**STATE OF MICHIGAN**
**IN THE SUPREME COURT**

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**PEOPLE OF THE STATE OF MICHIGAN**
**Plaintiff-Appellee,**

**v**

**Nos. 156408**

**KEVIN PATRICK KAVANAUGH**
**Defendants-Appellant.**

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**Berrien CC: 2014-004247-FH**
**COA No. 330359**

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# BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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## Table of Contents

Table of Authorities . . . . . -ii-

Statement of the Question . . . . . -1-

Statement of Facts . . . . . -1-

Argument

I. MCR 2.613(C) provides that "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." There are no exceptions or exemptions to the rule. A finding based in whole or in part on video or documentary evidence is clearly erroneous only if, reviewing the entire record, it is not plausible because the finding is indisputably contradicted by the video or documentary evidence . . . . . -2-

A. Under the clear language of MCR 2.613(C), review of a trial court's factual findings is for clear error . . . . . -3-

1. The history of MCR 2.613(C) . . . . . -3-
2. The Court of Appeals has effectively amended MCR 2.613(C) though it has no such authority . . . . . -8-
3. Federal courts apply the clearly-erroneous standard no matter the evidence presented to the trial judge, as do most state courts . . . . . -9-
4. Application of the clearly-erroneous standard to findings based on video or documentary evidence permits the setting aside of findings of the trial court that are implausible because contradicted by undisputable video or documentary evidence . . . . . -13-

B. Conclusion . . . . . -15-

Relief . . . . . -17-

## Table of Authorities

**Case** **Page**

**Federal Cases**

Anderson v. Bessemer City,
470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) . . . . . 6, 7, 8, 10, 12, 13, 14, 15

Scott v. Harris,
550 U.S. 372, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007) . . . . . 14

United States v. Santos,
403 F.3d 1120 (CA 10, 2005) . . . . . 10, 15

United States v. Simpson,
609 F.3d 1140 (CA 10, 2010) . . . . . 10

**State Cases**

Beason v. Beason,
435 Mich. 791 (1990) . . . . . 4

City of East Grand Rapids v. Vanderhart,
2017 WL 1347646 (2017) . . . . . 10

Harbor Park Market, Inc. v. Gronda,
277 Mich. App. 126 (2007) . . . . . 9

Love v. State,
73 N.E.3d 693 (Ind., 2017) . . . . . 14

Montanez v. State,
195 S.W.3d 101 (Tex. Crim. App. 2006) . . . . . 11

People v. Bylsma,
493 Mich. 17 (2012) . . . . . 7

People v. Franklin,
500 Mich. 92 (2017) . . . . . 7

People v. Kavanaugh,
320 Mich. App. 293 (2017) . . . . . 10

People v. Mitchell,
428 Mich. 364 (1987) . . . . . 4

People v. Swain,
499 Mich. 920 (2016) . . . . . 4

People v. White,
294 Mich. App. 622 (2013) . . . . . 9

People v. Zahn,
234 Mich. App. 438 (1999) . . . . . 8, 9

Robinson v. State,
5 N.E.3d 362 (Ind. 2014) . . . . . 11

State v. Binette,
33 S.W.3d 215 (Tenn. 2000) . . . . . 13

State v. S.S.,
162 A.3d 1058 (N.J., 2017) . . . . . 11, 14

State v. Walli,
799 N.W.2d 898 (App.) . . . . . 11

State v. Williams,
334 S.W.3d 177 (Mo. Ct. App. 2011) . . . . . 11

**Court Rules and Statutes**

F.R.Civ.P. 52 . . . . . 4, 5, 6, 7, 8

MCR 1.201 . . . . . 2

MCR 2.613(C) . . . . . passim

**Other Authority**

Frankfurter, "Some Reflections on the Reading of Statutes,"
47 Colum. L. Rev. 527 (1947) . . . . . 5

## Statement of the Question

**I.**

**MCR 2.613(C) provides that "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." There are no exceptions or exemptions to the rule. Is a finding based in whole or in part on video or documentary evidence clearly erroneous only if, reviewing the entire record, it is not plausible because the finding is indisputably contradicted by the video or documentary evidence?**

**Amicus answers: YES**

## Statement of Facts

Amicus adopt the Statement of Facts of the People.

