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# Shifting the Main Event: The Documentary Evidence Exception Improperly Converts the Appellate Courts into Fact-Finding Tribunals

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# SHIFTING THE MAIN EVENT: THE DOCUMENTARY EVIDENCE EXCEPTION IMPROPERLY CONVERTS THE APPELLATE COURTS INTO FACT-FINDING TRIBUNALS

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## I. INTRODUCTION

Appellate standards of review define the roles of appellate courts. The Wisconsin Supreme Court, with complete discretion to take or not to take cases, "act[s] primarily as a law-stating, law-developing court."[1] In 1978, Wisconsin established the Court of Appeals to serve as an error-correcting, case-deciding court.[2] As the appellate court's standards of review evolved, a "documentary evidence exception"[3] to the "clearly erroneous" standard slowly emerged.[4] This "standard" turns appellate

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1. William A. Bablitch, *Court Reform of 1977: The Wisconsin Supreme Court Ten Years Later*, 72 MARQ. L. REV. 1, 26-27 (1988); *see* WIS. STAT. § 809.62(1) (1991-92).

2. *See* WIS. CONST. art. VII, § 5(3); *see also* Wurtz v. Fleischman, 97 Wis. 2d 100, 107 n.3, 293 N.W.2d 155, 159 n.3 (1980).

3. This exception also has been referred to as a "physical evidence exception" by courts in other jurisdictions. *See* Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). We refer to this exception as the "documentary evidence exception" because that is how it has been referred to in Wisconsin case law. Our arguments against the documentary exception are equally applicable to any "physical evidence" exception to the "clearly erroneous" standard of review.

4. When reviewing a trial court's factual findings, the appellate courts will not set aside the findings unless they are clearly erroneous. WIS. STAT. § 805.17(2) (1991-92). The United States Supreme Court has determined 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." *Anderson*, 470 U.S. at 573 (citing United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). In addition to WIS. STAT. § 805.17(2), Wisconsin case law also has stated that findings of fact by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. Wisconsin courts have now merged these two standards, stating that "[w]hile we now apply the 'clearly erroneous' test . . . cases which apply the 'great weight and clear preponderance test' . . . may be referred to for an explanation of this standard of review because the two tests in this state are essentially the same." Noll v. Dimiceli's, Inc., 115 Wis. 2d 641,

courts into fact-finding tribunals, wastes judicial resources, and lengthens the already arduous road to judicial finality. The United States Supreme Court has rightfully noted that, with regard to fact finding, the trial court should be the main event rather than a tryout on the road to determination in the appellate courts.[5] We contend that utilization of the documentary evidence exception by the appellate courts improperly shifts the fact-finding main event from its rightful venue—the trial court. In this Article, we will (1) analyze the reasonableness standard of review that we believe should govern questions to which the documentary evidence exception is sometimes applied; (2) describe the evolution of the documentary evidence exception; and (3) propose that Wisconsin Statute section 805.17(2) be amended to foreclose use of the exception and codify the reasonableness standard of review for inferences drawn from the facts by the trial court.[6]

## II. Reasonableness Standard of Review for Inferences

Wisconsin courts have developed a standard of review for inferences from facts that is at odds with the present documentary evidence exception to the clearly erroneous rule. We contend that the reasonableness standard of review is the more appropriate standard when applying the documentary evidence exception.

In *Pfeifer v. World Service Life Ins. Co.*,[7] Judge Gartzke of the court of appeals explained the reasonableness inquiry as follows:

> Like the federal appellate courts, we apply the clearly erroneous standard when reviewing findings of fact by a trial court. Section 805.17(2), Stats., provides that findings of fact by a trial

643, 340 N.W.2d 575, 577 (Ct. App. 1983). Findings of fact made by a jury will be affirmed if supported by any credible evidence. In a criminal case, the Wisconsin Supreme Court has stated:

> When the defendant challenges the sufficiency of the evidence, the test is whether the evidence adduced, believed, and rationally considered by the jury was sufficient to prove the defendant's guilt beyond a reasonable doubt. Conversely stated, the test is whether, when considered most favorably to the state and the conviction, the evidence is so insufficient in probative value and force that it can be said as a matter of law that no trier of facts acting reasonably could be convinced to that degree of certitude which the law defines as "beyond a reasonable doubt."

