Parsons, Carol

From: Richard R. Orsinger [richard@orsinger.com]
Sent: Friday, January 18, 2002 1:54 PM
To: Chris Griesel
Cc: Lee, Debra; Babcock, Chip; William V. Dorsaneo (E-mail)
Subject: Supreme Court Rule Advisory Committee, TRAP 33.1

Chris:

I have comments on the Supreme Court's reaction to the SCAC request to amend TRAP 33.1, relating to preservation of error on legal and factual sufficiency of the evidence in a non-jury trial.

I support the SCAC's recommendation that we make it clear that no procedural step should be required in order to preserve a sufficiency of the evidence complaint on appeal from a non-jury trial. I support this proposition both for the practical reason that it has been the prevailing practice for years, and also for reasons relating to procedure.

In a jury trial, there is no jury charge to object to, and there is no verdict to JNOV or disregard. To preserve a legal sufficiency challenge, non-jury litigants would have to rely on a motion for instructed verdict (even though there is no verdict), or they would have to file something not presently recognized in Texas practice such as a post-rendition objection to the rendition, or motion modify the judgment to arrive at the opposite result.

Relying on a motion for instructed "verdict" to preserve a legal sufficiency challenge in a non-jury case is complicated by Quantel Business Sys., Inc. v. Custom Controls Co., 761 S.W.2d 302 (Tex.1988), which allows the court, when the plaintiff rests in a non-jury trial, to deny plaintiff relief on either legal sufficiency grounds or just based upon a preponderance of the evidence. If such a motion is granted without specifying the basis (as will ordinarily be the case upon oral motions), was it for legal sufficiency or failure to establish something by a preponderance of the evidence? Further, the motion for instructed verdict when the plaintiff rests is waived as far as the defendant is concerned if the defendant puts on evidence in rebuttal, requiring a new motion for instructed verdict at the close of evidence. For a plaintiff to preserve a "legal sufficiency" challenge, the plaintiff would have to move for judgment (or would he move for a finding) as a matter of law at some point, in order to complain on appeal that a fact issue was established as a matter of law.

Also, a verdict is determined before judgment is rendered, so parties can focus their legal sufficiency challenges for the trial court before the trial court renders judgment. In a non-jury trial, the findings of fact will almost always be issued after the judgment is signed. Therefore, if we require parties to bring legal sufficiency challenges to specific findings of fact, then unlike in jury trials these legal sufficiency challenges will occur after the trial court has signed a judgment.

As to factual sufficiency challenges, the logic of requiring a motion for new trial does not fit well into non-jury trials. In a jury trial, a trial judge is bound to render judgment on the verdict if there is legally sufficient evidence to support it. If the evidence is legally sufficient but not factually sufficient to support the verdict, the trial court can only grant a new trial--it cannot render a judgment contrary to the jury verdict. In a non-jury trial, a judge is not bound to render a judgment in favor of a party who has established a proposition by legally sufficient evidence--unless that evidence is so strong that it establishes the proposition as a matter of law. The distinction between legally sufficient evidence and factually sufficient evidence in a non-jury trial therefore

does not limit the trial court's options (render judgment vs. grant new trial), but only the appellate court's options (i.e., rendition vs. remand). So distinguishing between a legal and factual sufficiency complaint needs to be made to the appellate court but not necessarily to the trial court.

Apart from these details, it is my belief that the purpose of a motion for new trial is to call the court's attention to and secure the court's ruling on an issue which the trial court has not already ruled on. In a jury trial, unless some motion is made there will be no ruling by the trial court on the sufficiency of the evidence. In a non-jury trial, the trial court's rendition of judgment itself is the ruling on the sufficiency of the evidence. Why have the judge rule when rendering judgment, and require the parties to request the judge to rule on the same thing a second time after (s)he has ruled on it the first time?

Apart from the advisability of this proposed change, I am also troubled by the language of the proposed change to TRAP 33.1(d). Often a party who has the burden of proof in the trial court but fails to convince the trial judge will not end up with a negative finding on that point, but instead the trial court will just refuse to grant a favorable finding that the party requests. So we will not always have a negative finding that would be against the overwhelming weight of the evidence. Sometimes on appeal the proponent will be attacking the trial court's refusal to grant a desired finding. Instead of saying that a finding was proved as a matter of law or is against the great weight and preponderance of the evidence, we should say that "a requested finding was established as a matter of law or by the great weight and preponderance of the evidence." The problem with my proposed language is that it requires preservation as to specific findings or requested findings, and therefore cannot be done during trial, and likely cannot be done before rendition and signing of the judgment.

Thanks.

Richard

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