2000

One More Final Exam?

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An invitation to relive the agonies of yester-year by taking an examination question, even a brief one, may seem easy to refuse. Admitting that the subject is Civil Procedure may seal the issue. But this question triggers a reflex that should be common to all lawyers. Try it. After thinking about the question — if you frame your answer without writing it out, less than 20 minutes will do — go on to the explanation of the question's origin and my own answer.

Victim sued Driver, claiming that Driver struck Victim's automobile when Driver drove Driver's automobile through a red light at an intersection. Victim testified that the traffic signal was green for Victim, and produced an apparently disinterested witness, Green, who also testified that the signal was green for Victim. Driver testified that the light was green for Driver, and produced an apparently disinterested witness, Rouge, who also testified that the signal was green for Driver.

Judge Decisive, faced with two witnesses on each side of the color-of-the-signal issue, announced that he could not find any reason in the demeanor of the witnesses or the circumstances of the accident to find the witnesses for Victim more persuasive than the witnesses for Driver. The evidence was in "equipoise." Reasoning that Victim has the burden to prove by a preponderance of the evidence that the light was red for Driver, Judge Decisive found that Driver was not negligent and entered judgment for Driver.

On appeal, Victim argues that when there is a conflict in direct testimony a judge or jury cannot avoid the responsibility to decide by simply concluding that all witnesses are equally credible. Victim urges that it is not enough to conclude that it would be reasonable to believe either Victim's witnesses or Driver's witnesses; instead, the court is responsible to choose which witnesses to believe, however difficult that task may be.
Finish the court's opinion, explaining whether the court of appeals is bound by the "clearly erroneous" standard of review and whether Judge Decisive properly understood his responsibilities as finder of fact.

The inspiration for the question was a flat statement in Collier v. Turpin, 155 F.3d 1277, 1285 (11th Cir.1998). The trial judge, facing conflicting testimony, concluded that the evidence was in equipoise and that the burden of persuasion had not been carried. The court of appeals responded that this determination was not a finding of fact. Equipoise is possible only when dealing with the inferences to be drawn from circumstantial evidence. A direct conflict of testimony must be resolved one way or the other:

The evidence offered by both sides constituted direct, not circumstantial, evidence, and a factfinding required a choice between the two contradictory versions of events. Because the district court did not make such a choice, its determination that the evidence is 'in equipoise' is entitled to no deference.

This passage served as inspiration because it triggered an automatic response: "That cannot be right, can it?" The question seemed worth about 20 minutes. Following a long personal custom, I did not particularly think about the issue until the examination had been administered. Then I devoted 18 minutes to writing my own answer, not as a model of what to expect from the student answers but as a framework for thinking further. Rather than protect the innocent — me — it is presented without change. None of the answers, mine or the students', persuaded me to agree with the court. But students have the same happy position as the court — it makes no difference whether I agree with them. Unlike the court, however, students are graded on the inventiveness of their answers in comparison to the whole set of answers. On the whole, they did well.
The beguiling argument made by Victim need not detain us long. He is wrong. Under Civil Rule 52 (a), findings made by a district court sitting without a jury can be reviewed only for clear error. We could escape this limit only if there were no finding at all; and if there were no finding, our duty would be to remand with directions that the trial judge make a finding. We are in no position to make an original finding. The role of the court of appeals does not properly extend to original factfinding even when the trial court acted on an entirely written record, all of which is before the court of appeals. The amendment of Rule 52 (a) that entrenches application of the clear-error rule to findings made on a written record makes that clear if ever there were any doubt.

Here we do have a finding. And it is a finding based on oral testimony. The trial judge is explicit in seeking to take account of the witnesses' demeanor. Duty has been tended to. There is no means to enable us to find clear error when a trial judge has based a decision on consideration of the demeanor of live witnesses whose testimony is in direct conflict. (Of course it is possible that the traffic signal was not working, showing red in both directions; if that were the situation, Victim still would lose because Driver did not enter the intersection on a green light.) We cannot say that it was clear error to conclude that demeanor did not furnish any satisfactory basis to find whether the truth lies in the mouths of Victim and Green or Driver and Rouge.

The only remaining basis for Victim's argument is that although we cannot find clear error, we can find as a matter of law that Judge Decisive misunderstood the nature of the factfinder's duties. The argument that the evidence somehow "must" preponderate in favor of one party or the other fails to appreciate the nature of the preponderance-of-the-evidence test.

First, even if we take the preponderance test literally, in its usual forms of statement, it allows for precise equipoise. The plaintiff in this case must persuade the court that the light was red; many courts would say that the plaintiff must show that it was more probably red than not red. That is all that it says. It does mean that if the plaintiff fails to do this, the court can award half damages because it finds equal possibilities that the light was red and that it was green. The famous Louisiana case in which the trial judge got reversed for awarding one cow and one calf each to the plaintiff and to the defendant, being unable to find a reason to tip the balance, is a perfect illustration. For many reasons, both abstract and practical, we avoid splitting the difference. We seek to be right, not to compromise the truth. Pursuit of this lofty ideal will make the parties and factfinders more careful in approaching the tasks of presentation and decision.

Second, the preponderance test should not be taken literally. What it requires is a rough, intuitive sense of whether the party assigned the burden of persuasion has reduced unavoidable uncertainty to a point that justifies action in favor of that party. It requires acceptance of uncertainty, not rejection of uncertainty.

So to the question whether a judge must find some excuse to believe one set of witnesses rather than another. There simply is no reason why one set must be more persuasive. Our ability to determine the truth is limited, and it is a wise — not a lazy — judge who understands that the shortcomings of our assessments of demeanor may very well lead to the conclusion that no sufficient reason can be found to believe the plaintiff's witnesses over the defendant's witnesses. There is no need to force the judge to say the plaintiff's witnesses are less truthful, or not as persuasive. There is no indication that the judge has surrendered without conscientiously attempting to find a reason to credit one or more witnesses more than others. That conscientious attempt is all that is required.

That's it.
How did you do?