State v. Koller, 87 Wis. 2d 253, 266, 274 N.W.2d 651, 658 (1979) (citations omitted).

5. Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

6. For a general review of Wisconsin appellate standards of review, see Ronald R. Hofer, *Standards of Review—Looking Beyond the Labels,* 74 Marq. L. Rev. 231 (1991); Jeff Leavell, *Appellate Review: Choosing and Shaping the Proper Standard,* 60 Wis. B. Bull. 14 (Apr. 1987).

7. 121 Wis. 2d 567, 570, 360 N.W.2d 65, 67 (Ct. App. 1984).

> court sitting without a jury or with an advisory jury "shall not be set aside unless clearly erroneous . . . ." The supreme court adopted the "clearly erroneous" test in 1975, but has continued to apply a reasonableness standard to inferences by the trial court. We will continue to apply the reasonableness standard of review to inferences by a trial court from undisputed or established facts, unless the supreme court directs us to use another standard.
>
> Whether an inference may reasonably be drawn from undisputed or established facts is a question of law. Deciding the reasonableness of an inference is therefore a recognized appellate function.
>
> An appellate court must accept a reasonable inference drawn by a trial court from established facts if more than one reasonable inference may be drawn. If only one reasonable inference is available, the drawing of that inference is a question of law. This analysis is consistent with the constitutional limitations of the court of appeals. According to *Wurtz v. Fleischmann*, the appellate jurisdiction conferred upon the court of appeals by art. VII, sec. 5(3), of the Wisconsin Constitution precludes us "from making any factual determinations where the evidence is in dispute."[8]

The *Pfeifer* analysis has been followed by numerous appellate courts,[9] and the supreme court has not directed the appellate courts to use another standard. In fact, the supreme court's analysis is precisely the analysis that was used in *Pfeifer*. In *State v. Friday*,[10] the supreme court wrote:

> The drawing of an inference on undisputed facts when more than one inference is possible is a finding of fact which is binding upon an appellate court. It is not within the province of this court

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8. *Id.* at 570-71, 360 N.W.2d at 67 (citations & footnote omitted). The *Pfeifer* language cited contains a footnote stating: "*See also* State *ex. rel.* Sieloff v. Golz, 80 Wis. 2d 225, 241, 258 N.W.2d 700, 705 (1977) (when evidence is documentary, reviewing court is not bound by inferences drawn by fact finder)." *Id.* at 571 n.1, 360 N.W.2d at 67 n.1. This implies that some judges view the documentary evidence exception as an exception to the reasonableness standard, rather than as an alternative to it.

9. *See* County of Dane v. Norman, 168 Wis. 2d 675, 680-81, 484 N.W.2d 367, 369 (Ct. App. 1992); Blankenship v. Computers & Training, Inc., 158 Wis. 2d 702, 709-10, 462 N.W.2d 918, 921 (Ct. App. 1990); Haldemann v. Haldemann, 145 Wis. 2d 296, 307, 426 N.W.2d 107, 111 (Ct. App. 1988); State *ex rel.* Vaughan v. Faust, 143 Wis. 2d 868, 871, 422 N.W.2d 898, 899 (Ct. App. 1988); Spencer v. Spencer, 140 Wis. 2d 447, 450, 410 N.W.2d 629, 630-31 (Ct. App. 1987); State v. Middleton, 135 Wis. 2d 297, 321, 399 N.W.2d 917, 927 (Ct. App. 1986); Potts *ex rel.* Estate of Gavcus v. Garionis, 127 Wis. 2d 47, 54, 377 N.W.2d 204, 207 (Ct. App. 1985); State *ex rel.* McCaffrey v. Shanks, 124 Wis. 2d 216, 235, 369 N.W.2d 743, 754 (Ct. App. 1985).

10. 147 Wis. 2d 359, 434 N.W.2d 85 (1989).

> or any appellate court to choose not to accept an inference drawn by a fact finder when the inference drawn is a reasonable one.[11]

Thus, the reasonableness inquiry for inferences drawn from undisputed facts is solidly supported by Wisconsin case law.

