LEGAL MOJO

Findings of Fact and Conclusions of Law

By Hon. Tracy Christopher

Civil courts seem to be trying more bench trials and less jury trials. So, if you know you are going to try your case to the bench, what should you do to help your case, the trial judge, and the appellate process?[1]

1. Prepare a draft of findings before trial.

Some trial judges ask that the litigants prepare draft findings of fact and conclusions of law before trial. I recommend that you use Texas pattern jury charges to ensure that you have all elements of your causes of action covered.

The defense may have a more difficult time preparing draft findings (especially in a case with no discovery). But at a minimum, the defendant should prepare findings for its own counterclaim and for its affirmative defenses.

2. Should you request findings? What are the benefits?

Generally, if you lost the trial, and you want to appeal, you should request findings. You may also want findings to explain the court's decision to your client, even if you think an appeal is futile.

The most important benefit of requesting findings and conclusions is to narrow the scope of issues that the appellate court will need to decide in the appeal. The findings will show which causes of action or defenses the court found. If you do not get that narrowed down, you must attack all causes of action and rebut all defenses in your appellate brief. If you fail to do that in your brief, the appellate court can affirm on the unbriefed issues.

Do not request findings if you are the prevailing party. You want the appeal to be more difficult for the other side.

3. Preparing the findings

Trial judges often ask the prevailing party to prepare the findings of fact and conclusions of law. Start with the pleadings of both parties and prepare findings that address each cause of action or defense. Follow the relevant pattern jury charge and make sure you include the burden of proof. For example, a judge does not have to find that the defendant was not negligent; the judge only has to find the following: "The P failed to prove by a preponderance of the evidence that the D

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failed to use ordinary care." Similarly, a judge can reject an affirmative defense: "The D failed to prove its affirmative defense of waiver by a preponderance of the evidence."

The trial court is required only to make findings, or additional findings, on controlling factual issues. A trial court is not required to make evidentiary findings.

When preparing your findings for the trial court, watch out for *Casteel*[2]-type issues relating to invalid theories of liability. Although it is unclear that *Casteel* extends to bench trials, most practitioners think that it does. Make your findings specific as to causes of action, specific plaintiffs or defendants, and damages for each theory of recovery -- just like in a jury charge.

4. Review the findings.

Once the trial judge signs findings, review them for problems, and request additional findings, if necessary. Many practitioners forget this step. You must make this additional request or you will risk appellate problems under Texas Rule of Civil Procedure ("TRCP") 299.

If the court's original findings of fact do not include any findings on a ground of recovery or defense, the party relying on that ground of recovery or defense must timely request additional findings of fact or the ground is waived.

And when the court's findings of fact include one or more elements of a claim or defense, but omit others, the omitted elements will be presumed (if supported by the evidence) unless a party timely files a request for additional findings of fact asking the court to make findings regarding the omitted elements.

5. Conclusion

Watch for the important deadlines for your request for findings, the past due notice, and the request for additional findings in TRCP 296-299. Findings are beneficial if you need to appeal.

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[1] I have written more detailed articles, with citations, on this issue for both TexasBarCLE and UT Law CLE.
[2] *See Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 390 (Tex. 2000).