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2 Held at 1414 Colorado,
3 Austin, Texas 78701
4 September 13, 1986

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1 TEXAS SUPREME COURT
2 ADVISORY BOARD MEETING
3 September 13, 1986
4

5 CHAIRMAN SOULES: Let's bring this
6 meeting to order and get started.

7 We're going to take the last paragraph on
8 Page 8. Is there any controversy over the --
9 okay, I'm sorry. On Page 153 of the materials,
10 the last paragraph of Rule -- proposed Rule 279 --
11 is all that's left of that Rule to work on today.

12 Hadley, is there any change in that current
13 law?

14 PROFESSOR EDGAR: Yes, it just says
15 that the words "legally" or "factually" have been
16 added because lots of people have argued from time
17 to time, "What is that, is that legally
18 insufficient evidence or factually insufficient
19 evidence?" And clearly it means, I think, legally
20 sufficient, certainly after verdict. And since
21 you can't make a factual insufficiency argument
22 before verdict, we thought to remove any doubt
23 about what that means, to let people know it means
24 both. So that's why we were recommending that be
25 included.

1 CHAIRMAN SOULES: Does that -- in
2 effect, that's stating in the rules something the
3 rule did not state, but which was understood by
4 everybody to be the law anyway?

5 PROFESSOR EDGAR: Well, it wasn't
6 understood by everybody because people argued
7 about whether or not that meant legal or factual,
8 when, any way you look at it, it means both. So,
9 we just thought we would clean it up. It really
10 has become somewhat redundant, maybe, but we were
11 just doing that to make clear to the bench and bar
12 what's --

13 MR. WELLS: Well, if it's legally
14 insufficient, you make the objection before. You
15 know, this kind of lets you hide behind the law,
16 don't it?

17 PROFESSOR EDGAR: But you've always
18 been able to do that by filing a Motion for
19 Judgment N.O.V. We haven't changed the law any by
20 this.

21 CHAIRMAN SOULES: This is what the law
22 is. It just states it expressly, whereas the rule
23 previously did not so state it.

24 PROFESSOR EDGAR: That's right.

25 CHAIRMAN SOULES: Any -- is there any

1 objection to this?

2 JUDGE TUNKS: I'm not sure I
3 understood what change he made.

4 CHAIRMAN SOULES: All right, Judge.
5 As Hadley was saying, in the past, raising
6 insufficiency of the evidence --

7 JUDGE TUNKS: Factual insufficiency.

8 CHAIRMAN SOULES: -- was done after
9 verdict -- either factual or legal insufficiency.

10 For example, even though you can object to
11 the submission of an issue based on legally
12 insufficient evidence -- there is no evidence to
13 support it -- even if you did not do so after
14 verdict, you could move for a Judgment N.O.V.
15 because there was no evidence to support it. So
16 you could actually raise that after verdict even
17 though it was not raised before.

18 JUDGE TUNKS: But you can't ask for --
19 what bothers me is this terminology here. It
20 appears to state -- to infer that a basis -- that
21 an objection to an issue because there is factual
22 insufficiency is sufficient to keep it from being
23 submitted. That is not correct.

24 CHAIRMAN SOULES: That's correct. You
25 -- there's no question that you properly stated

1 the law there.

2 JUDGE TUNKS: The fact that this
3 language suggests that to me might also suggest it
4 to somebody else. The claim that the evidence is
5 factually insufficient may be made after the
6 submission to the jury.

7 PROFESSOR EDGAR: Well, that's a
8 correct statement of the law because that's the
9 only time it can be made.

10 JUDGE TUNKS: That's right. But it
11 infers that factual insufficiency could be made
12 before the case is submitted to the jury.

13 CHAIRMAN SOULES: Of course, it cannot
14 do so.

15 PROFESSOR EDGAR: I don't read that --

16 JUDGE TUNKS: I think probably Hadley
17 corrected it. I just didn't understand him clear
18 enough. I think you took out the word "factually"
19 here; did you not?

20 PROFESSOR EDGAR: No, you see, the
21 rule as it now reads just says, "a claim that the
22 evidence was insufficient to warrant the
23 submission may be made for the first time after
24 verdict."

25 JUDGE TUNKS: Yes, sir.

1 PROFESSOR EDGAR: And people have,
2 from time to time, said, "Well, does that mean
3 legally insufficient evidence or factually
4 insufficient evidence?" Well, actually it means
5 both, and that's what we've said.

6 JUDGE TUNKS: Well, you cannot
7 possibly file an objection to the submission of an
8 issue on the grounds that the evidence was
9 factually insufficient to sustain it -- to void or
10 submit it.

