CIVIL ORDERS: FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Contents

I. Introduction.

When must a civil order include written findings of fact and conclusions of law? Some types of orders must always include at least some findings and conclusions; some orders need only include them if a party asks for them; and for others, findings of fact are inappropriate whether requested or not. Rule 52 of the Rules of Civil Procedure gives us the core rules, but exceptions and clarifications abound, and some types of orders are governed by separate, more specific statutes. This benchbook chapter covers the fundamentals.

II. Rule of Civil Procedure 52.

A. Judgments in Non-Jury Trials.

1. Findings and Conclusions Required in Non-Jury Trials. In bench trials the judge not only makes the legal conclusions but also is the finder of fact. Written findings of fact and conclusions of law are required in all actions tried without a jury, whether or not requested by a party. Rule 52(a)(1). *See, e.g.*, Traber v. Crawford, 28 N.C. App. 694, 698–99 (new trial where findings did not cover all issues).

2. Separate Findings of Fact From Conclusions of Law. Findings of fact must be set forth separately from the conclusions of law. Failure to set forth the findings and conclusions separately may be reversible error particularly if the appellate court is unable to determine the trial court's intent. Dep't of Transp. v. Byerly, 154 N.C. App. 454, 458 (2002); Pineda-Lopez v. North Carolina Growers Ass'n, Inc., 151 N.C. App. 587 (2002).

3. Where Findings and Conclusions Should Appear. Normally the findings and conclusions will appear in the judgment. In the less common event a judge prepares a detailed written opinion or memorandum of

decision, it is sufficient if the judge includes the findings of fact and conclusions of law in that document. Rule 52(a)(3).

4. Amendments.

- Judge may amend a judgment in a non-jury trial upon motion made within 10 days of entry, upon timely Rule 59 motion, or upon the court's own initiative within 10 days of entry of judgment under Rule 59(e). Rule 52(b); Rule 59(a); Fox v. Fox, 103 N.C. App. 13, 22 (1991).
- Judge should be careful to include all necessary findings of fact and conclusions of law in the amended judgment.

B. Rule 41(b) Dismissals (Dismissals in Non-Jury Trials). In bench trials, upon motion of the defendant, a judge may render a decision (involuntary dismissal) against the plaintiff at the close of plaintiff's evidence. Rule 41(b). Upon doing so, judge must make written findings of fact and conclusions of law (just as if the judge had heard both parties' evidence). *Id.*; Rule 52(a)(2). Failure to make findings and conclusions as required by Rule 41(b) is reversible error and requires remand. Greensboro Masonic Temple v. McMillan, 142 N.C. App. 379, 382 (2001) (citing Hill v. Lassiter, 135 N.C. App. 515 (1999)). When the plaintiff's evidence is insufficient as a matter of law, however, there is no dispute of material fact and thus nothing for the trial court to "find." In this scenario, no findings of fact are required. Bauman v. Woodlake Partners., LLC, 199 N.C. App. 441, 454 (2009).

C. Orders on Motions.

1. Default Rule: Findings and conclusions are not required on decisions on motions (or the court's own orders without a motion). Rule 52(a)(2). *See, e.g.*, Monaghan v. Schilling, 197 N.C. App. 578, 582–83 (2009) (findings of fact not required in Rule 60(b) order unless requested).

2. Exception: When requested by a party, findings and conclusions are required. *Id.*

a. Timing of Request. Request should be made prior to entry of the trial court's written order (if any). J.M. Dev. Group v. Glover, 151 N.C. App. 584, 586 (2002).