The reasonableness inquiry directly conflicts with the documentary evidence exception to the clearly erroneous rule. When an appellate court encounters, as it often does, a finding made by a trial court that is based solely on documents, the reasonableness inquiry calls for the appellate court to defer to the trial court's inference unless it is unreasonable. However, the documentary evidence exception requires the appellate court to redecide the question without deference to the trial court.[12]

## III. Documentary Exception to Fact-Finding Rule

The documentary evidence exception to the clearly erroneous rule is referred to in several published Wisconsin appellate opinions. Almost all Wisconsin documentary exception opinions rely originally on *Will of Mechler*, a 1944 Wisconsin Supreme Court decision.[13] In *Mechler*, the

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11. *Id.* at 370-71, 434 N.W.2d at 89 (citing Onalaska Elec. Heating, Inc. v. Schaller, 94 Wis. 2d 493, 501, 288 N.W.2d 829, 833 (1980); Kessler v. Industrial Comm'n, 27 Wis. 2d 398, 400, 134 N.W.2d 412, 414 (1965)).

12. This situation occurred in Eau Claire Press Co. v. Gordon, 176 Wis. 2d 154, 499 N.W.2d 918 (Ct. App. 1993), an open records case in which the trial court decided on the basis of documents before it that the filing of a mandamus action by a newspaper seeking certain records was not the cause of the release of those records. The court of appeals reversed, finding that the inference was not reasonable. *Id.* at 160-62, 499 N.W.2d at 920-21. After much discussion, the court used the reasonableness inquiry rather than the documentary evidence exception to the clearly erroneous rule. *Id.*

13. 246 Wis. 45, 16 N.W.2d 373 (1944) (referred to as "*In re* Mechler's Will" in regional reporter). Cases that rely originally on *Mechler* include *In re* Hackbarth, 147 Wis. 2d 467, 472, 433 N.W.2d 266, 268 (Ct. App. 1988) (through *De Lap*); Racine Educ. Ass'n v. Board of Educ. (*Racine II*), 145 Wis. 2d 518, 521, 427 N.W.2d 414, 416 (Ct. App. 1988) (through *Sieloff*); Zurbuchen v. Teachout, 136 Wis. 2d 465, 471, 402 N.W.2d 364, 368 (Ct. App. 1987) (through *De Lap*); Levy v. Levy, 130 Wis. 2d 523, 529, 388 N.W.2d 170, 173 (1986) (through *Fisher*); State v. Rivest, 106 Wis. 2d 406, 423 n.4, 316 N.W.2d 395, 403-04 n.4 (1982) (Abrahamson, J., dissenting) (through *De Lap* and *Vogt*); Nosek v. Stryker, 103 Wis. 2d 633, 638 n.5, 309 N.W.2d 868, 872 n.5 (Ct. App. 1981) (through *De Lap*); State *ex rel.* Sieloff v. Golz, 80 Wis. 2d 225, 241, 258 N.W.2d 700, 705 (1977) (through *De Lap* and *Tropic of Cancer*); American Mut. Liab. Ins. Co. v. Fisher, 58 Wis. 2d 299, 303, 206 N.W.2d 152, 155 (1973) (through *De Lap*); De Lap v. Institute of Am., Inc., 31 Wis. 2d 507, 510, 143 N.W.2d 476, 477 (1966) (through *Tropic of Cancer*); McCauley v. Tropic of Cancer, 20 Wis. 2d 134, 148, 121 N.W.2d 545, 552-53 (1963) (directly and through *Vogt*); Vogt, Inc. v. Int'l Bhd. of Teamsters, 270 Wis. 315, 71 N.W.2d 359 (1955), *on reh.*, 270 Wis. 321, 321i-321j, 74 N.W.2d 749, 754-55 (1956), *aff'd*, 354 U.S. 284 (1957).

One appellate opinion, State v. Pepin, 110 Wis. 2d 431, 435, 378 N.W.2d 898, 900 (Ct. App. 1982), appears to stand on its own in putting forth the documentary evidence exception. In

supreme court was determining the intent of a will. Because the rule of this case is not easily apparent and is the genesis of the documentary evidence exception, we will substantially repeat its language. The court wrote:

