FINDINGS OF FACT AND CONCLUSIONS OF LAW: THE BASICS AND BEYOND

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Laurie Ratliff is a board certified civil appellate attorney in Austin, Texas who represents clients across Texas in appeals and original proceedings. Laurie also partners with trial counsel for presenting legal issues in motion practice, discovery disputes, summary judgments, and other trial court matters.

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I. INTRODUCTION

There are many similarities with appeals of jury trials and bench trials. Appeals of bench trials, however, involve a key difference from an appeal of a jury trial – unlike having a jury verdict to illuminate the facts underlying the result, the underlying reasons for a judgment in a bench trial are not always apparent. The rules of procedure allow a litigant to obtain factual findings that replace a jury's verdict and to obtain the trial court's legal bases for its rulings. The findings of fact and conclusions of law form the basis for the appeal.

Findings of fact and conclusions of law serve many purposes. They allow litigants to know the reasons for the trial court's ruling. This in turn narrows the issues for appeal. Findings of fact and conclusions of law are also necessary for appellants and appellees to preserve certain errors.

While findings of fact and conclusions of law provide a roadmap to the trial court's decision – both the factual basis and the legal reasons – they are an important tool for attorneys who draft them early in a case. Like in preparing a proposed jury charge early in a case, having proposed findings of fact and conclusions of law prepared well in advance assists in maintaining focus on the grounds of recovery and defenses, the elements of the grounds and defenses, and the evidence need to establish them. Further, preparing the findings of fact early on assists with drafting the appropriate discovery.

Understanding the procedure, preservation, and strategy issues is critical for obtaining findings of fact and conclusions of law. This article discusses the procedure for obtaining findings of fact and conclusions of law, strategies for requesting additional findings of fact, how to avoid waiver, issues to raise on appeal with findings of fact, and finally appellate review of findings of fact and conclusions of law.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. What Are Findings of Fact and Conclusions of Law and What Is Their Purpose?

Findings of fact take the place of a jury's verdict and provide the factual support for the court's judgment. Findings of fact are the "who did what, when, where, how, or why." *State v. Sheppard*, 271 S.W.3d 281, 291 (Tex. Crim. App. 2008). As one court described, "findings of fact are ultimate determinations of what specifically occurred, who did or did not do certain acts, what the values of services and property are worth, and the answer to any other specific inquiry necessary to establish conduct or the existence or nonexistence of a relevant matter." *Pacific Emp'rs Ins. Co.*, 86 S.W.3d 353, 356-57 (Tex. App.—Texarkana 2002, no pet.).

Findings of fact in a bench trial have the "same force and dignity" as a jury's answers to jury questions. *In re H.S.*, 550 S.W.3d 151, 167 (Tex. 2018); *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *In re J.K.R.*, 658 S.W.3d 354, 363 (Tex. App.—Corpus Christi-Edinburg 2022, no pet.); *Keisling v. Landrum*, 218 S.W.3d 737, 740 (Tex. App.—Fort Worth 2007, pet. denied).

"Conclusions of law may be a statement of a principle of law or the application of the law to the ultimate facts in the case." *Pacific Employers Ins. Co.*, 86 S.W.3d at 357.

Together, findings of fact and conclusions of law provide the trial court's reasoning for its judgment. *Allstate Ins. Co. v. Hegar*, 484 S.W.3d 611, 615 (Tex. App.—Austin 2016, pet. denied); *Hegar v. American Multi-Cinema, Inc.*, 605 S.W.3d 35, 43, n.6 (Tex.

2020) (supreme court pointing out significance of findings of fact and conclusions of law—to show the trial court's resolution of disputed facts and its legal conclusions).

Which are more important? The applicable standard of review confirms that findings of fact are the more important of the two. Findings of fact are reviewed for sufficiency of the evidence; conclusions of law are reviewed *de novo*. *Ortiz v. Jones*, 917 S.W.2d 770, 772 (Tex. 1996); *Perry Homes v. Cull*, 258 S.W.3d 580, 598 (Tex. 2008). The court of appeals treats findings of fact as it would jury findings but does not give any weight to the trial court's legal conclusions. When reviewing conclusions of law, courts of appeals will make their own legal determination. *First Trust Corp. TTEE FBO v. Edwards*, 172 S.W.3d 230, 233 (Tex. App.—Dallas 2005, pet. denied). An erroneous conclusion of law is not binding on an appellate court. *Bexar Cnty. Crim. Dist. Atty's Ofc. v. Mayo*, 773 S.W.2d 642, 643 (Tex. App.—San Antonio 1989, no writ). Further, if there is a conflict between a finding of fact and a conclusion of law, the fact finding prevails. *Buzbee v. Buzbee*, 870 S.W.2d 335, 340 (Tex. App.—Waco 1994, no writ).

What are the purposes of findings of fact and conclusions of law? First, findings of fact and conclusions of law narrow the issues for appeal and provide a basis for attacking the judgment. *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 252, 255 (Tex. App.—Houston [14th Dist.], pet. denied). Findings of fact assist the losing party by ascertaining the true basis for the trial court's decision. *Nicholas v. Env't Sys. (Internat'l) Ltd.*, 499 S.W.3d 888, 894 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

In a bench trial, there is a presumption of validity of the judgment and that all evidence necessary to support it was admitted at trial. To limit the scope of the presumption, an appellant should request findings of fact. *Vickery*, 5 S.W.3d at 252; *Larry F. Smith, Inc. v. Weber Co., Inc.*, 110 S.W.3d 611, 614 (Tex. App.—Dallas 2003, pet. denied).

Without findings of fact, the court of appeals implies all necessary findings in support of the judgment. *Combs v. Newpark Resources, Inc.*, 422 S.W.3d 46, 49 (Tex. App.—Austin 2013, no pet.); *Burnett v. Motyka*, 610 S.W.2d 735, 736 (Tex. 1980); *Schoeffler v. Denton*, 813 S.W.2d 742, 744 (Tex. App.—Houston [14th Dist.] 1991, no writ). If there are no findings of fact requested and none filed, the appellate court must affirm the judgment if any legal theory is supported by the evidence. *Newpark Resources*, 422 S.W.3d 46, 49; *Schoeffler*, 813 S.W.2d at 744.

Findings of fact also define the parameters of issues tried for purposes of res judicata. *Igal v. Brightstar Information Technology Group, Inc.*, 250 S.W.3d 78, 89-90 (Tex. 2008).

Second, a request for findings of fact extends the appellate deadlines. TEX. R. APP. P. 26.1(a)(4). The extended deadline only applies, however, in Rule 296 findings or in cases where findings of fact may be considered on appeal. *Id.* This is important because if not a proper case for findings of fact, the request does not extend the appellate deadlines and an appeal that relied on the extended deadlines would be dismissed for lack of jurisdiction. *See infra* II.G.1.

Third, preparing findings of fact and conclusions of law early in a case can provide a valuable pretrial tool. Attorneys routinely prepare a charge early in a case; it should be no different with a bench trial. Preparing draft findings of fact and conclusions of law early in the case assists with formulating discovery and with presenting evidence at trial. *See* Hon. Tracy Christopher, *Findings of Fact and Conclusions of Law—Do I Have to?*, 76 THE ADVOCATE (TEXAS) 44, 44 (2016) ("a well-done draft [of findings of fact and conclusions of law] can be a blueprint for the judge and

will help you prepare your case"). A draft of the findings of fact can also serve as a checklist during trial of the elements of your claims or defenses and of the evidence that is admitted related to each.

Finally, findings of fact allow a party to "tell the story" on appeal. Although findings of fact are intended to be limited to ultimate issues and not merely to detail evidentiary matters, they do often detail the evidence. Well-written findings of fact can become the statement of facts in an appellate court's opinion.

B. When Are Findings of Fact Appropriate and When Are They Not?

Findings of fact and conclusions of law are critical for appeals in bench trials. Findings of fact and conclusions of law are not appropriate, however, in every bench trial or hearing.

1. When Findings of Fact Are Required.

Under Rule 296, "in any case tried in the district or county court without a jury, any party may request the court to state in writing its findings of fact and conclusions of law." TEX. R. CIV. P. 296. Rule 296 gives a party a right to findings of fact and conclusions of law following a final adjudication after a conventional trial on the merits before the court. *IKB Indus. v. Pro-Line Corp.*, 938 S.W.2d 440, 442 (Tex. 1997); *Haddix v. American Zurich Ins. Co.*, 253 S.W.3d 339, 345 (Tex. App.—Eastland 2008, no pet.).

A case is "tried" when a court holds an evidentiary hearing. *Haddix*, 253 S.W.3d at 345. An evidentiary hearing occurs when the trial court determines questions of fact based on conflicting evidence. *International Union, UAA&AI Workers of America-UAW v. General Motors Corp.*, 104 S.W.3d 126, 129 (Tex. App.—Fort Worth 2003, no pet.). In such cases, findings of fact and conclusions of law are mandatory under Rule 296 and 297. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 769 (Tex. 1989); *In re Guardianship of Alford*, 596 S.W.3d 352, 358 (Tex. App.—Texarkana 2020, no pet.)

Note that one court of appeals has concluded that findings of fact are not appropriate, and a trial court has no duty to file them, in a post-judgment hearing. *Murray v. Murray*, 276 S.W.3d 138, 143 (Tex. App.—Fort Worth 2008, pet. dism'd). The court reasoned that a post-judgment hearing is not "tried" to the court within the meaning of Rule 296. *Id*.

Many statutes require a trial court to enter findings of fact. For example, in a guardianship proceeding, Estates Code § 1101.151(b) requires the probate court to make specific findings of fact. TEX. ESTATES CODE §1101.151(b). Similarly, in a divorce proceeding, under Family Code 6.711, if requested by a party, the trial court shall file findings of fact that set out the characterization of each party's assets and liabilities and the community's assets and liabilities. TEX. FAM. CODE §6.711(a), (b).

The TCPA also has a provision requiring a trial court to file findings of fact. *See* TEX. CIV. PRAC. & REM. CODE § 27.007(a) (if court awards sanctions under Section 27.009(b), then the trial court shall issue findings). According to the supreme court, Section 27.007(a) is the only one expressly requiring findings in the TCPA. *Greer v. Abraham*, 489 S.W.3d 440, 443, n.3 (Tex. 2016). "The Act does not otherwise expressly address findings of fact and conclusions of law, but neither does it forbid them." *Id.*; *see Mogged v. Lindamood*, No. 02-18-00126-CV, 2020 WL 7074390, at *19-20 (Tex. App.—Fort Worth Dec. 3, 2020, pet. denied) (en banc) (mem. op.) (observing that whether the procedures in Rules 296-99 apply to the TCPA is an open question and holding that the trial court had no absolute duty to file findings of fact with order on attorney's fees, costs, and sanctions).

In addition, findings of fact may be required after a jury trial. If some issues are tried to the court and others to a jury, findings of fact are appropriate. *Toles v. Toles*, 45 S.W.3d 252, 264, n.5. (Tex. App.—Dallas 2001, pet. denied). For example, if attorneys' fees are tried to the court and the merits of the case to the jury, findings of fact and conclusions of law are properly requested and filed on the attorneys' fees issue. *Shenandoah Assocs. v. J&K Properties, Inc*., 741 S.W.2d 470, 484 (Tex. App.—Dallas 1987, writ denied).

2. When Findings of Fact Are Helpful and May Be Considered on Appeal.

There are instances where findings of fact are not required under Rule 296 but may be helpful and considered on appeal. *IKB*, 938 S.W.2d at 442. The Supreme Court identified the following as proceedings where findings of fact, although not required under Rule 296, could be considered on appeal: a default judgment on a claim for unliquidated damages, judgment rendered as sanctions and any judgment based in any part on an evidentiary hearing with conflicting evidence for the trial court resolve. *Phillips v. McNeill*, 635 S.W.3d 620, 625 (Tex. 2021); *IKB*, 938 S.W.2d at 443. Given the advantages of having findings of fact and conclusions of law, the best practice is to make the request for findings of fact and encourage the trial court to sign them.

a. Procedural considerations

When appealing an interlocutory order, a party may request the trial court to enter findings of fact and conclusions of law. The filing of findings of fact in an accelerated appeal, however, is not mandatory. TEX. R. APP. P. 28.1(c) ("trial court need not file findings of fact and conclusions of law but may do so within 30 days after the order is signed."); *Niehaus v. Cedar Bridge, Inc.*, 208 S.W.3d 575, 579, n.5 (Tex. App.—Austin 2006, no pet.); *Tom James of Dallas, Inc. v. Cobb*, 109 S.W.3d 877, 884 (Tex. App.—Dallas 2003, no pet.). Also, as discussed *infra* II G.1 & G.2.e, findings of fact in an accelerated appeal do not extend appellate deadlines and are reviewed differently on appeal than Rule 296 findings of fact.

Accelerated appeals where findings of fact may be requested include appeals from interlocutory orders when by statute an appeal is allowed, quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected less than 30 days after the order or judgment. TEX. R. APP. P. 28.1(a). Accordingly, the appealable orders listed in Tex. Civ. Prac. & Remedies Code §51.014(a) are matters where findings of fact could be filed. TEX. CIV. PRAC. & REM. CODE §51.014(a).

Be aware of the different deadlines for the trial court to file findings of fact with accelerated appeals. Rule 28.1 provides that a trial court need not file findings of fact and conclusions of law but may do so within *30 days* after the order is signed. TEX. R. APP. P. 28.1(c). This deadline is different than the one in Rule 296 and 297. *See* TEX. R. CIV. P. 296, 297 (findings of fact are due twenty days after the request or forty days after the judgment or order).

b. Pleas to the jurisdiction

Rulings on pleas to the jurisdiction are frequently appealed interlocutory orders that raise findings of fact issues. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(8) (party may appeal grant or denial of government's plea to the jurisdiction). In deciding a plea to the jurisdiction, a trial court is not required to look solely to the pleadings but may consider evidence and must do so when necessary to resolve a jurisdictional challenge. *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 555 (Tex. 2000). Findings of fact and conclusions of law can be entered after a plea to the jurisdiction when there has been an

evidentiary hearing and when the facts are in dispute. *Goldberg v. Commission for Lawyer Discipline*, 265 S.W.3d 568, 578 (Tex. App.—Houston [1st Dist.] 2008, pet. denied); *see Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226-27 (Tex. 2004).

