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RIGHT-FOR-ANY-REASON: CLARIFYING PENNSYLVANIA'S SCOPE-BROADENING DOCTRINE

Kelly B. Cullen*

In Pennsylvania, the "right-for-any-reason" doctrine describes the traditional[1] power of an appellate court to affirm a correct lower court judgment on any basis, even if the grounds for affirmance were not argued in the court below.[2] The theory that appellate courts review the trial court's order, not the reasons or analysis behind the order, underlies right-for-any-reason.[3] Most jurisdictions follow this rule and will affirm a trial court's decision on legally valid grounds not argued below,[4] but not all jurisdictions refer to this judicial practice as the "right-for-any-reason" doctrine.[5]

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[1] *See, e.g.*, Ian S. Speir & Nima H. Mohebbi, *Preservation Rules in the Federal Courts of Appeals*, 16 J. APP. PRAC. & PROCESS 281, 283 (2015); Joan Steinman, *Appellate Courts as First Responders: The Constitutionality and Propriety of Appellate Courts' Resolving Issues in the First Instance*, 87 NOTRE DAME L. REV. 1521, 1593 (2012) ("It is black letter law that appellate courts may affirm on any ground that has support in the record.").

[2] Thomas G. Saylor, *Right for Any Reason: An Unsettled Doctrine at the Supreme Court Level and an Anecdotal Experience with Former Chief Justice Cappy*, 47 DUQ. L. REV. 489, 490 (2009).

[3] *Id.*; Ario v. Ingram Micro, Inc., 965 A.2d 1194, 1200 (Pa. 2009) (citing Hader v. Coplay Cement Mfg. Co, 189 A.2d 271, 274 (Pa. 1963)).

[4] *See, e.g.*, Pavilion Dev., L.L.C. v. JBJ P'ship, 979 So. 2d 24, 42–43 (Ala. 2007) (Murdock, J., concurring) (citing right for any reason); State v. Gallegos, 152 P.3d 828, 836 (N.M. 2007); Ga.-Pacific, LLC v. Fields, 748 S.E.2d 407, 412 (Ga. 2013).

[5] *See, e.g.*, Philibotte v. Nisource Corp. Servs. Co., 793 F.3d 159, 163 (1st Cir. 2015); Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 413 (2d Cir. 2014); Solimeno v. Yonan, 227 P.3d 481, 489 (Ariz. Ct. App. 2010) (citing State v. Robinson, 735 P.2d 801, 809 (Ariz. 1987)). Indeed, a quick search of Pennsylvania Superior Court decisions reveals that the term has only been adopted recently and sporadically in Pennsylvania. *See, e.g.*, *In re* Appeal of Costco Wholesale Corp., 49 A.3d 535, 542 (Pa.

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This Note refers to the practice as the right-for-any-reason doctrine, a simpler nomenclature than affirm on any basis, affirm on alternative grounds, affirm on an alternative basis, *et cetera*.[6] Further, it appears to be the name the Pennsylvania Supreme Court has adopted in recent years—likely inspired by Justice Saylor.[7] Thus, within this Note, the term right-for-any-reason incorporates all of the various phrases used by appellate courts to describe the practice of affirming lower court decisions on a basis or bases not used by the trial court in its reasoning.

This Note will examine the right-for-any-reason doctrine in Pennsylvania, and other jurisdictions, considering the purposes of appellate review and bearing in mind the potential equity concerns the doctrine raises. First, this Note will introduce the doctrine by examining it in the context of appellate review's limitations on scope and as described in Pennsylvania case law. Next, this Note will look at other jurisdictions' approaches to the doctrine, including the limits other jurisdictions place on the doctrine to balance the administrative, equitable, and formal concerns raised by the doctrine. Finally, this Note will propose clarification of the doctrine to bring it into harmony with the overarching purposes of appellate review, reinforce confidence in judicial decision making, and avoid potential inequities.

I. INTRODUCTION: APPELLATE REVIEW AND RIGHT-FOR-ANY-REASON IN PENNSYLVANIA

Right-for-any-reason has a long history in Pennsylvania[8] and has been used by the Superior Court with some frequency in recent years.[9] In 1857, the Pennsylvania Supreme Court affirmed a lower court ruling, stating, "[t]he only error upon the

Commw. 2012) ("affirm on alternate grounds"); Commonwealth v. Williams, 568 A.2d 1281, 1283 (Pa. Super. 1990) ("affirm on alternate grounds").

[6] *Lotes*, 753 F.3d at 399 ("affirm on alternative grounds"); *Philibotte*, 793 F.3d at 163 ("affirm on an alternative basis").

[7] *See generally* Saylor, *supra* note 2.

[8] *See Hader*, 189 A.2d at 274 (quoting Thomas v. Mann, 28 Pa. 520, 522 (Pa. 1857)).

[9] *See, e.g.*, Commonwealth v. Doty, 48 A.3d 451, 456 (Pa. Super. 2012) (highlighting the trial court's error and nonetheless affirming on alternate grounds); *In re* Jacobs, 15 A.3d 509, 509 (Pa. Super. 2011) (stating in the first paragraph that it affirmed on different grounds); Simmons v. Cobbs, 906 A.2d 582, 584 (Pa. Super. 2006) (emphasizing the court's ability to affirm on any basis in the judicial boiler-plate along with the standard of review), *inter alia*. This is even more evident in numerous unpublished opinions. *See, e.g.*, Goldblatt v. Young, 2017 Pa. Super. Unpub. LEXIS 2922, at *70 n.42 (Pa. Super. July 2017); Commonwealth v. Carter, 2016 Pa. Super. Unpub. LEXIS 2636, at *7 (Pa. Super. July 2016); Commonwealth v. Debnam, 2016 Pa. Super. Unpub. LEXIS 625, at *14 (Pa. Super. Feb. 2016).

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record is a wrong reason for a right judgment; but, as we review not reasons but judgments, we find nothing here to correct."[10] The court extended its reasoning to sustain a correct decision "for any reason whatsoever" and refused to reverse a correct lower court decision even if its reasoning was erroneous.[11] Pennsylvania courts have established, in theory, an expansive view of right-for-any-reason whereby an appellate decision maker may *sua sponte* rule on an issue without any consideration of the lower decision maker's reasoning.[12] The appellate context in which the doctrine operates, and how it actually operates in Pennsylvania, is vital to understanding and clarifying the doctrine.

A. Function of Appellate Review in the Right-for-any-reason Context

Right-for-any-reason is both a doctrine of judicial economy and of equity[13] that broadens the scope of appellate review.[14] Here, we consider "scope of review" as distinct from the "standard of review."[15] Scope of review refers to "what" the appellate court reviews on appeal, whereas the standard of review refers to "how" an appellate court reviews the issue or the amount of deference given to the trial court.[16] The scope of review, or what issues an appellate court considers, affects the standard of review because different issues receive different levels of scrutiny; *e.g.*, an application of law to fact receives an abuse of discretion standard, while a pure matter of law will be reviewed *de novo*.[17]

Traditionally, errors contrary to the interests of the verdict winner are obviated by the litigant's victory and the scope of appellate review is limited to the errors

[10] *Thomas*, 28 Pa. at 522.

[11] Sherwood v. Elgart, 117 A.2d 899, 901–02 (Pa. 1955); *see also Hader*, 189 A.2d at 274.