> In this case the court is called upon to deal with a written instrument [a will] in the light of circumstances as to which there is no dispute. *This presents a question of law and not of fact. . . .*
>
> Generally, the rule applicable to findings of fact made by the trial court does not apply where there are no disputed questions of fact because the reason for the rule itself fails. (In a certain class of cases inferences are said to be within the rule.) The reason for the rule is that fact finding is primarily a function of the trial court while on appeal this court deals mainly with questions of law. The position of the trial court for the determination of factual questions is obviously superior to that of the appellate court, in that the trial court has an opportunity to observe the witnesses, note their demeanor, the manner in which they testify, their intelligence or lack of it, and many other intangible things which it is impossible to place upon a court record. None of these considerations apply to a determination of a court made upon undisputed facts where the interpretation of a written instrument is under consideration. The reason for the rule failing, the rule itself fails.
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> While it is true that in a sense the determination of an intent of the maker of a written instrument from the instrument and the surrounding conditions is a search for a fact (the purpose the maker intended to manifest by the language used), the result is arrived at by the application of legal principles or rules of construction *rather than by inferences drawn from known facts* although the consideration of such inferences may be involved in the process. Under such circumstances the trial court is in no better position to reach a correct conclusion than is the appellate court. While the decision of the trial court in such cases is entitled to consideration and weight, *it does not have such persuasive effect as does a conclusion reached solely by inferences drawn from established facts.*[14]

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*Pepin*, the appellate court was reviewing a discretionary determination of the trial court, a decision to bar testimony as hearsay. The court applied what some commentators have referred to as a "better position" analysis to the question, *see* Hofer, *supra* note 6, at 237-38, and concluded that because the evidence to be admitted was "documentary," and no demeanor evidence attended it, the trial court was in no better position to determine the issue than the appellate court. Thus, the appellate court visited the hearsay question anew. *Pepin*, 110 Wis. 2d at 435, 378 N.W.2d at 900.

14. *Mechler*, 246 Wis. at 55-56, 16 N.W.2d at 378 (emphasis added) (citations omitted).

While the precise meaning of the *Mechler* decision is easily mistaken, careful analysis of its language leads to the conclusion that the *Mechler* court was not crafting an exception to the fact-finding standard of review, but merely explaining the distinction and reasoning behind review standards for questions of fact and those of law. The *Mechler* court states that: (1) it is presented with a question of law (interpretation of a will), (2) the trial court's legal determination is not arrived at "by inference drawn from known facts," and (3) the trial court's determination of this question of law is not entitled to such persuasive effect as a conclusion reached by a trial court from inferences drawn from established facts.[15] It is also apparent, at least as of the *Mechler* decision, that inferences drawn from undisputed facts remain questions of fact.[16]

*Mechler* was followed by *Vogt, Inc. v. International Brotherhood of Teamsters.*[17] *Vogt* turned on whether picketing was conducted for an unlawful purpose. The trial court refused to find, as the plaintiff had argued, "[t]hat the picketing of plaintiff's premises [had] been engaged in for the purpose of coercing, intimidating, and inducing the employer to force, compel, or induce its employees to become members of the defendant labor organizations . . . ."[18]

The appellate court found that "[t]he inference that the picketing was conducted for an unlawful purpose [was] inescapable"[19] and stated:

> We are of the opinion that the court should have made the finding requested by the plaintiff, and that, since the facts as to which the request was made are undisputed and the *inferences are only one way*, we should reverse for error in so refusing.[20] If, however, we

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15. As noted by the *Mechler* court, contract language interpretation involves applying rules of construction rather than determining competing inferences and, therefore, is appropriately reviewed as a question of law. *Id.* at 55, 16 N.W.2d at 373.

16. The *Mechler* court identifies two independent reasons for deference to the trial court in fact-finding situations. First, "fact finding is primarily a function of the trial court." Second, the trial court is in a superior position for making factual determinations. *Id.* The subtle distinction between these two reasons is lost on many who consider reasons for deference to the trial court, but should not be. The United States Supreme Court notes both reasons in Anderson v. Bessemer City, 470 U.S. 564 (1985).

17. 270 Wis. 315, 74 N.W.2d 749 (1956).

18. *Id.* at 321g, 74 N.W.2d at 753. This inference is equivalent to a finding that the picketing was conducted for an unlawful purpose.

19. *Id.* at 321h, 74 N.W.2d at 754.

20. For this proposition, the *Vogt* court cites 5 C.J.S. *Appeal and Error* § 1675. This section, now at 5A C.J.S. *Appeal and Error* § 1675 (1993), states:

> No question is presented for appellate review by the refusal of the trial court to find incidental or evidentiary facts, and an appellate court will review only if the trial court has refused to find ultimate facts as to which the evidence is uncontroverted and the inferences are all only one way.