If the facts are undisputed, however, findings of fact would be immaterial. *Goldberg.* 265 S.W.3d at 579, n.14. In a plea to the jurisdiction, if there are no disputed facts and the trial court rules as a matter of law, findings of fact have no purpose and are not considered on appeal. *U. Lawrence Boze' & Assocs., P.C. v. Harris Cnty. Appraisal Dist.*, 368 S.W.3d 17, 32-33 (Tex. App.—Houston [1st Dist.] 2011, no pet.); *F-Star Socorro, L.P. v. El Paso Cent. Appraisal Dist.*, 324 S.W.3d 172, 175 (Tex. App.—El Paso 2010, no pet.).

For example, in *Haddix v. American Zurich Insurance Company*, the trial court granted pleas to the jurisdiction and dismissed. On appeal, Haddix complained of the trial court's failure to file findings of fact. The Eastland Court observed that while the parties reached different conclusions regarding the evidence, the evidence was undisputed. *Haddix*, 253 S.W.3d at 346. Thus, the trial court was not required to file findings of fact. *Id.*; *see also Old Republic Nat'l Title Ins. Co. v. Bell*, 549 S.W.3d 550, 558(Tex. 2018) (with undisputed facts, court will not consider implied findings; only considered the legal question of whether the undisputed facts established jurisdiction).

What about plea-to-the-jurisdiction orders that state that the trial court considered "pleadings on file"? And what about plea-to-the-jurisdiction proceedings where the parties attach evidence to their filings and the matter is determined on a submission docket with no formal offering of evidence? Are these orders "evidentiary" for purposes of findings of fact?

In *Gene Duke Builders*, the trial court granted a plea to the jurisdiction and dismissed the case. *Gene Duke Builders, Inc. v. Abilene Housing Auth.*, 138 S.W.3d 907, 907 (Tex. 2004). Gene Duke timely requested findings of fact and filed its notice of appeal 85 days after the case was dismissed. *Id.* at 908. The court of appeals granted Abilene Housing Authority's motion to dismiss for lack of jurisdiction, concluding that because there was no "evidentiary hearing," the request for findings of fact did not extend the appellate deadline. *Id.* The supreme court reversed.

The supreme court explained the meaning of an "evidentiary hearing." Gene Duke did not offer any evidence at the hearing on the plea to the jurisdiction but attached evidence to the plea, including a deposition, affidavits, and other exhibits. *Id.* Gene Duke used the evidence to support its argument. Further, the trial court's dismissal order stated that "after reviewing the pleadings and considering arguments of counsel," it granted the plea to the jurisdiction. *Id.*

According to the supreme court, the trial court took evidence, thus findings of fact could be considered and the request for findings of fact extended the appellate deadline. *Id.*; *see also Addington v. Addington*, No. 14-03-00340-CV, 2004 WL 1472127, at *3 (Tex. App.—Houston [14th Dist.] July 1, 2004, no pet.) (mem. op.). (court of appeals concluded the trial court conducted an evidentiary hearing when a request for sanctions attached numerous documents even though there was no reporter's record or other way to know if the documents were admitted).

c. Special appearances

Orders on special appearances are often appealed and raise findings of fact issues. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(7) (party may appeal grant or denial of a special appearance). Some courts of appeal hold that an appellant is not entitled to findings of fact in a special appearance. *Chyba v. US Bank Nat. Assoc.*, No. 02-18-00296-CV, 2019 WL 2429404, at *1 (Tex. App.—Fort Worth June

6, 2019, no pet.) (mem. op.); *Tempest Broadcasting Corp. v. Imlay*, 150 S.W.3d 861, 867-68 (Tex. App.—Houston [14th Dist.] 2004, no pet.). These courts cite Rule 28.1(c) and its permissive language regarding findings of fact. TEX. R. APP. P. 28.1(c) (trial court need not file findings of fact but may do so); *see also Dukatt v. Dukatt*, 355 S.W.3d 231, 240 (Tex. App.—Dallas 2011, pet. denied) (citing TEX. R. APP. P. 28.1(c)).

Other courts of appeals have concluded that trial courts have no obligation to file findings of fact because a special appearance was not a conventional trial on the merits therefore Rules 296 and 297 do not apply. *Waterman Steamship Corp. v. Ruiz*, 355 S.W.3d 387, 428 & n.18 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *Simmons v. Boyd Gaming Corp.*, No. 09-16-00470-CV, 2017 WL 3298233, at *4-5 (Tex. App.—Beaumont Aug. 3, 2017, pet. denied) (mem. op.). The Houston First and Beamont Courts applied Rule 297. According to those courts, any error with the trial court's failure to file findings of fact was waived because no notice of past due findings was filed. *Waterman*, 355 S.W.3d at 428 & n.18; *Simmons v. Boyd Gaming Corp.*, 2017 WL 3298233, at *5, n.6.

Other courts of appeal conclude findings of fact are appropriate in a special appearance and that the losing party should request findings of fact. *Daimler-Benz Aktiengesellschatft v. Olson*, 21 S.W.3d 707, 715 (Tex. App.—Austin 2000, pet. dism'd w.o.j.); *Stauffacher v. Lone Star Mud, Inc.*, 54 S.W.3d 810, 814 (Tex. App.—Texarkana 2001, no pet.); *I & JC Corp. v. Helen of Troy, L.P.*, 164 S.W.3d 877, 883-85 (Tex. App.—El Paso 2005, pet. denied) (noted permissive language in Rule 28.1 but advised that when a "trial court rules on a special appearance, the losing party should request findings of fact and conclusions of law.").

d. Temporary injunctions

Temporary injunctions are another interlocutory order that raises findings of fact issues. *See* TEX. CIV. PRAC. & REM. CODE § 51.014(4) (party may appeal grant or refusal of a temporary injunction or grant or overrule of motion to dissolve a temporary injunction). Rule 683 provides that a temporary injunction must set out the *reasons* for its issuance and must be specific. TEX. R. CIV. P. 683. The "reasons" for an injunction are different than "findings of fact" under Rule 296-97. As the Supreme Court has explained, the order should explain the elements necessary for obtaining a temporary injunction. *Transport Co. of Tex. v. Robertson Transps., Inc.*, 152 Tex. 552, 261 S.W.2d 549, 556 (1953). A party can seek Rule 296 findings of fact and conclusions of law if it chooses. *Id.* Findings of fact, however, are not required to challenge the validity of a temporary injunction. *Courtlandt Place Historical Found. v. Doerner*, 768 S.W.2d 924, 926 (Tex. App.—Houston [1st Dist.] 1989, no writ.). If the party enjoined seeks "additional, detailed findings, the party may make a request under the rules of procedure governing findings of fact generally." *Operation Rescue-Nat'l v. Planned Parenthood of Houston & S.E. Tex., Inc.*, 937 S.W.2d 60, 82 (Tex. App.—Houston [14th Dist.] 1996), *aff'd as modified*, 975 S.W.2d 546 (Tex. 1998). Thus, a party in an injunction must decide whether the reasons in the injunction order require additional "findings." If so, then the party must comply with Rules 296-99. *Operation Rescue*, 937 S.W.2d at 82.

Another potential problem with findings of fact in the temporary injunctive context is their location—in the order or in a separate document. Rule 683 provides that the temporary injunction order must "set forth the reasons for its issuance." TEX. R. CIV. P. 683. As detailed below, findings of fact should not be included in a judgment and should be in a separate document. TEX. R. CIV. P. 299a. Findings of fact included in a temporary injunction comply with Rule 683. *El Tacaso, Inc. v. Jireh Star, Inc.*, 356 S.W.3d 740, 745 &

n.5 (Tex. App.—Dallas 2011, no pet.). Findings of fact contained in a temporary injunction order, however, have been held to violate Rule 299a. *Tom James*, 109 S.W.3d at 883-84. In *Tom James*, the court rejected an argument to consider findings in a temporary injunction as Rule 296 findings. The court reasoned that the findings in a temporary injunction do not meet the requirement of Rule 299a that findings of fact are to be separately filed. *Id.* at 884. The court then applied the standard of review applicable to cases where no findings had been requested or filed. *Id.*

The solution: put them in both places but make sure they are identical.

e. Motions for new trial

Finally, orders granting new trials raise findings of fact issues. The Texas Supreme Court has held that trial courts must state the specific reason for granting a new trial that sets aside jury verdict. *In re USAA Gen. Indem. Co.*, 629 S.W.3d 878, 892 (Tex. 2021) (orig. proceeding); *In re Columbia Med. Ctr. of Las Colinas,* 290 S.W.3d 204, 213 (Tex. 2009) (orig. proceeding). A trial court's order granting a motion for new trial may be reviewed by mandamus. *In re United Scaffolding, Inc.*, 377 S.W.3d 685, 688-89 (Tex. 2012) (orig. proceeding). On mandamus review, the court of appeals determines whether the trial court's stated reasons are reasonably specific and based on legally sound rationale. *In re Toyota Motor Sales, U.S.A., Inc.*, 407 S.W.3d 746, 749 (2013) (orig. proceeding); *see also In re City of Houston*, 418 S.W.3d 388, 393 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (court reviewed each of trial court's stated reasons for ordering a new trial); *see also In re Jones*, No. 05-16-00081-CV, 2016 WL 3166080 (Tex. App.—Dallas June 7, 2016, no pet.) (mem. op.) (court assumed it could review reasons for granting new trial contained in findings of fact and conclusions of law and found reasons insufficient).

3. <u>When Findings of Fact Are Not Appropriate and Should Not Be Requested.</u>

Not all proceedings result in a party being able to obtain findings of fact and conclusions of law. In cases where there are no questions of fact for the trial court to determine and a trial court rules as a matter of law, findings of fact and conclusions of law serve no purpose and should not be requested. *IKB*, 938 S.W.2d at 442; *Haddix*, 253 S.W.3d at 345, n.3. Findings of fact are not appropriate in the following matters: summary judgments, directed verdicts, j.n.o.v.'s, default judgment awarding liquidated damages, dismissal for want of prosecution without an evidentiary hearing, dismissal based on the pleadings or special exceptions, and any judgment rendered without an evidentiary hearing. *IKB*, 938 S.W.2d at 442; *see also Housing Auth. of City of El Paso v. Beltran Elec. Contractors, Inc.*, 550 S.W.3d 707, 711 (Tex. App.—El Paso 2018, pet. denied).

In addition, there are other cases where findings of fact and conclusions of law are not appropriate. Findings of fact are not appropriate in administrative appeals. *Young Chevrolet, Inc. v. Texas Motor Vehicle Bd.*, 974 S.W.2d 906, 912, n.9 (Tex. App.—Austin 1998, pet. denied) (no findings of fact in an administrative appeal unless an issue of procedural irregularities at agency and evidence is offered on that issue); TEX. GOV. CODE § 2001.175(e). Findings of fact also are not appropriate in an agreed case under Rule 263. No facts are "tried" in an agreed case within the meaning of Rule 296. *Markel Ins. Co. v. Muzyka*, 293 S.W.3d 380, 384 (Tex. App.—Fort Worth 2009, no pet.).

What happens if findings of fact are filed in these kinds of cases? If findings of fact are erroneously filed in a case that does not warrant findings, the error is not reversible. Instead, the findings of fact are simply disregarded on appeal. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex. 1994);

Cotton v. Ratholes, Inc., 699 S.W.2d 203, 204 (Tex. 1985); *Markel Ins.*, 293 S.W.3d at 384-85; *Addison Urban Dev. Partners, LLC v. Alan Ritchey Materials Co., LC*, 437 S.W.3d 597, 600-01 (Tex. App.—Dallas 2014, no pet.).

Most importantly, if findings of fact are not appropriate and could not considered in a particular case, a request for findings of fact will not extend the appellate deadlines. *IKB*, 938 S.W.2d at 443; *International Union v. General Motors Corp.*, 104 S.W.3d 126, 128-29 (Tex. App.—Fort Worth 2003, no pet.); *see infra* II. G.1 (discussion of Texas Supreme Court opinion with two-step analysis for determining if a request for findings extends the appellate deadline).

C. Procedure for Requesting Findings of Fact and Conclusions of Law and Strategies for Both Parties

The procedure for requesting for findings of fact and conclusions of law is different from all other post-judgment filings in two respects: 1) the deadline for filing the request is shorter than other post-judgment motions, and 2) the process requires the filing of a series of documents to preserve error.

Requesting findings of fact and conclusions of law is a three-step process. All three steps are critical in preserving error and in presenting a case on appeal.[1]

[1] More than a decade ago, the Supreme Court Advisory Committee debated Rules 296-299a and considered a simplified procedure for obtaining findings and conclusions. The Committee considered proposed amendments that: 1) encouraged broad form findings and avoided voluminous and evidentiary findings; 2) modified the deadline for the original request deadline to conform to other post-judgment preservation rules, and 3) eliminated the requirement for the notice of past due findings of fact, and 4) clarified the scenario when findings are stated in a judgment. SUPREME COURT ADVISORY COMMITTEE Proposed Draft Rules 296-299a (May 28, 2010); SUPREME COURT ADVISORY COMMITTEE *Hearing Transcript* (Feb. 13, 2009); SUPREME COURT ADVISORY COMMITTEE *Hearing Transcript* (April 9, 2010). To date, however, the findings of fact rules have not been amended.

Recent Amendments to the Rules Governing Findings of Fact and Conclusions of Law:

The Texas Supreme Court recently approved amendments to the Rules of Civil Procedure governing findings of fact and conclusions of law. Rules 297-299a were amended to change the wording from a trial court must "file" findings of fact and conclusions of law to a trial court must "send" findings and conclusions as provided in Rule 21(f)(10). TEX. R. CIV. P. 297-299a. Rule 21(f)(10) requires trial court clerks to send orders, notices, and other documents to the parties electronically through an electronic filing system approved by the Texas Supreme Court. TEX. R. CIV. P. 21(f)(10)(A). The requirement to notify the parties electronically does not apply to matters that are sealed or with unrepresented parties who have not provided an email address. *Id.* 21(f)(10)(B).

