HOW TO DRAFT GOOD FINDINGS OF FACT AND CONCLUSIONS OF LAW

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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 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, to have a target for appeal. Findings of fact and conclusions of law are also necessary to preserve certain errors.

While findings of fact and conclusions of law provide a roadmap or guide to the trial court's decision – both the factual basis and the legal reasons – they are an important tool for attorneys who take the time to prepare them early in a case. Just 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 developing case themes, in maintaining focus on the arguments and the evidence to be developed, and in guiding the presentation of the evidence at trial.

Understanding the procedure, preservation and strategy issues can be critical in securing 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 framework for the court's judgment. In cases tried without a jury, findings of fact delineate the facts that support the judgment. As they are often described, findings of fact in a bench trial have the "same force and dignity" as a jury's answers to jury questions. *Anderson v. City of Seven Points*, 806 S.W.2d 791, 794 (Tex. 1991); *Keisling v. Landrum*, 218 S.W.3d 737, 740 (Tex. App.—Fort Worth 2007, pet. denied). Conclusions of law, as the name suggests, identify the legal basis for the judgment based on the facts found.

Which are more important? Given the standard of review of findings of fact and conclusions of law, 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). That is, the court of appeals treats findings of fact as it would jury findings but does not give any particular weight to the trial court's legal conclusions. When reviewing conclusions of law, the court of appeals will make its own legal determination.

What is the purpose of having findings of fact and conclusions of law? Findings of fact and conclusions of law have several purposes. 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). 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.

Without findings of fact, the court of appeals implies all necessary findings in support of the judgment. *Combs v. Newpark Resources, Inc.*, __ S.W.3d __, 2013 WL 6920878 at *3 (Tex. App.—Austin Dec. 31, 2013, no pet. h.); *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 that is supported by the evidence. *Newpark Resources*, __ S.W.3d__, 2013 WL 6920878 at *3; *Schoeffler*, 813 S.W.2d at 744.

To limit the scope of the presumption, an appellant should request findings of fact to narrow the issues on appeal and to reduce the number of contentions an appellant must raise on appeal. *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). In addition, findings of fact 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.*

Third, preparing findings of fact and conclusions of law early in a case can provide a valuable pretrial tool. It is common to 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 tailoring discovery for the case and with presenting evidence at trial.

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 often detail the evidence. Well-written findings of fact can often end up in the appellate court's opinion as the statement of facts.

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. However, not every bench trial or hearing is a candidate for findings of fact and conclusions of law.

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. In such cases, findings of fact and conclusions of law are mandatory under Rule 296 and 297. A party cannot, however, compel their preparation. *IKB Indus*, 938 S.W.2d at 442-43; *Haddix*, 253 S.W.3d at 345. *See infra* E.2.a "Remedy." 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, Probate Code § 693 requires the probate court to make specific findings of fact. TEX. PROB. CODE § 693(a). 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).[1]

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).

Finally, a trial court's order granting a new trial raises the need for findings. As the Texas Supreme Court has recently concluded, trial courts must state the specific reason for granting a new trial that sets aside jury verdict. *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*, __ S.W.3d __, 2013 WL 6327636 (Tex. App.—Houston [1st Dist.] 2013, orig. proceeding) (court reviewed each of trial court's stated reasons for ordering a new trial.

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. *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.

In addition, 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

[1] There are two excellent articles containing lists of statutes requiring trial courts to enter findings of fact. *See* Rosemary Kanusky, *Nonjury Appeals*, ADVANCED CIVIL APPELLATE PRACTICE COURSE, ch. 3, pp. 4-7 (State Bar of Texas, Sept. 12-13, 2002) & Honorable Eva M. Guzman & Nina Reilly, *"Think Before You Write"—Preparing Findings of Fact and Conclusions of Law*, ADVANCED FAMILY LAW COURSE, ch. 51, pp. 6-10 (State Bar of Texas, Aug. 14-17, 2006).

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 E.1 & E.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.

A question arises in having findings of fact in an interlocutory appeal: which rules control? TRAP 28.1 provides that findings and conclusions are due, filed, within 30 days after the order is signed. TEX. R. APP. P. 28.1(c). This deadline is different than the deadline in Rule 296 and the procedure in Rules 296 and 297. Two appellate courts have stated that Rule 297 applies in interlocutory appeals. *Waterman Steamship Corp. v. Ruiz*, 355 S.W.3d 387, 428 (Tex. App.—Houston [1st Dist.] 2011, pet. denied); *I & JC Corp. v. Helen of Troy, L.P.*, 164 S.W.3d 877, 884-85 (Tex. App.—El Paso 2005, pet. denied).

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).

Rulings on pleas to the jurisdiction are an example of a frequently appealed interlocutory order that raise findings of fact issues. Findings of fact and conclusions of law can be entered after a plea to the jurisdiction when the facts are in dispute and there has been an evidentiary hearing. *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). However, if the facts are undisputed, findings of fact would be immaterial. *Goldberg*. 265 S.W.3d at 579, n.14. In a plea to the jurisdiction challenge 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 County 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.).

Similarly, 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 reach different conclusions regarding the evidence, the evidence was undisputed. 253 S.W.3d at 346. Thus, the trial court was not required to file findings of fact. *Id.*

Temporary injunctions are another interlocutory order that raises findings of fact issues. Rule 683 provides that a temporary injunction set out the reasons for its issuance and be specific. TEX. R. CIV. P. 683. 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.).

A 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 set out below in more detail, findings of fact are not to be included in a judgment. 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 in a temporary injunction order, however, have been held to violate Rule 299a. *Tom James*, 109 S.W.3d at 883-84.

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 facts to find 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 kinds of cases: 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 Gardner v. Abbott*, __ S.W.3d __, 2013 WL 5858017 at *8 (Tex. App.—Austin 2013, no pet.).

In addition, there are other kinds of cases where findings of fact and conclusions of law are not appropriate. For example, 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). 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 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. 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. Most importantly, if findings of fact are not appropriate and could not considered in a particular case, filing a request for findings does 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.)