> may not do that, we are at liberty to and should supply the finding.[21]

The *Vogt* court then cited a Maine case, *Pappas v. Stacey*,[22] as holding that the clearly erroneous rule is not applicable in a case that involves no oral testimony.[23] *Pappas* relied on *Mellen v. Mellen*,[24] which, like *Mechler*, involved the interpretation of a will. In *Mellen*, the Maine appellate court ignored the argument that the trial court's finding of "testamentary intent" was subject to the clearly erroneous rule. The appellate court remarked that the claim had no merit in a case that involved no oral testimony.[25]

After reciting various maxims of Wisconsin appellate review, the *Vogt* court quoted the *Mechler* language shown above.[26] Referring to *Mechler*, the *Vogt* court stated, "We see no distinction between the case where the court is called upon to deal with or construe a written instrument and where, as here, the court is required to study only pleadings and affidavits."[27] The *Vogt* court then independently reviewed the issue, concluding that the picketing was conducted for an unlawful purpose and that, therefore, the trial court properly enjoined it.

In his dissent, Justice Currie summarized the majority's standard of review holding as follows:

> Where a question of fact is presented on an appeal to this court as to whether peaceful picketing was conducted for an unlawful objective, and no parol testimony had been taken before the trial court but instead the proof in the record consists solely of affidavits or stipulated facts, this court is not concluded by findings of the trial court based upon inferences drawn from such affidavits or stipulated facts but is free to draw its own inferences from such record.[28]

It is apparent that the *Vogt* court relied on *Mechler* and the Maine decision, *Pappas*, in crafting this rule.[29] The *Vogt* rule crafts an exception in

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21. *Vogt*, 270 Wis. at 321i, 74 N.W.2d at 754 (citation omitted) (emphasis added).
22. 116 A.2d 497 (Me.), *appeal dismissed*, 350 U.S. 870 (1955).
23. *Vogt*, 270 Wis. at 321i, 74 N.W.2d at 754.
24. 90 A.2d 818 (Me. 1952).
25. *Id.* at 820.
26. *Vogt*, 270 Wis. at 321i-321j, 74 N.W.2d at 754-55.
27. *Id.* at 321j, 74 N.W.2d at 755.
28. *Id.* at 321n, 74 N.W.2d at 757 (Currie, J., dissenting).
29. Note that numerous published opinions of both the Wisconsin Supreme Court and the Wisconsin Court of Appeals contradict this rule. *See* State v. Friday, 147 Wis. 2d 359, 370-71, 434 N.W.2d 85, 89 (1989); Vocational, Technical & Adult Educ. Dist. 13 v. DILHR, 76 Wis. 2d 230, 240, 251 N.W.2d 41, 46 (1977); Pfeifer v. World Serv. Life Ins. Co., 121 Wis. 2d 567, 570, 360 N.W.2d 65, 67 (Ct. App. 1984).

cases where the record consists solely of affidavits or stipulated facts. However, the basis for the exception is two cases (*Mechler* and *Mellen* through *Pappas*) involving the interpretation of wills, which is a question of law. Moreover, in light of the *Vogt* language stating that the inference eventually drawn is "inescapable," and that "the inferences are all one way," the more appropriate holding to take from the *Vogt* majority should have been that the inference drawn by the trial court was unreasonable.[30]

The documentary evidence exception first appeared in *McCauley v. Tropic of Cancer*.[31] In *Tropic of Cancer*, the supreme court was reviewing a trial judge's determination regarding the sufficiency of a jury finding of obscenity. The court noted the view that when a constitutional protection is claimed, the judge or appellate court must make an independent review of the material to determine whether it is obscene.[32] The court also stated:

> That a judgment of obscenity is not a fact issue of the ordinary type is obvious. Issues of legal and constitutional interpretation dominate the process of determination. Upon the one hand is the desirability of according as much finality as is reasonable to decisions of the tribunal of first instance, and on the other the undesirability of a formula which puts the decision of one jury or one judge upon a difficult constitutional issue beyond the reach of reconsideration.[33]

The *Tropic of Cancer* court called attention to Massachusetts's reliance upon the rule that where the evidence is documentary, the appellate court is not bound by the inferences drawn by the trial court.[34] The supreme court cited *Mechler* and *Vogt*, stating "we have recognized a

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30. In affirming the *Vogt* decision, the United States Supreme Court referred to the inference drawn by the Wisconsin Supreme Court. Int'l Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284, 286 (1957).