Deadlines for findings of fact and conclusions of law:

***Step One*:**

The "Request for Findings of Fact and Conclusions of Law" is due within **20 days** after the judgment or order is signed;

The trial court must send Findings of Fact and Conclusions of Law within **20 days** after a timely filed request;

***Step Two*:**

A "Notice of Past Due Findings of Fact and Conclusions of Law" is due **30 days** after the original request was filed;

The trial court then has **40 days** from the date of the original request to send Findings of Fact and Conclusions of Law;

***Step Three*:**

After the court sends the original Findings of Fact and Conclusions of Law, any party may file a request for additional or amended findings or conclusions within

10 days after the original findings are filed; and

Within **10 days** after such request is filed, the court must send any additional findings and conclusions.

TEX. R. CIV. P. 296-298.

Details on the three steps:

1. The Request for Findings of Fact and Conclusions of Law and Strategies When Drafting

a. Rule 296 Requirements

The first step in the procedure for obtaining findings of fact and conclusions of law is to file a "Request for Findings of Fact and Conclusions of Law." As Rule 296 provides, any party may file a request for the trial court to state in writing its findings of fact and conclusions of law. TEX. R. CIV. P. 296. The request must be filed with the clerk within twenty days after the judgment is signed and must be served on all parties according to Rule 21a. TEX. R. CIV. P. 296. The clerk must immediately notify the trial court of the request. TEX. R. CIV. P. 296.

There is no procedure for extending this 20-day deadline. *Id.* A request for findings of fact can be filed early. A prematurely filed request for findings of fact is effective and deemed filed on the date of but after the signing of the judgment. TEX. R. CIV. P. 306c.

Rule 297 imposes a mandatory duty on the trial court to send properly requested findings of fact. "Within twenty days after a timely filed request is filed, the court must send its findings of fact and conclusions of law to the parties as provided in Rule 21(f)(10)." TEX. R. CIV. P. 297.

What about proposed findings of fact filed pretrial? A party's proposed findings of fact and conclusions of law filed pretrial are not a request for findings of fact. *Oh v. Hwang*, No. 05-15-00643-CV 2016 WL 2726307, at *2 (Tex. App.—Dallas May 9, 2016, no pet.) (mem. op.); *Villalon v. Galindo*, No. 14-14-00556-CV, 2015 WL 7456023, at *3-4 (Tex. App.—Houston [14th Dist.] Nov. 24, 2015, no pet.) (mem. op.).

A request for findings of fact in an appropriate case extends the appellate deadlines but a request for findings of fact does not extend plenary power. *See* TEX. R. CIV. P. 329b; *HSBC Bank USA, N.A. v. Watson*, 377 S.W.3d 766, 772 (Tex. App.—Dallas 2012, pet. dism'd). Thus, if a party needs plenary power extended, file a motion for new trial or motion to modify. TEX. R. CIV. P. 329b(e), (g). The expiration of the trial court's plenary power, however, does not affect the trial court's ability to file findings of fact. *In re Gillespie*, 124 S.W.3d 699, 703 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see infra* II.C.2.c (discussion of late-filed findings).

b. Considerations for Both Parties When Drafting Findings of Fact and Conclusions of Law

First, when preparing findings of fact and conclusions of law, look first at the pleadings for the causes of action and defenses. The proposed findings should track the court's judgment and the parties' grounds for recovery and defenses, including all elements. Confirm that all elements of each are included if supported by the evidence and the judgment. It is usually easier to write the conclusions of law first and then write the findings of fact that support each conclusion.

Second, when drafting findings, consider the trial court's duties. As the rule directs, findings of fact are on "grounds of recovery" or "defenses." TEX. R. CIV. P. 299. Ground of recovery or defense may include legal principles supporting the judgment. *Williams v. Gillespie*, 346 S.W.3d 727, 732-33 (Tex. App.—Texarkana 2011, no pet.) (court

characterized the parties' agreement as a "ground of recovery"). Further, a trial court is only required to enter findings (and additional findings) on ultimate or controlling issues. *Poydras v. Poydras*, No. 02-22-00152-CV, 2023 WL 415804, at *7, n.2 (Tex. App.—Fort Worth Jan. 27, 2023, no pet.) (mem. op); *Flanary v. Mills*, 150 S.W.3d 785, 792 (Tex. App.—Austin 2004, pet. denied); *Lifshutz v. Lifshutz*, 61 S.W.3d 511, 515 (Tex. App.—San Antonio 2001, pet. denied). A trial court is not required to set out in detail every reason and theory on how it made its decision. *H.K. Global Trading, Ltd. v. Combs*, 429 S.W.3d 132, 141 (Tex. App.—Austin 2014 pet. denied); *Nicholas v. Env't Sys. (Internat'l) Ltd.*, 499 S.W.3d at 894-95.

A trial court is not required to make findings on every disputed fact but only on those findings have some legal significance to an ultimate issue in the case. *Guillory v. Dietrich*, 598 S.W.3d 284, 290 (Tex. App.—Dallas 2020, pet. denied) (citing *Watts v. Lawson*, No. 07-03-0485-CV, 2005 WL 1241122, at *3 (Tex. App.—Amarillo May 25, 2005, no pet.) (mem. op.)). The Dallas Court noted that "excessive fact findings . . . make judgments unnecessarily difficult for litigants to appeal and appellate courts to review." *Guillory*, 598 S.W.3d at 290. Findings relating to mere evidentiary matters as opposed to controlling issues are unnecessary. *Id.*; *Knight Renovations, LLC v. Thomas*, 525 S.W.3d 446, 454 (Tex. App.—Tyler no pet.).

An ultimate issue is one that is essential to the cause of action and that would have a direct effect on the judgment or one that supports a judgment for one party or another. *In re J.K.R.*, 658 S.W.3d 354, 363 (Tex. App.—Corpus Christi-Edinburg 2022, no pet.); *Flanary*, 150 S.W.3d at 792; *Clear Lake City Water Auth. v. Winograd*, 695 S.W.2d 632, 639 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Cooke Cnty. Tax Appraisal Dist. v. Teel*, 129 S.W.3d 724, 731 (Tex. App.—Fort Worth 2004, no pet.) (citing *In re Marriage of Edwards*, 79 S.W3d 88, 94 (Tex. App.—Texarkana 2002, no pet.)). An evidentiary issue is one that the trial court may consider in deciding a controlling issue but is not alone controlling. *Flanary*, 150 S.W.3d at 792-93; *see also York v. Boatman* 487 S.W.3d 635, 645, n.7 (Tex. App.—Texarkana 2016, no pet.).

While findings of fact may contain numerous evidentiary findings, the trial court is not required to enter findings of fact on evidentiary issues. For example, in a case involving division of marital property, the ultimate or controlling issue is whether the division is just and right. *Hill v. Hill*, 971 S.W.2d 153, 155 (Tex. App.—Amarillo 1998, no pet.). The value of the property being divided is not a controlling issue, but rather is an evidentiary matter and one not required for the findings of fact. *Id.*; *see also In re R.E.G.*, No. 13-08-00335-CV, 2009 WL 3778014, at *5-6 (Tex. App.—Corpus Christi November 12, 2009, pet. denied) (mem. op.) (order contained the ultimate issue for determination, any other findings would have been evidentiary; court of appeals rejected argument that appellant was harmed by trial court's failure to enter finding).

Further, a trial court is not required to make findings of fact on undisputed matters. *Ad Villarai, LLC v. Chan II Pak*, 519 S.W.34d 132, 135 (Tex. 2017); *Limbaugh v. Limbaugh*, 71 S.W.3d 1, (Tex. App.—Waco 2002, no pet.).

Another consideration is raising *Casteel*-type errors in a bench trial. When an appellant wants to raise an issue that the trial court erroneously considered a type of damage for which there is no evidence, an appellant must request the trial court to enter specific findings separating the permissible bases for damages from the impermissible bases. *Macy's Retail Holdings, Inc v. Benavides*, No. 05-19-001264-CV, 2021 WL 3573363, at *11 (Tex. App.—Dallas Aug. 12, 2021, pet. denied) (mem. op.); *Zaidi v. Shah*, 502 S.W.3d 434, 440 (Tex. App.—Houston [14 Dist.] 2016, pet.

denied); *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 395 (Tex. App.—Dallas 2013, no pet.); *Miranda v. Byles*, 390 S.W.3d 543, 552 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); *Tagle v. Galvan*, 155 S.W.3d 510, 516 (Tex. App.—San Antonio 2004, no pet.).

Third, when drafting conclusions of law, consider their purpose. Conclusions of law state the reasons for the court's judgment based on the findings. In a straightforward case with a single ground of recovery, a trial court need not set out its reasoning in any detail. *Limbaugh* 71 S.W.3d at 6-7. On the other hand, if the case is factually complex and involving multiple grounds for recovery or multiple defenses, the trial court should detail its reasoning in conclusions of law. *Id.* at 7. A trial court places an undue burden on an appellant and forces an appellant to guess the reasons for a trial court ruling against it if conclusions of law are not sufficiently detailed. *Id.*

Finally, if requesting findings of fact and conclusions of law that are contrary to one's position, make clear that you do not agree with the proposed findings to avoid waiver. For example, a party may have prevailed on the merits, but lost on attorney's fees. Or prevailed on one ground and not on another. The trial court will look to the prevailing party to prepare proposed findings of fact and conclusions of law. The party will want to provide findings the court will sign so necessarily will be submitting findings contrary to their position on attorney's fees or the issue on which they did not prevail.

The best procedure: file a motion to submit findings of fact and include the qualifying language from *First Nat'l Bank v. Fojtik* and attach the proposed findings of fact and conclusions of law to the motion. *See First Nat'l Bank v. Fojtik*, 775 S.W.2d 632, 633 (Tex. 1989) (motion indicated disagreement with the findings, alleged the ruling was erroneous and stated disagreement with the content and result); *see also Hooks v. Samson Lone Star, LP*, 457 S.W.3d 52, 67 (Tex. 2015) (citing *Fojtik* as means of avoiding waiver of appeal); *Smith v. East*, 411 S.W.3d 519, 529 (Tex. App.—Austin 2013, pet. denied) (instructing that best strategy in reserving right to appeal is to follow *Fojtik* language); *Bray v. Tejas Toyota, Inc.*, 363 S.W.3d 777, 787 (Tex. App.—Austin 2012, no pet.) (same); *Beal Bank, SSB v. Biggers*, 227 S.W.3d 187, 190-91 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (same).[2] This is the same procedure used with filing a motion for judgment when a party did not prevail on all matters. Without qualifying the findings in this manner, a party waives taking a position on appeal contrary to the findings it requested. *General Chem. Corp. v. De La Lastra*, 852 S.W.2d 916, 920 (Tex. 1993) (party cannot challenge on appeal the very issue it requested); *Bluestar Energy, Inc. v. Murphy*, 205 S.W.3d 96, 101 (Tex. App.—Eastland 2006, pet. denied) (party cannot agree to omission of a cause of action and then object to the omission).

c. Strategy Considerations and Practical Points for the Appellant

If you are representing the party who lost in the trial court, be aware of the short deadline for requesting findings of fact and conclusions of law: *twenty* days after the judgment is signed. This is a commonly missed deadline since the typical post-judgment deadlines are 30 days after the judgment is signed. TEX. R. CIV. P. 329b(a). The failure to timely request findings of fact waives the right to complain about the trial court's failure to file findings of fact and

[2] The motion for judgment in *Fojtik* stated:

While Plaintiffs disagree with the findings of the jury and feel there is a fatal defect which will support a new trial, in the event the Court is not inclined to grant a new trial prior to the entry of judgment, Plaintiffs pray the Court enter the following judgment. Plaintiffs agree only as to the form of the judgment but disagree and should not be construed as concurring with the content and result.

First Nat'l Bank v. Fojtik, 775 S.W.2d 632, 633 (Tex. 1989).

conclusions of law. *Morrison v. Morrison*, 713 S.W.2d 377, 381 (Tex. App.—Dallas 1986, writ dism'd w.o.j.).

There is no procedure for a late-filed request for findings of fact. TEX. R. CIV. P. 296. The possible exception would be if a party did not timely receive notice of the judgment or order. If a party receives notice of the judgment or order after the twentieth day it was signed, then the deadline to request findings of fact has passed. In that situation, a party should file a motion under Rule 306a(4) and get a court order establishing the late notice and the date the party received notice of the judgment. *See* TEX. R. CIV. P. 306a(4). The late notice of judgment procedure is critical to both the timely filing of a notice of appeal and a request for findings of fact or any other applicable post-judgment motion.

An appellant should always request findings of fact and conclusions of law. Hon. Tracy Christopher, *Findings of Fact and Conclusions of Law—Do I Have to?*, 76 THE ADVOCATE (TEXAS) 44, 44 (2016). This is true even if the decision on whether to appeal the judgment has not yet been made.

d. Strategy Considerations and Practical Points for the Appellee

If you represent the party who prevailed at trial, it will be the losing party who files the request for findings of fact and conclusions of law. But the trial court will typically request or expect the prevailing party to prepare findings of fact and conclusions of law. Thus, after a request for findings of fact and conclusions of law is filed, the prevailing party should draft findings and conclusions. Contact the court to find out the trial judge's preferences when submitting findings of fact and conclusions of law. Most prefer a format that the judge can revise.

The prevailing party should start with the parties' pleadings to prepare findings that address each claim and defense on which the judgment was based. Look to the pattern jury charge or case law to determine the elements of the claims and defenses. Also, include the burden of proof. For example, if the plaintiff prevails at trial, then include findings of fact that reject the defendant's defenses: defendant failed to prove by a preponderance of the evidence her defense of contributory negligence. Similarly, if the defendant prevails, then include findings of act that plaintiff failed to prove by a preponderance of the evidence that defendant owed a duty to the plaintiff.