[12] *See In re* Appeal of Costco Wholesale Corp., 49 A.3d 535, 542 (Pa. Commw. 2012) (holding that an administrative board may *sua sponte* affirm on alternate grounds).

[13] *See* Saylor, *supra* note 2, at 494–95.

[14] J. Dickinson Phillips, Jr., *The Appellate Review Function: Scope of Review*, 47 L. & CONTEMP. PROBS. 1, 10 (Spring 1984).

[15] *See generally* JOHN KIMPFLEN ET AL., 16A STANDARD PENNSYLVANIA PRACTICE § 91:1 (2d ed. 2017).

[16] *Id.*; *see also* Morrison v. Dep't of Pub. Welfare, 646 A.2d 565, 570 (Pa. 1993); Lu-in Wang, Morrison v. Dep't of Pub. Welfare *and the Pennsylvania Revolution in Scope and Standard of Review*, 47 DUQ. L. REV. 609, 615–16 (2009).

[17] Wang, *supra* note 16, at 613.

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properly raised by the appellant.[18] In the right-for-any-reason context, the appellate court broadens the scope to, at least, encompass issues where the trial court may have erred to the detriment of the appellee and, at most, to consider issues potentially helpful to appellee that were never raised below.[19] The purpose of scope of review is, therefore, central to understanding the appropriateness of the right-for-any-reason doctrine in a given situation.

The scope of review serves as a judicial restraint "controlled by consideration of the specific functions that appellate courts serve."[20] The proper scope of review is often balanced between the two basic functions an appellate court serves as error-corrector and expounder of legal principle.[21] Generally, as error-corrector, the scope of review is limited to the set of reasons the trial court sets forth as the basis for its decision;[22] yet, a court particularly concerned with an equitable result on a particular set of facts might be tempted to extend its scope of review.[23] There are potentially inequitable and institutionally damaging consequences both with a strict adherence to formal scope of review restrictions and with departure from formal scope of review strictures.[24]

A narrow scope of review protects litigants by, *inter alia*, giving the adversary notice of issues, allowing for record development, and promoting a full airing of the issues at the trial level to avoid unnecessary subsequent appeals and litigation.[25] A narrow scope also protects the judicial system by promoting transparency, authority of the trial bench, integrity of process, and integrity of the adversarial system.[26] A broad scope of review, where the reviewing court steps outside the traditional scope of review, allows appellate courts to reach the correct result when the trial court's error, albeit not raised by appellant, is manifest and in cases where the result would

[18] Phillips, *supra* note 14, at 9.

[19] *Id.* at 10.

[20] *Id.* at 2.

[21] *Id.*

[22] Wang, *supra* note 16, at 613.

[23] Phillips, *supra* note 14, at 6.

[24] Wang, *supra* note 16, at 616.

[25] Phillips, *supra* note 14, at 4–5.

[26] *Id.* at 5.

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otherwise be inequitable.[27] Broadening or ignoring the scope of review may also allow a court to articulate a legal principle it sees as necessary.[28] The right-for-any-reason doctrine raises some of these same concerns that adhere to more traditional questions of scope. In the analysis of the doctrine's use in practice, this Note considers these various concerns and tensions.

B. The Pennsylvania Context

Given the tensions within the right-for-any-reason doctrine, there is a substantive limitation on the doctrine in Pennsylvania despite the sweeping statement that an appellate court may affirm for any reason.[29] The alternate grounds relied upon by the appellate court must be "as of record," or apparent from the record.[30] The formulation is oft repeated: "an appellate court may uphold an order of the lower court for any valid reason appearing as of record."[31]

The "as of record" qualifier appears to be the only restriction universally listed in cases invoking right-for-any-reason, yet, some opinions appear to hint at other restrictions.[32] In one decision, the Pennsylvania Supreme Court suggested it would not consider alternate reasoning where the trial court used an erroneous legal test, because erroneous legal reasoning affects which evidence is proffered and the weight it is given.[33] In an unpublished Superior Court decision, the judges affirmed a

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[27] *Id.* at 6.

[28] *Id.* at 6–8.

[29] *See* Ario v. Ingram Micro, Inc., 965 A.2d 1194, 1200 (Pa. 2009) (stating when an appellate court may affirm on an alternate grounds); *see also* Thomas v. Mann, 28 Pa. 520, 522 (Pa. 1857) ("The only error upon the record is a wrong reason for a right judgment; but, as we review not reasons but judgments, we find nothing here to correct.").

[30] *Ario*, 965 A.2d at 1200.

[31] *See, e.g.*, Scampone v. Highland Park Care Ctr., LLC, 57 A.3d 582, 596 (Pa. 2012); *Ario*, 965 A.2d at 1200; Commonwealth v. Moore, 937 A.2d 1062, 1073 (Pa. 2007); Moorhead v. Crozer Chester Med. Ctr., 765 A.2d 786, 787 n.2 (Pa. 2001).

[32] *See Scampone*, 57 A.3d at 607 (using the improper test affects how evidence is presented, and thus, makes ruling on the issue inappropriate); Traux v. Roulhac, 2014 Pa. Super. Unpub. LEXIS 3049, *16 (Pa. Super. Sept. 2014) (Bowes, J., dissenting) (suggesting an alternative basis in the summary judgment context may be inappropriate); Phillips Home Furnishing, Inc. v. Cont'l Bank, 354 A.2d 542, 544 (Pa. 1976) (dealing with *sua sponte* consideration of an issue benefiting the appellant, but is nonetheless relevant because it addresses concerns with broadening the scope of appellate review).

[33] *Scampone*, 57 A.3d at 596, 607 ("Employing the incorrect test generally affects how evidentiary proffers are received and the relative weight accorded to the relevant evidence . . . therefore, it is unfeasible to determine with any certainty either whether the requisite relationship exists between the respective parties . . . .").

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summary judgment on an alternate basis.[34] In an unpublished dissent, one judge argued that where the alternate grounds were never articulated at the trial level, right-for-any-reason should be inapplicable in the summary judgment context because an alternate basis would affect what evidence the parties proffer.[35] The Pennsylvania Supreme Court has similarly stated, "[a]n additional danger in the practice of deciding cases on issues not presented by the parties is that counsel has not been alerted to establish an adequate record upon which to decide the unanticipated issue."[36] While various courts have suggested additional limits on the right-for-any-reason doctrine, these limits appear to be up to the discretion of the judicial decision maker and are inconsistently applied.[37]

The foregoing examples of Pennsylvania's high and intermediate appellate courts struggling with the issue show the discretionary nature of the right-for-any-reason doctrine in Pennsylvania.[38] The Pennsylvania right-for-any-reason doctrine might be summed up in these terms: an appellate court may affirm a lower court's decision for any valid reason supported by the record,[39] but need not if prudential or equitable concerns militate against considering alternate reasons for affirming.[40]

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[34] Traux v. Roulhac, 2014 Pa. Super. Unpub. LEXIS 3049, *16 (Pa. Super. Sept. 2014) (Bowes, J., dissenting) (unpublished decision).

