Federalism and Appellate Procedure: Five Texas-Federal Differences to Know

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While federal and Texas civil procedure are closely related, the two systems have a number of small differences that can have considerable practical effect on a case. This article reviews five such differences that are particularly relevant to a specialist in civil-appellate law. The topics are: (1) findings of fact, (2) the "*Casteel* problem" in jury charges, (3) judgment finality, (4) personal jurisdiction, and (5) JNOV motions. Hopefully, these notes will come in handy someday for a skilled appellate lawyer who is working on a federal case after an extended period primarily focusing on state appeals, or vice versa.

1. Findings of Fact.

In Texas, in reviewing the results of a bench trial, an appellate court will often imply findings in support of the judgment. *See* Tex. R. Civ. P. 299 ("…The judgment may not be supported upon appeal by a presumed finding upon any ground of recovery or defense, no element of which has been included in the findings of fact; but when one or more elements thereof have been found by the trial court, omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment….").

Federal practice uses a different and less-deferential approach. *See ENI US Operating Co. v. Transocean*, 919 F.3d 931, 936 (5th Cir. 2019) ("Under [Fed. R. Civ. P.] 52(a), implicit findings will not automatically be inferred to support a conclusory ultimate finding. The district court must lay out enough subsidiary findings to allow us to glean 'a clear understanding of the analytical process by which [the] ultimate findings were reached and to assure us that the trial court took

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care in ascertaining the facts.' " (citation omitted)).

2. Jury charges—the "Casteel" problem.

In Texas, the problem of appellate review for jury submissions that mix valid and invalid legal theories is addressed by a line of cases named for *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378 (Tex. 2000). The Fifth Circuit does not have such a seminal case but a good summary of its analytical framework appears in footnote 4 of *Wellogix, Inc. v. Accenture, LLP*, 716 F.3d 867 (5th Cir. 2013), and *McCaig v. Wells Fargo Bank (Texas), N.A.*, 788 F.3d 463, 476 (5th Cir. 2015) (quoting *Muth v. Ford Motor Co.*, 461 F.3d 557, 564 (5th Cir. 2006)).

The two systems differ on how to treat a broad-form jury-verdict question that contains multiple bases for liability, all of which are legally valid, but some of which are not supported by sufficient evidence. The Texas Supreme Court treats this situation as a *Casteel* problem and will reverse. See *Benge v. Williams*, 548 S.W.3d 466 (Tex. 2018) ("The jury question in the present case, unlike the one in *Casteel*, did not include multiple theories, some valid and some invalid. It inquired about a single theory: negligence. But we have twice held that when the question allows a finding of liability based on evidence that cannot support recovery, the same presumption-of-harm rule must be applied.").

The Fifth Circuit, on the other hand, uses a more deferential standard of review and will not automatically reverse. *See Nester v. Textron, Inc.*, 888 F.3d 151 (5th Cir. 2018): "We will not reverse a verdict simply because the jury might have decided on a ground that was supported by insufficient evidence." (applying, *inter alia*, *Griffin v. United States*, 502 U.S. 46 (1991)).

3. Judgment finality.

In Texas practice, "a judgment is final *either* if 'it actually disposes of every pending claim and party' *or* 'it clearly and unequivocally states that it finally disposes of all claims and

all parties.›" *Bella Palma LLC v. Young*, 601 S.W.3d 799, 801 (Tex. 2021) (emphasis in original) (quoting *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex. 2001)).

In federal practice, however, "[w]ithout a [FED. R. CIV. P.] 54(b) order, 'any order or other decision, *however designated*, that adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties.'" *Guideone Ins. Co. v. First United Methodist Church of Hereford*, No. 20-10528, 2021 WL 688437 at*1 (5th Cir. Feb. 22, 2021) (emphasis in original) (quoting FED. R. CIV. P. 54).

4. Personal jurisdiction.

Because Texas's longarm statute extends to the full extent allowed by the Fourteenth Amendment Texas and federal courts purport to apply the identical substantive law in evaluating challenges to personal jurisdiction. Nevertheless, the systems differ in an important procedural matter and in how they articulate the controlling substantive standard.