11 PROFESSOR EDGAR: Does this indicate
12 that you can?

13 JUDGE TUNKS: I think it does. It did
14 to me.

15 PROFESSOR EDGAR: Well, that's not our
16 intention.

17 JUDGE TUNKS: Well, that's all right.

18 PROFESSOR EDGAR: And certainly that
19 was not --

20 JUDGE TUNKS: I just wanted to clear
21 that up in my own mind.

22 CHAIRMAN SOULES: All right, any
23 further discussion on final paragraph of Rule 279?

24 Okay. Those in favor of recommending the
25 Supreme Court adopt this final paragraph, show by

1 hands. Opposed? That's unanimously recommended,
2 then.

3 MR. RAGLAND: Lou, may I ask a
4 question?

5 CHAIRMAN SOULES: Yes, sir. Tom
6 Ragland.

7 MR. RAGLAND: As usual, I'm about two
8 days late on things. In the first paragraph,
9 third line -- we were talking about that yesterday
10 -- did we leave the word "limiting" in there --
11 "limiting construction"?

12 CHAIRMAN SOULES: No, it was taken
13 out.

14 MR. RAGLAND: Taken out?

15 CHAIRMAN SOULES: Yes, sir.

16 PROFESSOR EDGAR: We deleted the whole
17 paragraph, not just that part of it, Tom.

18 CHAIRMAN SOULES: All right. Now,
19 we're going to move to Rule 286.

20 MR. SPARKS (San Angelo): Can you tell
21 me how Rule 279 finally reads?

22 CHAIRMAN SOULES: Well, Sam, it
23 reads --

24 MR. SPARKS (San Angelo): What was
25 done in the first big paragraph on Page 7?

1 CHAIRMAN SOULES: Oh, before we leave
2 that, we need to raise Harry's concerns of
3 yesterday whether or not we should submit
4 "factual" or insert "factual" in -- on Page 152,
5 in the paragraph that's in plain type, not in
6 italicized type, in the fifth line, before the
7 word "element." Anybody have a chance to --

8 PROFESSOR EDGAR: Well, it certainly
9 wouldn't hurt anything, and if it's a cause for
10 concern then I certainly have no problem with
11 including it.

12 CHAIRMAN SOULES: Bill, what do you
13 think about inserting the word "factual" in that
14 fifth line? It's a matter Harry had concern about
15 and you were --

16 PROFESSOR DORSANEO: I don't like the
17 idea of it. I thought about it, and I think it
18 will create confusion.

19 CHAIRMAN SOULES: Why so?

20 PROFESSOR DORSANEO: Well, we're
21 really talking about deeming a component element
22 of -- we are really talking about a legal element,
23 if we're going to talk about anything. We're
24 talking about deeming that the judge found that a
25 particular component was supported by sufficient

1 evidence. I don't -- I just don't think the word
2 "factual" adds anything at all.

3 MR. REASONER: Well, I -- Luke, I have
4 thought about this further and the thing that
5 bothers me, if you will look back -- and I didn't
6 get a chance to talk to Hadley about it this
7 morning -- but the old rule referred to deeming
8 the issues themselves, you know, which I take to
9 be the issues that would have been submitted to
10 the jury.

11 PROFESSOR EDGAR: The fact issue.

12 MR. REASONER: The fact issue. Why
13 wouldn't it work, Hadley, if you just substituted
14 "questions," because as I understand the deemed
15 issue practice, you never went back and thought
16 about whether the issue was too broad or too
17 narrow, or how many issues there would have had to
18 have been. You were just deemed the answers to
19 however many issues were necessary to support the
20 cause of action, assuming you had a sufficient
21 submission for them to be necessarily reparable.
22 So why wouldn't it work just to put "questions"?

23 PROFESSOR EDGAR: Well, the problem
24 that I have conceptually with that, Harry, is that
25 with a broad-form question, a question in all

1 probability is going to consist of what we used to
2 think to be an independant ground of recovery or
3 defense --

4 MR. REASONER: Well, but --

5 PROFESSOR EDGAR: -- and we don't
6 really mean that, you see.

7 MR. REASONER: No, but for "deeming"
8 ever to come up, somebody has got to say, here is
9 a question that was not asked to the jury, or
10 maybe there are two questions that were not asked
11 to the jury. They really got to say they were
12 questions that were not asked to the jury.

13 PROFESSOR EDGAR: No, that's not what
14 we were talking about yesterday. We were talking
15 about a situation in which a question was asked,
16 but it was factually deficient with respect to an
17 essential component of that question. If we're
18 talking about fraud, for example.

19 MR. REASONER: But that's another way
20 of saying, Hadley, if fraud consists of A, B and
21 C, we didn't ask C to the jury. There is a
22 factual inquiry that was not made, whether because
23 of the definition or the way the question was
24 asked. So there was a question that was not
25 asked, and that's really what you want deemed, is

1 the jury's factual response to C.