[35] *Id.* (explaining that summary judgment should not "be affirmed on a ground that was not articulated in the trial court, and, consequently, upon a record that was not fully developed"), *withdrawn and rev'd en banc*, 126 A.3d 991 (Pa. Super. 2015); *see also* Roland F.L. Hull, *Appellate Practice and Procedure*, 57 MERCER L. REV. 35, 39–41 (2005) (describing the difficulties and pitfalls associated with preserving the record in summary judgment cases in Georgia).

[36] *Phillips Home Furnishing*, 354 A.2d at 544. As noted in *supra* note 32, *Phillips* deals with *reversing* a trial court on an alternate basis. But, the principal quoted above is relevant to consideration of alternate issues, regardless of affirmation or reversal, as both appellees and appellants must establish a record before the fact-finder and are not in the position to know which they will be until the conclusion of the trial. *See also In re* T.P., 78 A.3d 1166, 1179–80 (Pa. Super. 2013) (Wecht, J., dissenting) (arguing that the consideration of a legal issue not argued in the juvenile court impairs the "role dual advocacy plays in our judicial system").

[37] Commonwealth v. Fant, 146 A.3d 1254, 1267 (Pa. 2016) (Wecht, J., concurring) (arguing that affirming an appellate court reversal on alternate grounds is an unsettled part of right-for-any-reason doctrine); *Phillips Home Furnishing*, 354 A.2d at 544 (Roberts, J., dissenting) (suggesting the court's evaluation of the completeness of the record for the alternate issue is premature); Traux v. Roulhac, 126 A.3d 991 (Pa. Super. 2015) (*en banc*) (reversing the panel decision without addressing the panel dissent's concern about right-for-any-reason in the summary judgment context).

[38] *See, e.g.*, *Fant*, 146 A.3d 1254; Commonwealth v. DiNicola, 866 A.2d 329 (Pa. 2005).

[39] Ario v. Ingram Micro, Inc., 965 A.2d 1194, 1200 (Pa. 2009).

[40] *See* Commonwealth v. Moore, 937 A.2d 1062, 1073 (Pa. 2007) ("[A]n appellate court *may* affirm a valid judgment based on any reason appearing as of record.") (emphasis added); Commonwealth v.

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These prudential and equitable concerns have some recurring themes: an erroneous legal test might affect the evidence proffered;[41] an unarticulated grounds for summary judgment may affect what evidence was presented;[42] and issues not presented by the parties may result in an inadequate record.[43] These prudential grounds connect what is in the record and what might have been in the record. To clarify and define the contours of right-for-any-reason, a careful examination of what "as of record" means or should mean is essential.

II. AS OF RECORD: OTHER JURISDICTIONS' USE OF RIGHT-FOR-ANY-REASON

This part examines how other jurisdictions handle right-for-any-reason to determine if there are a set of equitable or prudential concerns that commonly arise, and to what extent other jurisdictions implement controls on right-for-any-reason.[44] Pennsylvania is not the only jurisdiction that requires an alternate basis to be apparent as of record.[45] In fact, the requirement appears to be adopted widely in right-for-any-reason jurisdictions.[46] Georgia has substantial jurisprudence on the right-for-any-reason doctrine,[47] stemming from a long history in its highest court.[48] Like

Parker, 919 A.2d 943, 948 (Pa. 2007) ("[A]n appellate court *has the ability* to affirm a valid judgment or verdict for any reason.") (emphasis added). *But see* Commonwealth v. Hernandez, 935 A.2d 1275, 1290 n.3 (Castille, J., concurring) (Pa. 2007) ("[W]e *must* affirm that decision if it is correct for any reason.") (emphasis added). In Pennsylvania, *Hernandez* is the only case this note's author found using the mandatory language and the decision Justice Castille cites uses the discretionary language. Moorhead v. Crozer Chester Med. Ctr., 765 A.2d 786, 787 n.2 (Pa. 2001).

[41] Scampone v. Highland Park Care Ctr., LLC, 57 A.3d 582, 596 (Pa. 2012).

[42] Traux v. Roulhac, Pa. Super. Unpub. LEXIS 3049, at *15–16 (Pa. Super. Sept. 24, 2014) (Bowes, J., dissenting).

[43] Phillips Home Furnishing, Inc. v. Cont'l Bank, 354 A.2d 542, 544 (Pa. 1976).

[44] It is important to note at the outset that, like in Pennsylvania, the application of right-for-any-reason in most jurisdictions is highly discretionary and judges often disagree over its application. The examples and theories presented herein illustrate and help to explain the approach that this Note advocates and do not represent any jurisdiction's comprehensive jurisprudence in the area.

[45] Ario v. Ingram Micro, Inc., 965 A.2d 1194, 1200 (Pa. 2009).

[46] *See, e.g.*, Ga.-Pacific, LLC v. Fields, 748 S.E.2d 407, 412 (Ga. 2013); Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002); State v. Gallegos, 152 P.3d 828, 836 (N.M. 2007).

[47] *See Ga.-Pacific*, 748 S.E.2d at 412; Nat'l Tax Funding, L.P. v. Harpagon Co., 586 S.E.2d 235, 240 (Ga. 2003); State v. Café Erotica, 507 S.E.2d 732, 735 (Ga. 1998); Brown v. Atlanta, 66 Ga. 71 (Ga. 1880).

[48] *Brown*, 66 Ga. at 75 (Ga. 1880) ("This court is not an expounder of theoretical law, but it administers practical law, and corrects only such errors as have practically wronged the complaining party."); Wyche

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Pennsylvania, an appellate court in Georgia is free to affirm a lower court decision on any basis supported by the record, even where the lower court's reasoning is flawed.[49] Florida calls its right-for-any-reason doctrine the "tipsy coachman" rule[50] and there are a number of Florida Supreme Court cases addressing the rule.[51] Similarly, New Mexico will invoke right-for-any-reason, so long as doing so is fair to the appellant.[52] An examination of how these other jurisdictions apply the "as of record" limitation will form a more specific set of rules that appellate courts could apply when deciding whether to consider an alternate basis.

A. Erroneous Legal Theory

Right-for-any-reason was once couched in mandatory terms in Georgia such that if a trial court is right for any reason it *must* be affirmed.[53] In recent decisions, the Georgia Supreme Court has departed from this directive and substituted discretionary language.[54] *City of Gainesville v. Dodd* provides one discretionary method of evaluating an alternate basis.[55] In *Dodd*, the court says it need not affirm on an alternate reason where the trial court's judgment was premised on an "erroneous legal theory."[56] The court points out that the right-for-any-reason doctrine is a doctrine of appellate efficiency that conflicts with the role of the appellate court as an error correcting body.[57] The majority's resolution of this conflict is not a *per*

v. Green, 11 Ga. 159, 177 (Ga. 1852) (holding that a judgment should be affirmed if there is any justifying the decision, provided the reasoning did not prejudice the losing party).

[49] *Nat'l Tax Funding*, 586 S.E.2d at 240.

[50] Dade Cty. Sch. Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 n.8 (Fla. 1999). The Florida courts trace the term to Georgia. *See* Home Depot U.S.A. Co. v. Taylor, 676 So. 2d 479, 480 (Fla. Dist. Ct. App. 1996). Interestingly, the Georgia courts seem to have largely abandoned the term, while it remains common in the Florida jurisprudence on the matter.