C. Procedure for requesting findings of fact and conclusions of law and strategies for both parties

Having discussed the purposes of findings of fact and conclusions of law and when they are appropriate, how are they obtained from the trial court? 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 properly 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.[2]

1. Filing a 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. 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. The clerk must immediately notify the trial court of the request. TEX. R. CIV. P. 296.

Rule 297 imposes a mandatory duty on the trial court to file properly requested findings of fact. TEX. R. CIV. P. 297. A court "shall file findings of fact and conclusions of law within twenty days after a timely request is filed." *Id.* The court must also send a copy of the findings and conclusions to each party in the suit. TEX. R. CIV. P. 297.

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. Make sure all elements of each are included if supported by the evidence and the judgment. It is usually best 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 obligations. A trial court is only required to enter findings (and additional findings) on ultimate or controlling issues. *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). 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. *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.).

While findings of fact typically contain numerous evidentiary findings, the trial court is not required to enter findings of fact on evidentiary issues. An evidentiary issue is one that a trial court considers in making its decision on a controlling issue, but that itself, is not a controlling issue. *Flanary*, 150 S.W.3d at 792-93.

[2] The Supreme Court Advisory Committee has debated Rules 296-299a and considered a simplified procedure for obtaining findings and conclusions. The Committee has considered proposed amendments that: 1) encourage broad form findings and avoiding voluminous and evidentiary findings; 2) modify the deadline for the original request deadline to conform to other post-judgment preservation rules, and 3) eliminate the requirement for the notice of past due findings of fact and 4) clarify 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). The rules, however, have not been amended.

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). A trial court is also not required to make findings of fact on undisputed matters. *Limbaugh v. Limbaugh*, 71 S.W.3d 1, (Tex. App.—Waco 2002, no pet.).

Another consideration is raising a *Casteel*-type error 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 and the impermissible bases. *In re Marriage of C.A.S. & D.P.S.*, __ S.W.3d __; 2013 WL 32304314 at *17 (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.).

Findings of fact are supposed to be on "grounds of recovery" or a "defense." 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").

Findings of fact must also be on "ultimate issues" and not on mere evidentiary issues. *Cooke County Tax Appraisal Dist. v. Teel*, 129 S.W.3d 724, 731 (Tex. App.—Fort Worth 2004, no pet.). An ultimate issue of fact is one that is essential to the cause of action and has a direct effect on the judgment. *Id.* (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 controlling in itself. *Id.*

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 it 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. As the prevailing party, the trial court will look to that party for preparing 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.

The best procedure is to file a motion to submit findings of fact and use the qualifying language in *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);[3] *see also 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). This is the same procedure used with filing a motion for judgment when a party did not prevail on all matters. The *Fojtik* language is used in that context too. Without qualifying 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 appellee

While the losing party files the request for findings of fact and conclusions of law, the trial court looks to the prevailing party to prepare findings of fact and conclusions of law. After a request for findings of fact and conclusions of law is filed, the prevailing

[3] 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).

party should prepare and submit findings of fact and conclusions of law to the court. Contact the court to find out the trial judge's preferences when submitting findings of fact and conclusions of law. Some prefer, for example, an electronic version for the judge to use to revise.

In addition to preparing and filing findings of fact and conclusions of law, the appellee should also make sure the trial court files signs and files them. If findings of fact should be filed under Rule 296, it is more expeditious to have them filed on time rather than having the court of appeals abate the case and send it back to the trial court to sign and file findings of fact.

The appellee should also request that all parties' findings of fact and conclusions of law submitted to the trial court are included in the clerk's record. It is not uncommon to find one's opponent taking an inconsistent position on appeal from findings of fact that were requested in the trial court. Also, note that clerk's offices vary on whether they maintain proposed findings of fact with the court's file. Clerk's offices may not keep proposed, unsigned findings of fact.

d. Strategy considerations and practical points for the appellant

First and foremost, be aware of the very short deadline for requesting findings of fact and conclusions of law: twenty days after the judgment is signed. This is a commonly missed deadline. 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 of the trial court's failure to file findings of fact and conclusions of law. *Morrison v. Morrison*, 713 S.W.2d 377, 381 (Tex. App.—Dallas 1986, writ dism'd w.o.j.). The rule has no procedure for a late-filed request for findings of fact. TEX. R. CIV. P. 296.

The appellant should always request findings of fact and conclusions of law. A common question by the losing party, however, is whether to submit proposed findings of fact at all and if so, how to write them. The trial court will almost certainly sign the findings and conclusions submitted by the prevailing party (or in the rare situation, write her own). So why submit them as the losing party? Should the appellant submit findings that support the judgment but that might be less slanted than the findings from the winning party in an effort to entice the trial court to sign them? Should the appellant try to convince the trial court of its error in the judgment through findings of fact and conclusions of law?

The best advice for the appellant: submit proposed findings and conclusions and submit them as though you prevailed at trial. Several reasons support this strategy. First, filing findings of fact and conclusions of law forces the losing party to go back through the pleadings and evidence and write out findings and conclusions that can be used as a benchmark to compare with the findings and conclusions that the trial court ultimately signs. Also, by submitting findings of fact, the losing party also gets two opportunities to set out findings. The second opportunity is in the request for additional findings and conclusions.

Second, attempting to submit findings of fact that support the judgment but that are slightly tilted in the appellant's favor in hope that the trial court will sign them does not work. It is extremely unlikely that the losing party can convince the trial court to change its mind by reading findings of fact and conclusions of law. The trial court has heard the evidence and signed a judgment against the appellant and would like to have her judgment affirmed if it is appealed. Third, in trying to soft-pedal proposed findings, a losing party risks being limited on appeal from taking a position contrary to findings of fact that it proposed.

One exception to this strategy is when a party prevails on the merits of a case, but loses on attorney's fees or some other issue. As the prevailing party, the trial court will expect the you to prepare all findings and conclusions. But even on the issue on which you lost, you will want to prepare findings that support the judgment and in a form that the court will sign. Because the findings on attorney's fees are contrary to the prevailing party's interest, the request needs to include qualifying language.

Finally, an appellant's real strategy is in the request for additional finding of fact and conclusions of law. As discussed below, it is in the request for additional findings where the losing party has the opportunity to preserve error.