3. *BUT NOTE*: Certain types of orders should not contain findings of fact, *even if the party requests them*:

a. Summary judgment motions (Rule 56). The court's task is to determine only whether genuine issues of material fact exist, and not to decide those facts one way or the other. Findings of fact are inappropriate. Tuwamo v. Tuwamo, 790 S.E.2d 331, 336 (N.C. App. July 19, 2016); Hodges v. Moore, 205 N.C. App. 722, 723 (2010); Broughton v. McClatchy Newspapers, Inc., 161 N.C. App. 20, 33-34 (2003). "The appellate courts of this State have on numerous occasions held that it is not proper to include findings of fact in an order granting summary judgment." Winston v. Livingstone College, Inc., 210 N.C. App. 486–87 (2011). The Judge may *recite* the undisputed facts, but is not required to do so. Wiley v. United Parcel Service, Inc., 164 N.C. App. 183, 189 (2004); Capps v. City of Raleigh, 35 N.C. App. 290, 292-93 (1978). If the court chooses to do so, it is best to make the intention clear:

> By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of

> summary judgment proceedings. We understand that a number of trial judges feel compelled to make findings of fact reciting those "uncontested facts" that form the basis of their decision. When this is done, any findings should clearly be denominated as "uncontested facts" and not as a resolution of contested facts. In the instant case, there was no statement that any of the findings were of "uncontested facts."

War Eagle, Inc. v. Belair, 204 N.C. App. 548, 552 (2010). *See also Winston*, 21 N.C. App. at 487 ("If the trial court chooses to recite uncontested findings of fact in its order, they should be clearly denominated as such.").

b. **Motions Under Rule 12(b)(6).** The court's only task is to determine whether complaint contains sufficient allegations. Allegations must be accepted as true. Findings of fact are inappropriate. M Series Rebuild, LLC v. Town of Mt. Pleasant, Inc., 222 N.C. App. 59, 63 (2012) (citing White v. White, 296 N.C. 661, 667 (1979)).

c. **Motions for Judgment on the Pleadings (Rule 12(c)).** The court's task is to determine whether the allegations in the complaint and admissions in the answer establish that movant is entitled to judgment as a matter of law. Findings of fact are inappropriate.

d. **Motions for Directed Verdict and JNOV (Rule 50).** The court's task is to determine whether there is/was sufficient evidence to allow the jury to reach a verdict as to an issue, not to resolve the evidentiary dispute. Hodgson Const., Inc. v. Howard, 187 N.C. App. 408, 411-12 (2007); N.C. Indus. Capital, LLC v. Clayton, 185 N.C. App. 356, 370–71 (2007).

Note that while findings of fact are inappropriate in a JNOV order, when assessing a JNOV motion regarding *punitive damages*, the court is required to issue a written opinion pursuant to G.S. 1D-50 stating its reasons for upholding or disturbing the award. Scarborough v. Dillard's, Inc., 363 N.C. 715, 722 (2009); Springs v. City of Charlotte, 209 N.C. App. 271, 281 (2011).

e. **Note – Opinions in Business Court Orders.** In a complex business case, the presiding business court judge must issue a written *opinion* in connection with any order granting or denying a motion under Rule 12, Rule 56 (summary judgment), Rule 59 (new trial), or Rule 60 (relief from judgment), other than an order "effecting a settlement agreement or jury verdict." G.S. 7A-45.3. Presumably this statute is *not* intended to include a requirement that actual findings of fact be included in Rule 12(b)(6) and summary judgment orders.

D. **Preliminary Injunctions and TROs.** Findings of fact and conclusions of law are not required unless requested by a party. Rule 52(a)(2). The Court must, however, include the following:

- In a TRO entered without notice, the order must state the date and hour of issuance; must define the injury; state why it is irreparable; and state

why it was issued without notice. Rule 65(b).

- In every injunction and restraining order, the order must set forth the reasons for issuance; must be specific in its terms; and must describe in reasonable detail the act or acts enjoined or restrained. Rule 65(d).

III. Other Types of Civil Orders (Outside Rule 52).

A. Rule 11 Sanctions. Findings of fact and conclusions of law should be included in an order granting or denying sanctions in order to allow appellate review. Sholar Bus. Assocs., Inc. v. Davis, 138 N.C. App. 298, 303 (2000); Lowry v. Lowry, 99 N.C. App. 246, 255 (1990).