[51] *See, e.g.*, *Dade Cty.*, 731 So. 2d at 645; Carraway v. Armour & Co., 156 So. 2d 494 (Fla. 1963); Robertson v. State, 829 So. 2d 901 (Fla. 2002); Sexton v. State, 221 So. 3d 547 (Fla. 2017).

[52] State v. Gallegos, 152 P.3d 828, 836 (N.M. 2007).

[53] Cheeves v. Lacksen, 544 S.E.2d 425, 427 (Ga. 2001); Simmons v. Boros, 341 S.E.2d 2, 3 (Ga. 1986).

[54] City of Gainesville v. Dodd, 573 S.E.2d 369, 371 (Ga. 2002); Ga.-Pacific, LLC v. Fields, 748 S.E.2d 407, 412 (Ga. 2013).

[55] *Dodd*, 573 S.E.2d at 371.

[56] *Id.* This is like the argument about erroneous legal tests raised in Pennsylvania. *See* Scampone v. Highland Park Care Ctr., LLC, 57 A.3d 582, 596 (Pa. 2012).

[57] *Dodd*, 573 S.E.2d at 372.

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se exception to right-for-any-reason in cases involving an erroneous legal theory, but an exercise of discretion that balances the various values of scope of review.[58]

The right-for-any-reason doctrine advances judicial economy, and the erroneous legal theory doctrine advances the court's error-correcting function.[59] This "erroneous legal theory" doctrine appears odd in the face of the zones of authority that the trial and appellate courts, respectively, occupy.[60] The trial court is a factfinding tribunal that is accorded significant discretion in weighing testimony and determining facts.[61] The appellate court makes legal decisions based on the record, both factual and legal, built below.[62] The appellate court's presumed expertise is legal theorizing because of more judges, clerks, and time to make a decision.[63] It would be an apparent contradiction to argue that the appellate court is well-situated to affirm a trial court on an alternate basis when it applies facts incorrectly to a sound legal theory, but not when the trial court applies the wrong legal theory.[64] Yet, the Georgia Supreme Court, despite the name of the "erroneous *legal* theory" exception, couches its discretionary resolution in *factual* terms.[65] The court argues that in many summary judgment cases, "there will be few grounds advanced for summary judgment, with no disputes pertinent to the facts supporting those grounds."[66] In these cases, right-for-any-reason should be invoked even where "the trial court's legal analysis is flawed."[67] In other cases, multiple grounds for summary judgment may be advanced with significant dispute as to those grounds, and the factual allegations concerning those grounds may go unaddressed by the trial court.[68] In

[58] *Id.* at 371–73.

[59] *Id.* at 372.

[60] Steinman, *supra* note 1, at 1523–24 (explaining the traditional deference given by appellate courts to trial courts as fact-finders).

[61] *Id.*

[62] *Id.* at 1524–25.

[63] *Id.* at 1525.

[64] *See Dodd*, 573 S.E.2d at 373.

[65] *Id.* at 372.

[66] *Id.*

[67] *Id.*; *see also* Abellera v. Williamson, 553 S.E.2d 806, 808 (Ga. 2001) (holding that where the trial court relied on only one of two grounds raised for summary judgment, the appellate court should consider the alternate reasoning in deciding whether to affirm).

[68] *Dodd*, 573 S.E.2d at 373.

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those cases, the court argues, both judicial economy and error correction are advanced vis-à-vis remand.[69] Put simply, the appropriateness of right-for-any-reason depends on the likelihood that factual allegations are insufficiently developed in the record.[70]

The dissent in *Dodd* disagrees with the majority's interpretation and argues that the right-for-any-reason doctrine is mandatory in the summary judgment context.[71] The concurrence agrees with the dissent insofar as right-for-any-reason has been traditionally mandatory in appeals from summary judgment, but the concurrence points out that the erroneous legal theory has also been couched in mandatory terms.[72] The concurrence's resolution is to ignore the erroneous legal theory and simply say an appellate court must affirm a summary judgment under right-for-any-reason *except* in cases where the record is insufficiently developed.[73] Arguably, the majority ruling implies exactly that.[74] The erroneous legal theory is simply a tool through which the majority evaluates the factual record; *i.e.*, an erroneous legal theory increases the likelihood of insufficient *factual* development.[75]

The Georgia Supreme Court's discretionary method is simply another way of evaluating whether a ground appears "as of record."[76] The "erroneous legal theory," understood in discretionary terms, acknowledges that a trial court's improper use of a legal theory might affect the factual record and make affirmance on an improperly developed alternate grounds inappropriate.[77] An improperly developed legal theory will fail to put the parties on notice of the proper legal theory, and thus, fail to notify the parties as to the requisite evidence to support the proper theory.[78] This lack of

[69] *Id.*

[70] *See id.* at 372–73.

[71] *Id.* at 373–75 (Carley, J., dissenting).

[72] *Id.* at 373 (Sears, J., concurring).

[73] *Id.*

[74] *See id.* at 373 (majority opinion).

[75] *See id.* The concurrence may be correct that it is the *incorrect* tool or, even, a clumsy tool. *See id.* at 373 (Sears, J., concurring).

[76] *See id.* at 373 (majority opinion) (illustrating the court examining the factual record in its discretionary review).

[77] *Id.*

[78] Hull, *supra* note 35, at 39–41 (illustrating the importance of ensuring that the right evidentiary matter is in the appellate record).

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notice can make the already difficult process of preparing the appellate record even more difficult because the parties must ensure the proper evidence makes it into the record.[79] When multiple grounds for summary judgment are raised and go mostly unaddressed, the record may be incomplete and may benefit from a thorough evaluation upon remand to the trial court.[80] The court in *Dodd* gives appellate courts the discretion to determine whether, even in the summary judgment context,[81] the record is sufficiently developed to sustain a right-for-any-reason determination.[82] Thus, Georgia's erroneous legal theory seeks to ensure the record is properly developed, or the alternate basis is truly "as of record."

B. Factfinding Inquiry

The "as of record" requirement is a positive inquiry.[83] The court looks at the record and asks whether there is sufficient material to support the potential alternate grounds.[84] There is a corollary question that flows from this positive inquiry; a court might ask—are there requisite facts missing from the record? That is, instead of what the record *contains*, a court might look to what *is missing* from the record. Some jurisdictions focus their search for whether an alternate basis is "as of record" through an inquiry that asks whether the trial court needs to do additional factfinding to resolve the issue.[85] This Note refers to this method as the "factfinding inquiry."

The factfinding inquiry is at its simplest in the summary judgment context. This is because the only "facts" available at the summary judgment phase are the motions

[79] *Id.* (describing the difficulties associated with preserving the record in summary judgment cases).

[80] *Dodd*, 573 S.E.2d at 373.

[81] The conflict in *Dodd* comes from both sides; *i.e.*, the erroneous legal theory doctrine and the right-for-any-reason doctrine respecting summary judgment are both couched in mandatory terms. *Id.* at 374 (Carley, J., dissenting) (citing Pryor Organization v. Stewart, 554 S.E.2d 132 (Ga. 2001)); Albany Oil Mill v. Sumter EMC, 441 S.E.2d 524 (1994) (showing the proposition that an appellate court **must** affirm a summary judgment ruling if it is right-for-any-reason).

[82] *Dodd*, 573 S.E.2d at 373 (majority opinion).

