's products and did not involve any credibility issues, the "court is in as good a position as a district court to decide that question." *Id.* at 614. Despite this language, which suggests application of a *de novo* standard of review, the court found that the district court's conclusion that the two products were not substantially similar was "clearly erroneous" and it reversed the denial of the preliminary injunction. *Id.* at 620-21.

161. 604 F.2d 1300 (10th Cir. 1979).

162. *Id.* at 1301. Pursuant to an agreement, plaintiffs received restricted stock in defendant corporation which could not be sold without a registration. *Id.* at 1302. The agreement permitted the plaintiffs to participate in certain SEC registrations if a public offering was made within three years. *Id.* The issue presented was whether defendant had breached the agreement by failing to notify the plaintiff of an impending secondary offering under Form S-16. *Id.* at 1304. The defendant contended that the contract did not require it to give notice of an S-16 offering. *Id.* at 1304-05. Plaintiff argued that the S-16 was a "successor" to forms covered in the agreement, and that the defendant was therefore required to give notice. *Id.*

163. *Id.* at 1305. The court found that there was no issue of witness credibility. *Id.*

164. *Id.* at 1305-06.

165. *Id.* at 1306.

166. *Id.* The court concluded that different interpretations were possible when looking at one particular statement in the agreement, but when the provision as a whole was examined "a different impression emerges." *Id.*

167. *Id.*

IV. PROPOSED AMENDMENT TO RULE 52(A)

A. *The Amendment and Its Purpose*

On July 18, 1984, Walter R. Mansfield, Chairman of the Advisory Committee of Civil Rules, submitted the final draft of the proposed amendment to rule 52(a) to the Committee on Rules of Practice and Procedure of the Judicial Conference.[168] The Committee on Rules of Practice and Procedure recommended approval by the Judicial Conference and transmittal to the Supreme Court for its consideration.[169]

The final draft of the proposed amendment modifies the present rule to provide that "[f]indings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[170] The Advisory Committee indicated three purposes of the proposed amendment:

> (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity.[171]

Recognizing that the argument behind *de novo* review is that rule 52(a) does not apply when findings of fact are based on an evaluation of documentary evidence, the Advisory Committee stated that this argument was outweighed "by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of facts."[172] The Advisory Committee found that to allow *de novo* review would undermine the legitimacy of district courts, multiply appeals by encouraging retrial of facts, and needlessly reallocate judicial authority.[173]

B. *Impact Of the Proposed Amendment*

Since the preliminary draft of the proposed amendment to rule 52(a) was published in August 1983,[174] two circuits have cited the pro-

168. Letter from Walter R. Mansfield, Chairman, Advisory Committee of Civil Rules, to the Committee on Rules of Practice and Procedure (July 18, 1984).

169. Report of the Judicial Conference Committee on Rules of Practice and Procedure (1984).

170. FED. R. CIV. P. 52(a) (Proposed Amendments 1984) (emphasis in original indicating new language).

171. *Id.* advisory committee note.

172. *Id.*

173. *Id.*

174. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 359 (1983). The pertinent provision of the pre-

posed amendment in support of the application of the clearly erroneous standard of review to findings of fact based on documentary evidence.[175]

In *Dothan Coca-Cola Bottling Co. v. United States*,[176] the Eleventh Circuit relied upon the preliminary draft of the proposed amendment in applying the clearly erroneous standard of review. In *Dothan* plaintiffs sued for an income tax refund on the ground that the Internal Revenue Service erred in classifying plaintiffs as personal holding companies.[177] The district court, relying on documents and transcripts from an earlier suit involving another taxpayer in an identical situation,[178] held for the plaintiffs.[179] The factual issue on appeal was whether payments that plaintiff had received were rent for tangible assets or royalty for its Coca-Cola franchise.[180] The government argued that the court should review the findings of fact free of the clearly erroneous standard of review or, at the least, under "an 'ameliorated clearly erroneous' standard of review."[181] While indicating that prior decisions within the Eleventh Circuit applied an ameliorated standard of review,[182] the court relied on

---

liminary draft provided: "findings of fact, *whether based on oral or documentary evidence*, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses *and to the need for finality*." *Id.* (emphasis in original indicating new language). The final draft of the proposed amendment dropped the phrase "and to the need for finality." For a discussion of the final draft of the proposed amendment, see *supra* notes 168-73 and accompanying text. All the cases citing the proposed amendment cited to the preliminary draft, not the final draft. *See* Dothan Coca-Cola Bottling Co. v. United States, 745 F.2d 1400, 1403 (11th Cir. 1984); Antilles Steamship Co. v. Members of the American Hull Ins. Syndicate, 733 F.2d 195, 203 n.1 (2d Cir. 1984) (Newman, J., concurring); Nissho-Iwai Co. v. M/T Stolt Lion, 719 F.2d 34, 39 n.3 (2d Cir. 1983).