B. Attorney Fees Generally. Findings and conclusions are required for both the entitlement to attorney fees per the *relevant* factors in *Washington v. Horton*, 132 N.C. App. 347, 351 (1999), and as to the reasonableness of the amount of attorney fees awarded, taking into consideration (1) time and labor expended, (2) skill required, (3) customary fee for like work, and (4) experience and ability of the attorney. Furmick v. Miner, 154 N.C. App. 460, 462 (2002); *see also* E. Brooks Wilkins Family Med., P.A. v. WakeMed, 784 S.E.2d 178, 186 (N.C. App. Jan. 5, 2016) (noting that findings of fact are required as to reasonableness of attorney fee awarded under Rule 37).

C. Attorney Fees Under G.S. 75-16.1. In awarding attorney fees under this statute, the court must include findings that:

(1) Either:

a. the defendant willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of the suit (if the plaintiff prevailed); or

b. the plaintiff knew, or should have known, the action was frivolous and malicious (if the defendant prevailed); and

(2) The reasonableness of the fee.

McKinnon v. CV Industries, Inc., 228 N.C. App. 190, 199 (2013)(remanding for ultimate finding regarding plaintiff's knowledge that claim was frivolous or malicious); Barbee v. Atlantic Marine Sales & Service, Inc., 115 N.C. App. 641, 648 (1994); Evans v. Full Circle Productions, Inc., 114 N.C. App, 777, 781 (1994).

BUT NOTE: In a 2016 opinion, the Court of Appeals held that no specific findings of fact were necessary where the trial court denied a fee award under this statute in the court's discretion. The Court held that "the trial court is not required to make such findings in any order declining to award attorney fees." E. Brooks Wilkins Family Med., P.A. v. WakeMed, 784 S.E.2d 178, 187–88 (N.C. App. Jan. 5, 2016).

D. Order Denying Motion to Compel Arbitration. An order denying a motion to compel arbitration must include findings of fact as to (i) whether the parties had a valid agreement to arbitrate; and (ii) whether the dispute falls within the substantive scope of that agreement. Cornelius v. Lipscomb, 224 N.C. App. 14, 16–17 (2012); Griessel v. Temas Eye Center, P.C., 199 N.C. App. 314, 317 (2009); *see also* Terrell v. Kernersville Chrysler Dodge, LLC, 798 S.E.2d 412, 417 (N.C. App. March

21, 2017) (remanded for findings); TMCS, Inc. v. Marco, 780 S.E.2d 588, 595 (N.C. App. 2015) (stating the requirement but holding that findings were adequate in this case).

E. Rule 9(j) Dismissals. Whether a party has complied with Rule 9(j) is a question of law, and the appellate courts review the matter de novo. McKoy v. Beasley, 213 N.C. App. 258, 262 (2011); Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr., P.A., 199 N.C. App. 425, 437 (2009); Phillips v. A Triangle Women's Health Clinic, Inc., 155 N.C. App. 372, 376 (2002). In 2012, however, the Court of Appeals stated that,

> When a trial court determines a Rule 9(j) certification is not supported by the facts, "the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence, whether the conclusions of law are supported by those findings, and, in turn, whether those conclusions support the trial court's ultimate determination."

Estate of Wooden ex rel. Jones v. Hillcrest Convalescent Ctr., Inc., 222 N.C. App. 396, 403 (2012) (quoting *Moore v. Proper*, 366 N.C. 25, 32 (2012), in which the Supreme Court stated the rule in the narrower context of determining that a plaintiff was unreasonable in expecting an expert to qualify under Rule 702). Based on the language of *Wooden*, the trial court should include written findings of fact when ruling that a Rule 9(j) certification is not supported by the facts in the record.

F. Contempt Orders. An order holding a person in civil contempt must contain findings of fact as to the statutory factors in G.S. 5A-21(a). G.S. 5A-23(e). The court must also address the contemnor's ability to comply during the alleged period of default and present ability to comply with the purge conditions. *See* Mauney v. Mauney, 268 N.C. 254, 268 (1964); Shippen v. Shippen, 204 N.C. App. 188, 190 (2010); Scott v. Scott, 157 N.C. App. 382, 393–94 (2003).