[83] *See supra* Part II.A (describing the Georgia courts' process of determining whether sufficient evidence exists in the record to support an alternate basis vis-à-vis the erroneous legal theory).

[84] *Id.*

[85] Ga. Dermatologic Surgery Ctrs., P.C. v. Pharis, 800 S.E.2d 376, 379 (Ga. App. 2017); *see, e.g.*, Ga.-Pacific, LLC v. Fields, 748 S.E.2d 407, 412 (Ga. 2013); Robertson v. State, 829 So. 2d 901, 906–11 (Fla. 2002).

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and the evidence supporting those motions.[86] Georgia imposes an additional requirement for summary judgments that "the movant raised the issue in the trial court and the nonmovant had a fair opportunity to respond."[87] An appellate court must confine its reasoning to the arguments the parties have had the opportunity to develop at the trial level.[88] The phrasing of Georgia's "raised" requirement is a stand-in for the more general factfinding inquiry. Thus, while "raised" is typically a preservation requirement placed on the appellant in the summary judgment context,[89] "raised" might also serve as a stand-in for the more general principle of notice. An appellant should have both notice that a ground for resolution is possible, and the opportunity to develop the record in response.[90] This places the emphasis on the appellant's opportunity to hear and address the arguments at the trial level.[91] This rule requiring the issue to be raised in the trial court addresses one of the conflicts in right-for-any-reason: fairness to the appellant.[92] By requiring any issue addressed in the appellate court to have been "aired out" in the trial court, the reviewing court may be more certain that the record is complete for that issue. Georgia's raised requirement balances, through notice, the potential harm of expanded scope of review with the benefits of judicial economy.[93]

The Georgia courts also apply a more general "factfinding" rule that invocation of the right-for-any-reason doctrine is inappropriate where additional factfinding is necessary to the final resolution of the issue.[94] In *Farmer v. State*, the state-appellee

[86] Summary judgment must be made prior to trial, and thus, the record is limited to the motions, transcripts of the hearings, and any documentation, statutes, or regulations supporting those motions. *See, e.g.*, FED. R. CIV. P. 56(b); GA. UNIF. SUPERIOR COURT. r. 6.6; PA. R. CIV. P. 1035.2.

[87] *Ga.-Pacific*, 748 S.E.2d at 412; Abellera v. Williamson, 274, 553 S.E.2d 806, 808 (Ga. 2001). Of course, this is further tempered by the discretionary power to refuse to consider alternate issues. *See* City of Gainesville v. Dodd, 573 S.E.2d 369, 373 (Ga. 2002).

[88] *Dodd*, 573 S.E.2d at 373 (Sears, J., concurring).

[89] *See generally* Speir, *supra* note 1, at 282–84.

[90] Generally, preservation for appellant requires the party to raise the issue and to pursue the issue, or seek a ruling, at the trial level. *Id.* at 283. Thus, a "raised" requirement does not function the same as a typical preservation requirement, but merely provides notice to the other party of the issue.

[91] *See id.*

[92] *See* CMGRP, Inc. v. Gallant, 806 S.E.2d 16, 19–20 (Ga. Ct. App. 2017).

[93] *See* Phillips, *supra* note 14, at 4.

[94] *See, e.g.*, Farmer v. State, 472 S.E.2d 70, 72 (Ga. 1996); Ga. Dermatologic Surgery Ctrs., P.C. v. Pharis, 800 S.E.2d 376, 379 (Ga. App. 2017) (insufficiently developed record to apply right-for-any-reason);

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sought to affirm a trial court's evidentiary ruling admitting hearsay evidence on an alternate basis grounded in a statutory necessity exception.[95] The majority held that the trial court made insufficient factual findings to rule on the necessity exception and declined to entertain the state's alternate basis.[96] The dissent, paired with a strong historical defense of right-for-any-reason, argued that the majority too easily dismissed the alternate basis proffered by the state and suggested that there were sufficient facts available to rule on the alternate grounds.[97] Neither the majority nor the dissenting opinions discounted the right-for-any-reason doctrine.[98] Instead, both indicated that if more factfinding were required to decide the alternate basis, remand would be appropriate.[99] The only disagreement stemmed from the sufficiency of the facts in the particular case.[100] The appropriateness of right-for-any-reason hinged on whether resolution of an alternate issue required additional factfinding.[101]

Florida also utilizes the requirement that an issue be of record in order to police equity issues within the right-for-any-reason doctrine.[102] In *Robertson v. State*, the court makes clear that "[t]he key to the application of this doctrine of appellate efficiency is that there must have been support for the alternative theory or principle of law in the record before the trial court."[103] Often, when an issue is not raised and argued before the trial court, there will not be sufficient material in the record to rule

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Sinkwich v. Conner, 654 S.E.2d 182, 183 (Ga. App. 2007) (finding that key documents missing from the record militated against right-for-any-reason and for remand in a dispute about lawyer's fees).

[95] *Farmer*, 472 S.E.2d at 72.

[96] *Id.*

[97] *Id.* at 73–74 (Carley, J., dissenting).

[98] *Id.* at 72 (majority opinion); *id.* at 74 (Carley, J., dissenting).

[99] *Id.*

[100] *Id.*

[101] *Id.* While the erroneous legal theory and the factfinding inquiry, described *supra* Parts II.A and II.B, suggest a cohesive well-articulated right-for-any-reason doctrine in Georgia, with substantive limitations, the doctrine is often invoked without explanation and without consideration of limitations. *See, e.g.*, Jones v. State, 802 S.E.2d 234, 240 (Ga. 2017) (mentioning that it is invoking right-for-any-reason only in the last line of the opinion); Considine v. Murphey, 773 S.E.2d 176, 180 (Ga. 2015) (affirming on an, apparently, alternate ground, but only mentioning right-for-any-reason in a citation's parenthetical); Brissey v. Ellison, 526 S.E.2d 851, 853 (Ga. 2000) (mentioning right-for-any-reason in the last sentence of the opinion).

[102] *See* Robertson v. State, 829 So. 2d 901, 906–11 (Fla. 2002).

[103] *Id.* at 906–07.

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on that alternate basis.[104] This parallels the basic formulation in Pennsylvania: the positive inquiry of whether there is sufficient evidence as of record.[105] The analysis in *Robertson* makes clear that the Florida Supreme Court also asks the corollary when examining the record: what is not in the record and why?[106]

In *Robertson*, the court reversed an intermediate appellate court's invocation of right-for-any-reason to affirm the trial court's evidentiary ruling.[107] The Florida Supreme Court noted that before admitting such evidence, the trial court normally makes various factual determinations with each side presenting or rebutting evidence.[108] The defendant would have had the opportunity to present and rebut evidence on the distinct theory advanced by the state.[109] Further, if the trial court admitted the evidence, the defendant would have the right to certain jury instructions.[110] All of this served to suggest that if the state had sought to present the evidence, under the alternate rule, the record might have been substantially different.[111] In these circumstances, the absence of *potential* evidence (and the opportunity to provide that evidence) is sufficient to render the record incomplete as to the issue and militate against the use of right-for-any-reason.[112]

The fact-finding inquiry focuses on what would have happened at the trial level if the alternate grounds had been raised earlier, which creates a hypothetical situation. If the court believes that the alternative grounds could have led to a

[104] *Id.* at 907 (approving similar reasoning in, Department of Revenue *ex rel.* Rochell v. Morris, 736 So. 2d 41, 42 (Fla. Dist. Ct. App. 1999)).