175. *See* Dothan Coca-Cola Bottling Co. v. United States, 745 F.2d 1400 (11th Cir. 1984); Nissho-Iwai Co. v. M/T Stolt Lion, 719 F.2d 34 (2d Cir. 1983).

176. 745 F.2d 1400 (11th Cir. 1984).

177. *Id.* at 1401. Plaintiffs had paid a 70% penalty tax imposed on personal holding companies prior to the suit. *Id.* Plaintiffs had never actively operated as bottling companies, but rather had leased their tangible assets and sublicensed their right to bottle and sell Coca-Cola to affiliated partnerships. *Id.* The government contended that these payments represented a royalty, thus making plaintiffs a personal holding company. *Id.* at 1402. The plaintiffs asserted that the payments constituted compensation for the use of tangible property. *Id.*

178. Coca-Cola Bottling Co. v. United States, 615 F.2d 1318 (Ct. Cl. 1980). Both parties stipulated to use of the record from the prior suit providing that the district court could consider the transcript as applicable in all relevant aspects to the parties involved in the present suit. 745 F.2d at 1402.

179. *Id.*

180. *Id.* at 1401.

181. *Id.* at 1402. The court commented that "[t]he key to this appeal is the standard of review that should be given to the district court's determination." *Id.*

182. *See* Seaboard Coast Line R.R. Co. v. Trailer Train Co., 690 F.2d 1343, 1348-49 (11th Cir. 1982) (affirming the lower court's finding that an arbitration clause did not apply, court stated that when the finding of fact is solely based on

the preliminary draft of the proposed amendment and its Advisory Note, as well as the *Gypsum* decision, in applying the clearly erroneous standard.[183] The court went on to state that even if it accepted an ameliorated clearly erroneous standard of review when evidence was entirely documentary, the present case was distinct since the parties stipulated to the use of transcripts from an earlier proceeding. It would be inefficient, the court reasoned, to order a second live presentation of the witnesses for the sole purpose of applying the normal clearly erroneous standard of review.[184] In conclusion, the court held that the district court's findings of fact were not clearly erroneous.[185]

In *Nissho-Iwai Co. v. M/T Stolt Lion*,[186] the Second Circuit, per Judge Mansfield, Chairman of the Advisory Committee of Civil Rules, indicated that it might be departing from its history of applying *de novo* review to findings of fact based on documentary evidence.[187] In *Nissho-Iwai*, the plaintiff brought an action against defendant shipowner, seeking damages for discoloration of cargo.[188] A district judge tried the case on a record primarily consisting of deposition transcripts and documents,[189] and found that plaintiff failed to established a prima facie case.[190] The Second Circuit remanded for additional findings of fact

depositions, affidavits, and documents, "the burden of establishing clear error is not so heavy, and the clearly erroneous rule is somewhat ameliorated . . .").

183. 745 F.2d at 1403. The court relied on the reasoning of the Advisory Committee Note, which it quoted at length, and on the interest in finality, in applying the clearly erroneous standard. *Id.* It should be noted that reference to a "need for finality" has been deleted from the final draft of the proposed amendment. *See supra* note 174.

The court also quoted the definition of clearly erroneous found in *Gypsum*. 745 F.2d at 1403 (quoting *Gypsum*, 333 U.S. at 395) ("although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed"). The court commented that the Supreme Court has "never intimated that a lesser standard applies where a trial court's determination is based solely upon documentary evidence." *Id. But see Bose Corp.*, 104 S. Ct. at 1959 ("the presumption has lesser force in the former situation [total documentary evidence] than in the latter [oral]").

184. 745 F.2d at 1403-04. In the analogous case, the court of claims had indicated that "the presumption of correctness can be applied less stringently to documentary evidence"; however, the Eleventh Circuit rejected this view in the present case. *Id.* at 1404 (quoting Coca-Cola Bottling Co. v. United States, 615 F.2d 1318, 1322 (Ct. Cl. 1980)).

185. *Id.*

186. 719 F.2d 34 (2d Cir. 1983).

187. *Id.* at 38-39. For a discussion of *de novo* review in the Second Circuit, see *supra* notes 115-28 and accompanying text.