2 So it seems to me that the use of "question"
3 really is parallel with the prior practice. When
4 you inject the notion of an element, by which I
5 take it you mean in this instance, an element of a
6 cause of action in a legal concept, that's
7 radically different from our prior deemed issue of
8 practice.

9 PROFESSOR DORSANEO: No, I don't think
10 it is, because we're deeming that there is
11 evidence -- we're deeming a finding, all right?
12 The findings are what are deemed and there are
13 findings on particular --

14 MR. REASONER: No, that's -- that may
15 be what you are doing in your head; that's not
16 what this language says. It says, "deeming" --

17 PROFESSOR DORSANEO: Well, I think you
18 need to read the language more carefully if you
19 don't think that's what it says.

20 MR. REASONER: All right. Well, read
21 it. It says, "deeming the element." It's not
22 saying it's deeming any finding; it's not saying
23 it's deeming the answer to any question. It's
24 saying it's deeming an element of a cause of
25 action.

1 CHAIRMAN SOULES: I think Harry's got
2 a -- has raised a new matter here and I think it
3 needs to be addressed. Sam Sparks, San Angelo.

4 MR. SPARKS (San Angelo): I don't
5 think it's a new matter. We kicked this thing
6 around yesterday ten times. And Judge Pope sat
7 there, and we used the examples of five elements
8 of fraud. Now, one of them is omitted. That's
9 what we've been talking about all this time.

10 And I was told yesterday -- both Edgar and
11 Bill said that was a legal element. You know, one
12 of the five requirements is omitted from the
13 instruction that's given to the jury and it's
14 going to be deemed. That's what we kicked around
15 yesterday. And it's not factual, it's just an
16 element. And in that case it's a legal element.
17 This is not a new -- we talked about this
18 yesterday for two hours.

19 MR. REASONER: Well, are you
20 supporting me, Sam?

21 CHAIRMAN SOULES: Well, let me say
22 this: From the --

23 MR. SPARKS (San Angelo): I don't want
24 the word "factual" in there. I think it creates a
25 problem. Without it in there, it covers both

1 factual and legal.

2 MR. REASONER: I think you're right,
3 and that's why I think it ought to say
4 "questions."

5 MR. SPARKS (San Angelo): Well, let's
6 vote on it.

7 PROFESSOR EDGAR: Well, the thing --
8 if it says "questions," though, Harry, it just
9 says "when the ground of recovery of defense
10 consists of more than one question," okay? The
11 jury is asked, "Do you find that the defendant's
12 negligence proximately caused the plaintiff's
13 injury? What amount of damages, if any?" The
14 jury answers damages; does not answer question --
15 does not answer the liability question. Then
16 you're going to deem a finding of "yes" on the
17 first question that was not answered? That's not
18 what we intend here. We're talking about when a
19 question contains more than one element.

20 PROFESSOR DORSANEO: See, and before
21 it was one question per element, before, under the
22 old scheme. That's why it said "issue" before,
23 because each element had to have it's own separate
24 question under the separate and distinct scheme.

25 PROFESSOR EDGAR: Its component part.

1 PROFESSOR DORSANEO: Its piece. Now,
2 maybe "element" isn't a very good word, but it
3 comes as close to identifying what we have always
4 been talking about as anything else we had to use,
5 I think. And when you say "factual element," I'm
6 not sure what a "factual element" is.

7 MR. SPARKS (El Paso): What is wrong
8 with the use of the word "issue" in this
9 particular --

10 PROFESSOR DORSANEO: Because it
11 doesn't mean anything.

12 PROFESSOR EDGAR: Because it creates
13 an ambiguity because "issue" in the before time --
14 before we changed it -- meant "question" and not
15 "legal issue." I really think that's the problem
16 with the current rule. It has the word "issue" in
17 it, and we don't know whether "issue" means issue
18 in the sense of component part of a claim or a
19 defense, or question, which could be bigger than
20 one issue in the sense that you are mentioning it.

21 Really, that's why I suggested we change it
22 to "element." I'm not completely happy that
23 "element" -- "element" isn't great -- but I
24 wouldn't want to say "part." When I hear "parts,"
25 I start thinking about cars, see? I have to talk

1 "element" -- that's as close as I can come. And
2 it really isn't a factual element; it's an
3 element, like materiality is an element of a fraud
4 case.

5 CHAIRMAN SOULES: Do we have three
6 alternatives? One that we just leave "element"
7 there without any modifier. The second, that we
8 modify element by inserting the word "factual" --
9 "factual element." And then, third, that we
10 replace "element" with the word "question."