## Argument

### I.

**MCR 2.613(C) provides that "Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." There are no exceptions or exemptions to the rule. A finding based in whole or in part on video or documentary evidence is clearly erroneous only if, reviewing the entire record, it is not plausible because the finding is indisputably contradicted by the video or documentary evidence.**

### Introduction

This Court has directed supplemental briefing on these questions:

- what deference should be accorded to the trial court's factual findings where a recording of events under consideration is available to an appellate court;
- what evidence may be considered in determining whether there was clear error in the trial court's factual findings; and
- what standard of review is to be applied under such circumstances.

Amicus submits that these questions are answered by a current court rule—MCR 2.613(C)—which needs no amendment, though, should amendment be considered, it should be considered under the ordinary process of publication for comment and a public hearing.[1]

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[1] See MCR 1.201:

> Before amending the Michigan Court Rules or other sets of rules within its jurisdiction, the Supreme Court will notify the secretary of the State Bar of Michigan and the state court administrator of the proposed amendment, and the manner and date for submitting comments. The notice also will be posted on the Court's website, http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-adminmatters/pages/default.aspx.
> (B) Notice to Bar. The state bar secretary shall notify the

## A. Under the clear language of MCR 2.613(C), review of a trial court's factual findings is for clear error

### 1. The history of MCR 2.613(C)

MCR 2.613(C)—the citation of which appears nowhere in the Court of Appeals opinion here—provides that "*Findings of fact by the trial court may not be set aside unless clearly erroneous*. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it" (emphasis

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appropriate state bar committees or sections of the proposed amendment, and the manner and date for submitting comments. Unless otherwise directed by the Court, the proposed amendment shall be published in the Michigan Bar Journal.
(C) Notice to Judges. The state court administrator shall notify the presidents of the Michigan Judges Association, the Michigan District Judges Association, and the Michigan Probate and Juvenile Court Judges Association of the proposed amendment, and the manner and date for submitting comments.
(D) Exceptions. The Court may modify or dispense with the notice requirements of this rule if it determines that there is a need for immediate action or if the proposed amendment would not significantly affect the delivery of justice.
(E) Administrative Public Hearings. The Court will conduct a public hearing pursuant to Supreme Court Administrative Order 1997-11 before acting on a proposed amendment that requires notice, unless there is a need for immediate action, in which event the amendment will be considered at a public hearing following adoption. Public hearing agendas will be posted on the Court's website.

supplied).[2] The text is clear, and so should be applied in all cases.[3] Review of factual findings by a trial court is for clear error. There are no exceptions or exemptions, only a caution that when applying the standard of clear error an appellate court must, where credibility is involved, give regard to the special opportunity of the trial court to judge the credibility of witnesses. Nothing in the rule provides that where the trial judge is not, in the particular circumstances, in a special position to judge the credibility of the witnesses, such as with documentary evidence, or, more recently, and in the present case, with video evidence, the standard of clear error disappears.

MCR 2.613(C) is identical to its predecessor provision in the 1963 court rules, GCR 517.1. And that provision, this Court has said, was "modeled after F.R.Civ.P. 52(a)."[4] The version of the federal rule that Michigan followed provided that "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 of the credibility of the witnesses." There was, then, no difference between the federal and the Michigan rule save for style, and it has been said that if a text is "obviously transplanted

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[2] MCR 2.613(C) is applicable in criminal cases. See MCR 6.001(D): "The provisions of the rules of civil procedure apply to cases governed by this chapter, except," with none of the exceptions applying to MCR 2.613.

And see *People v. Mitchell*, 428 Mich. 364, 369 (1987) ("In this case, the trial court, after an evidentiary hearing, found that the affidavit was made on oath to a magistrate. *Findings of fact by a trial court will not be set aside on appeal unless clearly erroneous. MCR 2.613(C)*") (emphasis supplied).