2. Notice of Past Due Findings of Fact and Conclusions of Law and strategy considerations

The second step in the procedure for obtaining findings of fact and conclusions of law is to file a notice past due findings and conclusions if the trial court fails to timely file them. Unlike most preservation rules, the rules on findings of fact require a reminder notice if the trial court misses its deadline to file findings of fact and conclusions of law. The notice has two purposes: 1) it extends the trial court's deadline for filing findings of fact and conclusions of law, and 2) it is mandatory for an appellant to avoid waiver of the trial court's failure to file findings of fact.

a. Rule 297 requirements

Rule 297 provides the procedure for filing a notice of past due findings of fact. If the court fails to timely file 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 late notice extends the time for the trial court to file 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 file 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 of filing a past due notice of findings is frequently missed but it is a critical step in preserving error on the court's failure to file findings and conclusions. The failure to timely file a notice of past due findings waives the right to complain about the failure to file findings. *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.); *Haining v. Haining*, No. 01-08-00091-CV, 2010 WL 1240752, at *4 (Tex. App.—Houston [1st Dist.] March 25, 2010, pet. denied) (mem. op.).

When filing a notice of past due findings, do not file the notice early. Some courts of appeals have concluded that a notice of past due findings request filed early is *not* timely and an appellant waived 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 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.

Note too, that late-filed findings of fact are better than none at all. Even if the trial court misses the extended deadline, the trial court can still file findings and conclusions. The expiration of the trial court's plenary power 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.); *Jaramillo v. Portfolio Acquisitions, LLC*, No. 14-08-00939-CV, 2010 WL 1197669 (Tex. App.—Houston [14th Dist.] no pet.) (mem. op.). A trial court may file findings late because the findings and conclusions do not operate to change the judgment; rather, they merely explain the court's reasoning. *Gillespie*, 124 S.W.3d at 703. The rules also do not prohibit a trial court from entering findings of fact after the deadline. *Davey v. Shaw*, 225 S.W.3d 843, 852 (Tex. App.—Dallas 2007, no pet.). If the trial court enters findings of fact after the deadline, the only issue is whether an appellant is harmed. 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. *Id.* The late-filed findings and conclusions are considered on appeal. *Id.*

The Beaumont Court of Appeals, however, has recently concluded that a trial court's findings of fact and conclusions of law signed after the court of appeals obtains exclusive jurisdiction over the case are a nullity. *Sonnier v. Sonnier*, 331 S.W.3d 211, 215-16 (Tex. App.—Beaumont 2011, no pet.); *see also Naime v. Soliman*, No. 04-11-00865-CV, 2012 WL 2835161 at *3, n.2 (Tex. App.—San Antonio 2012, no pet.) (refusing to consider findings filed after appellate briefs were filed). The decision in *Sonnier* conflicts with an earlier Beaumont Court decision in which the court considered late-filed findings of fact. *Jefferson County Drainage Dist. No. 6 v. Lower Neches Auth.*, 876 S.W.2d 940, 959 (Tex. App.—Beaumont 1994, writ denied).

3. Request for Additional Findings of Fact and Conclusions of Law and strategies when drafting

The final step in the procedure for obtaining findings of fact and conclusions of law is the filing of a request for additional findings and conclusions. Once findings of fact and conclusions of law are filed, both parties must consider whether additional or amended findings of fact and conclusions of law are necessary for their respective appeals. The request for additional findings is in reality a misnomer. There is little chance that a trial court will sign additional findings and conclusions. The point of the request is to "object" to the findings that have been signed and thereby 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 and preserves arguments for appeal.

a. Rule 298 requirements

Rule 298 sets out the procedure for filing additional or amended findings of fact once the trial court files its original findings and conclusions. After findings are filed, 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 filed 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 refusal to enter additional findings. *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 file additional findings and conclusions. TEX. R. CIV. P.

298 ("court shall file any additional or amended findings and conclusions that are appropriate within ten days after the request is filed.") The rule also provides that no findings or conclusions "shall be deemed or presumed by any failure of the court to make additional findings or conclusions." *Id.*

A related matter to additional findings of fact is omitted findings. As Rule 299 points out, findings of fact form the basis of the judgment upon "all grounds of recovery and of defense embraced therein." TEX. R. CIV. P. 299. The judgment cannot be supported on appeal by a presumed finding on a ground of recovery or defense if no element has been included in the findings. *Id.* However, if one of more elements of a ground or defense is included in the findings, "omitted unrequested elements, when supported by evidence, will be supplied by presumption in support of the judgment." *Id.* Finally, the court's refusal to file a requested finding is reviewable on appeal. *Id.*

b. 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 three purposes: 1) point out omitted elements of grounds of recovery or defenses that are partially included to avoid deemed findings under Rule 299; 2) point out entirely omitted grounds of recovery or defenses; and, 3) limit an appellee from expanding issues on appeal to avoid presumptions in support of judgment

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 avenue to preserve error. A request for additional findings is similar to an objection. *Vickery*, 5 S.W.3d at 255-56. Thus, the request for additional findings, like an objection, needs to be specific. *Id.* A request for additional findings of fact has significance unrelated to the trial court actually filing additional findings of fact. To raise an issue on appeal, a party must have requested a finding of fact on the issue or the issue must be in the court's findings.

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 County 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. *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.

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

c. 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 *files* it 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 of 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. filed) (appellants waived complaint by failing to request additional findings of fact).

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.*

Requesting additional findings of fact depends on the omission, whether an omitted element or an entirely omitted cause of action. The guiding principle is this: 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.). 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.

If an element is omitted. If there is an omission, 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 entered but inadvertently omit an essential element of a ground of recovery or defense, the omitted element is supplied by implication or deemed. *Id.*, *Hailey v. Hailey*, 176 S.W.3d 374, 383-84 (Tex. App.—Houston [1st Dist.] 2004, no pet.); *Davis v. Sysco Food Servs. of Austin, L.P.*, No. 03-08-00593-CV, 2009 WL 4458600, at *2 (Tex. App.—Austin Dec. 4, 2009, pet. dism'd) (mem. op.). 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 evidence that the trial court relied on it 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.