31. 20 Wis. 2d 134, 148, 121 N.W.2d 545, 552-53 (1962).

32. *Id.* at 147-48, 121 N.W.2d at 552.

33. *Id.* at 148, 121 N.W.2d at 552.

34. *Id.* (citing Attorney General v. Book Named "Tropic of Cancer," 184 N.E.2d 328, 329-30 (Mass. 1962)). The Massachusetts "*Tropic of Cancer*" case cites Corkum v. Salvation Army of Mass., Inc., 162 N.E.2d 778, 780 (Mass. 1959), which cites Malone v. Walsh, 53 N.E.2d 126, 129 (Mass. 1944), which cites Newburyport Soc'y for Relief of Aged Women v. Noyes, 192 N.E. 54, 55 (Mass. 1934). *Noyes* explained the rule relied upon in *Tropic of Cancer* as follows:

> All the evidence is reported. There is little if any conflict in the testimony. . . . The decision of the issues raised depends not upon the credibility of witnesses but upon proper inferences from testimony not in substantial controversy and upon the governing principles of law. In these circumstances no deference is due to the decision of the trial judge. It is the duty of this court to draw its own inferences, and to decide the case according to its own judgment.

similar rule."[35] The court then undertook an independent review of the book, deemed it not to be obscene, and reversed the trial court.[36] Although the *Tropic of Cancer* court relied on a documentary evidence exception, it could have looked anew at the obscenity determination simply because it was a finding of constitutional fact.[37]

The fourth crucial case within the *Mechler* line is *De Lap v. Institute of America, Inc.*[38] In *De Lap*, Justice Heffernan noted, citing *Tropic of Cancer*, that "in certain cases where the evidence is documentary, the appellate court is not bound by inferences drawn therefrom by the trial court."[39] However, in *De Lap*, the court applied the general "contrary to the great weight and clear preponderance of the evidence"[40] standard afforded factual findings. The court noted, "It is apparent that exhibits that are the subject of so much conflicting testimony in regard to the accepted practices of a trade are not of a nature that can be evaluated *ab initio* by this court."[41] Thus, although *De Lap* is often cited for holding that when the evidence is documentary the appellate court need not defer to the trial court, it is actually a decision in which the appellate court, when confronted with documentary evidence, did defer to the trial court.

The *Mechler* line, which started innocently enough by explaining the rationale behind the different standards of review for questions of law

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*Noyes*, 192 N.E. at 55. This remains the law in Massachusetts. National Medical Care, Inc. v. Zigelbaum, 468 N.E.2d 868, 872 (Mass. App. Ct. 1984).

35. *Tropic of Cancer*, 20 Wis. 2d at 148, 121 N.W.2d at 553.

36. *Id.* at 151, 121 N.W.2d at 554.

37. In questions of constitutional fact, the historical factual determination is reviewed as a question of fact subject to the clearly erroneous standard, but the constitutional validity of those facts is independently determined by the appellate court. Isiah B. v. State, 176 Wis. 2d 639, 500 N.W.2d 637, *cert. denied*, 114 S. Ct. 231 (1993); State v. Woods, 117 Wis. 2d 701, 345 N.W.2d 457 (1984), *rev'd on other grounds sub nom.* Woods v. Clusen, 605 F. Supp. 890 (E.D. Wis. 1985), *aff'd*, 794 F.2d 293 (7th Cir. 1986). The rationale for this review has been explained in State v. Hoyt, 21 Wis. 2d 284, 305-06, 128 N.W.2d 645, 655-56 (1964) (Wilkie, J., concurring) (in the context of the voluntariness of a confession) as follows:

> The scope of constitutional protections, representing the basic value commitments of our society, cannot vary from trial court to trial court, or from jury to jury. Reasonable men can differ as to whether a given confession was voluntary. Whatever the ultimate substantive dimension of these rights might be, they must be uniform throughout the jurisdiction. This can be accomplished only if one decision maker has the final power of independent determination. It is the task of this court to determine the voluntariness of a confession by applying certain standards articulated by the United States supreme court to the facts of the given case.