[3] See *People v. Swain*, 499 Mich. 920 (2016): "*Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test. The Court of Appeals erred in failing to give proper deference to the specific findings of the trial court . . . ."

[4] *Beason v. Beason*, 435 Mich. 791, 801 (1990).

from another legal source, whether the common law or other legislation, it brings the old soil with it."[5] The federal rule was amended in 1985 to clear away any doubt that the rule applies in all situations, and thus now reads that "'Findings of fact, *whether based on oral or other evidence*, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility" (emphasis added). The Notes of the Advisory Committee state that the purposes of the amendment were "(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."[6] The language "whether based on oral or other evidence" is redundant to the literal language of the rule, but, as the Committee noted, was added to end the practice of some courts of appeals of failing to apply the rule where other than oral evidence was received in the trial court. The Committee observed that "[s]ome courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous," while other courts went further, "holding that appellate review may be had without application of the 'clearly erroneous' test since the appellate court is in as good a position as the trial court to review a purely documentary record." A third group

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[5] Frankfurter, "Some Reflections on the Reading of Statutes," 47 Colum. L.Rev. 527, 537 (1947), quoted in *Sekhar v. United States*, 570 U.S. 729, 133 S. Ct. 2720, 2724, 186 L. Ed. 2d 794 (2013).

[6] Notes of Advisory Committee on Rules—1985 Amendment.

applied the rule as written.[7] Most relevant, with regard to the discussion of the standard of review as discussed by the Court of Appeals here—again, unencumbered by reference to MCR 2.613(6)—the Committee observed that the principal argument in favor of essentially de novo review where the trial court's factual findings were based on evidence such as documentary evidence, was that the rationale of the standard of clear error "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." But the Committee was of the view that even in these situations, applying the rule to mean what it says—with the amendment making it clear that its literal meaning was to be followed—was the better course, for 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."[8]

Indeed, shortly before the amendment to Rule 52(c) went into effect the United States Supreme Court reached essentially the same conclusion. In *Anderson v. Bessemer City*[9] the Court said that a factual 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

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[7] Id.

[8] Id.

[9] *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

mistake has been committed,"[10] which is also the standard applied in Michigan.[11] Application of this standard, the Court said, "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently," and "[t]he reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court." Indeed, in applying the clearly-erroneous standard, cautioned the Court, "appellate courts must constantly have in mind that their function is not to decide factual issues de novo." In the end, "[i]f 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 factfinder's choice between them cannot be clearly erroneous."[12]

Critically, the Court continued on to say that "*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*," as the "the theory that an appellate court may exercise de novo review over findings not based on credibility determinations . . . . is impossible to trace . . . back to the text of Rule 52(a), *which states straightforwardly that 'findings of fact shall not be set aside unless clearly erroneous*.'" While it is true, the Court said, that the rule emphasizes the special deference paid to credibility determinations, that emphasis

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[10] Id., 105 S.Ct. at 1511.

[11] See e.g. *People v. Bylsma*, 493 Mich. 17, 26 (2012); *People v. Franklin*, 500 Mich. 92, (2017).

[12] Id.

"does not alter its clear command: 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.'"[13]

While emphasis is given in the rule to the superior position of the trial court to assess credibility, and the text of the rule is clear that it applies to all situations, the Court said that its 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*.[14]

**2. The Court of Appeals has effectively amended MCR 2.613(C) though it has no such authority**

The Court of Appeals on several occasions has come close, at the least, to modifying the standard of review for a trial court's findings of fact based on the theory rejected by the drafters of F.R.Civ.P 52(a) and the United States Supreme Court given the plain text of the rule; namely, that where credibility is not at issue, no deference to the trial court is required. In *People v.*

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[13] Id., 105 S.Ct. at 1511-1512.

[14] Id., 105 S.Ct. at 1512 (emphasis supplied).

