DANIEL R. SCHRAMM
Retired Lawyer (Inactive Status as of Oct. 5, 2023)
Residence: 14915 Greenberry Hill Court
Chesterfield, Missouri 63017
Email: daniel@dschrammlaw.com

ANOTHER HEADWIND FOR AN APPELLANT MAKING A FACTUAL CHALLENGE

At the risk of coming across like a curmudgeon, I want to confront what I consider to be a questionable procedural tactic used by some Missouri appellate courts to dispose of appeals from findings of fact. On occasion, the appellate judges will affirm the judgment summarily if the judges do not believe the appellant's lawyer has presented all possible evidence in favor of the judgment. And the appellate court is the sole arbiter of what is sufficient. As a retired lawyer on inactive status, I now feel free to express my opinion about the fairness of this tactic.

Appellants face an extraordinarily heavy burden when challenging a factual finding in a judgment under Missouri law. Indeed, the Missouri Supreme Court declares it "rarely" reverses a judgment as against the weight-of-the-evidence.[1] Under the general standard of review, the reviewing court must "give due regard to the trial court's opportunity to judge the credibility of witnesses."[2] The evidence and all reasonable inferences must be viewed in the light most favorable to the judgment, and all contrary evidence and inferences are disregarded.[3]

The reviewing courts thus impose strong headwinds upon any appellant who is challenging factual findings. Beyond the general standard of review, the courts adopt a four-pronged test when an appellant argues the trial court's finding was against the weight-of-the-evidence. The appellant must:

(1) identify a challenged factual proposition necessary to sustain

[1] *Pearson v. Koster,* 367 S.W.3d 36, 52 (Mo. banc 2012).
[2] *Stuart v. Ford*, 292 S.W.3d 508, 514 (Mo.App. S.D. 2009).
[3] *Id.* at 514.

the judgment;
(2) identify all the favorable evidence supporting the proposition;
(3) identify the contrary evidence, subject to the trial court's credibility determinations, explicit or implicit; and
(4) prove in light of the whole record that the supporting evidence, when considered along with the reasonable inferences drawn therefrom, is so lacking in probative value that the trier of fact could not reasonably believe the proposition.[4]

In a similar vein, the courts adopt a three-pronged test when an appellant argues the trial court's finding was not supported by substantial evidence. The appellant must:

(1) identify a challenged factual proposition necessary to sustain the judgment;
(2) identify all the favorable evidence supporting the proposition;
(3) demonstrate why the supporting evidence, when considered along with the reasonable inferences drawn therefrom, is so lacking in probative value that the trier of fact could not reasonably believe the proposition.[5]

When appellants fail to go through the required four-pronged or three-pronged analysis – as applicable - the appellate courts say the argument is "analytically useless and provides no support for [their] challenge."[6] By taking this approach, the courts force appellants to apply the correct analytic framework. I see no problem with compelling appellants to conduct the proper analysis.

My problem is with how some reviewing courts apply the second prong of both a substantial evidence challenge and a weight-of-the-evidence challenge. For the second prong of each challenge, the appellant is directed to "identify all favorable evidence in the record supporting [the] proposition" found by the trial court.[7] If the appellate

[4] *Hopkins v Hopkins*, 449 S.W.3d 793, 802 (Mo.App. W.D. 2014).
[5] *Id.*at 803.
[6] *Randall v. Randall*, 497 S.W.3d 850, 858, n.5 (Mo.App. W.D. 2016).
[7] See, *O.H.B. v. L.Y.S.*, 665 S.W.3d 329, 333 (Mo.App. E.D. 2023).

court does not believe the appellant has sufficiently identified all possible favorable evidence, the argument supplies no support for the appeal. The court considers the argument analytically useless.[8]

Think about that. The appellant's counsel must scour the record and serve as an advocate for the opposing side as a condition for making his or her factual challenge. And the appellate court is the sole arbiter of what is sufficient. Can the court reject an argument on this ground even if the trial court actually says it only considered limited evidence in making its finding? You would think the appellant's lawyer could take the trial court at its own word on the subject.

Let me offer a hypothetical example to show how unfair this tactic can be. Suppose a wife makes a weight-of-the-evidence argument to challenge the trial court's findings that her former husband owed the wife no additional maintenance for particular years. Assume the separation agreement provided a formula for maintenance based on a percentage of the "gross income" of the husband's company. And for her weight-of-the-evidence argument, assume the wife relies on a trial exhibit prepared by the husband showing at least some "gross income" for his company.

For the second prong of wife's analysis, assume the wife's counsel points out that the trial court found the husband's company suffered tax losses. Indeed, counsel points to the husband's testimony about the amount of such tax losses taken from corporate tax returns. And assume counsel admits the husband testified he did not pay the wife a percentage of the profits for the years in question because he claimed there were none.

In essence, the wife presents a legitimate factual dispute over whether the husband's admissions about some "gross income" in his trial exhibit were negated by his company's carryover tax losses. Yet,

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[8] *O.H.B. v. L.Y.S.*, 665 S.W.3d 329, 333-334 (Mo.App. E.D. 2023); *O'Gorman & Sandroni, P.C. v. Steve Dodson Dibia Clayton Computer*, 478 S.W.3d 539, 544-547 (Mo.App. E.D. 2015); *Houston v. Crider*, 317 S.W.3d 178, 187-188 (Mo.App. S.D. 2010)

assume the reviewing court throws out the wife's entire argument by declaring the second prong of the analysis was analytically useless. The court does so on the theory the wife's counsel omitted evidence - mostly unspecified - about the company's losses. You can assume the wife won other parts of what was a cross-appeal in her capacity as the respondent.

I understand the sound jurisprudential reasons for giving deference to the trial court on findings of fact. The reviewing court must do so under the standard of review. And I consider the headwinds created by the standard of review to be perfectly justifiable. But I'm troubled when the courts seize on their criticism of the second prong of the analysis to throw out an appellant's argument. This is especially troubling when the appellant's lawyer is trying in good faith to apply the required three or four-pronged analysis.

Put yourself in the shoes of the appellant's counsel. The lawyer must exercise some judgment in presenting all the evidence favorable to the judgment. The lawyer must be honest about the favorable evidence. At the same time, the lawyer must be careful to satisfy the second prong without giving up the point of the argument.

The reviewing court certainly may insert any overlooked evidence into the analysis if it sees fit. And any competent respondent's counsel should be able to direct the court to such evidence. But I consider it unduly punitive for the court to throw out an entire argument on the basis of some perceived omission by appellant's counsel. To do so strikes me as an unfair procedural tactic that puts form over substance. I urge appellate courts to be more cautious in using this tactic to avoid the merits of legitimate factual disputes.

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