38. 31 Wis. 2d 507, 510, 143 N.W.2d 476, 477 (1966).

39. *Id.*

40. *Id.* at 511, 143 N.W.2d at 478. This is equivalent to the clearly erroneous standard. *See* Hofer, *supra* note 6; Leavell, *supra* note 6.

41. *De Lap*, 31 Wis. 2d at 511, 143 N.W.2d at 478.

and those of fact, has gradually been turned around to stand for a different concept: "When the evidence to be considered is documentary, . . . [appellate courts] need not give any special deference to the trial court's findings."[42] This contradicts the well-established reasonableness standard of review of inferences drawn by the trial court from undisputed facts.

## IV. Because the Reasonableness Inquiry Is the Better View, Section 805.17(2) Should Be Amended to Eliminate the Documentary Evidence Exception

In a recent commentary,[43] Ronald Hofer contends that appellate standards of review should be determined by using a functional approach. Hofer writes:

> We then may test a particular issue whose standard of review is unknown by making several inquiries of it. Was the trial court's determination dependent upon any of the following: (1) An assessment of the credibility of any witnesses? (2) A weighing of conflicting testimony? (3) A weighing of conflicting evidence? and (4) The application of a statute within the particular expertise of that tribunal? Negative answers to all these questions suggests that the issue is one to which little deference should be paid—conventionally, an issue of law. Affirmative answers to any of these question suggest that the issue is one to which some deference should be paid—conventionally, one of fact.[44]

This approach is helpful when making the initial inquiry in determining the appropriate appellate court standard of review. However, one must be careful in applying the functional approach when dealing with undisputed evidence if the parties disagree as to the factual inference to be drawn from this evidence.

Notwithstanding its limitations, however, application of the functional approach shows that the reasonableness inquiry is a better rule than the documentary evidence exception. The third question of the functional approach is dispositive. If a trial court makes a decision solely on the basis of documents, is that determination dependent upon a weighing of conflicting evidence? The answer is yes if the documents or portions of a single document conflict. Analysis then turns to what constitutes documents or portions of documents that conflict. We submit

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42. Racine Educ. Ass'n v. Board of Educ., 145 Wis. 2d 518, 521, 427 N.W.2d 414, 416 (Ct. App. 1988).

43. Hofer, *supra* note 6.

44. *Id.* at 242.

that documents that conflict are not limited merely to documents that state polar opposites. The proper test to determine whether documents conflict is whether they give rise to two competing reasonable inferences. Thus, the reasonableness inquiry is consistent with the functional approach. If two reasonable competing inferences can be drawn from the documents, then the court's decision of which inference to adopt is based upon a weighing of conflicting evidence. Conversely, the documentary evidence exception is inconsistent with the functional approach because it grants no deference to the trial court in situations where the court's underlying determination depends on a weighing of evidence.

Moreover, the advent of video technology in the courts displays the fallacy of the documentary evidence exception. The premise of the exception is that where the appellate court is in as good of a position as the trial court to decide a matter, it should give the trial court's decision no deference. Some states, most notably Kentucky, have begun videotaping court proceedings in place of stenography.[45] In at least one case, Wisconsin trial proceedings were reduced to videotape.[46] In instances where the relevant portion of a trial court proceeding is reduced to videotape that is available to the appellate court, the appellate court is arguably in as good of a position as the trial court to observe the demeanor and to judge the credibility of witnesses. If, as the documentary evidence exception holds, the sole reason for deference to the trial court is that it is in a better position to make the call, then video technology would eclipse all deferential standards of review.

Surely, it should not. It should not because a second independent reason for deference to trial courts on fact-finding matters exists. We defer to trial court fact finding because our system of justice has rightfully determined that the trial courts will fulfill that function. Over time, they develop an expertise in fact finding that eludes the appellate courts, which deal primarily with issues of law. Also, it becomes a waste of judicial resources and postpones finality when the appellate court reviews factual findings *de novo*. This independent rationale for deference is violated by the documentary evidence exception.

The United States Supreme Court has recognized the shortcomings of the documentary evidence exception. In *Anderson v. Bessemer City*,[47]

45. *See* Robert F. Stephens, *Kentucky Courts Go Video*, 9 AM. J. TRIAL ADVOC. 359 (1986).