[105] *See, e.g.*, Ario v. Ingram Micro, Inc., 965 A.2d 1194, 1200 (Pa. 2009).

[106] *See generally Robertson*, 829 So. 2d at 901.

[107] *Id.* at 907.

[108] *Id.* at 907–08.

[109] *Id.* (quoting Robertson v. State, 780 So. 2d 106, 120 (Fla. Dist. Ct. App. 2001) (Sorondo, J., dissenting)).

[110] *Id.* at 908.

[111] *Id.* (quoting Robertson v. State, 780 So. 2d 106, 120 (Fla. Dist. Ct. App. 2001) (Sorondo, J., dissenting)).

[112] *Id.* Interestingly, this substantive oversight of the right-for-any-reason doctrine seems to be substantially similar to the complaint lodged by Judge Bowes in her unpublished dissent in Traux. Traux v. Roulhac, No. 1797, 2014 Pa. Super. Unpub. LEXIS 3049, *15 (Pa. Super. Oct. 2014) (arguing where the basis for summary judgment was not argued below, the plaintiff has not had the opportunity to develop an appropriate record).

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different record, it will not consider affirmance.[113] If the record would not have been different, or the other litigant had notice of the issue and should have developed the record, the court will consider the alternate grounds.[114]

C. Fact-Dependency

The final method of determining "as of record" that this Note examines is fact-dependency. Fact-dependency focuses on the factual allegations underlying the alternate issues and the argued issues.[115] The fact-dependency method, as described here, does not require the court to imagine the trial with the alternate issue or to engage in hypotheticals, and will provide a more mechanical, concrete, framework that courts may apply.[116]

New Mexico formulates its right-for-any-reason doctrine as follows: "we will affirm the trial court's decision if it was right for any reason so long as it is not unfair to the appellant for us to do so."[117] Fairness, under this doctrine, is sometimes defined in terms of whether the alternate basis would be fact-dependent.[118] In *State v. Franks*, the court thoroughly articulated this principle, stating, "[i]n particular, it would be unfair to an appellant to affirm on a fact-dependent ground not raised below."[119] The court then articulated two reasons that fact-dependent alternate basis are unfair to appellants:

> First, ordinarily it is improper for [an appellate court] to engage in fact-finding; that is a trial-court function. Second, it would be improper to make a finding on a

[113] *See, e.g.*, *Robertson*, 829 So. 2d at 907 (refusing to consider alternate grounds because of the effect on the record); Farmer v. State, 472 S.E.2d 70, 72 (Ga. 1996).

[114] *See* Abellera v. Williamson, 274 553 S.E.2d 806, 808 (Ga. 2001) (holding that the court should consider an alternate issue where the appellant had the opportunity to respond to the issue).

[115] *See infra* notes 125–28 and accompanying text (illustrating an examination of the facts necessary to resolve an issue).

[116] *See infra* notes 136–39 and accompanying text (describing this Note's interpretation of fact-dependency).

[117] State v. Gallegos, 152 P.3d 828, 836 (N.M. 2007).

[118] *See, e.g.*, Drummond v. Drummond (*In re* Drummond), 945 P.2d 457, 461 (N.M. Ct. App. 1997); State v. Franks, 889 P.2d 209, 212 (N.M. Ct. App. 1994).

[119] *Franks*, 889 P.2d at 212.

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> fact relevant only to an issue that had not been raised below, because the appellant lacked an opportunity to present admissible evidence relating to the fact.[120]

Importantly, the fact-dependent grounds are "unfair" where the underlying facts were relevant only to the unraised alternate grounds.[121] In New Mexico, an appellate court may invoke right-for-any-reason where the alternate grounds "do not require looking 'beyond the *factual allegations* that were raised and considered below.'"[122]

Many decisions of the New Mexico Supreme Court do not explicitly state this as a "fact-dependent grounds" rule but, nonetheless, make the rule clear in their analyses of right-for-any-reason.[123] Where the factual underpinning of the issue is clearly presented, this is a relatively easy doctrine to follow.[124] For instance, in *Drummond v. Drummond*, the court considered an order from the trial court reopening an adoption decree.[125] The trial court reopened the adoption decree on the basis that Grandparents made misrepresentations to Mother.[126] While the Supreme Court found that the trial court misapplied the law as to misrepresentation, it listed the facts—either not disputed or found by the trial court—that would support two separate bases on which to affirm.[127] In this instance, the court very clearly laid out the factual bases that were submitted and argued before the trial court that would make it fair to rule on an alternate legal basis, even if the particular legal basis was not raised below.[128]

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[120] *Id.*

[121] *Id.*

[122] Wild Horse Observers Ass'n v. N.M. Livestock Bd., 363 P.3d 1222, 1230 (N.M. Ct. App. 2015) (citing State v. Wasson, 964 P.2d 820, 824 (N.M. Ct. App. 1998)) (emphasis added).

[123] *See, e.g.*, *Drummond*, 945 P.2d at 461; State v. Carrillo, 399 P.3d 367, 375 (N.M. 2017); State v. Vargas, 181 P.3d 684, 687 (N.M. 2008).

[124] *Carrillo*, 399 P.3d at 375 (upholding the admissibility of business record evidence because appellant had testified at trial as a custodian of said business records); *Vargas*, 181 P.3d at 687 (ruling on an alternate basis because the factual allegations underlying the basis were both "raised and considered below").

[125] *Drummond*, 945 P.2d at 458.

[126] *Id.* at 459.

[127] *Id.* at 461–63 (holding either the doctrine of equitable estoppel or exceptional circumstances justified reopening the adoption decree).

[128] *Id.*

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CMGRP, Inc. v. Gallant illustrates the opposite end of the fact bound spectrum.[129] In *CMGRP*, the appellee successfully argued for declaratory judgment at the trial court.[130] The trial court held that the non-solicitation clause in Gallant's employment contract was unenforceable.[131] Gallant argued that the enforceability of the clause was a legal question to be resolved from an examination of the contract.[132] On appeal, she offered, as the alternate basis for affirmance, that CMGRP failed to present sufficient evidence as to the reasonable necessity of the provision.[133] Here, the appellee had affirmatively argued that factual development was unnecessary before the trial court and then sought to invoke right-for-any-reason on evidentiary grounds.[134] The Georgia appellate court easily dismissed the alternate reasoning because her positive framing of the issue as a question of law, and failure to raise any factual issue below, precluded notice to CMGRP that it should present evidence on the issue.[135]

In *Drummond*, the predicate facts were not just available in the record, the trial court considered all of the predicate facts necessary for either alternative basis.[136] On the other hand, in *CMGRP*, the appellee raised a fact-dependent alternate basis where the ruling below did not rely on any factual development, and the appellate court easily refused to employ right-for-any-reason.[137] On the one extreme of the fact-dependency analysis, where a litigant cannot point to anything in the record in support of her proposition, the court may easily refuse to employ the right-for-any-reason doctrine.[138] Even when a litigant can point to the record for support of his proposition, it must be clear, either from the nature of the trial court's ruling or the

[129] CMGRP, Inc. v. Gallant, 806 S.E.2d 16 (Ga. Ct. App. 2017).