188. *Id.* at 35-36. The facts indicate that the pipe which defendant used to move the cargo had a leak that allowed the cargo to become contaminated and discolored. *Id.* at 36.

189. *Id.* at 36. The only live testimony was one expert who testified briefly. *Id.* For the second remand, further discovery was taken and additional deposition testimony was received. *Id.* at 37.

190. *Id.* at 36. The district judge held that plaintiff was required to prove

under a different burden of proof.[191] The district court again found that plaintiff failed to establish a prima facie case.[192] On appeal, the court recognized that in the past it had scrutinized findings of fact more closely when they were based on documentary evidence.[193] The court went on to conclude, however, that its function was to review questions of law; it would defer, when reasonably possible, to the district court's findings of fact.[194] The court noted for support that the preliminary draft of the proposed amendment to rule 52(a) sought to preserve the separation of functions between district and appellate courts.[195] The court, however, concluded that this case was a rare instance where it would make its own determinations because of the districts court's continued failure to make credibility determinations and to apply the controlling principle of law.[196] The Second Circuit thus reversed and remanded with directions to enter judgment in favor of the plaintiff.[197]

V. ANALYSIS

Adoption of the proposed amendment to rule 52(a) will end the practice in some circuits of applying *de novo* review to findings of fact based on documentary evidence. As exemplified by *Dothan* and *Nissho-Iwai*, the proposed amendment has had a direct effect on circuits which

not just fault, but fault on the part of the defendant in the discharge of the cargo, which he failed to do. *Id.*

191. *Id.* at 37. The Second Circuit held that plaintiff was not required to prove defendant's fault, but only to make out a prima facie case by demonstrating that the defendant took the cargo in good condition and discharged it in a discolored condition. *Id.*

192. *Id.* at 38. The district court did not discredit the plaintiff's witness, but held that any discoloration which plaintiff's witness observed was insufficient to establish plaintiff's prima facie case. *Id.*

193. *Id.* at 38-39 (citing Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979); J. Gerber & Co. v. S.S. Sabine Howaldt, 437 F.2d 580, 586 (2d Cir. 1971) (since the evidence was presented by depositions, the court was "in as good a position as the trial court to examine, interpret, and draw inferences . . .")).

194. *Id.* at 39.

195. *Id.* at 39 n.3 (citing Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 359 (1983)). The court only quoted the "whether based on oral or documentary evidence" of the preliminary draft, which is in accord with the final draft of the proposed amendments. For a discussion of the differences between the preliminary draft and the final draft, see *supra* notes 168-74 and accompanying text.

196. 719 F.2d at 40. It is submitted that the primary reason that the court employed full review was the failure of the district court to abide by its instructions after the first remand. The court concluded that the district court "erred *as a matter of law* in deciding that [plaintiff] had failed to make out a prima facie case." *Id.* (emphasis added). It is further submitted that *Nissho-Iwai* marks a clear departure from the Second Circuit line of cases following Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950). For a discussion of *Orvis v. Higgins*, see *supra* notes 115-123 and accompanying text.

197. 719 F.2d at 41.

had not consistently applied the clearly erroneous standard of review in the past.[198] Accepting the proposed amendment, two questions remain. First, is the abandonment of *de novo* review proper? Second, will the modified clearly erroneous standard of review survive the amendment to rule 52(a)?

First, it is submitted that abandonment of *de novo* review is proper for several reasons. The foremost rationale for the proposed amendment is that it properly allocates judicial resources between district and appellate courts, and preserves the judicial structure in *all* nonjury cases.[199] As the Second Circuit stated in *Nissho-Iwai*, the function of trial courts is to determine questions of fact, while the function of appellate courts is to review questions of law.[200] As Judge Duniway suggested in *Lundgren*, if an appellate court is to make its own findings of fact, then the requirement in rule 52(a) that a trial court "find facts specially" is rendered moot.[201] While there is merit to the argument that if the evidence is documentary the reviewing court should make its own finding to insure that justice is done,[202] this analysis damages the structure and function of the federal system in which deference is to be given to the district judge.[203] It is submitted that the appropriate function of appellate courts in all nonjury cases is solely to determine whether there is sufficient support in the record for the findings of fact.

It is further submitted that the Supreme Court has always mandated application of the clearly erroneous standard to all findings of fact, whether based on documentary or oral evidence. Beginning with *Gypsum* and continuing through *Bose*, the Supreme Court has never sug-

198. For a discussion of *Dothan* and *Nissho-Iwai*, see *supra* notes 176-97 and accompanying text.

199. *See* FED. R. CIV. P. 52(a) advisory committee note (Proposed Amendment 1984).