46. Vandervelden v. Victoria, 177 Wis. 2d 243, 502 N.W.2d 276 (Ct. App.), *rev. denied*, 505 N.W.2d 137, *cert. denied*, 114 S. Ct. 388 (1993).

47. 470 U.S. 564 (1985).

the Court addressed the issue of a "documentary evidence" exception to the federal clearly erroneous rule.[48] Justice White commented on appellate court review of trial court decisions based solely on documentary evidence as follows:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.
>
> This is so even when the district court's findings do not rest on credibility determinations, *but are based instead on physical or documentary evidence or inferences from other facts.* To be sure, various Courts of Appeals have on occasion asserted the theory that an appellate court may exercise *de novo* review over findings not based on credibility determinations. This theory has an impressive genealogy . . . but it is impossible to trace the theory's lineage back to the text of Rule 52(a), which states straightforwardly that "findings of fact shall not be set aside unless clearly erroneous." . . . Rule 52(a) "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."
>
> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. *Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event'. . . rather than a 'tryout on the road.'* " For these reasons, review of factual findings under the clearly-erroneous standard—with its deference to the trier of fact—is the rule, not the exception.[49]

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48. FED. R. CIV. P. 52(a). Section 805.17(2) of the Wisconsin Statutes is based on Federal Rule 52. *See* WIS. STAT. § 805.17 (1991-92) (1974 Judicial Council Committee Note).

49. *Anderson*, 470 U.S. at 573-75 (emphasis added)(citations omitted).

Justice White's words highlight an important distinction that is often lost on those who observe and practice before appellate courts. The reasons for deference to the fact finder are not merely limited to the fact finder's ability to experience firsthand the witnesses' testimony. They also include the trial court's expertise at fact finding and significant considerations of judicial economy and legal access. With the current backlog at both the trial and appellate levels, the documentary evidence exception can delay for years a factual finding upon which a litigant can rely. All too often this justice delayed is justice denied.

Shortly after the *Anderson* decision, Congress amended Federal Rule of Civil Procedure 52(a) to clarify its intent.[50] The federal statute now provides 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."[51] Regarding its judgment of the arguments for and against the documentary evidence exception, the Advisory Committee stated:

> The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are 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 the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.[52]

Thus, both Congress and the United States Supreme Court have rejected the documentary evidence exception to the clearly erroneous rule.

The Wisconsin courts should follow the federal courts. The Wisconsin Supreme Court, through the Judicial Council, should amend Wiscon-

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50. *Anderson* apparently did not have an impact on Congress's action, because it is not cited in the Advisory Committee Notes to the 1985 amendment, and those notes state that "[t]he Supreme Court has not clearly resolved the issue." Thus, both Congress and the Court independently rejected the documentary evidence exception in 1985.

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

52. *Id.* (Advisory Committee Notes—1985 Amendment).

sin Statute section 805.17(2) to permanently banish the documentary evidence exception to the annals of legal trivia. At the same time, the council and supreme court should clarify the role of appellate courts through codification of the reasonableness standard of review set forth in *Friday* and *Pfeifer*.

Section 805.17(2) presently reads as follows:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the ultimate facts and state separately its conclusions of law thereon. The court shall either file its findings and conclusions prior to or concurrent with rendering judgment, state them orally on the record following the close of evidence or set them forth in an opinion or memorandum of decision filed by the court. In granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings 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 the credibility of the witnesses.* The findings of a referee may be adopted in whole or part as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of ultimate fact and conclusions of law appear therein. If the court directs a party to submit proposed findings and conclusions, the party shall serve the proposed findings and conclusions on all other parties not later than the time of submission to the court. The findings and conclusions or memorandum of decision shall be made as soon as practicable and in no event more than 60 days after the cause has been submitted in final form.[53]

We propose that the emphasized sentence should be replaced by the following two sentences:

> Findings of fact, including those based solely on documentary or physical evidence, shall not be set aside unless clearly erroneous. Due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses; inferences drawn by the trial court from the facts shall not be set aside unless they are unreasonable.

We believe that these changes will help focus the appellate courts on their proper role and will produce a more responsive legal system.

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53. WIS. STAT. § 805.17(2) (1991-92) (emphasis added).