FINDINGS OF FACT & CONCLUSIONS OF LAW

Albert Diaz
Special Superior Court Judge

I. INTRODUCTION

PURPOSE OF FINDINGS OF FACT (FOF) & CONCLUSIONS OF LAW (COL)

A. Not designed to encourage "ritualistic recitations" (i.e. harass the trial judge) but instead to:

1. Dispose of issues raised by the pleadings;

2. Make definite what was decided for purposes of res judicata and estoppel;

3. Evoke care on the part of the trial judge in ascertaining the facts; and

4. Allow for meaningful appellate review.

Greensboro Masonic Temple v. McMillan, 142 N.C. App. 379, 382, 542 S.E.2d 676, 678 (2001); *Hill v. Lassiter*, 135 N.C. App. 515, 520 S.E.2d 797 (1999); *Mashburn v. First Investors Corp.*, 102 N.C. App. 560, 402 S.E.2d 860 (1991).

GENERAL PRINCIPLES

A. If you are evaluating evidence, or the matter involves an appeal that grants trial judge *de novo* review power, be alert to the need for FOF/COL. In some instances, they will be required (as discussed below), in others not, except on request of a party.

B. If the matter requires you to accept one party's version of the facts as true, or puts you in the role of a traditional appellate court, then FOF/COL normally are not appropriate.

WHAT IS REQUIRED?

Judge must:

A. Find facts on all issues joined in the pleadings;

B. Declare conclusions of law arising from the facts; and

C. Enter judgment accordingly.

Hilliard v. Hilliard; 146 N.C. App. 709, 710-11, 554 S.E.2d 374, 375 (2001); *Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 328 S.E.2d 849 (1985).

II. WHEN ARE FOF/COL REQUIRED OR APPROPRIATE?

CRIMINAL CASES

A. Motions to suppress evidence (N.C.G.S. § 15A-977(f)).

B. Proceedings regarding capacity (N.C.G.S. § 15A-1001-09).

C. Mistrials (N.C.G.S. § 15A-1064).

D. Motions for Appropriate Relief (N.C.G.S. § 15A-1420).

FOF required when the Court holds an evidentiary hearing to resolve disputed issues of fact. COL required when motion is based on an asserted violation of the Defendant's rights under the US Constitution or other federal law.

E. Impact of Delayed Ruling

1. *See State v. Trent*, 359 N.C. 583, 614 S.E.2d 498 (2005) (granting new trial for defendant where trial court heard motion to suppress during spring term, did not get consent of the parties to enter order out of session and out of term, and then did not announce ruling in open court until seven months later, during fall term, and did not enter order until one year later).

2. *Cf. Capital Outdoor Advertising, Inc. v. City of Raleigh*, 337 N.C. 150, 446 S.E.2d 289 (1994) (in civil cases, relevant statutes permit a judge to sign an order out of term and out of district without the consent of the parties so long as the hearing to which the order relates was held in term and in district).

3. Note: Recent amendment to N. C. R. Civ. P. 7 now allows motions filed in Superior Court district consisting of more than one county to be heard in any county in that district.

CIVIL CASES

A. N. C. R. Civ. P. 52 sets out general standard:

1. Under Rule 52(a)(1), FOF/COL are required in all actions tried upon the facts without a jury.

2. FOF/COL must be entered in bench trials, even absent a request by the parties. Failure to enter proper order will generally result in remand, unless facts are undisputed and lead to only one inference. *Lineberger v. N.C. Dept. of Corr.*, 657 S.E.2d 673, 683 (N.C. Ct. App. 2008);*Cumberland Homes, Inc., v. Carolina Lakes Prop. Owner's Ass'n*, 158 N.C. App. 518, 581 S.E.2d 94 (2003) (declaratory judgment action).

3. Dismissal under N. C. R. Civ. P. 41(b) also requires entry of findings and conclusions where Court hears the case without a jury and dismisses the matter on the merits at the close of the Plaintiff's evidence.

   a. Test for dismissal under Rule 41(b) differs from that of directed verdict under Rule 50(a). Trial court does not take evidence in light most favorable to plaintiff but simply considers and weighs all competent evidence before it. *See Hill v. Lassiter*, 135 N.C. App. 515, 520 S.E.2d 797 (1999) (stating test and reversing trial court for failing to make findings/conclusions required for appellate review).

   b. Court may dismiss the matter and enter findings even though plaintiff has made out prima facie case that would have precluded directed verdict for defendant in a jury case. *In re Foreclosure of Deed of Trust*, 63 N.C. App. 744, 306 S.E.2d 475 (1983).

   c. But better practice is to decline to enter Rule 41(b) dismissals except in clearest of cases. *See, e.g., In re J.E.C.M.*, 657 S.E.2d 445 (N.C. Ct. App. 2008) (*quoting Esteel Co. v. Goodman*, 82 N.C. App. 692, 348 S.E.2d 153 (1986)).

