In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-08-00114-CV

SANDRA EARL VAIL KNOWLES, Appellant

V.

NEAL NOBLE, Appellee

On Appeal from the 71st Judicial District Court
Harrison County, Texas
Trial Court No. 07-1140

Before Morriss, C.J., Carter and Moseley, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Sandra Earl Vail and Neal Noble were divorced in Louisiana at a time when Noble's name was Donald Neal Brown.[1] As a result of that divorce, Noble was ordered to pay Vail child support, and he complied. In fact, over the years, Noble paid Vail too much. This appeal—from the trial court's judgment dated July 31, 2008, in the amount of $43,214.19, the trial court found overpayment plus interest—challenges both the jurisdiction of the trial court to render the judgment and the legal and factual sufficiency of the evidence to support the judgment.[2]

We reverse the judgment of the trial court in this case and remand this matter to that court for further proceedings, based on our holdings that (1) the trial court had jurisdiction over the petition for refund of overpayment of child support and (2) the evidence was legally sufficient but factually insufficient to support the judgment for such overpayment.

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[1]In the briefing and even in the record, Vail's name is usually spelled "Vail." However, in at least one order, and on the cover of her appellate brief, her name is spelled "Vale." Also, in several locations, her former husband refers to her as Sandra Vail Knowles. Vail testified she was engaged to a Mr. Knowles, but does not refer to herself with that surname. Her former husband is referred to variously as Neal Noble or Donald Neal Brown. For the sake of simplicity and consistency, we will refer to the parties as "Vail" and "Noble."

[2]In a companion appeal, our cause number 06-08-00113-CV, the same two parties, under different names, dispute the validity of a default judgment for Noble dated October 30, 2007, involving part of his overpayment. In that case, Vail challenges the trial court's denial of Vail's bill of review which sought to overturn that default judgment. The appeal of that case is addressed in our separate opinion of even date herewith. Vail appeals both cases in a single brief; we address the two cases separately.

(1) The Trial Court Had Jurisdiction Over the Petition for Refund of Overpayment of Child Support

Vail challenges the trial court's jurisdiction to hear this case. She couches her argument in suggested application of the Texas Family Code statutes setting jurisdiction of Texas courts where some of the parties reside outside of Texas or where the judgment affecting parent-child rights is from another state. *See, e.g.*, TEX. FAM. CODE ANN. § 159.611 (Vernon Supp. 2008); § 159.613 (Vernon 2008). The petition filed by Noble was styled "Original Petition to Modify Child Support Order." At the time of that petition, one of the children the subject of the parties' divorce order, granted by a Louisiana court, was deceased, and the other over the age of eighteen. In the petition, Noble alleged that the Louisiana court had found him liable for child support arrearages owed to Vail in the amount of $26,115.00; that Louisiana order had been entered February 2, 1994. The only modification sought was to determine how much Noble's monthly child support payments should be; he also asked the trial court to find that he had actually satisfied all his arrearage obligations. We observe that Texas statutes dealing with arrearages and payment of child support obligations are addressed in SubChapter F, chapter 157, titled "Enforcement." And because there were no children actually the subject of any modification that could have been made, we believe this action is more accurately characterized as an enforcement action. The court must look to a motion's content rather than its title to determine its nature. TEX. R. CIV. P. 71; *In re B.O.G.*, 48 S.W.3d 312, 316 (Tex. App.—Waco 2001, pet. denied); *Wilson v. Kutler*, 971 S.W.2d 557, 559 (Tex. App.—Dallas 1998, no writ). None of the terms of the order are being modified. The dispute in this case merely

concerns whether the unmodified terms of the Louisiana judgment have been met. Because this is an enforcement action, not a modification, the jurisdictional terms of Section 159.613 do not have to be met. Section 159.610 provides:

> A tribunal of this state may enforce a child support order of another state registered for purposes of modification in the same manner as if the order had been issued by a tribunal of this state, but the registered order may be modified only if the requirements of Section 159.611, 159.613, or 159.615 have been met.

TEX. FAM. CODE ANN. § 159.610 (Vernon 2008). Thus, because this dispute concerns an enforcement, not a modification, the trial court had jurisdiction.