To avoid deemed findings when an element has been omitted, a party should request an additional finding on the omitted element. *Vickery*, 5 S.W.3d at 253-54; TEX. R. CIV. P. 298, 299. 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.

If the record, however, demonstrates that the trial court deliberately omitted the element, there is no presumption to supply the missing element. *Id.* at 252. If the prevailing party submits proposed findings that includes all elements and the trial court omits a ground or defense, it is apparent that the omission was deliberate and that the element was requested and refused. *Id.* at 253. In this situation, there is no supplied element by implication. *Id.* Unlike the requirement in Rule 299 to deem omitted elements, the omitted element in this scenario is not "unrequested."

The party relying on the omitted element should file a request for additional findings including the omission to argue the issue on appeal.

Vickery demonstrates the need to clearly identify the omitted element. Vickery complained about an omitted element from the findings of fact, but never alerted the trial court to the omitted elements. 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 presumed that the trial court impliedly found the omitted elements. *Id.* at 258.

The court of appeals 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. If findings support plaintiff but are silent on defendant's affirmative defense, 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.

In *Vickery*, appellant's negative findings did not avoid the omitted findings from being deemed. If an appellant chooses to request negative additional findings contrary to the judgment, an appellant does not avoid deemed findings on omitted elements unless appellant had specifically identified the true issue – that is, the omitted necessary elements. *Id.* at 256.

If an omission of an entire ground or defense. 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 preserve error. *Briggs Equipment Trust v. Harris County Appraisal Dist.*, 294 S.W.3d 667, 674 (Tex. App.—Houston [1st Dist.] 2009, pet. filed); *Limestone Group, Inc. v. Sai Thong, L.L.C.*, 107 S.W.3d 793, 799 (Tex. App.—Amarillo 2003, no pet.). Failing to do so waives the complaint about the unmentioned ground 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 the omission is 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.

To properly raise an omission of an entire ground of recovery or defense, the party relying on the omitted ground must file a request for additional findings including the omitted ground or defense.

A party waives for appellate purposes a theory of recovery or defense unless the proponent of the theory secures a finding on the theory or an element of it. *Hill v. Hill*, 971 S.W.2d at 156. This waiver applies to both appellants and appellees. If an appellant contends the trial court erred in rejecting her defense, she must make sure that she requests the court to make a finding upon that defense. *Id.* at 156-57. If she does not, the defense is waived. *Id.* An appellee suffers the same waiver if she fails to request findings upon all of 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).

Limit an appellee from expanding issues on appeal. By requesting additional findings, an appellant can prevent an appellee from expanding its arguments on appeal that support the judgment. For example, if an appellee prevailed on one statutory ground in a disjunctive list of possible grounds, the findings of fact only mention that ground, and assume that there is disputed evidence of one of the other grounds. An appellant should request an additional finding of fact on the other grounds as though the appellant prevailed. That allows an appellant to argue the other ground and prevents a deemed finding for the appellee.

D. Proper form of the trial court's findings of fact and conclusions of law[4]

Rule 296 and 299a prescribe the form for the trial court's findings of fact and conclusions of law. The rules 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 finding of fact "shall not be recited in a judgment." TEX. R. CIV. P. 299a. Findings of fact shall be filed with the district clerk separate and apart from the judgment. *Id.* While the rule requirements are straightforward they raise several issues.

1. Findings of fact must be in writing; they cannot be oral.

Findings of fact and conclusions of law must be in writing and cannot be made orally on the record. *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); *Heritage Gulf Coast Props, Ltd. v. Sandalwood Apartments, Inc.*, __ S.W.3d __, 2013 WL 5323983 at *11 (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.); *In re Estate of Wallis*, No. 12-07-00022-CV, 2010 WL 1987514 at *6 (Tex. App.—Tyler May 19, 2010, no pet.) (mem. op.).

While oral pronouncements may not amount to findings of fact and conclusions of law, such statements are not without significance. For example, 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 enter 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 at end of trial that explained the reasons for its ruling. According to the Austin Court, 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).

2. In writing, but can a letter suffice?

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

A problem occurs when a trial court sends a 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 County 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.*

Several courts of appeals have applied *Cherokee Water* and concluded that pre-judgment letter rulings do not constitute findings of fact. *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.), *but*

[4] Attached as Appendix A is an example of findings of fact and conclusions of law from an ERISA case that provides an instructive template for a trial court when drafting findings of fact and conclusions of law.

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"); *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).

Other courts of appeals vary on this interpretation. 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). Other courts have construed letter rulings as findings of fact, noting that the rules do not require any particular form. *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 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.).

3. Separate from the judgment, but . . .

Rule 299a makes it clear that findings of fact should be in a document separate from the judgment, however, the rule also contemplates that findings will often 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 contained in a judgment. The Amarillo Court has concluded that findings in a judgment have probative value as long as they do not conflict with separately filed findings of fact. *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 court 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 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).

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.); *Sutherland v. Cobern*, 843 S.W.2d 127, 131, n.7 (Tex. App.—Texarkana 1992, writ denied.). If findings of fact in the judgment are not considered, then the court of appeals reviews as though no findings were made. *Sutherland*, 843 S.W.2d at 131, n.7.

The court in *Guridi* demonstrates the significance of this problem. In that case, the First Court refused to consider findings of fact recited in a judgment when separate findings of fact were filed. The separately filed findings contained no mention of fraud; the judgment 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, no presumed findings on fraud could be supplied on appeal. *Guridi*, 98 S.W.3d at 317.

The best procedure is to encourage the trial court to sign findings of fact and conclusions of law that are in a separate document from the judgment.