Procedurally, in federal court, "[t]he party seeking jurisdiction bears the burden of proof but must only present a prima facie case." *E.g.*, *Jones v. Artists Rights Enf. Corp.*, 789 Fed. Appx. 423, 425 (5th Cir. 2019). In Texas state court, however: "The plaintiff bears the initial burden of pleading allegations that suffice to permit a court's exercise of personal jurisdiction over the nonresident defendant. Once the plaintiff has met this burden, the defendant then assumes the burden of negating all potential bases for personal jurisdiction that exist in the plaintiff's pleadings." *Searcy v. Parex Resources, Inc.*, 496 S.W.3d 58, 66 (Tex. 2019).

Substantively, an element of the Texas personal-jurisdiction test is that "there must be a substantial connection between those contacts and the operative facts of the litigation." *See Moki Mac River Expeditions v. Drugg*, 221 S.W.3d 569 (Tex. 2007). The Fifth Circuit has not adopted this phrasing; on this specific topic, it continues to focus more generally on whether

the plaintiff's "claims…stem from [its] contacts with Texas." *See Carmona v. Leo Ship Mgmnt., Inc.* 924 F.3d 190, 197 (5th Cir. 2019). The U.S. Supreme Court is presently considering appeals from other states that use language similar to that in *Moki Mac*.

5. JNOV motions

FED. R. CIV. P. 50(a)(2) and (b) require that a party make a motion for judgment as a matter of law before the close of evidence, and then renew that motion after the close of evidence. A line of Fifth Circuit authority holds that the failure to renew a JMOL motion bars an appeal about evidentiary sufficiency. *See McLendon v. Big Lots Stores, Inc.*, 749 F.3d 373, 375 n.2 (5th Cir. 2014); *see also Acadian Diagnostic Labs, LLC v. Quality Toxicology, LLC*, 965 F.3d 404, 413 (5th Cir. 2020). Another line of cases allows a sufficiency challenge but only if reviewed for plain error. *Shepherd v. Dallas Cty.*, 591 F.3d 445, 456 (5th Cir. 2009). One recent Fifth Circuit case holds that a charge objection may be enough to preserve a sufficiency ground. *Al-Saud v. YouToo Media, L.P.*, 754 Fed. Appx. 246, 250 n.2 (5th Cir. 2018) (citing *Jimenez v. Wood Cty., Tex.*, 660 F.3d 841, 844–45 (5th Cir. 2011) (en banc)); *see also NewCSI, Inc. v. Staffing 360 Sols., Inc.*, 865 F.3d 251, 263–64 (5th Cir. 2017).

The Texas rules do not have a comparable renewal requirement. *See* TEX. R. CIV. P. 301 ("[U]pon motion and reasonable notice the court may render judgment non obstante veredicto if a directed verdict would have been proper.…"). A legal-sufficiency point is preserved by a directed-verdict motion, a JNOV motion, a proper charge objection, a motion to disregard a jury finding, or a motion for new trial. *See, e.g.*, *Cecil v. Smith*, 804 S.W.2d 509, 511 (Tex. 1991).

Both the federal and Texas rules allow a post-trial sufficiency challenge involving expert testimony, although the scope of that review may be narrower than review of a traditional *Daubert* ruling. See *Stevenson v. E.I. DuPont Nemours & Co.*, 327 F.3d

400, 407 (5th Cir. 2003) ("[T]his Court may review the record to determine the sufficiency of the evidence; the defendant's waiver of any challenges to the admissibility of the expert testimony does not preclude such a sufficiency review by this Court."); *City of San Antonio v. Pollock*, 284 S.W.3d 809, 817 (Tex. 2009) ("[W]hen the challenge is restricted to the face of the record—for example, when expert testimony is speculative or conclusory on its face—then a party may challenge the legal sufficiency of the evidence even in the absence of any objection to its admissibility." (quoting *Coastal Transp. Co. v. Crown Central Petrol. Corp.*, 136 S.W.3d 227, 233 (Tex. 2004)).