200. 719 F.2d at 39 & n.3 ("Since our function is to review questions of law, . . . we prefer, when reasonably possible, to defer to the district court's findings of fact.") (citing Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 359 (1983)). *See also* R. POUND, *supra* note 6, at 300 ("the primary work of the [appellate] courts was to find and declare the law . . ."); Wright, *supra* note 4, at 766.

201. 307 F.2d at 114. Rule 52(a) provides in part that "the court shall find the facts specially and state separately its conclusion of law thereon . . . ." FED. R. CIV. P. 52(a). It is submitted that if a reviewing court made its own findings of fact, this portion of rule 52(a) would have no significance.

202. *See* Wright, *supra* note 4, at 779-82 (discussing whether a secondary function of appellate courts is to ensure that justice is done in a particular case; concluding that the price of justice is too great and only the rich, who can afford appeal, reap the benefits of this justice). It is further submitted that appellate courts can adequately administer justice within the parameters of the clearly erroneous standard of review.

203. *See* Chesnut, *supra* note 37, at 540-41; Wright, *supra* note 4, at 781 ("federal district judges are generally believed to be men of much ability, rightly entitled to the greatest respect"). *See also* Orvis v. Higgins, 180 F.2d at 542 (Chase, J., dissenting) ("Though trial judges may at times be mistaken as to facts, appellate judges are not always omniscient.").

gested that *de novo* review applies to findings of fact.[204] The findings of fact in both *Gypsum* and *Pullman-Standard* were based primarily on documentary evidence, and in both of these cases the Supreme Court held that the clearly erroneous standard of review applied.[205] Proponents of *de novo* review, in distinguishing Supreme Court cases, have focused on the Court's emphasis on credibility determinations by the trial judge, and have claimed that rule 52(a) applies only in instances where the trial judge must make such determinations.[206] It is submitted that the Court's emphasis on this factor was never intended to indicate a limitation on the application of the clearly erroneous standard such that courts would apply a different standard of review in "paper cases" as compared with cases where oral testimony is heard.[207] Rather, it is submitted that the Supreme Court was only emphasizing what the rule says, that "[f]indings 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 of the credibility of the witnesses."[208] The Court was not placing a condition precedent on application of the rule, but merely interpreting what the rule literally meant. To apply *de novo* review runs counter to Supreme Court precedent.

It is finally submitted that the very difference between the pre- and post-Federal Rules of Civil Procedure judicial systems requires application of the clearly erroneous standard of review to all findings of fact. Prior to 1936, the federal courts operated under a dual system consisting of actions at law and actions in equity.[209] In the dual system, it was possible to differentiate between the standards of review applicable to

204. For a discussion of the Supreme Court decisions discussing this issue, see *supra* notes 48-73 and accompanying text.

205. In *Gypsum*, the government's evidence consisted of 600 documents and 28 witnesses. 333 U.S. at 372. In *Pullman-Standard*, the findings of fact were made on the basis of exhibits. Swint v. Pullman-Standard, 624 F.2d 525, 529 (5th Cir. 1980), *rev'd*, 456 U.S. 273 (1981). For a discussion of the *Gypsum* and *Pullman-Standard* decisions, see *supra* notes 48-55 & 63-69 and accompanying text.

206. *See, e.g.*, Miller v. Commissioner, 327 F.2d 846 (2d Cir.), *cert. denied*, 379 U.S. 816 (1964) (court applied *de novo* review after finding that the factors cited by the *Duberstein* court as warrenting heavy reliance on the trier of fact—taking testimony, observing documents, and apportioning credibility—were not present).

207. *See* United States v. General Motors Corp., 384 U.S. 127 (1965). In *General Motors*, the Court never intimated that the clearly erroneous standard did not apply to "paper cases." For a discussion of *General Motors*, see *supra* notes 58-61 and accompanying text.

208. FED. R. CIV. P. 52(a). *See* Wright, *supra* note 4, at 769-70. Professor Wright contends that the rule places two *separate* restrictions on appellate review. *Id.* at 769. He asserts that proponents of *de novo* review incorrectly read the rule as though it said: "Findings of fact shall not be set aside unless clearly erroneous *if* the trial court has had an opportunity to judge the credibility of the witnesses." *Id.* at 769-70 (emphasis in original).