4. In all other cases, FOF/COL are necessary only when requested by a party, or where otherwise required by statute or caselaw.

a. *E.g., Agbemavor v. Keteku*, 629 S.E.2d 337 (N.C. Ct. App. May 16, 2006) (reversing grant of summary judgment where trial court failed to make findings of fact regarding service of process and jurisdiction over defendant after Defendant made a motion pursuant to Rule 52(a)(2) requesting that the trial court make such findings).

b. Absent specific request, trial court has discretion whether to make FOF/COL. If court does not do so, appellate courts will presume that judge on proper evidence found facts to support his judgment. *Cail v. Cerwin*, 185 N.C. App. 176, 188, 648 S.E.2d 510, 518 (2007); *Watkins v. Hellings*, 321 N.C. 78, 361 S.E.2d 568 (1987) (discovery sanctions).

B. Timing of request

1. *J.M. Dev. Group v. Glover*, 151 N.C. App. 584, 566 S.E.2d 128 (2002) (request deemed timely if made before entry of written order).

C. Preparation of Order

1. Court may request proposed FOF/COL from counsel and may adopt those prepared by a party. *Johnson v. Johnson*, 67 N.C. App. 250, 313 S.E. 2d 162 (1984).

2. *But see Bright v. Westmoreland County*, 380 F.3d 729 (3d. Cir. 2004) (reversing trial court for adopting draft opinion submitted by prevailing party, stating that "this practice involves the failure of a trial judge to perform his judicial function); s*ee also United States v. Jenkins*, 60 M.J. 27 (C.A.A.F. 2004) (vacating 16 intermediate appellate court decisions because opinions replicated substantial portions of the government's brief).

D. Amendment of FOF/COL

1. Rule 52(b) allows amendment upon motion made not later than 10 days after entry of judgment.

2. So long as motion otherwise timely, trial court may amend judgment or order even though notice of appeal has been given. *York v. Taylor*, 79 N.C. App. 653, 339 S.E.2d 830 (1986).

III. <u>SPECIFIC LEGAL ISSUES</u>

TRIAL MATTERS

A. TRO/Preliminary Injunction (Rule 52(a)(2) & Rule 65)

1. Although order must state reason for granting relief, FOF/COL generally not required unless requested by party or otherwise required by statute. *Pruitt v. Williams*, 25 N.C. App. 376, 213 S.E.2d 369 (1975).

2. Same analysis applies to motions seeking other provisional remedies (i.e arrest and bail, attachment, claim and delivery, and receivership proceedings).

3. Effect of Delay in entering Order

   a. *See Hassell v. Hassell*, 149 N.C. App. 972, 563 S.E.2d 100 (2002); *Onslow County v. Moore*, 129 N.C. App. 376, 499 S.E.2d 780, *rev. denied*, 349 N.C. 361, 525 S.E.2d 453 (1998) (trial court erred in holding defendant in contempt for violating a preliminary injunction order where the contempt finding was based on conduct that occurred prior to filing of the order).

   b. *But see Hart Cotton Mills, Inc. v. Abrams,* 231 N.C. 431, 57 S.E.2d 803 (1950) (formal service of an preliminary injunction order is not required to hold party accountable for violating the same; all that is necessary is actual notice of the order's existence and contents).

B. Consent Judgments

1. Not required even if requested by parties, as these are not judgments in purest sense, but rather a summary of the parties' agreement. *Buckingham v. Buckingham*, 134 N.C. App. 82, 89, 516 S.E.2d 869, 875 (1999); *In re Estate of Peebles*, 118 N.C. App. 296, 454 S.E.2d 854 (1995).

C. Rule 12(b)(6) Motions to Dismiss

1. Not required (even if requested)--trial court is deemed to have accepted as true the well-pleaded allegations of non-moving party. *G & S Business Services, Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 380 S.E.2d 792 (1989).

D. Motions for Judgment on the Pleadings (N. C. R. Civ. P. 12(c))

1. Same rule applies. *United Va. Bank v. Air-Lift Associates, Inc.*, 79 N.C. App. 315, 323, 339 S.E.2d 90, 95 (1986) (*quoting J.F. Wilkerson Contracting Co., Inc. v. Rowland*, 29 N.C. App. 722, 225 S.E.2d 840 (1976)).

E. Motions for Summary Judgment (N. C. R. Civ. P. 56(c))

1. Same rule applies, as summary judgment presupposes that there are no triable issues of material fact. *Oglesby v. S.E. Nichols, Inc.*, 101 N.C. App. 676, 680, 401 S.E.2d 92, 95 (1991) (*quoting Garrison v. Blakeney*, 37 N.C. App. 73, 246 S.E.2d 144 (1978)).

2. While FOF/COL in summary judgment orders generally are "disfavored", *see, e.g., Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 338 S.E.2d 601 (1986), where there is no real issue of disputed fact, a factual summary is not error and may be helpful on appeal. *Wiley v. United Parcel Service Inc.*, 164 N.C. App. 183, 594 S.E.2d 809 (2004); *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978).