11 Now, are those the three alternatives that
12 are before the house?

13 MR. REASONER: No, I would say you
14 could not completely replace -- because I think
15 Hadley is right. The preparatory language doesn't
16 make sense if you use "question." But it seems to
17 me that, when you get down to what it is you are
18 deeming, that you could substitute "question" for
19 "element" there.

20 CHAIRMAN SOULES: Harry, tell me
21 exactly how that would work because that -- I'm
22 afraid I don't yet understand.

23 MR. REASONER: It may well be that I
24 don't understand, but I think down at the end when
25 you say, "and make a file written" -- well, let's

1 see. Where you have the last element or elements,
2 I believe it would work if you substituted
3 "question" there.

4 CHAIRMAN SOULES: Rusty.

5 MR. MCMAINS: I mean the whole thing
6 is modified when you get right down to what it is
7 that we are deeming it talks about, if there is
8 factually sufficient evidence to support a finding
9 thereon.

10 It's a finding on an element of a cause of
11 action, or a ground of recovery or a ground of
12 defense. And that's a finding which is as close
13 as we can come in the current practice to
14 describing whatever the animal is, because when
15 you submit to the jury a question with a whole
16 bunch of definitions and instructions in a broad
17 form -- we can call that a "jury finding," or we
18 can call it an "implied finding" when we get to
19 the nonjury situation -- but to call it a
20 "question" is wrong; to call it an "instruction"
21 is wrong, and to call it a "factual finding" is
22 not necessarily accurate. But it doesn't make any
23 difference when you talk about factual elements
24 because we talked about findings here. That's as
25 clear as it needs to be.

1 People are going to understand how this works
2 the same way it used to work, to the extent that
3 it ever worked; and to the extent that it didn't
4 work, it ain't going to work again. But that's
5 not a new problem. We aren't creating any new
6 problems that weren't there before.

7 CHAIRMAN SOULES: Well, that's
8 debatable, but we did that yesterday.

9 MR. REASONER: Yeah, well, I --

10 CHAIRMAN SOULES: Justice Wallace.
11 Excuse me, Judge, I didn't see you.

12 JUSTICE WALLACE: The perception I get
13 sitting here listening -- and I certainly share in
14 what I'm about to say -- is that I'm not sure
15 anybody in here understands what this says. And
16 if this group doesn't understand it, how in the
17 world is that trial judge going to understand it
18 up there on the bench when you start hitting him
19 with it?

20 Now, if I understood Hadley's explanation
21 yesterday, this was intended to cover an
22 alternative ground of recovery or defense that was
23 lacking in the legal or factually sufficient
24 evidence.

25 MR. MCMAINS: No.

1 PROFESSOR EDGAR: No, that was on the
2 top of Page 8, Judge Wallace, which we have
3 eliminated.

4 JUSTICE WALLACE: Oh, I'm sorry.

5 PROFESSOR EDGAR: We're talking over
6 here on Page 152.

7 JUSTICE WALLACE: That's what I get
8 for coming in late.

9 PROFESSOR EDGAR: I share Rusty's
10 view. This is not intended to change the law in
11 any way the mechanics of "deemed findings," Harry.
12 We're just simply trying to find a word which is
13 sufficiently descriptive to cover the changes we
14 made yesterday. And I don't really -- to whatever
15 extent it was confusing before, it will remain
16 confusing; but to whatever extent it was
17 explanatory, it will continue to be so.

18 PROFESSOR DORSANEO: Well, all I can
19 say is when Hadley and I went through this at the
20 last meeting, Rusty, we sat down and tried to make
21 it mean what it has always meant, in terms of the
22 change from narrow as you practiced to broad as
23 you practiced, to preserve it. This is as close
24 as we could come to getting it to be the same as
25 it has been for -- since it was invented. And I'm

1 confident that putting "factual" in is going to
2 make a bigger problem than it's going to do an
3 improvement. And what the problem --

4 MR. REASONER: Well, I'm not confident
5 either way, but I'm persuaded by Rusty's
6 enthusiasm that we can't improve on it at the
7 moment and we might as well move on.

8 CHAIRMAN SOULES: Well, is everybody
9 satisfied that we leave this the way we left it
10 yesterday?

11 JUDGE TUNKS: Resigned to it, instead
12 of being satisfied.

13 CHAIRMAN SOULES: Resigned to it, all
14 right.

15 Let's go on to 286. Is there a controversy
16 about this?

17 MR. SPARKS (San Angelo): Luke, my
18 question is still the same, is the first paragraph
19 just like it's written? Is that what we have
20 adopted, no changes?

21 PROFESSOR EDGAR: No, we added after
22 the underlined portion, "submitted or requested,"
23 we said, "are waived" instead of "shall be deemed
24 as waived."

25 MR. SPARKS (San Angelo): All right,