E. 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 of fact and conclusions of law. Instead, file a motion for new trial. *See, e.g., Ford v. City of Lubbock*, 76 S.W.3d 795, 798

(Tex. App.—Amarillo 2002, no pet.) In *Ford*, appellant appealed the trial court's granting of a plea to the jurisdiction and filed a request for findings of fact and conclusions of law. *Id.* at 796. Appellant filed her notice of appeal 90 days after the trial court signed its order of dismissal, relying on the request for findings of fact to extend her appellate deadlines. *Id.* The court of appeals granted appellee's motion to dismiss. The court of appeals concluded that because there were no facts in dispute in the plea to the jurisdiction, findings of fact served no purpose and thus, the request for findings did not extend appellate deadlines. *Id.* at 796-98. The court dismissed the appeal. *Id.*; *see also Black v. Shor*, __ S.W.3d __, 2013 WL 1687537 at *9 (Tex. App.—Corpus Christi 2013, pet. denied) (findings of fact appropriate only when trial court is called upon to determine questions of fact upon conflicting evidence).

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. CIV. P. 329b; *HSBC Bank USA, N.A. v. Watson*, 377 S.W.3d 766, 772 (Tex. App.—Dallas 2012, pet. filed). File a motion for new trial or a motion to modify the judgment if seeking to extend the court's plenary power. *Id.* 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, if filed.

a. In 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. *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. filed). 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. *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.).

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, it is mandatory for the trial court file findings of fact and conclusions of law. *Cherne*, 763 S.W.22d at 772. When a trial court fails to file findings, it is presumed harmful, unless the record affirmatively shows no harm. *Id.* An appellant is harmed if there are two or more possible grounds on which the trial court could have ruled and an appellant has to guess at the court's basis for its ruling. *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.).

The failure to make findings of fact, however, does not compel reversal if the record affirmatively demonstrates that the complaining party suffered no harm. *Las Vegas Pecan & Cattle Co. v. Zavala County*, 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. *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. *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 support an appellant's argument of 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).

Remedy. Mandamus is not an available remedy to compel a trial court to file findings of fact and conclusions of law. *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). The remedy for a trial court's failure to file findings of fact when required is to ask the court of appeals to abate the appeal and direct the trial court to correct the error. *Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 773 (Tex. 1989). TEX. R. APP. P. 44.4(a). If the original judge is no longer serving, the case may be remanded for a new trial. *Liberty Mut.*, 243 S.W.3d at 795.

b. When findings of fact are filed, they may be challenged for insufficiency of the evidence.

It is imperative to challenge the court's findings of fact and conclusions of law. Findings of fact are reviewable for legal and factual sufficiency of the evidence under the same standards applied with reviewing a jury's answers.[5] *Ortiz v. Jones*, 917 S.W.2d at 772; *Catalina v. Blasdel*, 881 S.W.2d 295, 297 (Tex. 1994). Similarly, implied findings can and 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 need to file a post-judgment motion raising it. TEX. R. APP. 33.1(d). It is important to note, however, that raising sufficiency of the evidence does not expand to challenging an omitted finding. *Long v. Long*, 234 S.W.3d 34, 42 (Tex. App.—El Paso 2007, pet. denied). Challenging omitted elements requires filing a request for additional findings of fact. *Id.*

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. *Ortiz v. Jones*, 917 S.W.2d at 772.

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

[5] When reviewing findings of fact under a legal sufficiency challenge, the appellate court determines whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. *Midland Cent. Appraisal Dist. v. BP America Prod. Co.*, 282 S.W.3d at 219-20; *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The appellate court reviews the evidence in a light most favorable to the challenged finding, crediting any favorable evidence if a reasonable factfinder could and disregarding any contrary evidence unless a reasonable factfinder could not. *Keller*, 168 S.W.3d at 821-22; 827. A no-evidence or legal sufficiency challenge is sustained only when: 1) the record discloses the complete absence of a vital fact; 2) the court is barred by the rules of evidence or other law from giving weight to the only evidence offered to prove a vital fact; 3) the only evidence is no more than a scintilla; or 4) the evidence conclusively establishes the opposite fact. *Keller*, 168 S.W.3d at 810; *BP America*, 282 S.W.2d at 220. When reviewing a factual sufficiency challenge, the appellate court considers all the evidence and determines whether the evidence supporting a finding is so weak as to be clearly wrong and unjust or whether the evidence is so against the great weight and preponderance of the evidence to be clearly wrong and manifestly unjust. *BP America*, 282 S.W.3d at 220; *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

an appellate court unless the contrary is established as a matter of law or if there is no evidence to support the finding. *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 696-97 (Tex. 1986); *Odessa Tex. Sheriff's Posse, Inc. v. Ector County*, 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.).

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).

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.).

c. Conclusions of law are reviewed *de novo*

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 appeal than findings of fact. On appeal, courts of appeals re-determine the legal questions. Conclusions of law are review *de novo* to determine their correctness as applied to the facts. *Perry Homes v. Cull*, 258 S.W.3d at 598; *Curocom Energy LLC v. Young-Sub Shim*, __ S.W.3d __, 2013 WL 6029532 at *1 (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.

d. Review of incomplete findings of fact

If complaining of the incompleteness or omissions, i.e., an element of or an entire cause of action or defense has been omitted, a party must file a request for additional findings of fact to raise the defect and avoid deemed findings. *See supra* II. C. 3.

Similar to arguments regarding the absence of findings of fact, with the trial court's failure to file additional findings, 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 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 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 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. The deadlines and requirements for securing findings of act are unlike other preservation rules – shorter, with a reminder notice and with a requirement to follow up 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 are omitted.

Appendix A

CAUSE NO. 2011-06887

STEVEN IVES AND LLOYD DELANO,	§	IN THE DISTRICT COURT OF
	§	
Plaintiffs,	§	
	§	
v.	§	HARRIS COUNTY, TEXAS
	§	
ALTA MESA HOLDINGS, L.P., ALTA MESA ACQUISITION SUB, LLC (collectively as successors to THE MERIDIAN RESOURCE CORPORATION), THE MERIDIAN RESOURCE & EXPLORATION LLC CHANGE IN CONTROL SEVERANCE PLAN, AND THE MERIDIAN RESOURCE & EXPLORATION, LLC.	§	
	§	
Defendants.	§	152nd JUDICIAL DISTRICT

DEFENDANTS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

Defendants Alta Mesa Holdings, LP ("Alta Mesa Holdings"), Alta Mesa Acquisition Sub, LLC ("Acquisition Sub"), The Meridian Resources & Exploration LLC Change in Control Severance Plan (the "Plan"), and The Meridian Resource & Exploration, LLC ("TMRX") (collectively "Defendants") submit their Proposed Findings of Fact and Conclusions of Law for the bench trial on Plaintiffs' claims under ERISA § 502(a)(1)(B). Defendants reserve the right to request additional or amended findings.