*Zahn,*[15] without reference to MCR 2.613(C), the court said the because "the trial court made its decision solely on the basis of the preliminary examination transcript . . . . the trial court was in no better position than this Court to assess the evidence, and there is no reason to give special deference to the trial court's 'findings.'"[16] Citing *Zahn*, the court in *Harbor Park Market, Inc. v. Gronda*[17] said that "there is some authority for the proposition that little or no deference is due a trial court's findings of fact when they are based solely on transcripts and exhibits . . . . [but] because our decision is based solely on the contract language, we need not decide what deference is due the factual findings made in this case."[18] Then in *People v. White*[19] the panel, without reference to MCR 2.613(C), said that "[b]ecause the only evidence submitted to the trial court on the motion to suppress was the audio/video disk, and that is something that we can review as easily as the trial court, the clearly erroneous standard may not even apply to the trial court's finding that defendant was not subjected to express questioning."[20] And then in the present case, where a dashcam recording is a part of the evidence, the panel noted that it had "watched and listened to the recording," and thus was not required to "rely on the trial court's conclusions as to what the videotape contains," citing to the unpublished opinion—though as if were published—of *City of East Grand Rapids v. Vanderhart*, to the effect that "because an appellate

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[15] *People v. Zahn*, 234 Mich. App. 438 (1999).

[16] Id., at 445-446.

[17] *Harbor Park Market, Inc. v. Gronda*, 277 Mich.App. 126, 130 n. 1 (2007).

[18] Id., at 130 n1.

[19] *People v. White*, 294 Mich. App. 622 (2013).

[20] Id., at 633.

court is able to review a video as easily as the trial court, the trial court's factual findings regarding that video are entitled to less deference."[21] *Vanderhart* also does not cite MCR 2.613(6). There is no basis in the rule for this "no or less" deference approach; the standard, no matter the evidence presented to the trial court, is whether the trial court's findings were clearly erroneous.

### 3. Federal courts apply the clearly-erroneous standard no matter the evidence presented to the trial judge, as do most state courts

Given that the federal rule was amended in 1985 to make clear that it means what it says, and also given the United States Supreme Court decision in *Bessemer City*, it is not surprising that federal courts of appeals review findings of fact for clear error no matter the sort of evidence considered by the trial judge. Several examples follow. In *United States v. Simpson*[22] the court, reviewing a finding of reasonable suspicion, said that it was required to view the evidence presented at the suppression hearing in the light most favorable to the government. . . . Moreover, this court defers to the district court's finding of facts and reviews them solely for clear error, even when, as here, there is video tape of the stop and detention."[23] The court in *United States v.*

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[21] *People v. Kavanaugh*, 320 Mich. App. 293, 2017 WL 2882721, at 2 (2017), citing to *"City of East Grand Rapids v. Vanderhart*, —— Mich.App. ——, ——, —— N.W.2d —— (2017) (Docket No. 329259), slip op. at 4, 2017 WL 1347646 (Opinion by Swartzle, J.)." But that opinion, as stated on its face, is not published.

After this draft was prepared, it was discovered that the Court of Appeals had amended its opinion without any notice to the parties to remove reference to *Vanderhart* in favor of reference to *Zahn*, discussed infra (the original version of the opinion still appears on Westlaw). Because, though unpublished, *Vanderhart* discusses appellate review of trial court fact-finding involving video evidence, amicus leaves its discussion of the case intact.

[22] *United States v. Simpson*, 609 F.3d 1140 (CA 10, 2010).

[23] Id., at 1146.

*Santos*,[24] in a decision telling with regard to the present case, rejected defendant's "suggestion that this Court *make its own analysis of the degree of nervousness displayed on the tape*," as, the court said, this was to ask the appellate court "in effect to usurp the district court's position as finder of fact. We must reject this invitation, since the availability of some of the same evidence that was before the district court does not transform this Court into the factfinder . . . . The increasing availability of videotapes of traffic stops due to cameras mounted on patrol cars does not deprive district courts of their expertise as finders of fact, or alter our precedent to the effect that appellate courts owe deference to the factual findings of district courts."[25]

A recent decision of the New Jersey Supreme Court, *State v. S.S.*,[26] rejects a standard other than clear error when video evidence is reviewed by the trial court in making its findings of facts, and helpfully lays out the decisions by other state courts.[27] The court concluded that "a

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[24] *United States v. Santos*, 403 F.3d 1120 (CA 10, 2005).

