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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

NOVEMBER 17, 1995

(AFTERNOON SESSION)

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Taken before D'Lois L. Jones, a
Certified Shorthand Reporter in Travis County
for the State of Texas, on the 17th day of
November, A.D., 1995, between the hours of
12:30 o'clock p.m. and 5:00 o'clock p.m. at
the Texas Law Center, 1414 Colorado, Rooms 101
and 102, Austin, Texas 78701.

NOVEMBER 17, 1995

MEMBERS PRESENT:

Alejandro Acosta Jr.
Charles L. Babcock
Pamela S. Baron
Hon. Scott A. Brister
Prof. Elaine A. Carlson
Prof. William V. Dorsaneo
Hon. Sarah B. Duncan
Anne L. Gardner
Hon. Clarence A. Guittard
Charles F. Herring
David E. Keltner
Gilbert I. Low
Hon. F. Scott McCown
Russell H. McMains
Robert E. Meadows
Harriett E. Miers
David L. Perry
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

EX OFFICIO MEMBERS:

Honorable Nathan L. Hecht
David B. Jackson
Doris Lange
W. Kenneth Law
Michael Prince
Hon. Paul Heath Till
Bonnie Wolbrueck

MEMBERS ABSENT:

Prof. Alex Albright
David J. Beck
Ann T. Cockran
Michael G. Gallagher
Michael A. Hatchell
Donald M. Hunt
Tommy Jacks
Franklin Jones Jr.
Joseph Latting
Thomas S. Leatherbury
John H. Marks, Jr.
Anne McNamara
Richard R. Orsinger
Hon. David Peeples
Anthony J. Sadberry
Paula Sweeney

EX-OFFICIO MEMBERS ABSENT:

Hon. Sam Houston Clinton
Hon. William J. Cornelius
O. C. Hamilton, Jr.
Paul N. Gold

NOVEMBER 17, 1995
AFTERNOON SESSION

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1 PROFESSOR DORSANEO: Well, I
2 will attempt to add in a definition of final
3 judgment, which may be the last sentence, or
4 it may begin "a final judgment is rendered."
5 I'm inclined to think that it will be easier
6 to do it the second way than the first way.

7 That takes us to paragraph (b). Now,
8 paragraph (b) is meant to be the beginning
9 part of current Rule 301, although the genesis
10 of its creation really is by reference to
11 current Rule 306, which begins, "The entry of
12 the judgment shall contain the full names of
13 the parties, for and against whom the judgment
14 is rendered," with the notion being that this
15 would probably begin a final judgment and with
16 the idea also being, as David Keltner
17 suggested, that we would provide a separate
18 definition for the term "order." I move the
19 adoption of paragraph (b) with respect to the
20 form and substance of a judgment, that is to
21 say, a final judgment.

22 My own on-horseback thought is that to
23 the extent there is difficulty in defining a
24 final judgment we would at least provide to
25 the person who thinks that that's what he or

1 second one is probably congenial with this
2 definition to be prepared of final judgment.

3 CHAIRMAN SOULES: I think
4 that's right, the way it looks to me. So what
5 do we do?

6 PROFESSOR DORSANEO: I can
7 draft it that way, and it will all match.

8 CHAIRMAN SOULES: Justice
9 Duncan.

10 HONORABLE SARAH DUNCAN:
11 Doesn't that depend on how -- if an order of
12 nonsuit is the order that renders -- that
13 establishes a final judgment, does the order
14 of nonsuit have to conform to the pleadings,
15 the nature of the case proved, and the jury's
16 verdict or the findings and conclusions? I
17 mean, clearly it doesn't.

18 CHAIRMAN SOULES: That's why it
19 needs to be separated.

20 HONORABLE SARAH DUNCAN: That's
21 why it depends on the definition of a final
22 judgment. I mean, if we are talking here just
23 about a judgment following a trial then the
24 second sentence in (b) --

25 PROFESSOR DORSANEO: Well,

1 that's the problem. We have that problem now.
2 The question is whether we live with it,
3 continue to live with it, or try to figure out
4 a way to fix it. Rule 301 says something very
5 much like that second sentence. "The judgment
6 of the court shall conform to the pleadings,
7 the nature of the case proved, and the
8 verdict, if any; and it shall be so framed as
9 to give the party all the relief to which he
10 may be entitled either in law or in equity."
11 And that's not even as accurate as this
12 sentence, really.

13 HONORABLE SARAH DUNCAN: I
14 understand, but in the rules as they exist now
15 we haven't defined judgment to include orders.
16 Expressly.

17 CHAIRMAN SOULES: Anne Gardner.

18 MS. GARDNER: I was just going
19 to put in my two cents worth. That goes back
20 to reading the current rule, back to Rule 300
21 again. Judgment there is defined as one being
22 rendered after verdict or after a nonjury
23 trial. It's not -- well, in effect, it limits
24 it to those types of judgments. I just feel
25 like we are embarking on a whole different

1 course by getting off on all of these other
2 things in this series of rules, and I think
3 that the more I hear and think about it, the
4 more problems it seems to be running into, and
5 I feel that it would be better to stay with
6 the original concept of a judgment after a
7 trial on the merits.

8 PROFESSOR DORSANEO: So you
9 would suggest modifying this second sentence
10 if we don't stick with the exact language we
11 have in the current rules and don't bother
12 changing it at all, a reference to probably a
13 conventional trial.