Finally, in addition to preparing and filing findings of fact and conclusions of law, the appellee should also request that all parties' proposed findings of fact and conclusions of law that were filed in the trial court be included in the clerk's record. It is not uncommon to find a party taking an inconsistent position on appeal from proposed findings of fact that were requested in the trial court.

2. <u>Notice of Past Due Findings of Fact and Conclusions of Law and Strategy Considerations</u>

The second step in the procedure for obtaining findings of fact and conclusions of law is the "Notice of Past Due Findings of Fact and Conclusions of Law" if the trial court fails to timely send them. Unlike other post-judgment preservation rules, the findings of fact rules require a reminder notice if the trial court misses its deadline to send findings of fact and conclusions of law. The notice of past due findings extends the trial court's deadline for sending findings of fact and conclusions of law. But most importantly, the notice of past due findings is mandatory for an appellant to avoid waiver of the appellate complaint that the trial court failed to send findings of fact.

a. Rule 297 Requirements

Rule 297 provides the procedure for filing a notice of past due findings of fact. If the trial court fails to timely send findings of fact and conclusions of law within 20 days after the request is filed, the party who requested findings of fact must file a "Notice of Past Due Findings of Fact and Conclusions of Law." The notice of past due must be filed within thirty days after the original request was filed. TEX. R. CIV. P. 297. The notice of past due findings must state the date the original request was filed and the date the findings and conclusions were due. TEX. R. CIV. P. 297. The clerk is required to immediately inform the court of the late notice. *Id*

The filing of the notice of past due findings extends the time for the trial court to send findings of fact and conclusions of law. TEX. R. CIV. P. 297. With the filing of past due notice, the trial court's deadline to send findings and conclusions is extended to forty days from the date the original request was filed. *Id.*

b. Strategy Considerations and Practical Points for the Notice of past Due Findings of Fact

Rule 297's requirement to file the notice of past due findings is often missed but it is critical to preserving error on the court's failure to sign and send findings and conclusions. The failure to timely file a notice of past due findings waives the right to complain about the trial court's failure to send findings. *Ad Villarai*, 519 S.W.3d at 135; *Chater Drywall Houston, Inc. v. Matthews Invests. Sw., Inc. XX*, No. 14-22-00484-CV, 2023 WL 3476909, at *3 (Tex. App.—Houston [14th Dist.] no pet.) (mem. op.); *Legoland Discovery Centre (Dallas), LLC v. Superior Builders, LLC*, 531 S.W.3d 218, 221 n.3 (Tex. App.—Fort Worth 2017, no pet.); *Watts v. Oliver*, 396 S.W.3d 124, 130 (Tex. App.—Houston [14th Dist.] 2013, no pet.); *Gnerer v. Johnson*, 227 S.W.3d 385, 389 (Tex. App.—Texarkana 2007, no pet.).

When filing a notice of past due findings, do not file the notice before the judgment is signed. Courts of appeals have concluded that a notice of past due findings filed before the judgment is signed is not timely and an appellant waived the complaint regarding the trial court's failure to file findings of fact. *Estate of Gorski v. Welch*, 993 S.W.2d 298, 301 (Tex. App.—San Antonio 1999, pet. denied); *Echols v. Echols*, 900 S.W.2d 160, 161-62 (Tex. App.—Beaumont 1995, writ denied). The courts in both cases reasoned that Rule 306c lists only the request for findings of fact, not the notice of past due findings of fact, as a document that can be filed early and still be effective. TEX. R. CIV. P. 306c. Further, both courts of appeals pointed out that a notice of past due findings filed before the judgment is signed does not serve the purpose of the notice—to bring to the trial court's attention that findings of fact have been requested but not filed.

An important consideration about the deadline to file the Notice of Past Due Findings of Fact: If the request for findings of fact is filed *before* the judgment is signed, then by operation of TEX. R. CIV. P. 306c, the request for findings will be deemed filed the date the judgment was signed. TEX. R. CIV. P. 306c. That means, the deadline to file the Notice of Past Due in this situation is thirty days after the judgment is signed, not thirty days after the request was filed.

c. What about late-filed findings of fact?

Generally, the perfection of an appeal terminates the authority of the trial court. *Ex parte Travis*, 73 S.W.2d 487, 483-84 (Tex. 1934). "It is a rule of general application that when an appeal is perfected to the Court of Civil Appeals, the latter Court (subject to the right of the trial court to grant a motion for

new trial in term time, and absent statutory exception) acquires plenary exclusive jurisdiction over the entire controversy." *Ammex Warehouse Co. v. Archer*, 381 S.W.2d 478, 482 (Tex. 1964) (internal citations omitted); *Miles v. Ford Motor Co.*, 914 S.W.2d 135, 138 (Tex. 1995); *Doctors Hosp. Facilities v. Fifth Court of Appeals*, 750 S.W.2d 177, 179 (Tex. 1988); *Robertson v. Ranger Ins. Co.*, 689 S.W.2d 209, 210 (Tex. 1985); *Carrillo v. State*, 480 S.W.2d 612, 618 (Tex. 1972); TEX. R. APP. P. 25.1(b). Thus, the exclusiveness of an appellate court's jurisdiction terminates the trial court's power over the subject matter of the appeal during the pendency of the appeal. *Ammex Warehouse*, 381 S.W.2d at 482.

Findings of fact are an exception. A trial court can send findings of fact after its loses plenary power. *Ad Villarai, LLC*, 519 S.W.3d at 141 (expiration of plenary power does not affect trial court's ability to file findings of fact); *In re Gillespie*, 124 S.W.3d 699, 703 (Tex. App.—Houston [14th Dist.] 2003, no pet.). Even if the trial court misses the extended deadline, the trial court can still file findings and conclusions. *Davey v. Shaw*, 225 S.W.3d 843, 852 (Tex. App.—Dallas 2007, no pet.).

The reason? Late-filed findings of fact and conclusions of law do not operate to change the judgment; rather, they merely explain the court's reasoning. *Gillespie*, 124 S.W.3d at 703. Late-filed findings of fact provide a remedy for an appellant who is entitled to have findings of fact when a trial court has failed to comply with the rules. In such instance, appellate courts recognize that if an appellant can show harm, then an appeal should be abated, and a trial court ordered to file findings. This also allows an appellant to have findings of fact and to file additional findings of act, both critical for an appellant's appeal. Plenary power does not bar this remedy.

If the trial court enters findings of fact after the deadline, the only issue is whether an appellant is harmed. Unless a party can show injury, litigants have no remedy for late-filed findings and the late-filed findings will be considered on appeal. *Robles v. Robles*, 965 S.W.2d 605, 610 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). Injury is shown if a litigant was: 1) unable to request additional findings, or 2) prevented from presenting her appeal. *Id.* If a party can show harm by the late-filed findings of fact, the party should request the court of appeals to abate the appeal to allow the party to request additional or amended findings. *Davey v. Shaw*, 225 S.W.3d at 852.

Showing harm can be more difficult than you might expect. In *E.M.D.*, the trial court timely filed findings of fact and appellant timely filed a request for additional findings. *In re Guardianship of E.M.D.*, No. 11-20-00042-CV, 2020 WL 6193990 (Tex. App.—Eastland Oct. 22, 2020, pet. denied) (mem. op). After the appeal had been on file for five months, both appellant's and appellee's briefs were on file, and oral argument set less than four weeks away, the trial court reversed the outcome-determinative finding of fact in the case. *Id.* at *8. The court of appeals found there was no harm to appellant by the trial court's reversal of sole determinative fact finding in the case. *Id.*

In *Merlo v. Lopez*, the trial court filed findings of fact during the pendency of the appeal and after appellant had filed his brief. No. 01-19-00102-CV, 2021 WL 278060, at *5-6 (Tex. App.—Houston [1st Dist.] Jan. 28, 2021, no pet.) (mem. op.). The court of appeals held there was no harm with the late-filed findings. *Id.* at *6-7. The court permitted appellant to supplement his brief to address the late findings. *Id.* at 7. Further, the court of appeals observed that appellant did not file a request for additional findings or request to abate the appeal to pursue additional findings in the trial court. *Id.*

3. Request for Additional Findings of Fact and Conclusions of Law and Strategies When Drafting

The final step in the process: after findings of fact and conclusions of law are sent, both parties must consider whether additional or amended findings of fact and conclusions of law are necessary for their respective positions on appeals. Each party should carefully review the findings of fact and conclusions of law to determine if the claims and defenses set out in the pleadings, along with their elements, are included in the findings of fact and conclusions of law. A party who lost on an issue whether a ground of recovery or a defense, must file a request for additional findings to preserve error.

A request for additional findings of fact has significance unrelated to the trial court filing additional findings of fact. The request for additional findings is in reality a misnomer. To raise an issue on appeal, the issue must be in the court's findings or in a request for additional findings of fact. The primary point of the request for additional findings is to object to the findings that have been signed and preserve error. For example, findings of fact and conclusions of law may omit elements of a ground of recovery or a defense. Findings of fact and conclusions of law may omit an entire ground of recovery or a defense. A request for additional findings points out these omissions, preserves the argument for appeal, and avoids waiver.

a. Rule 298 Requirements

Rule 298 sets out the procedure for filing additional or amended findings of fact after the trial court sends its original findings and conclusions. After the court sends the original findings of fact, any party may request additional or amended findings or conclusions. TEX. R. CIV. P. 298. A request for additional findings of fact and conclusions of law must be made within ten days after the original findings and conclusions are sent by the court. TEX. R. CIV. P. 298. The failure to timely request additional findings and conclusions waives the right to complain on appeal of the trial court's initial findings and conclusions. *Sibley v. Port Freeport*, No. 01-22-00860-CV, 2024 WL 791612, at *9 (Tex. App.—Houston [1st Dist.] Feb. 27, 2024, no pet.) (mem. op.) (citing *Dallas Morning News Co. v. Bd. of Trustees of D.I.S.D.*, 861 S.W.2d 532, 538 (Tex. App.—Dallas 1993, writ denied)). Further, the failure to request additional or amended findings waives the right to complain of the trial court's refusal to enter additional findings and conclusions. *Guerrero v. Salinas*, No. 01-21-00563-CV, 2023 WL 2483542, at *7 (Tex. App.—Houston [1st Dist.] March 14, 2023, no pet.) (mem. op.); *In re Marriage of C.A.S. & D.P.S.*, 405 S.W.3d 373, 381 (Tex. App.—Dallas 2013, no pet.). The court then has ten days to send additional findings and conclusions. TEX. R. CIV. P. 298 ("[w]ithin ten days after such request is filed, the court must send any additional or amended findings and conclusions to the parties . . . .") The rule further provides that no findings or conclusions "shall be deemed or presumed by any failure of the court to make additional findings or conclusions." *Id.*

b. Omitted Findings—Rule 299 Requirements

Rule 299 sets out the presumptions when there are omissions from the trial court's findings of fact. Findings of fact sent by the trial court shall form the basis of the judgment. TEX. CIV. P. 299. The judgment may not be supported on appeal by a presumed finding on any ground of recovery or defense if no element has been included in the findings. *Id.* However, when one or more elements have been found, then omitted, unrequested elements that are supported by the evidence will be presumed in support of the judgment. *Id.* A trial court's refusal to make a requested finding shall be reviewable on appeal. *Id.*

Rule 299 has been interpreted to require parties to request findings of fact and

conclusions of law relevant to a theory of recovery or defense that they intend to assert on appeal. *MCG Drilling Invs., LLC v. Double M Ranch, Ltd.*, No. 11-14-00299-CV, 2018 WL 2022590, at *5 (Tex. App.—Eastland April 30, 2018, no pet.) (mem. op.); *Park v. Payne*, 381 S.W.3d 615, 618 (Tex. App.—Eastland 2012, no pet.).

c. Considerations for Both Parties When Drafting Additional Findings of Fact and Conclusions of Law

The request for additional or amended findings of fact and conclusions of law serves two purposes: 1) point out omitted elements of grounds of recovery or defenses that are partially included to avoid deemed findings under Rule 299; and 2) point out entirely omitted grounds of recovery or defenses. Raising these omissions in a request for additional findings prevents deemed findings and waiver of a claim or defense.

While the request for additional findings applies to both parties, for the appellant, the request for additional findings of fact is critical and the primary method to preserve error. A request for additional findings is like an objection. *Vickery*, 5 S.W.3d at 255-56. Thus, the request for additional findings, like an objection, should be specific. *Id.* Further, a request for additional findings of fact and conclusions of law "should sharpen not obfuscate, the issues for appeal." *Id.* at 255.

Additional findings of fact are not required if the original findings and conclusions properly and succinctly relate the ultimate findings of act and law necessary to apprise the parties of adequate information to prepare an appeal. *Simons v. Simons*, No. 11-21-00066-CV, 2023 WL 2415209, at *9 (Tex. App.—Eastland March 9, 2023, no pet.) (mem. op.); *Pakdimounivong v. City of Arlington*, 219 S.W.3d 401, 412 (Tex. App.—Fort Worth 2006, pet. denied). Like original findings of fact, a request for additional findings must be on ultimate issues, not evidentiary matters. *Vickery* 5 S.W.3d at 255; *Flanary*, 150 S.W.3d at 792 (trial court must only file additional findings if original findings do not succinctly relate the ultimate findings of facts and law necessary to apprise the appellant of adequate information to prepare an appeal). To be effective, a request for additional findings must specifically point out the defects and not hide them among numerous unnecessary requests. *Vickery* 5 S.W.3d at 254; *Stuckey Diamonds, Inc. v. Harris Cnty. Appraisal Dist*., 93 S.W.3d 212, 213 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (request for additional findings containing 103 findings obfuscated any valid findings).