I. FINDINGS OF FACT

A. The merger.

1. On December 22, 2009, The Meridian Resource Corporation ("Meridian Corporation") entered into an Agreement and Plan of Merger with Alta Mesa Holdings, LP ("Alta Mesa Holdings") and Alta Mesa Acquisition Sub, LLC ("Acquisition Sub").

2. Under the Merger Agreement, as evidenced by Section 2.1, Meridian Corporation: (i) merged with and into Acquisition Sub, (ii) the separate corporate existence of Meridian Corporation ceased, and (iii) Acquisition Sub became the surviving company in the merger.

3. The merger triggered a "change in control" under the terms of The Meridian Resources & Exploration LLC Change in Control Severance Plan (the "Severance Plan" or "Plan").

B. The Severance Plan.

4. The Plan entitles participants to severance benefits if they incur a "Termination of Employment or Affiliation Relationship," which is defined to include a resignation by the participant "for Good Reason after a Change in Control occurs."

5. "Good Reason" is defined by Section 2.1 of the Plan to include five circumstances, including the assignment of "substantially diminished" job responsibilities:

> ***"Good Reason"*** for termination by the Participant of his employment or affiliation means the occurrence (without the Participant's express written consent) after any Change in Control, of any one of the following acts by the Company, or failures by the Company to act, unless, in the case of any act or failure to act described in paragraph (a) below, such act or failure to act is corrected prior to the effective date of the Participant's termination for Good Reason:
>
> (a) the assignment to the Participant of any duties or responsibilities which are substantially diminished as compared to the Participant's duties and responsibilities immediately prior to a Change in Control or a material change in the Participant's reporting responsibilities, titles or offices as an employee or consultant and as in effect immediately prior to the Change in Control.

6. The Plan establishes an administrative committee (the "Committee").

7. Section 2.1 of the Plan states: "For purposes of any determination regarding the existence of Good Reason, any claim by the Participant that Good Reason exists shall be presumed to be correct unless the Company establishes to the Committee by clear and

convincing evidence that Good Reason does not exist. The Committee's determination regarding the existence of Good Reason shall be conclusive and binding upon all parties unless the Committee's determination is arbitrary and capricious."

8. Under Section 2.1 of the Plan, the Committee was initially defined to mean: "prior to a Change in Control, Joseph Reeves and Michael Mayell," who are former TMRX executives. This Committee has made no determination of Plaintiffs' claims under the Plan.

9. After a Change in Control, the Committee was defined to include "such individuals as may be appointed by Joseph Reeves and Michael Mayell."

10. Article X(b) of the Severance Plan also provides that: "the power to appoint the Committee and the power to amend or terminate the Plan shall be exercised by TMRX."

11. On or around May 26, 2010, TMRX amended the Plan effective as of the merger date ("First Amendment").

12. The First Amendment updated the definition of Committee (the "Amendment Committee") under the Plan to conform with the new corporate governance of TMRX:

> "'Committee' means one or more individuals as may be appointed by the Board of Managers of TMRX to serve as the Committee until such time as removed or replaced by the Board of Managers of TMRX in its discretion; provided, however, any employee of TMRC or TMRX or their Affiliates shall be automatically removed as a Committee member upon his termination of employment with TMRC, TMRX and their Affiliates.

13. After the First Amendment, the Board of Managers of TMRX appointed Hal Chappellee as the Amendment Committee. Mike McCabe and Mike Ellis were also subsequently appointed to the Amendment Committee.

14. On July 2, 2010, TMRX adopted a second amendment to the Plan ("Second Amendment"), which eliminated the possibility of double recovery of severance benefits.

15. On December 30, 2010, TMRX adopted a third amendment to the Plan ("Third Amendment"), which created a claims procedure for seeking benefits under the Plan.

C. The Plaintiffs resigned and sought benefits under the Plan.

16. On February 1, 2011, Plaintiffs Lloyd Delano and Stephen Ives (collectively "Plaintiffs") voluntarily resigned their employment from Alta Mesa Holdings.

17. On the same day, Plaintiffs also filed this lawsuit claiming that they resigned for "Good Reason" and were entitled to severance benefits under the Plan.

18. Alta Mesa Holdings: (i) accepted their resignations effective as of 5:00pm on February 1, 2011, (ii) immediately sought clarification of whether the Plaintiffs were filing claims under the Plan, and (iii) reserved its rights under the Plan.

19. On July 26, 2011, Plaintiffs filed a claim for benefits under the Plan.

20. On October 10, 2011, the Amendment Committee met and reviewed Plaintiffs' claims.

21. On October 31, 2011, after careful consideration, the Amendment Committee issued a decision denying Plaintiffs' claims for benefits under the Plan.

22. On December 28, 2011, Plaintiffs appealed the denial of their claims under the Plan's administrative claims procedures.

23. On February 24, 2012, the Amendment Committee again met and reviewed Plaintiffs' appeal and, after careful consideration, issued a decision again denying Plaintiffs' claims for benefits under the Plan.

D. The Court's summary judgment rulings.

24. Plaintiffs sought summary judgment declaring the First Amendment void.

25. On September 17, 2013, the Court granted the Plaintiff's motion, ruling that "all of the Plaintiffs claims against [Defendants] are GRANTED."

26. At Plaintiffs' request, and because the original order exceeded the scope of the summary judgment motion, the Court subsequently modified the summary judgment order on October 8, 2013, ruling only that the "the First Amendment to the Severance Plan is void."

27. Defendants' counsel did not receive a copy of the modified order or any notice that the Court had entered the Order until November 8, 2013.

E. Defendants immediately began a diligent and exhaustive process to present evidence to the pre-amendment Plan Committee, but the Committee refused to act.