[130] *Id.* at 25.

[131] *Id.*

[132] *Id.* at 19–20.

[133] *Id.*

[134] *Id.*

[135] *Id.*

[136] Drummond v. Drummond (*In re* Drummond), 945 P.2d 457, 461 (N.M. 1997). ("[In order to find Grandparents made a misrepresentation to Mother . . . the district court *necessarily accepted* Mother's testimony. . . .").

[137] *CMGRP*, 806 S.E.2d at 19.

[138] *Id.* (refusing to apply right-for-any-reason in a short paragraph).

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trial court's opinion, that the lower court considered the factual allegation or that the fact was never in dispute.[139]

III. EVALUATING "AS OF RECORD"

The "as of record" requirement is central to the right-for-any-reason analysis. Yet, when Pennsylvania appellate courts exercise their discretion to either address or refuse to address alternate bases for affirmance, they rarely explain their decision in explicit terms of the evidence in the record.[140] This Note proposes that Pennsylvania courts articulate an explicit methodology for examining whether an issue is apparent as of record, and thus, whether right-for-any-reason is appropriate. This Note proposes, generally, the following formulation:

> An appellate court may affirm a lower court if it is right-for-any-reason apparent as of record. A basis is apparent as of record when it is not fact-dependent. The alternate basis is not fact-dependent where the predicate facts underlying the alternate basis are substantially the same as those underlying issues argued below such that it would be fair to appellant to consider those facts. Fairness to appellant is considered in terms of whether the appellant had notice that the predicate facts for the alternate basis would be at issue in the case.

The proposal is guided by an analysis of several jurisdictions' use of right-for-any-reason and specifically addresses how a court might more accurately consider both the record before it and the effect an alternate issue might have on the record.

A. Fact-Dependency

The proposed method of evaluating right-for-any-reason provides a two-step process for determining when an alternate basis is apparent as of record. Under the proposed test, the court first employs the mechanical fact-dependency test. The court considers and then "sets aside" what evidence in the record is required to decide the

[139] *Drummond*, 945 P.2d at 463–64; Wild Horse Observers Ass'n v. N.M. Livestock Bd., 363 P.3d 1222, 1230 (N.M. Appeals 2015).

[140] *See, e.g.*, Commonwealth v. Doty, 48 A.3d 451, 456 (Pa. Super. 2012) (affirming PCRA decision on alternate grounds without explaining why right-for-any-reason is appropriate); *In re* Jacobs, 15 A.3d 509, 509 (Pa. Super. 2011) (noting the power to affirm on an alternate basis only in a footnote); Simmons v. Cobbs, 906 A.2d 582, 584 (Pa. Super. 2006) (tying the court's ability to affirm on any basis in the judicial boiler-plate along with the standard of review).

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alternate issue.[141] This evidence is the predicate evidence. The court then evaluates the factual assertions and allegations required to decide the issues argued below, and compares those to the predicate evidence. If the predicate evidence is unique to the alternate issue, the court should refuse to consider it as a basis for affirmance.

In *Wild Horse Observers Association*, the litigants debated the proper legal categorization of a group of horses that roamed public lands around Placitas, New Mexico.[142] The litigation centered on the statutory status of the animals, either "estray livestock" or wild horses, and the corresponding obligations of the New Mexico Livestock Board ("Appellee") regarding horses on the Placitas Open Space.[143] Wild Horse Observer Association ("Appellant") sought to overturn the trial court's dismissal based on the statutory definition of estray and livestock.[144] The appellate court agreed and overruled the trial court.[145] Appellee nonetheless sought to invoke right-for-any-reason to affirm the trial court's dismissal on the alternate basis of mootness.[146] At the trial court level, Appellee introduced affidavit evidence that the horses no longer had access to the Placitas Open Space, and thus, any obligation on the part of Appellee was moot.[147] The court looked beyond the fact that these affidavits were in the record to note, "nothing in the record indicat[ed] the district court actually considered these affidavits in dismissing the Association's claims."[148] The affidavits, as the predicate evidence, were not important to the issues actually decided below and were not "raised and considered below."[149] In other words, the predicate evidence was unique to the alternate basis and could not be used to invoke right-for-any-reason.[150]

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[141] Of course, if the appellate court discovers *no* evidence in the record, then the rest of the analysis is moot, and it should refuse to consider the issue.

[142] *Wild Horse Observers*, 363 P.3d at 1224.

[143] *Id.* at 1224–25.

[144] *Id.* at 1225.

[145] *Id.*

[146] *Id.* at 1229.

[147] *Id.* at 1230.

[148] *Id.*

[149] *Id.*

[150] *Id.* The court also found, with similar reasoning, that collateral estoppel could not be a basis for right-for-any-reason. *Id.*

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If the predicate evidence was central to contested issues below, then an appellate court should consider the merits of the alternate issue. In many cases, whether a set of facts was central will be obvious, and the appellate court need not proceed to any sort of "fairness" analysis.[151] For instance, where the litigants do not contest factual allegations and the court is faced with an issue of statutory interpretation, the court should invoke right-for-any-reason.

In *State v. Wasson*, the state sought to overturn a trial court's dismissal of forgery charges filed against Wasson.[152] After being pulled over, Wasson lied about his name and signed his brother's name on traffic citations.[153] The New Mexico Supreme Court disagreed with the trial court's reasoning for dismissal.[154] Wasson sought to affirm the dismissal under the right-for-any-reason doctrine.[155] He argued that a rule requiring more specific charges to supersede general ones applied and required the dismissal of his forgery charges.[156] The court easily considered this alternate basis that only required the analysis of a statute because such a basis, "does not require [a] look beyond the factual allegations that were raised and considered below."[157] Where the alternate issue concerns a statute with uncontested factual underpinnings, a basis focusing on that statute would normally be appropriate under right-for-any-reason.[158]

In cases like *Wasson*, where the facts are conceded, it should be facially clear whether the alternate basis is appropriate or not.[159] If the suggested alternate basis is grounded in the conceded facts, the court may invoke right-for-any-reason. Where the alternative appears to have no support in the record, the court should refuse to consider the basis. Some cases will be less clear. The predicate evidence will overlap

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[151] *See* CMGRP, Inc. v. Gallant, 806 S.E.2d 16, 19–20 (Ga. Ct. App. 2017) (refusing to apply right-for-any-reason where appellee explicitly argued the matter was governed by a legal question below).

[152] State v. Wasson, 964 P.2d 820, 821–22 (N.M. 1998).

[153] *Id.*

[154] *Id.* at 824.

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *See id.* at 825. After considering the alternate basis on the merits, the court ruled for the state. *Id.* Different jurisdictions might handle this situation differently, only putting the right-for-any-reason analysis in its opinion where the court intends to affirm on the alternate basis.

[159] *Id.*

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with factual allegations relevant to argued issues, but it will be unclear how central those factual allegations were to the fact finder's resolution. In such cases, some uncertainty will remain after the application of the more mechanical fact-dependency analysis. In the face of such uncertainty, the court proceeds to analyze fairness under the hypothetical fact-finding analysis.[160]

B. Fairness

The second step of the proposed right-for-any-reason analysis is a fairness analysis similar to the fact-finding inquiry conducted by the Georgia and Florida courts.[161] To evaluate fairness, the court must determine whether the appellant had notice that the predicate evidence was important to the case and a fair opportunity to respond with her own evidence. The court should ask itself this hypothetical question: would the record change, and how would it change if the issue were debated below? If the court can easily ascertain that the record would be substantially the same, and is currently sufficient to answer the alternate basis, the court should invoke right-for-any-reason. If, on the other hand, the court finds it difficult to firmly answer these questions, the court should remand the case or otherwise reverse the trial court's erroneous reasoning.