209. For a discussion of federal judicial practice prior to 1936, see *supra* notes 6-33 and accompanying text.

each of the two causes of action.[210] The purpose of the Federal Rules of Civil Procedure was to eliminate this dual system and provide for uniform procedural rules.[211] It is submitted that since a premium has been placed on uniformity in the federal judicial system since 1936, the pre-1936 arguments in favor of *de novo* review carry no weight. Prior to 1936, *de novo* review was applied to actions in equity where evidence was entirely documentary because the reviewing court was in the same position as the trial court in reviewing the evidence. There was no competing goal of uniformity to interfere with the selection of a standard of review for findings of fact. It is submitted that the promulgation of the Federal Rules of Civil Procedure provided a new goal—uniformity—which superseded the rationale in support of *de novo* review, and thus there was no overriding rationale for transferring the equity practice of *de novo* review to post-1936 federal judicial practice. For the foregoing reasons, it is submitted that abandonment of *de novo* review of findings of fact based on documentary evidence is appropriate and long overdue.

Second, it is submitted that the modified clearly erroneous standard will survive the passage of the amendment to rule 52(a). The primary reason that courts should continue to apply this standard is that, as it is applied in several circuits, the modified standard is in essence merely a restatement of the normal clearly erroneous standard as it applies to cases where there is no oral evidence to trigger the operation of the second clause of rule 52(a). Thus, circuits adhering to the modified standard apply the clearly erroneous standard and append an explicit assertion that the burden of proving a finding of fact clearly erroneous is lessened because the absence of oral testimony made it unnecessary for the trial judge to make any credibility determinations. In addition, circuit courts that have applied a modified clearly erroneous standard of review continue to state that the findings cannot be overturned unless, upon review of the evidence, the court is left with "a definite and firm conviction" that a mistake has been committed by the trial court.[212] Moreover, continuing application of the modified clearly erroneous standard is supported by the Supreme Court's decision in *Bose*, in which Justice Stevens asserted the presumption of correctness has "lesser force" in documentary cases than in cases based on oral testimony.[213]

---

210. It is submitted that the very nature of a dual system required appellate courts to make classifications, and therefore classifications as to the applicable standard of review were both logical and known by the parties.

211. For a discussion of the promulgation of the Federal Rules of Civil Procedure, see *supra* note 34 and accompanying text.

212. *See, e.g., Onaway*, 695 F.2d at 200 ("we can overturn such findings of fact only if upon reviewing 'the entire evidence' we are 'left with the definite and firm conviction that a mistake has been committed' ") (quoting McAllister v. United States, 348 U.S. 19, 20 (1954)).

213. *Bose*, 104 S. Ct. at 1959. The Court commented that the "requirement that special deference be given to a trial judge's credibility determinations is itself a recognition of the broader proposition that the *presumption of correctness*

In conclusion, it is submitted that the modified clearly erroneous standard is not different from the clearly erroneous standard; rather, the modified clearly erroneous standard only recognizes that because no credibility determinations have been made by the district court, the appellate court reviews the evidence unconcerned about assessments by the trial court which the appellate court cannot review. It is therefore slightly easier to hold a finding clearly erroneous when all of the trial court's assessments and findings are before the appellate court.

VI. CONCLUSION

The proposed amendment to rule 52(a) will resolve the disagreement between the courts of appeals over the appropriate standard of review of findings of fact based upon documentary evidence. By terminating the use of *de novo* review, the amendment promotes uniformity and preserves the deference which should be accorded to trial judges' decisions. While courts will no longer employ a *de novo* standard of review, courts may and should continue to employ both a modified clearly erroneous standard of review and the traditional clearly erroneous standard of review. By lessening the burden of proof, justice is promoted without forfeiting the uniformity which is vital under the Federal Rules of Civil Procedure.

Kevin P. Robins

---

that attaches to factual findings is stronger in some cases than in others." *Id.* (emphasis added). It is submitted that this lessening of presumptions is exactly what is incorporated in the modified clearly erroneous standard. *See* Oscar Gruss & Son v. First Bank, 582 F.2d 424, 431 (7th Cir. 1978) ("While the force of the rule [52(a)] may be 'less inhibiting' . . . [findings] cannot be set aside unless the appellate court can 'come to a definite and firm conviction that an error [was] committed in the findings . . . .") (deletion by *Gruss* court) (quoting Mercantile Nat'l Bank v. Howmet, 524 F.2d 1031, 1035 n.3 (7th Cir. 1975), *cert. denied*, 424 U.S. 957 (1976)).