28. Immediately following the Court's original summary judgment ruling, Defendants promptly began analyzing options going forward, including appellate options.

29. Defendants' counsel also immediately began to attempt to reconstitute the original Committee of Joseph Reeves and Michael Mayell under the pre-amendment Plan.

30. First, Defendants reached out to Joseph Reeves to determine whether he would approve or ratify the Plan as amended.

31. Defendants' counsel first contacted Reeves through his counsel, Michael R. Absmeier at Gibbs & Bruns, LLP, on October 21, 2013.

32. That afternoon, Defendants' counsel provided Absmeier with: (i) the Court's original September 17, 2013 Order, (ii) Plaintiffs' Motion to Modify and proposed Order, and (iii) the Plan and all Plan amendments for Mr. Reeves's consideration.

33. On October 25, 2013, Reeves took the position that he was not comfortable ratifying or otherwise approving of the Plan as amended.

34. Meanwhile, Defendants continued to work toward submitting evidence to the Committee, including Reeves, for a determination of Plaintiffs' benefits under the original Plan.

35. Absmeier promised to follow up with the Defendants.

36. Absmeier did not call the following week, so defense counsel left Absmeier a follow-up message on November 5, 2013.

37. Defense counsel also called Michael Mayell, the other committee member under the Plan, on November 5, 2013 to discuss the matter.

38. Defense counsel sent Mayell the same materials provided to Reeves's counsel.

39. Neither Reeves nor Mayell acted on the requests to make a determination under the Plan or approve the Plan Amendments.

F. Reeves and Mayell have conflicts of interest.

40. Following the merger, Reeves and Mayell were no longer officers or employees of TMRX and had no incentive to uphold TMRX's interests under the Plan.

41. Moreover, both Reeves and Mayell have interests at stake in the Plan.

42. Mayell's son sued Alta Mesa for benefits under the Plan before his case eventually settled.

43. Reeves also has a son who was initially listed as a participant under the Plan with the potential to seek over $300,000 in severance benefits upon a qualifying termination from employment.

44. Joseph Reeves currently owns and operates a company, Matrix Petroleum, LLC, which competes with Defendants.

45. In light of these conflicts of interest, Reeves and Mayell lack any incentive to cooperate with Defendants.

G. The Court denied Defendants' continuance request.

46. On October 30, in light of its continuing efforts to reconstitute the pre-amendment Committee, Defendants moved to continue the then current November 18, 2013 trial setting.

47. The Court denied the motion on November 8, 2013.

48. That afternoon, Defendants filed an Emergency Motion for Reconsideration of the Court's denial of the continuance motion, providing additional detail about Defendants' extensive efforts to present evidence to the pre-amendment Committee and seek approval of the Plan Amendments.

49. Defendants requested that Plaintiffs' ERISA claims be remanded to the pre-amendment Committee of Joseph Reeves and Michael Mayell for a benefits determination.

50. The Court held an emergency hearing on the motion on November 13, 2013.

51. The Court granted a two week continuance of the trial setting to December 2, 2013, but otherwise denied the request for a further continuance.

H. Defendants' continued due diligence: They promptly hired a third-party to reconstitute the original Committee, but Reeves and Mayell again refused to act.

52. On the same day that the Court held a hearing on the Emergency Motion for Reconsideration, Defendants hired a third-party, Ms. Alexia Gannon, to try to facilitate a swift administrative decision.

53. On November 14, 2013, Ms. Gannon sent letters to Reeves and Mayell again asking them to: (i) ratify the amendments previously made to the Plan, (ii) issue a Plan determination as the Committee, or (iii) appoint Alta Mesa as the new Committee to the Plan.

54. Defendants proposed submitting an administrative record to the Committee on or before November 18, 2013 so that the Committee could render a benefits determination under the Plan on or before November 27, 2013, the last business day before trial in this matter.

55. On November 17, 2013, Ms. Gannon followed up with an email to Reeves and Mayell and again reiterated that Alta Mesa was preparing an administrative record for the Committee's review.

56. Ms. Gannon interviewed numerous individuals and compiled a summary of her findings into an administrative record.

57. On November 18, 2013, both Reeves and Mayell issued written statements refusing to take any further action in this matter prior to trial.

58. The Court finds that Reeves and Mayell have refused to make a determination of whether Plaintiffs are entitled to benefits under the Plan.

59. Defendants have acted promptly with the utmost diligence, taking numerous and extensive steps to obtain a Committee determination of Plaintiffs' claims under the Plan. Defendants nevertheless have been unable to exhaust the administrative process called for under the Plan because of the Committee's refusal to act. Accordingly, the Court finds that the Committee has failed to discharge its obligations under the Plan and ERISA.

60. Based on the evidence presented at trial and these findings, the Court further finds that the Committee, as presently constituted, (i) has serious and irreparable conflicts of interests that preclude it from fairly determining Plaintiffs' claims and (ii) will not take the steps necessary to fully exhaust the administrative process under the Plan and ERISA. Therefore, the Court finds that the appointment of a new Committee to resolve Plaintiffs' claims is the only viable option to allow the administrative process to be fully exhausted.

II. CONCLUSIONS OF LAW

A. The parties must exhaust the Plan administrative process.

61. To recover benefits under the Plan, the parties must exhaust the Plan administrative process. *See* Plan § 2.1 (definition of "Good Reason"); *Bourgeois v. Pension Plan for the Employees of Santa Fe Int'l Corps.*, 215 F.3d 475, 479 (5th Cir. 2000).

62. Under Section 2.1, the Plan administrative process requires the Committee to render a determination of "Good Reason," which is then reviewed by this Court under an arbitrary and capricious standard:

> For purposes of any determination regarding the existence of Good Reason, any claim by the Participant that Good Reason exists shall be presumed to be correct unless the Company establishes to the Committee by clear and convincing evidence that Good Reason does not exist. The Committee's determination regarding the existence of Good Reason shall be conclusive and binding upon all parties unless the Committee's determination is arbitrary and capricious.

B. Because Reeves and Mayell have refused to fulfill their fiduciary obligation, there is no administrative record for this Court to review.