[25] Id., at 1128 (emphasis supplied).

[26] *State v. S.S.*, 162 A.3d 1058, 1069–1070 (N.J., 2017).

[27] The court in its decision pointed to other state courts reviewing for clear error:

> See e.g. *Robinson v. State*, 5 N.E.3d 362, 365 (Ind. 2014) (noting that deferential "appellate standard of review remains constant," even "when faced with video evidence"); *State v. Williams*, 334 S.W.3d 177, 181 (Mo. Ct. App. 2011) (applying clearly-erroneous standard of review to video evidence in suppression hearing because "trial court's findings of fact are entitled to deference even where they are based on physical or documentary evidence"); *Montanez v. State*, 195 S.W.3d 101, 109 (Tex. Crim. App. 2006) (holding that "deferential standard of review ... applies to a trial court's determination of historical facts when that determination is based on a videotape recording admitted into evidence at a suppression hearing"); *State v. Walli*, 334 Wis.2d 402, 799 N.W.2d 898, 904 (App.) ("[W]hen evidence in the record consists of disputed testimony and a video recording, we will apply the clearly

standard of deference to a trial court's fact-findings, even fact-findings based solely on video or documentary evidence, best advances the interests of justice in a judicial system that assigns different roles to trial courts and appellate courts."[28] Trial judges, the court said, "have ongoing experience and expertise in fulfilling the role of factfinder."[29] As to matters of law, on the other hand, "appellate courts construe the Constitution, statutes, and common law 'de novo—'with fresh eyes'—owing no deference to the interpretive conclusions' of trial courts, 'unless persuaded by their reasoning.'"[30] With regard to findings of fact, where it is possible to draw more than one reasonable inference from a video recording, continued the court, "then the one accepted by a trial court cannot be unreasonable and the alternative inference accepted by an appellate court cannot be superior."[31] Recall the statement by the United States Supreme in Court *Bessemer City* that a finding of fact that is "plausible in light of the record" cannot be overturned as clear error even if the appellate court would reach a different conclusion if sitting as finder of fact. "In such a scenario, a trial court's factual conclusions reached by drawing permissible inferences cannot be clearly mistaken, and the mere substitution of an appellate court's judgment for that of the trial court's advances no greater good. A de novo standard of review permits the trial court, Appellate

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> erroneous standard of review when we are reviewing the trial court's findings of fact based on that recording."), petition for review denied, 806 N.W.2d 639 (Wis. 2011).

Id., at 1069.

[28] Id.

[29] Id.

[30] Id.

[31] Id., at 1070.

Division, and this Court to draw reasonable inferences from a review of a video recording and yet reach different findings of fact. In this hierarchy, the highest appellate court's factual findings prevail, not because they are necessarily superior but because they are last."[32]

A few court's have gone the other way, and when doing so their rationale is that rejected by the federal rule, *Bessemer City*, and the text of the Michigan rule. Illustrative is *State v. Binette*[33] from the Tennessee Supreme Court, where the Court said that "[w]hen a trial court's findings of fact on a motion to suppress are based solely on evidence that does not involve issues of credibility, appellate courts are just as capable to review the evidence and draw their own conclusions. Accordingly, we hold that when a trial court's findings of fact at a suppression hearing are based on evidence that does not involve issues of credibility, a reviewing court must examine the record de novo without a presumption of correctness."[34] Not only is such an approach inconsistent with the federal rule, *Bessemer City*, and the Michigan rule, but Tennessee has no rule comparable to the federal and Michigan rules. For that reason alone it should be rejected.

**4. Application of the clearly-erroneous standard to findings based on video or documentary evidence permits the setting aside of findings of the trial court that are implausible because contradicted by undisputable video or documentary evidence**

Review of factual findings for clear error should mean that overturning of a trial court's findings of fact will be rare, but hardly impossible. As *State v. S.S.*, says, "deference does not

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[32] Id.