(2) The Evidence Was Legally Sufficient but Factually Insufficient to Support the Judgment for Such Overpayment

The test for legal sufficiency of the evidence is "whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review." *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). In making this determination, we credit favorable evidence if a reasonable fact-finder could, and disregard contrary evidence unless a reasonable fact-finder could not. *Id*. So long as the evidence falls within the zone of reasonable disagreement, we may not substitute our judgment for that of the fact-finder. *Id*. at 822. The trier of fact is the sole judge of the credibility of the witnesses and the weight to give their testimony. *Id*. at 819. Although we consider the evidence in a light most favorable to the challenged findings, indulging every reasonable inference that supports them, we may not disregard evidence that allows only one inference. *Id*. at 822. Anything more than a scintilla of evidence is legally sufficient to support the finding. *Cont'l*

Coffee Prods. Co. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about the existence of a vital fact. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 262 (Tex. 2002).

When considering a factual sufficiency challenge to a jury's verdict, courts of appeals must consider and weigh all of the evidence, not just that evidence which supports the verdict. *Ramsay v. Tex. Trading Co.*, 254 S.W.3d 620, 625 (Tex. App.—Texarkana 2008, pet. denied) (citing *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 406–07 (Tex. 1998)). In a factual sufficiency review, a court of appeals considers and weighs all the evidence, and will set aside the verdict only if the evidence is so weak or the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

The court of appeals is not a fact-finder. Accordingly, the court of appeals may not pass on the witnesses' credibility or substitute its judgment for that of the fact-finder, even if the evidence would clearly support a different result. *Maritime Overseas Corp.*, 971 S.W.2d at 407. If we find the evidence factually insufficient, we must clearly state why the evidence is insufficient to support the finding or why the finding is so against the great weight and preponderance of the evidence as to be manifestly unjust. *Pool*, 715 S.W.2d at 635. In so doing, we do not pass on the credibility of the witnesses, and we do not substitute our opinion for the trier of fact, even if there is conflicting

evidence on which a different conclusion could be supported. *Clancy v. Zale Corp.*, 705 S.W.2d 820, 826 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

A hearing was held on July 11, 2008. Most of the hearing was focused on testimony from Vail regarding various residences, including one in Monroe, Louisiana, where she said she had lived off and on since 2003, and one in Baskin, Louisiana, where she received her mail. However, this testimony is really relevant only to the bill of review, where Vail asserted she had not been properly served with citation and sought to overturn the trial court's default judgment.

The instant appeal addresses the judgment entered by the trial court twenty days after the hearing. That judgment made the following findings:

- "[A]s of September 1, 2004, [Noble] had paid all amounts due from him to [Vail] by virtue of a judgment debt entered in Louisiana in 1993 and proceeded to make overpayment from that time."
- Noble made "payments of $996.00 per month through December 2005 and $600.00 per month thereafter through the month of June 2007" and thus "[Noble] overpaid [Vail] $35,705.05."
- Noble was entitled to recover "pre-judgment interest on the sum of $25,705.05 from January 2006 through June of 2007 at the rate of 5% and . . . pre-judgment interest on the entire amount of $35,707.05 from July 1, 2007 to August 1, 2008."

Finally, the trial court judgment awarded Noble judgment against Vail in the amount of $43,214.19.

At the only hearing held in this case, on July 11, 2008, most of the testimony was by Vail about her residences and whether she had been served properly with Noble's petition to modify. The following is the only piece of testimony about any arrearages or overpayment:

> Q. [Noble's attorney]: Ms. Vail, this is a big stack of canceled checks and those sorts of things that [Vail's attorney] gave me. This is your stack, right?

A. [Vail]: Yes, sir.

Q.: And do you agree that your - - that you agree that over this period of time, [Noble], my client, has paid $90,189.17?

A.: Yes, sir.

Q.: Toward this Louisiana judgment?

A.: Yes, sir.

The record is unclear whether that "big stack of canceled checks" was ever admitted to evidence. The parties signed a stipulation that the checks were "admissible." But there is no indication they were ever offered or admitted. After Vail's testimony, lunch loomed, and the trial court indicated its intention of recessing for that meal. At the end of the hearing, the following exchange took place:

> [Noble's attorney]: . . . There are some additional payments made after the date of judicial finding that we would like to present evidence on and then there is a small bit of rebuttal evidence on the testimony of Mrs. Vail that she has given us today from her son-in-law that has come here with great reluctance under --
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> The Court: Why don't you go to lunch?
>
> [Vail's Attorney]: I am going to object to any testimony on the new lawsuit that he is talking about additional arrearages. I will be completely honest with you, Judge, he and I –
>
> The Court: I have got to go in there. They are starting. I paid $54 for that. That is going to be my lunch. I don't know when that is over and you can check with them and we will resume after lunch.