14 MS. GARDNER: That would work.

15 MR. ORSINGER: Well, this
16 should apply to a summary judgment that
17 disposes of the case, too, shouldn't it?

18 CHAIRMAN SOULES: That's always
19 a trial.

20 MR. ORSINGER: The term
21 "conventional trial" includes a summary
22 judgment?

23 PROFESSOR DORSANEO:
24 Unconventional trial, that is to say, not a
25 trial.

1 HONORABLE SARAH DUNCAN: Luke,
2 I mean, that's really not true. We just got
3 through saying that after summary judgment the
4 court isn't required to make findings or
5 conclusions. So this sentence wouldn't apply.
6 This sentence would only apply after a jury
7 trial.

8 MR. ORSINGER: And summary
9 judgment would certainly apply to the first
10 sentence but it wouldn't apply to the
11 second -- well, part of the second sentence
12 would apply. It needs to conform to the
13 pleadings and the proof by affidavit or
14 admission or whatever. It's really just the
15 findings that doesn't apply to the summary
16 judgment; isn't that right?

17 CHAIRMAN SOULES: Right. I
18 mean, you could repunctuate this second
19 sentence and make it apply universally, I
20 think.

21 HONORABLE SCOTT BRISTER: "And
22 if applicable."

23 CHAIRMAN SOULES: Just say,
24 "The judge of the court shall conduct the form
25 of the pleadings," and then insert "and," and

1 don't put any punctuation in all the rest of
2 the sentence. "The nature of the case proved,
3 the jury's verdict, or the judge's finding of
4 fact unless the judgment is rendered as a
5 matter of law." Because "form of the
6 pleadings," that will take care of a nonsuit.

7 MR. ORSINGER: Well, maybe we
8 don't have a problem because of that last
9 phrase because judgment is a matter of law in
10 summary judgment, isn't it?

11 HONORABLE C. A. GUITTARD:
12 Right.

13 MR. ORSINGER: And so the
14 "unless" clause means "the findings unless."
15 You get no findings on a directed verdict.
16 You get no findings on a summary judgment. So
17 maybe that "unless" clause saves us.

18 CHAIRMAN SOULES: Well, it also
19 would apply --

20 MR. MCMAINS: Well, of course,
21 that last sentence is related to changes that
22 are proposed in the new Rule 301.

23 PROFESSOR DORSANEO: That last
24 part of it is certainly.

25 MR. MCMAINS: Yeah. Because

1 the new NOV stuff is now called motions for
2 judgment as a matter of law, and it's an
3 attempt to federalize the NOV practice, and
4 that's what that relates to, and that
5 doesn't -- and I mean, I think reasonably when
6 you say "unless a judgment is rendered as a
7 matter of law" that you would go over and look
8 over here, especially in that same section,
9 and look in the Rule 301 which talks about
10 "motion judgment." I suppose that's supposed
11 to be "motion for judgment as a matter of
12 law."

13 MR. ORSINGER: So it wouldn't
14 necessarily be interpreted to include summary
15 judgment?

16 MR. MCMAINS: In fact, I don't
17 think it is. I mean, I think a motion for
18 judgment as a matter of law is given the
19 term -- our definition is in Rule 301.

20 PROFESSOR DORSANEO: It would
21 embrace summary judgments, although there is
22 not a specific reference, and a summary
23 judgment is a motion for judgment as a matter
24 of law just as much as any other motion is a
25 motion for judgment as a matter of law. One

1 of the reasons for embracing that lingo at the
2 Federal level, we are not attempting to
3 embrace the Federal practice, just the
4 language, just the term "judgment as a matter
5 of law."

6 CHAIRMAN SOULES: Justice
7 Duncan.

8 HONORABLE SARAH DUNCAN: It
9 seems to me the only problem here, it
10 doesn't -- the problem in (b) does not
11 necessarily that we back down on the idea of
12 defining judgment or when a final judgment is
13 rendered. It just means that the last
14 sentence in (b) needs to be restricted to
15 judgments following trial.

16 PROFESSOR DORSANEO: Uh-huh.

17 MR. MCMAINS: Well, except what
18 about a default judgment? Is that a trial?

19 PROFESSOR DORSANEO: That is
20 the problem.

21 MR. MCMAINS: It is a trial.

22 PROFESSOR DORSANEO: We don't
23 know. We have different ideas about what's a
24 trial.

25 MR. MCMAINS: I mean, it is a

1 trial in the sense that if you find out about
2 it in time, you can file a motion for new
3 trial. So I guess the assumption is that if
4 there it's a new trial, there had to be an old
5 trial. You may not have been there, and it
6 may have been very short. It may have been
7 had before the court reporter.

8 CHAIRMAN SOULES: Well, all
9 judgments have to conform to the pleadings,
10 don't they?

11 PROFESSOR DORSANEO: Yes.

12 HONORABLE C. A. GUITTARD:
13 Unless they apply to the final.

14 MR. ORSINGER: Well, that would
15 be the debate. These proposed rules I
16 think --

17 CHAIRMAN SOULES: That's only
18 if you waive pleadings.

19 MR. ORSINGER: Yeah. These
20 proposed rules don't make you replead just
21 because you have tried something by consent;
22 isn't that right?

23 CHAIRMAN SOULES: Well, you
24 don't have to replead it in a trial by consent
25 anyway, unless somebody objects to my