F. Motions for Relief from Judgment (Rule 60(b))

1. Not required, but might be better practice. *Condellone v. Condellone*, 137 N.C. App. 547, 528 S.E.2d 639 (2000).

G. Criminal & Civil Contempt (N.C.G.S. §§ 5A-11, 14, 23(e))

1. Statute requires separate findings of fact sufficient to justify order of contempt. *State v. Ford,* 164 N.C. App. 566, 596 S.E.2d 846 (2004); *Glesner v. Dembrosky*, 73 N.C. App. 594, 327 S.E.2d 60 (1985).

2. For criminal contempt, be sure that you find relevant facts supporting your order beyond a reasonable doubt or you will see the case again. *State v. Brill*, 661 S.E.2d 788 (N.C. Ct. App. 2008); *Ford,* 164 N.C. App. at 568, 596 S.E.2d at 849.

3. Exception: court need not apply standard where there are no factual determinations for the court to make. *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 595 (1998), *aff'd*, 350 N.C. 656, 517 S.E.2d 605 (1999) (affirming contempt order where trial court failed to indicate the standard of proof applied in holding the witness in contempt for refusing the trial court's order to answer an attorney's question because "there was simply no factual determination for the trial court to make").

H. Rule 11 Sanctions

1. FOF/COL required for appellate review. *Lowry v. Lowry*, 99 N.C. App. 246, 393 S.E.2d 141 (1990). Failure to enter FOF/COL generally results in reversible error unless there is no evidence in the record, considered in the light most favorable to the movant, which could support an award of sanctions. *Lincoln v. Beuche*, 166 N.C. App. 150, 601 S.E.2d 237 (2004).

I. Award of Attorneys Fees

1. Order must contain findings regarding the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of the attorney. *United Lab v. Kuykendall*, 335 N.C. 183, 437 S.E.2d 374 (1993) (award of fees under Chapter 75); *Hill v. Jones*, 26 N.C. App. 168, 215 S.E.2d 168 (1975) (award of fees under N.C.G.S. § 6-21.1 requires court to make some findings of fact supporting award).

APPEALS

A. Appeals from the Clerk

1. Where judge sits as an appellate court, FOF/COL not appropriate.

   Example: Petitions to reopen estate under N.C.G.S. Chap. 28. *See, e.g., In Re Estate of English*, 83 N.C. App. 359, 350 S.E.2d 379 (1986)(on appeal of Clerk's order denying petition to reopen estate, the superior court hearing should have been on the record only and not *de novo*, and the judge was confined to correcting errors of law).

2. But FOF/COL required for *de novo* proceedings.

   Example: Competency determinations (N.C.G.S. Chapter 35A)

B. Agency Appeals

1. Rules of Civil Procedure (including Rule 52) generally do not apply to agency appeals under the APA (N.C.G.S. § 150B-1, *et. seq.*) or other statutory appeal mechanisms. Where judge sits as a true appellate court and applies "whole record" review, she generally may not find facts (instead, test is whether there is "substantial evidence" to support FOF), and trial court's review of conclusions of law is limited to statutory criteria. *Markham v. Swails*, 29 N.C. App. 205, 223 S.E.2d 920 (1976).

2. But where petitioner alleges that final agency decision is affected by error of law, judge's review is *de novo* as to COL. *N.C. Forestry Ass'n v. N.C. Dept. of Env't and Natural Res.*, 162 N.C. App. 467, 591 S.E.2d 549 (2004). However when conducting the *de novo* review, a judge is required to adopt the administrative agency's findings of fact that were supported by substantial evidence, rather than make alternate findings of fact. *N.C. Dept. of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004)

3. Other Examples:

    a. Employment Security Commission Appeals (governed by N.C.G.S. § 96-15): FOF by Commission deemed conclusive if there is any competent evidence to support them; court's review is confined to questions of law.

    b. Zoning Board Appeals (N.C.G.S. §153A-345(e)): *Godfrey v. Zoning Bd. Of Adjustment*, 317 N.C. 51, 344 S.E.2d 272 (1986)(trial court may only determine whether FOF are supported by competent evidence).

    c. But where reviewing court determines that FOF in APA appeal are not supported by competent or substantial evidence, court may enter findings at variance with those of agency. *N.C. Dept. of Crime Control and Pub. Safety v. Greene*, 172 N.C. App. 530, 534, 616 S.E.2d 594, 598 (2005); *Scroggs v. N.C. Criminal Justice Educ. & Training Stds. Comm'n*, 101 N.C. App. 699, 400 S.E.2d 742 (1991).

4. Where statute grants judge *de novo* review of agency decision, court must enter FOF/COL.

    Examples:

    a. N.C.G.S. § 150B-51(c): where agency does not adopt ALJ decision, trial judge has *de novo* review and must make FOF/COL. *See, e.g., Donoghue v. N.C. Dept. of Correction*, 166 N.C. App. 612, 603 S.E.2d 320 (2004).

    b. N.C.G.S. § 20-25 (appeal of DMV suspension of driver's license). *See Joyner v. Garrett*, 279 N.C. 226, 182 S.E.2d 553 (1971)