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SUBSTANTIAL EVIDENCE VS. WEIGHT OF THE EVIDENCE: WHAT'S THE DIFFERENCE?

The Missouri Supreme Court places a premium on an appellate lawyer's ability to draw the distinction between substantial evidence and weight of the evidence. Last year, the Court criticized an appellant for combining into the same point relied on a substantial-evidence challenge, a misapplication-of-law challenge, and an against-the-weight-of-the-evidence challenge. *Ivie v. Smith*, 439 S.W.3d 189, 199, n. 11 (Mo. banc 2014). The Court ruled that these three challenges must appear in separate points to be preserved for appellate review. *Id.*

The *Ivie* rule creates a host of new challenges for an appellant's lawyer. For instance, what does *Ivie* do to an appellant's claim that the trial court misapplied the law when the issue contains a mixed question of law and fact? The Court in *Ivie* ruled that the misapplication-of-law challenge must be presented as a separate point. The *Ivie* rule also compels the lawyer to draw the distinction between substantial evidence and weight of the evidence. *Ivie* says that these two types of factual challenges must be presented as separate points. The lawyer thus must pick his or her poison by selecting the most appropriate factual challenge from the record. Or, the lawyer could try to argue both theories at the risk of tedious duplication. Either way, the lawyer must understand the difference between these two distinct types of factual challenges.

In two recent decisions, the Southern District has offered some clarity on the distinction. See, *Chorum v. Chorum*, 2015 Mo.App LEXIS 851*9 (Mo.App. S.D. August 28, 2015) and *In re Marriage of Adams*, 414 S.W.3d 29, 33-34 (Mo.App. S.D. 2013). The court has laid out the distinct sequential steps for the two types of factual challenges:

A not-supported-by-substantial-evidence challenge requires the completion of three sequential steps. The appellant's must:

- (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
- (2) identify all favorable evidence in the record supporting the existence of that proposition; and
- (3) demonstrate why the favorable evidence, when considered along with the reasonable inferences drawn from the evidence, does not have probative force upon the proposition such that the trier of fact could not reasonably decide the existence of the proposition.

An against-the weight-of-the-evidence challenge requires the completion of four sequential steps. The appellant must:

- (1) identify a challenged factual proposition, the existence of which is necessary to sustain the judgment;
- (2) identify all favorable evidence in the record supporting the existence of that proposition;
- (3) identify the evidence in the record contrary to the belief of that proposition, resolving all conflicts in testimony in accordance with the trial court's credibility determinations, whether explicit or implicit; and
- (4) demonstrate why the favorable evidence, along with the reasonable inferences drawn from the evidence, is so lacking in probative value, when considered in the context of the totality of the evidence, that it fails to induce that proposition.

Chorum v. Chorum, 2015 Mo.App LEXIS 851* 9-10 (Mo.App. S.D. August 28, 2015), citing *In re Marriage of Adams*, 414 S.W.3d 29, 33-34 (Mo.App. S.D. 2013).

Because of the standard of review, the appellant faces a heavy burden with either kind of factual challenge. But *Chorum* and *Adams* provide the appellant's

lawyer with a good roadmap for how best to proceed. And it may help the lawyer evaluate the type of challenge most appropriate for the particular appeal. If a challenge under either theory might work, the framework will help the lawyer to draw the analytical distinction between one point and the other.

The appellant's lawyer should have the Southern District's framework at hand when crafting the points and argument. In this way, the framework serves as a useful tool. As a word of caution, however, if the lawyer fails to follow the proper framework, the Southern District has held that the argument is "analytically useless and provides no support for [appellant's] point." See, *Chorum*, 2015 Mo.App LEXIS 851* 9-10.

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