A trial court does not have to sign additional findings that are inconsistent with or contrary to the original findings. *Mynard v. Degenhardt*, No. 14-22-00773, at *10 (Tex. App.—Houston [14th Dist.] Dec. 28 2023, pet. filed) (mem. op.); *Johnston v. McKinney American, Inc.*, 9 S.W.3d 271, 277 (Tex. App.—Houston [14th Dist.] 1999, pet. denied.) (citing *Tamez v. Tamez*, 822 S.W.2d 688, 692-93 (Tex. App.—Corpus Christi 1991, writ denied). If the requested additional findings would not result in a different judgment, the trial court need not make them. *Johnston*, 9 S.W.3d at 277; *Tamez*, 822 S.W.2d at 693. That means, if the trial court's findings omit an element of a party's defense for example, that party must request an additional finding on the omitted element that is consistent with the judgment, that is, supporting the rejection of the affirmative defense. That preserves error to complain about the omitted element on appeal.

As with the original findings of fact, a trial court's ability to file additional findings of fact is not precluded by a lack of plenary power. *Robles v. Robles*, 965 S.W.2d at 611 (a trial court may file additional findings even after it loses plenary power).

Note that proposed findings of fact filed before trial are not a proper request for

additional findings. *Oh v. Robert C. Hwang, P.C.*, 2016 WL 2726307, at *2.

Finally, as with the submission of original findings of fact, if requesting additional or amended findings that are contrary to your position (as in example just given), state that you disagree with the submission and use the language from *Fojtik*. *See supra* II. C. 1. b.

d. Strategy Considerations and Practical Points for Both Parties

Note that Rule 298 starts the deadline to file a request for additional findings from a different date than most rules. Rule 298 ties the deadline for requesting additional or amended findings to the date the trial court *sends* its findings of fact, not the day the court *signs* the findings. TEX. R. CIV. P. 298. Failing to timely request additional findings of fact and conclusions of law waives the right to complain about the trial court's failure to enter the additional findings. *Heritage Res., Inc. v. Hill*, 104 S.W.3d 612, 620 (Tex. App.—El Paso 2003, no pet.) (appellant waived complaint regarding trial court's failure to segregate attorney's fees when appellant failed to request an additional finding on the issue); *Knight v. Knight*, 301 S.W.3d 723, 733, n.10 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (appellant failed to request additional findings regarding the characterization of certain property and waived her right to complain on appeal); *Smith v. Abbott*, 311 S.W.3d 62, 73 (Tex. App.—Austin 2010, pet. denied) (appellants waived complaint by failing to request additional findings of fact); *Schneider v. Whatley*, 535 S.W.3d 236, 241 (Tex. App.—El Paso 2017, no pet.) (waiver by failing to request additional findings).

The request for additional findings of fact does not result in a presumed finding by the trial court's failure to sign additional findings. TEX. R. CIV. P. 298. There is no presumption that in refusing to sign the additional findings that the trial court resolved a factual dispute contrary to appellant's position. *Vickery*, 5 S.W.3d at 258. An appellant can request findings contrary to the judgment "without fear that the court's failure to make such findings will itself be interpreted as a finding against the appellant." *Id.* Note that Rule 298's provision that no findings are deemed or presumed only applies after original findings of fact and conclusions of law are filed. *International Metal Sales, Inc. v. Global Steel Corp.*, No. 03-07-00172-CV, 2010 WL 1170218, at *3 (Tex. App.—Austin March 24, 2010, on pet. h.) (mem. op.). If no findings are filed, Rule 298 does not apply, and all findings are inferred in support of the judgment. *Id.*

e. What Findings Were Omitted?

A request for additional findings turns on what the trial court omitted from the findings.

Bottom line for preservation of error: To raise an issue on appeal, it must be in the trial court's findings of fact or in a request for additional findings of fact.

Requesting additional findings of fact depends on the omission, whether an element of a cause of action or defense is omitted or whether an entire cause of action or defense is omitted. The guiding principle: if you want to raise an issue on appeal, it needs to be in the findings of fact or in a request for additional findings of fact. *Century Indem. Co. v. First Nat'l Bank of Longview*, 272 S.W.2d 150, 156 (Tex. Civ. App.—Texarkana 1954, no writ); *Townson v. Liming*, No. 06-10-00027-CV, 2010 WL 2767984, at *2, n.2 (Tex. App.—Texarkana July 14, 2010, no pet.) (mem. op.). Although summarized here, it is worth reading *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) before preparing additional or amended findings of fact. It contains a comprehensive discussion of requests for additional findings and conclusions and has been cited by almost every court of appeals across the state on this issue.

If an element of a claim or defense is omitted. If there is an omission of an element, it must first be determined whether the trial court deliberately or inadvertently omitted the element. *Vickery*, 5 S.W.3d at 252.

If findings of fact are filed but inadvertently omit an essential element of a ground of recovery or defense, the omitted element is implied or deemed. *Id.*; *Seger v. Yorkshire Ins. Co., Ltd.*, 503 S.W.3d 388, 401 (Tex. 2016); *In re Estate of Miller*, 446 S.W.3d 445, 450 (Tex. App.—Tyler 2014, no pet.); *Hailey v. Hailey*, 176 S.W.3d 374, 383-84 (Tex. App.—Houston [1st Dist.] 2004, no pet.). The reason for implying omitted elements is that when a ground of recovery or defense is partially included in the findings of fact, this is some indication that the trial court relied on the ground or defense in making its decision. *Vickery*, 5 S.W.3d at 253. As Rule 299 states, "when one or more elements thereof have been found by the trial court, omitted, unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment." TEX. R. CIV. P. 299; *Howe v. Howe*, 551 S.W.3d 236, 244-45 (Tex. App.—El Paso 2018, no pet.). This presumption, of course, assumes that evidence exists to support the presumed finding. *Hill v. Hill*, 971 S.W.2d at 156, n. 2.

To avoid deemed findings when an element of a claim or defense has been omitted, a party should request an additional finding on the omitted element. *In re Estate of Miller*, 446 S.W.3d at 450; *Vickery*, 5 S.W.3d at 253-54; TEX. R. CIV. P. 298, 299. The failure to do so waives a party's right to complain on appeal of the presumed finding. *In re Estate of Miller*, 446 S.W.3d at 450. The appellant, however, must specifically make the trial court aware of the omitted element and indicate the party does not agree. *Vickery*, 5 S.W.3d at 254.

For example, in a negligence case, if the findings of fact omit causation, but include duty, breach, and damages, if supported by the evidence, causation will be deemed or implied unless the defendant/appellant requests an additional finding of fact on causation. The defendant/appellant's failure to request an additional finding on causation waives its right to complain on appeal of the presumed finding on causation. Moreover, it is appellant's burden to attack both express and implied findings of fact. *Howe v. Howe*, 551 S.W.3d at 245.

When implied or deemed findings of fact arise, an appellee has no burden to request further findings of fact or to complain of the other findings made. *Id.*

If the record demonstrates that the trial court deliberately omitted an element of a claim or defense, there is no presumption to supply the missing element. *Vickery*, 5 S.W.3d at 252. For example, if a party submits proposed findings that include all elements and the trial court omits an element of a ground or defense, it is apparent that the omission was deliberate, and that the element is treated as requested and refused. *Id.* at 253. In this situation, the missing element is not supplied by implication. *Id.* Unlike the requirement in Rule 299 to deem omitted elements, the omitted element in this scenario is not "unrequested."

In this scenario, the party relying on the omitted element should file a request for additional findings that includes the omitted element to preserve the issue for appeal.

Vickery demonstrates the need to specifically identify the omitted element. Vickery complained about omitted elements but never identified them. Instead, Vickery submitted negative findings and hid the two omitted elements among 44 other additional findings, making it impossible for the trial court to realize the omission. *Vickery*, 5 S.W.3d at 254-55. The court of appeals

rejected Vickery's request for additional findings as an appropriate means of attacking omitted findings and presumed that the trial court impliedly found the omitted elements. *Id.* at 258.

The court of appeals in *Vickery* also described the use of negative findings. A party that requests findings that are contrary to the judgment is said to have requested "negative" findings. While a trial court is not required to enter findings that are contrary to the judgment, there are occasions when negative findings must be filed to avoid waiver. According to the court in *Vickery*, if findings support plaintiff but are silent on defendant's affirmative defense, the defendant must file additional findings on its affirmative defense, which would be contrary to the judgment, but critical for defendant's appeal. *Vickery*, 5 S.W.3d at 255.

The court in *Vickery* held that "a request for *negative* findings *contrary* to a court's judgment has no logical or legal significance toward rebutting the presumption of validity unless the trial court is specifically alerted to the real issue, i.e, one or more necessary elements have been omitted in the court's original findings." *Id.* at 256.

Vickery failed to meet the requirement of Rule 298 because he failed to identify to the trial court the specific omissions from the findings of fact that he sought to challenge on appeal. *Id.*

The reality is that using negative findings is not helpful. The better approach is to clearly state the findings of fact that you need to avoid deemed findings or waiver of an entire claim or defense because of omissions from the trial court's findings. When requesting additional findings are against your client's interest, include the qualifying language from *Fojtik*. *See supra* II. C. 1 b.

If an entire theory of recovery or defense is omitted. If a trial court's findings of fact omit an entire ground of recovery or defense, the party relying on the ground or defense must request additional findings to avoid waiver. *Guerrero v. Salinas*, 2023 WL 2483542, at *7; *Howe v. Howe*, 551 S.W.3d at 244-45; *Briggs Equipment Trust v. Harris Cnty. Appraisal Dist.*, 294 S.W.3d 667, 674 (Tex. App.—Houston [1st Dist.] 2009, pet. denied); *Limestone Group, Inc. v. Sai Thong, L.L.C.*, 107 S.W.3d 793, 799 (Tex. App.—Amarillo 2003, no pet.). The failure to request the additional findings waives any complaint about the omitted ground of recovery or defense. *Briggs*, 294 S.W.3d at 674.

When a ground of recovery or defense is entirely omitted, the presumption is that the trial court did not rely on that ground or defense and thus, the omission was deliberate. *Vickery*, 5 S.W.3d at 252. Under Rule 299, a judgment cannot be supported by a ground or defense that has been entirely excluded from the findings of fact. TEX. R. CIV. P. 299; *Vickery*, 5 S.W.3d at 252.

The issue of waiver applies to both appellants and appellees. If an appellant contends the trial court erred in rejecting her defense, she must request the court to make a finding upon that defense. *Hill v. Hill*, 971 S.W.2d at 156-57. If she does not, the defense is waived. *Id.* An appellee suffers the same waiver if she fails to request findings on all her theories of recovery. If an appellee fails to request findings on all her theories of recovery, she is precluded from arguing that the trial court erred in failing to grant relief on the theories omitted from the findings. *Id.* at 157; *see also Midland Cent. Appraisal Dist. v. BP America Prod. Co.*, 282 S.W.3d 215, 224, n.3 (Tex. App.—Eastland 2009, pet. denied) (error waived when appellant attempted to raise on appeal a statutory ground on which it failed to request a finding).

D. The Trial Court's Findings of Fact and Conclusions of Law

The rules provide little guidance on the proper form for findings of fact and conclusions of law. Rule 296 and 299a only require that findings of fact and conclusions of law be in writing and in a separate document from the judgment. TEX. R. CIV. P. 296, 299a. The trial court's findings of fact "must not be recited in a judgment." TEX. R. CIV. P. 299a. Findings of fact shall be sent as a document separate and apart from the judgment. *Id.* While the rule requirements are straightforward, they raise several issues.

1. Rule 296 Requires Findings to be in Writing, but What About Findings of Fact stated on the Record?

Findings of fact and conclusions of law must be in writing and cannot be made orally on the record. TEX. R. CIV. P. 296, 299a; *In re Doe 10*, 78 S.W.3d 338, 340, n.2 (Tex. 2002). The court of appeals must ignore oral pronouncements as they do not constitute findings of fact and conclusions of law. *In re W.E.R.*, 669 S.W.2d 716, 716 (Tex. 1984); *Bank of America v. Groff*, No. 14-19-00726-CV, 2021 WL 98559, at *3 (Tex. App.—Houston [14th Dist.] Jan. 12, 2021, no pet.) (mem. op.); *KKR RV's LLC v. Anderson*, No. 01-18-00178-CV, 2018 WL 6318478, at *2 (Tex. App.—Houston [1st Dist.] Dec. 4, 2018, no pet.) (mem. op.); *Seneca Ins. Co. v. Ross*, 507 S.W.3d 798, 803 (Tex. App.—El Paso 2015, no pet.); *Heritage Gulf Coast Props, Ltd. v. Sandalwood Apartments, Inc.*, 416 S.W.3d 642, 657-8 (Tex. App.—Houston [14 Dist.] 2013, no pet.); *Celestine v. Department of Family & Protective Servs.*, 321 S.W.3d 222, 232 (Tex. App.—Houston [1st Dist.] 2010, no pet.).

While the rule is clear that findings of fact must be in writing, cases appear to consider oral statements at least in part. For example, the Dallas Court of Appeals noted that a trial judge's comments from the bench are not a substitute for findings of fact and conclusions of law. *Kaur-Gardner v. Keane Landscaping, Inc.*, 05-17-00230-CV, 2018 WL 2191925, at *4 (Tex. App.—Dallas May 14, 2018, no pet.) (mem. op.). But the court then considered them. According to the court of appeals, a trial court's written findings *supersede* any oral statements. *Id.* Further, any *conflict* with an oral pronouncement and written findings of fact, the written instruments control. *Id.*

In another case, the Austin Court considered oral pronouncements when ruling on an appellant's complaint about lack of findings of fact. In *Burnet Central Appraisal District v. Millmeyer*, 287 S.W.3d 753, 759-60 (Tex. App.—Austin 2009, no pet.), appellant complained about the trial court's failure to file findings of fact and conclusions of law. In deciding whether appellant suffered harm by the lack of findings, the Austin Court referred to the trial court's statements on the record that explained the reasons for its ruling. According to the court of appeals, the trial court's oral pronouncements negated any harm in the failure to file findings of fact. *Id.*; *see also Pope v. Pope*, No. 03-06-00550-CV, 2007 WL 2010766 (Tex. App.—Austin July 12, 2007, no pet.) (mem. op.) (court looked to trial judge's comments from the bench to determine if appellant was harmed by the trial court's failure to file findings of fact).