In *Georgia Dermatologic Surgery Centers. P.C. v. Pharis*, the Georgia Court of Appeals considered the trial court's grant of summary judgment in favor of Pharis.[162] Georgia Dermatologic Center's ("Appellant's") claim involved breach of fiduciary duty, which stemmed from Pharis' operation of a competing medical practice while allegedly on Appellant's board.[163] The stated grounds for summary judgment were that Appellant "was estopped from asserting that Pharis [was] a director of [appellant corporation]."[164] The appellate court found the trial court's

[160] This Note does not seek to significantly alter the actual application of right-for-any-reason. Instead, this Note concentrates on proposing a method to clarify the process and help guide an appellate court in the application of the doctrine as it is already applied. Of course, the very process of consciously considering these issues might change some outcomes. As a prudential matter, Pennsylvania's appellate courts might cut the second step of this analysis and simply remand if there is sufficient uncertainty after application of the fact-dependency analysis. Considering the courts' traditional discretion in this area, this note keeps the second step to keep the proposal in line with current practice.

[161] *See supra* Part II.B.

[162] Ga. Dermatological Surgery Ctrs., P.C. v. Pharis, 800 S.E.2d 376, 378 (Ga. App. 2017).

[163] *Id.*

[164] *Id.*

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reasoning erroneous and considered an alternate basis.[165] Pharis, apparently acknowledging the weakness of the equitable estoppel argument, sought to invoke right-for-any-reason based on insufficient evidence of his reinstatement to Appellant's board of directors.[166] The appellate court acknowledged that Pharis' arguments were strong,[167] and the recitation of facts made by the court suggested that there was some support in the record for this alternate basis.[168] Yet, the trial court's opinion was unclear as to which facts it based its decision and the supporting evidence for the trial court's equitable theory was not obvious from the record.[169] It was clear that evidence of Pharis' status as a director was important in the proceeding, yet unclear to what extent the trial court emphasized this evidence.[170] The court ruled that the record was insufficiently developed and declined to act on the right-for-any-reason claim.[171] In other words, uncertainty surrounded the place of the predicate evidence in the trial court proceedings and made it unclear whether the appellant was on notice to rebut or proffer related evidence.[172] Fairness to Appellant favored remand and the further development of the record.[173]

Fairness is synonymous, in this context, with sufficient notice to allow an appellant to fully develop the record. As such, fairness to appellant in the right-for-any-reason analysis aids in correct decision making. By affording the appellant the opportunity to present and rebut evidence pertinent to an issue, the judicial decision maker, as in *Pharis*, ensures that she makes her decision on a record fully developed in the context of the issue, not simply the record as is.[174]

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[165] *Id.* at 379.

[166] *Id.*

[167] *Id.*

[168] *Id.* at 378 (appellant corporation's primary shareholder, Baucom, conceded in deposition that he did not consider Pharis an officer or director; testimony and documentation showed that Baucom was listed as the sole director on a number of important documents).

[169] *Id.* at 379.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *See id.* The court here does not discuss this analysis in terms of fairness to appellant. An examination of the discretion employed by the court suggests that fairness is likely one reason, another reason might be ensuring the correct decision is reached.

[174] *Id.*

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IV. CONCLUSION

This formulation is not a radical departure from the way in which Pennsylvania appellate courts evaluate application of right-for-any-reason. Instead, it reflects the concerns that the appellate courts have expressed regarding the doctrine as to both fairness and accuracy.[175] The formulation serves to (i) elucidate the traditional right-for-any-reason recitation in Pennsylvania by clarifying what basis will be "apparent as of record," (ii) demystify when and how an appellate court decides to affirm on an alternate basis, and (iii) guide an appellate court in its analysis. As it is still a discretionary process, the application of right-for-any-reason will not always be unanimous, but the reasons for and against application in a given case should be articulated. Judicial transparency may be of special importance in Pennsylvania given the Commonwealth's strong commitment to judicial openness.[176]

A clarification of right-for-any-reason analysis requires an appellate court to go beyond the normal statement that it may affirm on any basis and to lay bare its thought process. Such an approach would mitigate some of the adverse effects of scope-broadening by bolstering the perceived integrity of the adversarial process.[177] Additionally, the requirement that the court explicitly consider whether the evidence required for an alternate basis was crucial, and whether appellant had both notice and the opportunity to contest the predicate evidence underlying an issue reduces the potential for an unfair decision on an underdeveloped record.[178] The proposed formulation also requires the appellate court to thoroughly examine the record and the evidence supporting both the alternate basis and the issues argued below. This process, while time consuming, ensures that the benefits of a scope-broadening doctrine materialize. Scope-broadening only works to avoid unjust results where the court may say, with reasonable certainty, that the avoided result is incorrect and unjust.[179] An explicit articulation of when and why an appellate court invokes right-

[175] *See, e.g.*, Commonwealth v. Fant, 146 A.3d 1254 (Pa. 2016); Commonwealth v. DiNicola, 866 A.2d 329 (Pa. 2005); Saylor, *supra* note 2.

[176] *See* PA. CONST. art. 1, § 11; Commonwealth v. Hayes, 414 A.2d 318, 332 (Pa. 1980) (Larsen, J., concurring) (pointing out that the open courts clause requires access to criminal and civil trials and "the appearance of impropriety in the administration of criminal justice is as destructive as its reality"); Commonwealth v. Contakos, 453 A.2d 578, 580–82 (Pa. 1982) (discussing Penn's trial and the concerns underlying Pennsylvania's Open Courts Clause).

[177] *See* Phillips, *supra* note 14, at 5 ("Every departure from a scope-limiting rule . . . undercuts the adversarial process to some extent.").

[178] *See id.* at 4–5 (describing litigation specific values harmed by broadening scope).

[179] *See id.* at 6 (describing the scope-broadening goal of avoiding unjust results).

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for-any-reason would protect the integrity of the judicial system and help ensure that an appellate court is not avoiding facially unjust results by imposing unjust results in-fact.[180]

[180] This Note does not attempt to address all issues related to right-for-any-reason doctrine and focuses on defining "as of record." Some Pennsylvania Supreme Court Justices express concerns about when it is appropriate to invoke right-for-any-reason to affirm an intermediate court's reversal. *See, e.g.*, Saylor, *supra* note 2, at 495–96 (debating whether the Supreme Court can affirm a trial court by *reversing* an appellate court for any valid reason); Commonwealth v. Fant, 146 A.3d 1254, 1267 (Pa. 2016) (Wecht, J., concurring) (arguing that affirming an appellate court reversal on alternate grounds is an unsettled part of right-for-any-reason doctrine). Though it is likely that an increased focus on the evidence produced through the adversarial process at the trial level would impact these arguments, this Note does not examine what effect, if any, a change in the approach to "as of record" may have on that debate.

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