G. Consent Judgments. Findings and conclusions are not required. *In re* Estate of Peebles, 118 N.C. App. 296 (1995). There are no facts to be determined. The Court is merely reciting the parties' agreement and allowing formal entry of the agreement into the record. Crane v. Green, 114 N.C. App. 105, 107 (1994). Note, however, that a court may choose to include its own findings of fact and conclusions of law in a consent judgment, and whether it has done so has bearing on whether the judgment can be enforced through the court's contempt powers. *See* PCI Energy Servs. v. Wachs Technical Servs., Inc., 122 N.C. App. 436, 439–40 (1996); Nohejl v. First Homes of Craven County, Inc., 120 N.C. App. 188 (1995).

IV. Tips for Drafting Findings of Fact.

A. Recitations of Evidence are Not Findings. Findings of fact should not merely recite the evidence in the record (in other words, what a witness said or a document showed). They must, instead, state the court's own resolution about the disputed issue of fact. As the Court of Appeals has stated,

> [R]ecitations of the testimony of each witness do not constitute findings of fact by the trial judge, because they do not reflect a conscious choice between the conflicting versions of the incident in

> question which emerged from all the evidence presented.

Chloride, Inc. v. Honeycutt, 71 N.C. App. 805, 806 (1984) (quotation omitted). *See also* In re O.W., 164 N.C. App. 699, 703 (2004) (simply reciting what a source said were not findings of fact); Long v. Long, 160 N.C. App. 664, 668 (2003) (summarizing witness testimony and the conclusions of a report were not findings of fact); In re Gleisner, 141 N.C. App. 475, 480 (2000) ("[I]t is especially crucial that the trial court make its own determination as to what pertinent facts are actually established by the evidence[.]").

- **Illustration.** Disputed Issue: Whether Mr. Davis signed a contract.
  - Not findings of fact: "Mr. Davis testified that he signed the contract." or "Ms. Lloyd testified that Mr. Davis could not have signed the contract."
  - Proper findings of fact: "Mr. Davis signed the contract." or "Mr. Davis did not sign the contract."

B. Findings Should Not Be Equivocal. To be clear to the parties and a reviewing court, findings of fact should not sound equivocal or uncertain. They should, instead, leave the reader with a clear understanding of the trial court's factual determinations.

- **Illustration.** Disputed Issue: Whether Mr. Davis signed a contract.
  - Unclear: "It appears to the court that Mr. Davis did [did not] sign the contract." (or "It seems that…"; "The court is inclined to find that…"; "It appears to the court that…")
  - Clear: "Mr. Davis signed [did not sign] the contract."

C. Avoid Wholesale Incorporation by Reference. Incorporation of portions of the record or of pleadings, such as findings of experts or agencies, should be done carefully and only in connection with independent findings by the court. For example, a trial court order included a finding stating that, "[t]he Court incorporates each of the factual allegations set forth in the Petition as findings of fact as if set forth herein in their entirety." Rejecting this finding, the Court of Appeals stated that,

> [T]he trial court incorporated the allegations from the . . . petition as its findings of fact. This it cannot do, particularly without making sufficient additional findings of fact which indicate the trial court considered the evidence presented at the hearing. . . . [A] trial court may not incorporate wholesale the allegations in the petition as a substitute for making its own findings of fact.

In re S.C.R., 217 N.C. App. 166, 169 (2011). However, the Court of Appeals has clarified that:

> [I]t is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, [the appellate court] will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading."

In re J.W., 241 N.C. App. 44, 48–49 (2015).

D. Only "Ultimate" Facts Required. When making findings of fact, the court need not include a finding resolving every factual dispute that arose in the matter at issue. The court is required only to include findings as to the "ultimate" or "controlling" facts—the "final facts required to establish the plaintiff's cause of action or the defendant's defense." Woodard v. Mordecai, 234 N.C. 463, 470 (1951). While only "controlling" facts are required, the findings should, of course, be sufficient to support each of the relevant conclusions of law. Woodring v. Woodring, 164 N.C. App. 588, 592 (2004); Beck v. Beck, 163 N.C. App. 311, 314–15 (2004).