Similarly, the Texarkana Court rejected appellant's harm argument when the trial court failed to file findings of fact but announced its reasoning for the ruling on the record. *Payne v. Payne*, No. 06-20-00051-CV, 2021 WL 1216885, at *6 (Tex. App.—Texarkana April 1, 2021, no pet.) (mem. op.). According to the court of appeals, the appellant cannot show harm because he was not forced to guess the reasons for the adverse ruling. *Id.*

The best approach: do not rely on a trial court's pronouncements on the record; file a

request for findings of fact and encourage the court to file them.

2. Rule 296 Requires Findings to be in Writing, but Does a Judge's Pre-Judgment Letter Suffice?

The rule requires findings to be written and separate from the judgment but does not otherwise describe the format. TEX. R. CIV. P. 296, 299a.

A problem occurs when a trial court sends a pre-judgment letter ruling that contains findings of fact and conclusions of law. The Supreme Court rejected an attempt to alter formal findings of fact with a pre-judgment letter ruling. *Cherokee Water Co. v. Gregg Cnty. Appraisal Dist.*, 801 S.W.2d 872, 878 (Tex. 1990). The Court's reasoning appeared to be based on the fact that the letter was prepared before the judgment and thus did not constitute post-judgment Rule 296-99a findings of fact. *Id.*

Appellate courts split on whether to consider findings in a pre-judgment letter. Some courts of appeals have applied *Cherokee Water* and concluded that pre-judgment letter rulings do not constitute findings of fact. *Adlong v. Twin Shores Prop. Owners Assoc.*, No. 09-21-00166-CV, 2022 WL 869801, at *7, n. 14 (Tex. App.—Beaumont March 24, 2022 pet. denied) (mem. op.); *Beard v. Beard*, 49 S.W.3d 40, 66 (Tex. App.—Waco 2001, pet. denied); *Alan Reuber Chevrolet, Inc. v. Grady Chevrolet, Ltd.*, 287 S.W.3d 877, 883 (Tex. App.—Dallas 2009, no pet.); *Mondragon v. Austin*, 954 S.W.2d 191, 193 (Tex. App.—Austin 1997, pet. denied); *Gupta v. Gupta*, No. 03-09-00018-CV, 2010 WL 2540487, at *7 (Tex. App.—Austin June 24, 2010, no pet.) (mem. op.); *Castillo v. August*, 248 S.W.3d 874, 880 (Tex. App.—El Paso 2008, no pet.); *Coleman v. Coleman*, No. 09-06-00171-CV, 2007 WL 1793756, at *2, n.2 (Tex. App.—Beaumont 2007, pet. denied) (mem. op); *Burgess v. Denton Cnty.*, 359 S.W.3d 351, 359 n.37 (Tex. App.—Fort Worth 2012, no pet.); *AIMS ATM, LLC v. Sanip Enters, Inc.*, 01-13-00155-CV, 2014 WL 810839, at *1, n.1 (Tex. App.—Houston [1st Dist.] Feb. 27, 2014, no pet.) (mem. op.) (letter ruling did not constitute findings of fact); *West v. West*, No. 01-14-00350-CV, 2016 WL 1719328, at *6, n.5 (Tex. App.—Houston [1st Dist.] April 28, 2016, no pet.) (mem. op.) (prejudgment letter rulings do not constitute formal findings of fact); *but see Barry v. Jackson*, 309 S.W.3d 135, 138-39, n.4 (Tex. App.—Austin 2010, no pet.) (court agreed letter ruling was not a finding of fact but "we believe it is nonetheless instructive background regarding the court's reasoning").

The Houston Fourteenth Court questioned the applicability of *Cherokee Water* when a letter ruling matches the judgment. *Chenault v. Banks*, 296 S.W.3d 186, 190 (Tex. App.—Houston [14th Dist.] 2009, no pet.); *see also Ward v. Siegmund*, No. 14-04-00865-CV, 2004 WL 2187170, at *1 (Tex. App.—Houston [14th Dist.] Sept. 30, 2004, no pet.) (mem. op.) (findings of fact should be in a separate document from the judgment).

Other appellate courts have considered the findings of fact in a pre-judgment letter rulings. These courts reason that Rules 296-98 do not require any particular form for findings of fact and conclusions of law. *Rose v. Woodworth*, No. 04-08-00382-CV, 2009 WL 97256, at *1 (Tex. App.—San Antonio Jan. 14, 2009, no pet.) (mem. op.); *Senora Res., Inc. v. Kouatli*, No. 01-00-00264-CV, 2000 WL 1833771, at *2-3 (Tex. App.—Houston [1st Dist.] Dec. 14, 2000, no pet.) (mem. op); *Villa Nova Resort, Inc. v. State*, 711 S.W.2d 120, 124 (Tex. App.—Corpus Christi 1986, no pet); *Duddlesten v. Klemm*, No. 06-08-00106-CV, 2009 WL 635153, at *2 (Tex. App.—Texarkana March 13, 2009, no pet.) (mem. op.) (trial court's letter expressed findings and conclusions and court of appeals treated as official findings), *but see Moore v. Jet Stream Investments, Ltd.*, 315 S.W.3d 195, 208-09 (Tex. App.—Texarkana June 3, 2010, pet denied) (letter ruling stated "below are my

findings" but court of appeals refused to treat as findings when subsequent judgment conflicted with letter).

The Eastland Court distinguished *Cherokee Water* and construed a pre-order letter ruling as findings of fact. The Eastland Court noted that unlike *Cherokee Water*, the trial court did not file formal finding of fact and expressly indicated in the letter ruling that it intended the letter to constitute findings of fact. *Kendrick v. Garcia*, 171 S.W.3d 698, 701-02 (Tex. App.—Eastland 2005, pet denied); *see also Long Term Care Pharmacy Alliance v. Texas Health & Human Servs. Comm'n*, 249 S.W.3d 471, 476-77 (Tex. App.—Eastland 2007, no pet.) (construed letter as findings of fact but pointed out the court of appeals' own conflicting authority).

More recently, the Eastland Court reached the opposite conclusion. In *Jurgens v. Martin*, the Eastland Court cited *Cherokee Water* and held that a prejudgment letter ruling is "not a finding of fact as contemplated by the rules of civil procedure." 631 S.W.3d 385, 419 (Tex. App.—Eastland Mar. 18, 2021, no pet.).

The Tyler Court of Appeals also distinguished *Cherokee Water* and concluded that a prejudgment letter satisfied the purpose of Rule 296. *In re Estate of Miller*, 446 S.W.3d 445, 451 (Tex. App.—Tyler 2014, no pet.). In *Miller*, the trial court's letter ruling was dated before the order, but the letter and the order were filed together. The letter included the court's ruling, "findings," and the controlling authority.

The Tyler Court held that the trial court's prejudgment letter provided an extensive explanation of the basis for the ruling, "which satisfies the purpose of Rule 296." *Id.* at 451. Further, upon receipt of the letter, appellant could have requested additional findings of fact and conclusions of law. *Id.* at 452; *see* TEX. R. CIV. P. 298. The appellant failed to file a request for additional findings—in response to the trial court letter—and thus waived any complaint of the implied findings presumed in support of the judgment. *Id.*

The best approach: do not rely on a trial court's pre-judgment letter ruling as findings; file a request for findings of fact and encourage the court to file them.

3. Rule 299a Requires Findings to be Separate from the Judgment, but what if Findings are Included in the Judgment?

Rule 299a provides that findings of fact must not be recited in a judgment and should be in a separate document; however, the rule also contemplates that findings may end up in a judgment. "If there is a conflict between findings of fact recited in a judgment in violation of this rule and findings of fact made pursuant to Rules 297 and 298 the latter findings will control for appellate purposes." TEX. R. CIV. P. 299a; *Redman*, 401 S.W.2d at 894.

Courts of appeals split on how to consider findings of fact recited in a judgment. Some appellate courts have concluded that findings in a judgment have probative value if they do not conflict with separately filed findings of fact. *Archer v. DDK Holdings LLC*, 463 S.W.3d 597, 609, n.7 (Tex. App.—Houston [14th Dist.] 2015, no pet.); *South Plains Lamesa R.R., Ltd.*, 280 S.W.3d 357, 365 (Tex. App.—Amarillo 2008, no pet.); *Hill v. Hill*, 971 S.W.2d at 157. The courts reasoned that findings recited in the judgment reveal the basis for the trial court's decision and should be considered. *South Plains Lamesa R.R.*, 280 S.W.3d at 365; *Hill*, 971 S.W.2d at 157; *see also Isaac v. Burnside*, 616 S.W.3d 609, 614 (Tex. App.—Houston [14th Dist.] 2020, pet denied) (because no findings were filed in a separate document, those in the judgment have probative value); *Bruce v. Bruce*, No. 03-16-00581-CV, 2017 WL 2333298, at *2 (Tex. App.—Austin May 26, 2017, no pet.) (mem. op.) (findings in the judgment have probative value); *James J. Flanagan Shipping Corp. v. Del Monte Fresh Produce N.A.*, 403 S.W.3d

360, 364-65 (Tex. App.—Houston [1st Dist.] 2013, no pet.) (findings of fact in a judgment given probative value); *Martinez v. Molinar*, 953 S.W.2d 399, 401 (Tex. App.—El Paso 1997 no writ) (findings in a judgment serves the underlying purpose of Rule 296 of allowing the parties to know the court's findings); *In re U.P.*, 105 S.W.3d 222, 229, n.3 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (findings in a judgment have probative value if not in conflict with separately filed findings); *In re Sigmar*, 270 S.W.3d 289, 295, n.2 (Tex. App.—Waco 2008, orig. proceeding) (findings of fact in an order given probative value so long as not in conflict with separately filed findings); *In re Estate of Jones*, 197 S.W.3d 894, 899-900 (Tex. App.—Beaumont 2006, pet. denied) (will consider findings in a judgment if no objection and no conflict with separately filed findings); *In re C.K.C.*, No. 12-10-00366-CV, 2011 WL 7099714, at *2 (Tex. App.—Tyler Dec. 30, 2011, no pet.) (mem. op.) (will consider findings in a judgment unless replaced by separate findings).

Other courts of appeals have concluded that findings in a judgment cannot be considered on appeal. *Guridi v. Waller*, 98 S.W.3d 315, 317 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *Salinas v. Beaudrie*, 960 S.W.2d 314, 317 (Tex. App.—Corpus Christi 1997, no pet.); *Casino Magic Corp. v. King*, 43 S.W.3d 14, 19, n.6 (Tex. App.—Dallas 2001, pet. denied); *In re S.V.*, No. 05-17-01294-CV, 2019 WL 1529379, at *4 (Tex. App.—Dallas April 9, 2019, no pet.) (mem. op.); *In re RSR Corp.*, 405 S.W.3d 265, 271, n.3 (Tex. App.—Dallas 2013, orig. proceeding); *Sutherland v. Cobern*, 843 S.W.2d 127, 131, n.7 (Tex. App.—Texarkana 1992, writ denied.); *Boland v. Natural Gas Pipeline Co.*, 816 S.W.2d 843, 844 (Tex. App.—Fort Worth 1991, no writ); *In re A.I.G.*, 135 S.W.3d 687, 694 (Tex. App.—San Antonio 2003, no pet.); *In re Estate of Hill*, No. 11-94-090-CV, 1995 WL 17212323, at *2, n.3 (Tex. App.—Eastland May 25, 1995, writ denied). If findings of fact in the judgment are not considered, then the court of appeals reviews as though no findings were made. *In re RSR*, 405 S.W.3d at 271, n.3; *Sutherland*, 843 S.W.2d at 131, n.7.

Guridi demonstrates the significance of this issue. In that case, the Houston First Court refused to consider findings of fact recited in a judgment when separate findings of fact were filed. The separately filed findings did not contain any mention of fraud; the judgment, however, recited findings relating to fraud. Because the separately filed findings contained no element of fraud and the court refused to consider the findings on fraud contained in the judgment, there were no presumed findings on fraud to be supplied on appeal. *Guridi*, 98 S.W.3d at 317.

Be aware that the El Paso Court of Appeals has held that parties must object in the trial court to the impermissible inclusion of findings of fact in the judgment or the complaint is waived. *Howe v. Howe*, 551 S.W.3d at 247. According to the court of appeals, "[e]ven though Rule 299a does not permit findings to be contained in the judgment, because no one raised that complaint below, we accept any findings in the judgment as findings of fact for the purposes of this appeal." *Id.*; *see also Silverio v. Silverio*, 625 S.W.3d 680, 684 (Tex. App.—El Paso 2021, no pet.) (citing *Howe v. Howe*).

The holding in *Howe* has been picked up by other appellate courts. The Fort Worth Court of Appeals concluded that findings of fact in a judgment require some action in the trial court. In *In re Z.G.*, the court of appeals explained that while there were findings in the judgment, appellant failed to file a motion to modify or correct the judgment to exclude the fact findings that were included in the judgment. No. 02-19-00352-CV, 2021 WL 1229967, at *23 n.56 (Tex. App.—Fort Worth April 1, 2021 no pet.) (mem. op.) (citing *Howe v. Howe*). The San Antonio Court also cited *Howe* and the failure to complain in the trial court of the findings included in the judgment.

Bradley v. Chapman, No. 04-20-00539-CV, 2022 WL 379358, at *3 n.7 (Tex. App.—San Antonio Feb. 9, 2022, no pet.) (mem. op.) (citing *Howe v. Howe*).

The best procedure is to request the trial court to sign findings of fact and conclusions of law that are in a separate document from the judgment and depending on which appellate district you are in, file an objection or motion to modify to raise the issue of findings of fact being included in the judgment.

4. Who Can File Findings of Fact After the Judge who tried the case Leaves Office?

The Texas Supreme Court addressed the issue of whether a newly elected district-court judge or the former judge she replaced could file findings of fact from a trial over which the former judge presided before his term expired.

In *Ad Villarai*, Judge Lowy conducted a bench trial in October 2014 and signed a final judgment on November 24, 2014. Although appellant timely requested findings of fact and filed a notice of past due findings, Judge Lowy did not file findings of fact before leaving the bench at the end of the year. Judge Williams, the new judge, timely filed findings of fact and conclusions of law on January 12, 2015. *Ad Villarai* 519 S.W.3d at 136.