The reporter's record, though, does not indicate whether any proceedings were held after lunch. Though Exhibit 20, consisting of numerous pay stubs, is contained in the reporter's record, the

exhibit index in that record does not report any place in the record reflecting its admission into evidence, but instead states that Exhibit 20 was "marked after . . . hearing."

Vail's testimony that Brown paid $90,189.17 in child support payments offers some evidence that he overpaid his child support obligation. This constitutes legally sufficient evidence to support the trial court's award.

Even if the pay stubs were in fact admitted into evidence, they suggest that $27,943.52 was paid by Noble during the time period they cover, January 13, 2005, to June 15, 2007. Each pay stub has an entry "CHLD S," which we assume indicates a child-support payment withheld from that weekly wage payment and presumably paid over to Vail. Each pay stub reflects a weekly deduction for "CHLD S" and a corresponding "Y-T-D" amount. The check stub dated June 15, 2007, reports $3,272.01 paid for that year to date. The December 29, 2006, stub has a child-support year-to-date entry of $7,338.38. The December 29, 2005, stub reports $17,333.13 in child support payments for that year. These total $27,943.52 for the two calendar years 2005–06 and the first part of 2007. Even assuming the trial court's award of five percent interest, we do not see how this evidence could support an award of $43,214.19.

We point out, though, the trial court judgment does not mention a figure of $27,943.52. The judgment states that after Noble satisfied his child support obligations in full "as of September 1, 2004," he continued to pay "$996.00 per month through December 2005 and $600.00 per month thereafter through the month of June 2007" and thus Noble "overpaid [Vail] $35,705.05." By our

reckoning, however, the indicated language asserts that Noble paid $996.00 for sixteen months (September 2004 through December 2005), which amounted to $15,936.00, and $600.00 for eighteen months, yielding $10,800.00. These figures total $26,736.00. This is $8,969.05 less than the total arrived at by the trial court for these months' overpayments.

After making this finding, however, the trial court judgment states Noble was entitled to recover "pre-judgment interest on the sum of $25,705.05 from January 2006 through June of 2007, at the rate of five percent and . . . to recover pre-judgment interest on the entire amount of $35,707.05 from July 1, 2007, to August 1, 2008." Although no explanation is given for the figure of $25,705.05, this figure evidently comes from the holding in the trial court's default judgment entered October 30, 2007,[3] where the trial court made a finding that "the total amount [Noble] should have paid was $54,188.67 and the actual amount [Noble] actually paid was at least $79,893.72 by December 31, 2005." Setting aside the qualifier "at least," the difference between $54,188.67 and $79,893.72 is $25,705.05.[4] It appears this may be the genesis of this figure which is so prominent in the parties' discussions and arguments.

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[3]This default judgment is involved in our companion cause number 06-08-00113-CV. In that proceeding, the default judgment was challenged by a bill of review, which was denied by the trial court. By our opinion in that appeal, released contemporaneously with this opinion, we reverse that decision by the trial court and remand that case for a new trial.

[4]We note that the October 2007 default judgment did not award $25,705.05 to Noble, but simply found that he had overpaid Vail by "at least" that amount.

Even if we assume the figure $25,705.05 comes from the October default judgment, there is no explanation for the trial court's adding an even $10,000.00 to that for "the entire amount of $35,705.05." Further, even assuming a factually sufficient basis for these figures, the trial court's five percent interest would not produce a total of $43,214.19.

It is true that Vail agreed, at the hearing, that Noble paid $90,189.17 over a "period of time" and that these monies were paid "[t]oward [the] Louisiana judgment." But there is nothing in the record detailing how much of that $90,189.17 makes up the overpayments forming the basis for Noble's suit. Further, the totals detailed above simply do not support the trial court's award of $43,214.19. The evidence, while legally sufficient, is factually insufficient to support the trial court's judgment. *Cf. RePipe, Inc. v. Turpin*, 275 S.W.3d 39, 48 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (some evidence of damage rendered evidence legally sufficient, but where evidence clearly showed damages were $49,360.86 less than jury's award, evidence was factually insufficient); *Ayala v. Valderas*, No. 2-07-134-CV, 2008 Tex. App. LEXIS 8042 (Tex. App.—Fort Worth Oct. 23, 2008, no pet.) (evidence in conversion case factually insufficient where jury award reflected replacement value of property, but legal standard in such cases was fair market value).

We reverse the judgment of the trial court and remand this case to that court for further proceedings in accordance with this opinion.

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Josh R. Morriss, III
Chief Justice

Date Submitted: August 19, 2009
Date Decided: October 16, 2009