[33] *State v. Binette*, 33 S.W.3d 215 (Tenn. 2000).

[34] Id., at 217.

mean that appellate courts must give blind deference to those findings. Appellate courts have an important role to play in taking corrective action when factual findings are so clearly mistaken—so wide of the mark—that the interests of justice demand intervention."[35] With regard to documentary and video evidence, *Love v. State*,[36] discussed by the People in the application for leave, is instructive. Though the case was one of sufficiency of the evidence, rather than motion practice, the court noted that it had previously held that "[w]hile technology marches on, the appellate standard of review remains constant"—and so held in the context of review of findings of fact on a motion to suppress. The court wrote to add that courts "must apply the same deferential standard of review to video evidence as to other evidence, unless the video evidence indisputably contradicts the trial court's findings. A video indisputably contradicts the trial court's findings when no reasonable person can view the video and come to a different conclusion."[37] This is, amicus believes, stated somewhat inartfully. The standard does not *change* if the video indisputably contradicts the trial court's findings; rather, the standard of clear error has been *met* if a part of the record—and perhaps on occasion the video is the *entire* evidentiary record—indisputably contradicts the trial court's fact finding. But a finding is

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[35] *State v. S.S.*, 162 A.3d at 1070.

[36] *Love v. State*, 73 N.E.3d 693 (Ind., 2017).

[37] Id., at 695. See also *Bessemer City*, 105 S.Ct. at 1512: "Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." And see *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769, 1775, 167 L. Ed. 2d 686 (2007), a summary judgment/qualified immunity case, where the factual findings below were rejected by the Supreme Court because there was a "videotape capturing the events in question" and the "videotape *quite clearly contradict[ed]* the version of the story told by respondent and adopted by the Court of Appeals" (emphasis supplied).

"plausible" on the evidentiary record, which may include or consist of a video, as *Bessemer City* puts the standard, unless no reasonable person can view the video and come to the same conclusion as did the trial judge. If that is the case, then clear error has occurred. But an appellate court should not, for example, as the court pointed out in *Santos*, simply "*make its own analysis of the degree of nervousness displayed on the tape*," or its own analysis of whatever fact or facts are involved in the tape, rather than reviewing for whether the trial judge's findings are plausible, or instead indisputably contradicted by video evidence.

**B. Conclusion**

As to the Court's three questions, amicus thus says:

- what deference should be accorded to the trial court's factual findings where a recording of events under consideration is available to an appellate court?

  *MCR 2.613(C) answers the question: factual findings may not be set aside unless clearly erroneous; where video evidence is the basis of the findings, clear error occurs if findings of the trial judge are implausible because the video indisputably contradicts those findings.*[38]

- what evidence may be considered in determining whether there was clear error in the trial court's factual findings?

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[38] Amicus joins the argument of the People as to the Court of Appeals error in rejecting the fact-finding of the trial judge. The panel had stated that it need give no deference to the trial court's findings, as it could view the video itself, but later said the trial court's findings were "clearly erroneous," but with no discussion of whether the trial court's view of the matter was plausible, particularly as supplemented by oral testimony, where a participant to the event may be able to discern such matters as nervousness that are not apparent from a dashcam or bodycam video. Recall *United States v. Santos*, discussed previously, rejecting the suggestion it make "*its own analysis of the degree of nervousness displayed on the tape*," as "in effect . . . to usurp the district court's position as finder of fact. . . . the availability of some of the same evidence that was before the district court does not transform this Court into the factfinder." The panel here appears to have done precisely that which the *Santos* court refused to do.

*Amicus is not sure what is meant here, but answers that the evidentiary record made by the parties in the matter before the trial judge should be that which is considered as to whether the trial judge's findings of fact based on the record made are clearly erroneous (see Bessemer City: "*[i]f 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.*"*

- what standard of review is to be applied under such circumstances?

  *The standard of review is for clear error; MCR 2.613(C) is clear on the point.*

## Relief

Wherefore, amicus requests that this Court grant the People's application for leave to appeal, and reverse the Court of Appeals.

Respectfully submitted,

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