Pak appealed, contending Judge Williams's findings were invalid because she lacked authority to file them. *Id.* The Dallas Court of Appeals agreed and concluded that Judge Lowy could not file them since he was no longer available to respond to an order of the court. *Id.* The court of appeals reversed and remanded.

The Supreme Court rejected several arguments, including Rule of Civil Procedure 18 and Civil Practice and Remedies Code § 30.002, that Villarai contended granted successor judges authority to file findings on behalf of predecessor judges no longer in office because of an election. *Id.* 138-40.

The Supreme Court relied on Civil Practice and Remedies Code § 30.002(a), which provides that if a judge's term of office expires during the period for filing findings of fact, the judge may still file findings in the case. *Id.* at 140-41. Because Judge Lowy's term expired during the period for filing findings of fact, § 30.002(a) authorized him to file findings even after his term expired.

The Court further noted that the expiration of plenary power had no impact on Judge Lowy's ability to file findings of fact. *Id*. 141. Findings can be filed late—either on the court's own volition or at the request of a court of appeals. *Id.*; *see Cherne*, 763 S.W.2d at 773.

The Supreme Court held that Judge Williams's findings were invalid and that only the former judge had authority to file findings of fact. *Id.* at 142. The record did not indicate why Judge Lowy did not file findings. *Id.* As the Court explained, "because we do not *know* that he refused to file findings—which would leave Villarai without recourse—the trial court should request that he file findings before ordering a new trial." *Id.* at 142.

The Court then ordered an "extraordinary solution." *Id.* at 142. Judge Williams was ordered to request Judge Lowy to file findings. If Judge Lowy fails or refuses to file them, then the court of appeals may remand for a new trial. *Id.* at 142-43.

E. What if the Trial Court Refuses to Sign Findings of Fact when a Party is Entitled to them and Properly Requested Them?

A party cannot compel a trial court to file findings of fact. *IKB Indus*, 938 S.W.2d at 442-43; *Haddix*, 253 S.W.3d at 345. Mandamus is not an available remedy to compel a trial court to file findings of fact and

conclusions of law. *In re Hodges III*, No. 10-18-00268-CV, 2018 WL 4011591, at *1 (Tex. App.—Waco August 22, 2018, orig. proceeding) (mem. op.); *In re Martin,* No. 06-09-00099-CV, 2009 WL 4281276, at *1-2 (Tex. App.—Texarkana Dec. 2, 2009, orig. proceeding) (mem. op.) (recognizing there is an appellate remedy for failure to file findings of fact – abate the appeal and order the trial court to file findings of fact and conclusions of law); *In re Sheshtawy*, 161 S.W.3d 1, 2 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding) (same).

Efforts to get the trial court to sign the findings of fact soon after the trial while the case is still on the court's mind, as opposed to months later after an abatement, is the best option. A practical option may be to set a hearing on a motion to sign findings of fact and conclusions of law. If requested and a timely notice of past due findings has been filed, setting a hearing to enter findings may get the trial court to take action.

If the trial court still does not file findings of fact, despite a timely request and notice of past due findings, the last option is to request that the court of appeals abate the appeal and order the trial court to file findings. This should be done before the briefs are due. If the trial court files late findings of fact, request additional findings of fact for omitted findings.

If the trial court still refuses to file findings in the face of an appellate court order to do so, the remedy is a reversal and remand for trial. *Ad Villarai, LL*, 519 S.W.34d at 136.

F. Other Strategy Considerations and Issues that Arise with Findings of Fact.

While many scenarios arise with findings of fact, below are some issues that do not fit squarely in one category or another.

Should the losing party submit proposed findings of fact with the request for findings of fact? This seems likely not helpful. The trial court will look to the prevailing party for proposed findings. Plus, since findings must be in support of the judgment, the losing party must be careful not to submit findings against the party's interest (without qualifying the submission) or risk waiver. The losing party should focus on the timely filing of the request, the timely notice of past due, if necessary, and most significantly, the request for additional findings to avoid deemed findings or waiver.

Should the winning party not submit proposed findings? If an appellant misses the deadline to request findings, is not entitled to them, or misses the notice of past due findings of fact then it may make sense for the winning party not submit findings. Of course, that assumes that the trial court did not request the winning party to prepare them. Otherwise, given the options for the appellant to get findings of fact filed (if truly entitled to them and met all the deadlines), the better practice is for the winning party to submit proposed findings and avoid the problems of the court drafting the findings using findings of fact that were submitted pretrial or drafting them from memory. By submitting findings of fact, the winning party can put their spin on them or at least provide the trial court with a post-judgment version of the facts.

What about separate trials on the merits and attorney's fees? A trial court may conduct a bench trial on the merits and sign a partial judgment and schedule a separate hearing on attorney's fees. Do you file findings of fact from the merits-based partial judgment? Rules 296-299a make no reference to a "final" judgment. Instead, the rules only refer to a "judgment." The safe approach: file a request for findings and notice of past due if not filed using the partial judgment date. A second request for findings and notice of past due would be necessary for the judgment on attorney's fees.

What about a request for additional findings of fact when the trial court either states the findings on the record, puts them in a prejudgment letter ruling, or recites the findings in the judgment?

A couple of cases have stated that parties should file the request for additional findings using a trial court's letter ruling. In *Senora Res., Inc. v. Kouatli*, the Houston First Court treated a trial court's letter as findings of fact and noted that the appellate could have requested additional findings of fact. 2000 WL 1833771, at *3 & n.1. In *In re Estate of Miller*, the Tyler Court treated a letter ruling as Rule 296 findings and that upon receipt of the letter, held that appellant could have requested additional findings of fact and conclusions of law. 446 S.W.3d at 451-52. The appellant failed to file a request for additional findings—in response to the trial court letter—and thus waived any complaint of the implied findings presumed in support of the judgment. *Id.* at 452; *see also Rose v. Woodworth*, No. 04-08-00382-CV, 2009 WL 97256, at *1 (Tex. App.—San Antonio Jan. 14, 2009, no pet.) (mem. op.) (letter ruling with findings filed of record treated as findings of fact to which request for additional findings could have been filed to preserve error).

The problem with letter rulings, oral statements on the record, or findings in a judgment is that the parties will not know until after filing the request for findings of fact and notice of past due findings whether the trial court will file separate findings of fact and trigger the deadline to file a request for additional findings. *See* TEX. R. CIV. P. 298 (deadline to file request for additional findings is trial court files the original findings). Further, appellate decisions that treat these scenarios as findings [or not] are often nuanced because no letter ruling, oral pronouncement, or findings in a judgment are the same.

There are too many variables to give a "best practice" answer to this issue other than to comply with the rules for requesting findings and past due findings and the appellate option to seek an abatement to order findings to be filed but be aware of how the appellate court where your appeal will be filed has treated the issue to determine if a request for additional findings should be filed in response to the letter ruling or findings in a judgment.

G. Appellate Issues Relating to Findings of Fact and Conclusions of Law

1. Effect on Appellate Deadlines

A request for findings of fact and conclusions of law made in an appropriate case (required under Rule 296 or when can be considered on appeal) will extend the deadlines for perfecting an appeal. TEX. R. APP. P. 26.1(a)(4); *see IKB*, 938 S.W.2d at 442-43. If unsure if findings of fact will extend the appellate deadlines, do not rely on a request for findings. Instead, file a motion for new trial or comply with the thirty-day deadline.

In 2021, the Texas Supreme Court adopted a new two-party inquiry for determining whether a request for findings of fact in cases where findings are not required by the rules will extend the deadline to appeal to ninety days. *Phillips v. McNeill*, 635 S.W.3d 620, 625-27 (Tex. 2021). The new approach addresses cases where it is unclear whether an appellant could rely on a request for findings of fact to extend the deadline. "In uncertain cases, courts should break any tie in favor of the timeliness of the appeal." *Id.* at 627.

In *Phillip*, HHSC filed a plea to the jurisdiction on immunity grounds. The trial court granted the plea and dismissed Phillips' claims. Phillips requested findings of fact and conclusions of law and filed his notice of

appeal eighty-seven days after the judgment was signed.

The supreme court relied on two earlier opinions—*IKB Industries* and *Gene Duke Builders*—to adopt a two-step inquiry to determine when a request for findings of fact that are not required by the rules extend the appellate deadline. *Id.* at 625. The first step: was the non-jury proceeding a type in which the trial court could consider evidence? If so, the second step: was there evidence before the trial court? *Id.*

According to the Court, the first step is "categorical, not case-specific." *Id.* The first step "will be answered yes for a judgment following a bench trial, a default judgment on claim for unliquidated damages, a judgment rendered as sanctions, and any other judgment that could be based in any part on an evidentiary hearing." *Id.*

The second step is case-specific and "focuses on whether evidence was presented to the trial court, not whether that evidence proved to be necessary in hindsight." *Id.* "[I]t is not relevant whether the evidence presented was disputed, or jurisdictional, or material to an issue later raised on appeal." *Id.* "The question is not whether the trial court *had* to consider evidence to render judgment, but whether it received evidence it *could* consider." *Id.* at 626.

Applying the new approach, the supreme court noted that the trial court conducted a bench trial, which is a type of non-jury proceeding in which evidence can be considered. *Id.* at 626. As to the second inquiry, the parties presented evidence to the trial court. *Id.* The judgment stated evidence was considered but the supreme court concluded that such reference was "not necessary" to answer the second inquiry "yes." *Id.*; *see also Gene Duke Builders*, 138 S.W.3d at 908 (supreme court concluded that trial court took evidence when the evidence was attached to a plea to the jurisdiction but not formally offered).

Further, the supreme court rejected HHSC's argument that the appeal involved only legal issues, not factual ones. *Id.* at 627. According to the Court, there were factual disputes for the trial court to resolve. *Id.*; *see also Zeon Chemical, L.P. v. Harris Cnty. Appraisal Dist.*, No. 14-20-00798-CV, 2022 WL 619681, at *3-4 (Tex. App.—Houston [14th Dist.] March 3, 2022, no pet.) (mem. op.) (applying *Phillips*).

Note that accelerated appeals are different. A request for findings of fact and conclusions of law in an accelerated appeal does not extend the time to perfect an accelerated appeal. TEX. R. APP. P. 28.1(b). Accelerated appeals include appeals in quo warranto proceedings, appeals required by statute to be accelerated or expedited, and appeals required by law to be filed or perfected less than 30 days after the order or judgment. TEX. R. APP. P. 28.1(a).

While a request for findings of fact in an appropriate case extends the appellate deadlines, a request for findings of fact does not extend plenary power. *See* TEX. R APP. P. 26.1(a)(4); TEX. R. CIV. P. 329b; *HSBC Bank USA, N.A. v. Watson*, 377 S.W.3d 766, 772 (Tex. App.—Dallas 2012, pet. dism'd). File a motion for new trial or a motion to modify the judgment if seeking to extend the court's plenary power. TEX. R. CIV. P. 329b(e), (g).

2. Appellate Review of Bench Trials

Appellate complaints relating to findings of fact and conclusions of law fall into three categories: 1) the absence of findings of fact; 2) the sufficiency of the evidence supporting the findings of fact and correctness of conclusions of law if findings are filed; and 3) the omissions or lack of completeness of the findings of fact.

a. The Absence of Findings of Fact.

If findings of fact are not requested and none are filed. If no findings of fact and conclusions of law are filed or requested, all questions of fact will be presumed and found in support of the judgment. *Zac Smith & Co. v. Otis Elevator Co.*, 734 S.W.2d 662, 666 (Tex. 1987); *Treuil v. Treuil*, 311 S.W.3d 114, 130 (Tex. App.—Beaumont 2010, no pet.)

If there are no findings of fact and conclusions of law filed, the court of appeals infers that the trial court made all the necessary findings of fact necessary to support the judgment that are supported by the evidence. *Shields Ltd. P'ship v. Bradberry*, 526 S.W.3d 471, 480 (Tex. 2017); *Moncrief Oil Int'l, Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 (Tex. 2013); *Sixth RMA Partners, L.P. v. Sibley*, 111 S.W.3d 46, 52 (Tex. 2003); *Rourk v. Cameron Appraisal District*, 305 S.W.3d 231, 234-35 (Tex. App.—Corpus Christi 2009, pet. denied). If there is a reporter's record, the implied findings are not conclusive and may be challenged by raising both legal and factual sufficiency of the evidence issues on appeal. *Shields Ltd. P'ship*, 526 S.W.3d at 480; *BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 795 (Tex. 2002); *In re Estate of Henry*, 250 S.W.3d 518, 522 (Tex. App.—Dallas 2008, no pet.). With no findings of fact, the court of appeals will affirm the trial court's judgment if it can be upheld on any legal theory supported by the evidence. *Worford v. Stamper*, 801 S.W.2d 108, 109 (Tex. 1990); *Builders First Source-S. Tex., LP v. Ortiz*, 515 S.W.3d 451, 456 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

When there is no reporter's record and no findings of fact have been requested or filed, the court of appeals implies all necessary findings in support of the judgment. *Waltenburg v. Waltenburg*, 270 S.W.3d 308, 312 (Tex. App.—Dallas 2008, no pet.). In that case, every reasonable presumption consistent with the record will be indulged in favor of the judgment. *Ette v. Arlington Bank of Commerce*, 764 S.W.2d 594, 595 (Tex. App.—Fort Worth 1989, no writ). An appellant is entitled to reversal only if she can show fundamental error. *Id.*

If findings of fact are requested, but none are filed. To raise a complaint about the lack of findings of fact and conclusions of law, an appellant must have filed a timely request for findings of fact and conclusions of law and a timely notice of past due findings of fact and conclusions of law. TEX. R. CIV. P. 296, 297.