63. As members of the Committee, Reeves and Mayell have a fiduciary obligation under the Plan to consider Defendants' challenge to the existence of Good Reason and to render an administrative determination regarding the existence of Good Reason in this case. *See* Plan § 2.1; 29 U.S.C. § 1002(21)(A) (definition of fiduciary); 29 U.S.C. § 1104(a)(1)(D) (ERISA fiduciaries must discharge their duties "in accordance with the documents and instruments governing the plan"); *see also Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989) ("one is a fiduciary to the extent he exercises *any* discretionary authority or control").

64. Because the current Committee has refused to fulfill their fiduciary obligations and to consider Defendants' challenge to the existence of Good Reason, there is currently no administrative record which this Court can review under an arbitrary and capricious standard.

C. This Court has authority to break the administrative deadlock.

65. This Court has concurrent jurisdiction with the federal courts to resolve claims for benefits under ERISA. (Pl's 2d Am. Petition ¶ 8) (citing 29 U.S.C. § 1132(e)(1)).

66. As an incident to the Court's concurrent jurisdiction, it also has the inherent and equitable powers to appoint a substitute committee under the Plan to resolve Plaintiffs' claim for severance benefits in this case. *See* TEX. GOV'T CODE § 21.001(a) ("A court has all powers necessary for the exercise of its jurisdiction . . ., including authority to issue the writs and orders necessary or proper in aid of its jurisdiction."); *see also, e.g., Strategic Minerals Corp. v. Dickson*, 320 S.W.2d 882, 884-85 (Tex. App.—Austin 1959, writ ref'd n.r.e.) (holding that "under appropriate equitable principles the appointment of a receiver" was proper where a dissolved corporation had valuable assets that the board of directors refused to take action on); *Berkshire Petroleum Corp. v. Moore*, 268 S.W. 484, 486-87 (Tex. App.—San Antonio, 1924, no writ) (holding that "[c]ourts of equity have inherent power to appoint receivers independently of statutory authority" where officers of a company are "failing and refusing to perform their functions"); *Harris v. Windswept Envtl. 401(k) Plan*, 2013 WL 5537024, at *3 (E.D.N.Y. Oct. 7, 2013) (noting that the "[l]ong-held principles of trust law" on which ERISA is based allow courts to fill vacant trusteeships); *Solis v. J.P. Maguire Co., Inc. Salary Sav. Plan*, 2012 WL 4060569, at **3-4 (E.D.N.Y. July 24, 2012) (holding that it was appropriate for the court to appoint a new fiduciary where the prior fiduciary was disqualified from service "leaving the plan abandoned without any provision for a replacement fiduciary").

67. Because an administrative determination is a pre-condition to an award of severance benefits in this case and because the current committee is irreparably conflicted and refuses to discharge its fiduciary obligations, the Court concludes that it must exercise its inherent and equitable powers in this case to appoint a substitute committee.

D. TMRX shall propose a list of committee members for the Court's approval.

68. Because the current Committee has refused to Act, TMRX is now the sole remaining party with the power to amend the Plan and appoint a new committee. *See* Plan § 9 ("TMRX may amend or terminate the Plan by a written instrument that is authorized by the Committee."); § 10(b) ("the power to appoint the Committee and the power to amend or terminate the Plan shall be exercised by TMRX").

69. Accordingly, TMRX shall submit a list of proposed committee members for the Court's approval, and Plaintiffs' claims for severance benefits under the Plan shall then be remanded to the new Plan Committee for the exhaustion of administrative procedures. *See Seman v. FMC Corp. Ret. Plan for Hourly Employees,* 334 F.3d 728, 733 (8th Cir. 2003) ("When a plan administrator fails to render any decision whatsoever on a participant's application for benefits, it leaves the courts with nothing to review under any standard of review, so the matter must be sent back to the administrator for a decision."); *Pakovich v. Broadspire Services, Inc.*, 535 F.3d 601, 607 (7th Cir. 2008) ("when the plan administrator has not issued a decision on a claim for benefits that is now before the courts, the matter must be sent back to the plan administrator to address the issue in the first instance").

E. The Court rejects Plaintiffs' argument that Defendants have forfeited their rights to invoke the administrative process under the Plan.

70. Plaintiffs have acknowledged in their briefing to this Court: "The Severance Plan does not specifically state a deadline for the Company (TMRX) to make its claim to the Committee . . . ." (Pl's Resp. to Motion for Continuance at 3.)

71. The Court agrees and concludes that the Plan contains no deadline by which TMRX had to challenge Plaintiffs' assertion of "Good Reason" to resign to the Committee.

72. In the alternative, the Court also concludes that any default payment provision violates ERISA's requirement that plans contain adequate claims procedures. *See* 29 U.S.C. § 1133, ERISA § 503; *cf.* 29 C.F.R. § 2560.503-1 (claims procedures).

73. Moreover, the Court concludes that, at all times, Defendants took timely action under the Plan. In reaching this conclusion, the Court considered the following circumstances among others: (i) the same day that Plaintiffs resigned Alta Mesa asked for clarification of whether Plaintiffs were making a claim for benefits the under Plan and simultaneously reserved all of its rights under the Plan, (ii) Plaintiffs responded by immediately filing this lawsuit, which Defendants have vigorously contested, (iii) after receiving this Court's summary judgment order, Defendants diligently reached out to contact Reeves and Mayell and reconstitute the original Committee to obtain a new determination regarding whether Plaintiffs resigned for Good Reason, (iv) Reeves and Mayell have failed to fulfill their fiduciary obligation to render a determination in this case regarding whether Plaintiffs had Good Reason to resign.

F. The parties' claims for attorneys' fees in connection with Plaintiffs' ERISA claims are not yet ripe for decision.

74. Because there has been no final determination as to whether Plaintiffs are entitled to benefits under the Severance Plan, the parties' claims for attorneys' fees in connection with the Plan claims under ERISA is not yet ripe for decision.

Respectfully submitted,

/s/ Matthew T. Deffebach

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing instrument was served on counsel for Plaintiffs in accordance with the Texas Rules of Civil Procedure on December 9, 2013 in the manner set forth below.

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