If properly requested and in an appropriate case, a trial court has a mandatory duty to file findings of fact and conclusions of law. *Cherne*, 763 S.W.22d at 772; *Nicholas v. Envtl. Sys. (Int'l) Ltd.*, 499 S.W.3d 888, 894 (Tex. App.—Houston [14 Dist.] 2016, pet. denied). The stated purpose of Rules 296-98 is to "narrow the bases of the judgment to only a portion of [the multiple] claims and defenses, thereby reducing the number of contentions that the appellant must raise on appeal." *Larry F. Smith, Inc.,* 110 S.W.3d at 614.

When a trial court fails to file findings, it is presumed harmful, unless the record affirmatively shows no harm. *Ad Villarai*, 519 S.W.3d at 135; *Cherne*, 763 S.W.22d at 772. An appellant is harmed if there are two or more possible grounds on which the trial court could have ruled, and an appellant must guess at the court's basis for its ruling. *Scott v. Scott*, No. 14-21-00077-CV, 2022 WL 4553336, at *11 (Tex. App.—Houston 14th Dist.] Sept. 29, 2022, no pet.) (mem.op.); *Zieba v. Martin*, 928 S.W.2d 782, 786 (Tex. App.—Houston [14th Dist.] 1996, no writ); *see also In re Marriage of Grossnickle*, 115 S.W.3d 238, 253 (Tex. App.—Texarkana 2003, no pet.). Putting an appellant in the position of having to guess the trial court's reasons for rendering judgment against her defeats the purpose of Rule 296 and 297—to narrow the issues and reduce the number of issues that must be raised on appeal. *Pham v.*

Harris Cnty. Rentals, L.L.C., 455 S.W.3d 702, 706-07 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

The failure to make findings of fact, however, does not compel reversal if the record affirmatively demonstrates that the complaining party suffered no harm. *Graham Central Station, Inc. v. Pena*, 442 S.W.3d 261, 263 (Tex. 2014); *Las Vegas Pecan & Cattle Co. v. Zavala Cnty.*, 682 S.W.2d 254, 256 (Tex. 1984); *Martinez v. Molinar*, 953 S.W.2d at 401. Where there is only one theory of recovery or defense, there is no injury if no findings of fact are filed. *Martinez*, 953 S.W.2d at 401; *see also General Elec. Capital Corp. v. ICO, Inc.*, 230 S.W.3d 702, 711 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (only one argument raised thus appellant knew the basis for trial court's ruling).

The test for whether the complaining party has suffered harm is whether the appellant is forced to guess at the reason or reasons the trial court ruled against it. *Ward v. Gallagher*, No. 08-22-00224-CV, 2023 WL 4244748, at *4 (Tex. App.—El Paso June 28, 2023, no pet.) (mem. op.); *Martinez*, 953 S.W.2d at 401; *Burnet Cent. Appraisal Dist. v. Millmeyer*, 287 S.W.3d at 760 (trial court's statements on the record at end of trial sufficiently explained reasons for its ruling and negated any harm in the failure to file findings of fact); *see also Midwest Med. Supply Co. v. Wingert*, 317 S.W.3d 530, 535(Tex. App.—Dallas July 20, 2010, no pet.) (no harm in having no findings of fact when only issue is a legal one).

Other cases show harm when no findings of fact are filed. When there are multiple possible bases on which the trial court could have relied in making its decision, an appellant is harmed by the lack of findings of fact. *Liberty Mut. Fire Ins. v. Laca*, 243 S.W.3d 791, 795 (Tex. App.—El Paso 2007, no pet.). The El Paso Court reasoned that without findings, appellant was forced to appeal under a more onerous standard of review even though the party properly requested findings of fact. Without findings of fact, appellant was forced to expend resources to brief all issues, rather than those forming the basis of the trial court's decision. *Id.*; *see also Vargas v. Texas Dep't of Protective & Regulatory Servs.*, 973 S.W.2d 423, 426-27 (Tex. App.—Austin 1998, pet. granted, judgm't vacated w.r.m.) (forcing appellant to challenge sufficiency of each ground for termination put appellant at disadvantage without findings of fact; court remanded based on changed circumstances).

The remedy for a trial court's failure to file findings of fact when required is to request the court of appeals to abate the appeal and direct the trial court to file findings of fact. *Ad Villarai*, 519 S.W.3d at 136; *Cherne Indus.*, 763 S.W.2d at 773; TEX. R. APP. P. 44.4(a). If a trial court still fails to file findings, the appellate court "must reverse the trial court's judgment and remand the case for a new trial." *Ad Villarai*, 519 S.W.3d at 136; TEX. R. APP. P. 44.1(a)(2).

b. Review of Findings of Fact.

Appellate review of findings of fact and conclusions of law depends on whether there is a reporter's record on file at the court of appeals.

Reporter's record on file. If there is a reporter's record, the trial court's findings are not conclusive if the contrary fact finding is established as a matter of law or if there is no evidence to support the finding. *Middleton v. Kawasaki Steel Corp.*, 687 S.W.2d 42, 44 (Tex. App.—Houston [14th Dist.] 1985), *writ ref'd n.r.e. per curiam*, 699 S.W.2d 199 (Tex. 1985); *Johnston v. McKinney American, Inc.*, 9 S.W.3d at 276. With a reporter's record, findings of fact (and implied findings) are reviewable for legal and factual sufficiency of the evidence under the same standards applied with reviewing a jury's answers. *Ortiz v. Jones*, 917 S.W.2d at 772; *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). Similarly,

implied findings should be challenged for insufficiency the same as if actual findings. *Vickery*, 5 S.W.3d at 258; *Sutherland*, 843 S.W.2d at 131.

A challenge to the sufficiency of the evidence in a bench trial can be raised for the first time in appellant's brief. There is no requirement to file a post-judgment motion to raise it. TEX. R. APP. 33.1(d). It is important to note, however, challenging the sufficiency of the evidence on appeal is not the same as challenging an omitted finding. *Long v. Long*, 234 S.W.3d 34, 42 (Tex. App.—El Paso 2007, pet. denied). Challenging omitted elements requires the filing of a request for additional findings of fact. *Id.*

No reporter's record on file. If there is no reporter's record, the court of appeals is bound by the findings of fact and must presume that the evidence was sufficient and that every fact necessary to support the findings and judgment were proved at trial. *Redman v. Bennett*, 401 S.W.2d 891, 894 (Tex. App.—Tyler 1966, no writ). Without a reporter's record, the court of appeals indulges every presumption in favor of the trial court's judgment. *Jahan Tigh v. De Lage Landen Fin. Servs.*, 545 S.W.3d 714 (Tex. App.—Fort Worth 2018, no pet.).

With unchallenged findings of fact, and when there is no reporter's record, findings of fact are conclusive on appeal. *Rapp Collins Worldwide, Inc. v. Mohr*, 982 S.W.2d 478, 481 (Tex. App.—Dallas 1998, no pet.).

The best practice: insist on a court reporter and request the reporter's record for the appeal.

It is imperative to challenge the court's individual findings of fact and conclusions of law. When a party appeals from a non-jury trial, it must complain of specific findings of fact and conclusions of law. *Mayfield v. Peek*, 2017 WL 769879, at *5. A general complaint about the trial court's judgment does not present a justiciable question. *Id.*

Be aware of "unchallenged" findings of fact. With voluminous findings, it is important to confirm that all relevant findings are challenged. Unchallenged findings of fact with a reporter's record are binding on an appellate court unless the contrary is established as a matter of law or if there is no evidence to support the finding. *Borgelt v. Austin Firefighters Assoc.*, __ S.W.3d __, 2024 WL 3210046, at *5, n.8 (Tex. June 28, 2024); *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696-97 (Tex. 1986); *Odessa Tex. Sheriff's Posse, Inc. v. Ector Cnty.*, 215 S.W.3d 458, 467 (Tex. App.—Eastland 2006, pet. denied). The appellate court must overrule challenges to findings of fact that support a legal conclusion when other unchallenged findings of fact also support the legal conclusion. *Britton v. Texas Dep't of Criminal Justice*, 95 S.W.3d 676, 682 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

If a finding of fact is labeled a conclusion of law, the appellate court is not bound by the designation and may treat it as a finding of fact subject to the applicable standard of review. *Texas Outfitters Ltd., LLC v. Nicholson*, 572 S.W.3d 647, 653 n.7 (Tex. 2019).

c. Review of Conflicting Findings of Fact

As provided in Rule 299, findings of fact shall form the basis of the judgment. What about conflicting findings? An appellate court will not set aside a judgment because of conflicting findings of fact if the conflict can be reconciled. *Eagle Railcar Servs, L.P. v. Matheson Tri-Gas, Inc.*, No. 12-22-00103-CV, 2023 WL 4681162, at *20 (Tex. App.—Tyler July 21, 2023, pet. denied) (mem. op.); *In re N.E.C.*, No. 05-18-01350, 2020 WL 3286521, at *3 (Tex. App.—Dallas June 18, 2020, pet. denied); *Yazdani-Beioky v. Sharifan*, 550 S.W.3d 808, 822 (Tex. App.—Houston [14th

Dist.] 2018, pet. denied). If findings of fact cannot be reconciled with the conclusions of law, the findings of fact control. *Yazdani-Beioky*, 550 S.W.3d at 822.

An appellate court applies a *de novo* standard of review when attempting to reconcile findings. *Id.* If two possible interpretations exist, the appellate court will use the interpretation that will harmonize the judgment with the findings of fact and conclusions of law upon which it is based. *Id.*; *Grossnickle v. Grossnickle*, 935 S.W.2d at 841. The reviewing court does not determine whether the findings reasonably may be viewed as conflicting; instead, the question is whether there is any reasonable basis upon which the findings may be reconciled. *Yazdani-Beioky v. Sharifan*, 550 S.W.3d at 821.

An erroneous finding of fact does not warrant reversal unless the erroneous finding is on an ultimate fact issue. *Id.* at 822. Immaterial findings of fact are harmless and are not grounds for reversal even if conflicting. *Id.*

If there is a conflict between findings of fact recited in judgment and findings of fact made pursuant to Rules 296-98, the latter findings control. TEX. R. CIV. P. 299a.

d. Review of Omissions from the Findings of Fact

If complaining of an omitted element or a cause of action or defense, a party must file a request for additional findings of fact that includes the omitted elements to avoid deemed findings. *See supra* II. C. 3. If complaining of the omission of an entire cause of action or defense, a party must file a request for additional findings that includes the elements of the cause of action or defense to avoid waiver.

To obtain a reversal based on the failure to enter additional findings of fact, the appellant must demonstrate that it was prevented from adequately presenting its case on appeal. *Johnston*, 9 S.W.3d at 277. Complaints about the trial court's failure to file additional findings as preventing an appellant from adequately presenting its appeal must detail how a party was prevented from being able to appeal. *Stuckey Diamonds*, 93 S.W.3d at 213.

e. Review of Conclusions of Law

A challenge to a conclusion of law can be raised for the first time on appeal. As with findings of fact, there may be instances where additional or amended conclusions of law must be requested to preserve error.

Conclusions of law have less impact on an appeal than findings of fact. Courts of appeal re-determine the legal conclusions. Conclusions of law are reviewed *de novo* to determine their correctness as applied to the facts. *Hegar v. American Multi-Cinema, Inc.*, 605 S.W.3d 35, 40 (Tex. 2020); *Perry Homes v. Cull*, 258 S.W.3d at 598; *Curocom Energy LLC v. Young-Sub Shim*, 416 S.W.3d 893, 896 (Tex. App.—Houston [1st Dist.] 2013, no pet.); *Keisling*, 218 S.W.3d at 741. Erroneous conclusions of law are not binding on an appellate court. *Chavez v. Chavez*, 148 S.W.3d 449, 456 (Tex. App.—El Paso 2004, no pet.). Conclusions of law will be upheld on appeal if the judgment can be sustained on any legal theory supported by the evidence. *Johnston*, 9 S.W.3d at 277. That is, an incorrect conclusion of law will not require reversal if the controlling findings of fact support a correct legal theory. *Johnston*, 9 S.W.3d at 277.

Frequently findings of fact will include statements that are conclusions of law. Even when conclusions of law are mislabeled as findings of fact, the court of appeals reviews them *de novo*. *BP America*, 282 S.W.3d at 220; *see BMC Software,* 83 S.W.3d at 794.

f. Review of Non-Rule 296 Findings of Fact

Findings of fact filed in interlocutory appeals and other non-Rule 296 cases are reviewed differently than Rule 296 findings. For findings made in cases where the trial court standard is abuse of discretion, the findings are helpful and aid in the court's review on appeal but are not "binding" in the same manner as findings under Rule 296. *IKB*, 938 S.W.2d at 442; *Chrysler Corp. v. Blackmon*, 841 S.W.2d 844, 852-53 (Tex. 1992). Unlike review of Rule 296 findings where findings are tested for legal and factual sufficiency, in an abuse of discretion review, an appellate court can reverse even if the findings and evidence support a trial court's order. *IKB*, 938 S.W.2d at 442; *Chrysler Corp.*, 841 S.W.2d at 852-53; *see also Doran v. ClubCorp USA, Inc.*, 174 S.W.3d 883, 887 (Tex. App.—Dallas 2005, no pet.) (in an interlocutory appeal, findings do not carry the same weight as findings under Rule 296; court makes an independent review of the evidence); *Tom James*, 109 S.W.3d at 884 (in an interloctory appeal, findings are "helpful," but "they do not carry the same weight on appeal as findings made under rule 296, and are not binding when we are reviewing a trial court's exercise of discretion.").

III. CONCLUSION

Obtaining findings of fact and conclusions of law is critical for a successful appeal of a bench trial. Knowing the requirements of the rules is imperative. The deadlines and requirements for securing findings of act are unlike other post-judgment preservation rules – shorter deadline, with a reminder notice, and with a requirement to request additional findings if there are omissions. Requests for additional findings are important for both appellant and appellee for preservation purposes to avoid waiver if elements or entire grounds or defenses are omitted. Best practices indicate filing draft findings of fact and conclusions of law before trial. After findings are filed, review the trial court's findings, and compare them to the pleadings and trial evidence. Focus on the need for additional findings for preservation purposes. And, finally, request the reporter's record for sufficiency challenges.