Some Practical Suggestions for Dealing With the Presumed Findings Rules in Texas Civil Procedure

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Under certain circumstances, the Texas Rules of Civil Procedure allow appellate courts to "deem" or "presume" that a trial court has made fact findings in support of the trial court's judgment. The relevant rules are rule 279 and rules 296-299 of the Texas Rules of Civil Procedure, and there are several treatises and articles explaining these rules.[1] In this article I presume to add to the excellent literature on this subject by offering what I hope are five practical suggestions for dealing with the issues that these rules typically raise. I assume some familiarity with these rules and the case law interpreting them.

A. First suggestion: Watch for elements missing from the findings.

The first suggestion for practice is an obvious point: once the initial findings are made, keep an eye out for elements that are missing from those findings.

This applies to jury and nonjury cases. When the jury or trial court makes the initial findings, the losing party has a tendency to focus primarily on sufficiency of the evidence issues, i.e., what's wrong with the findings that were made, and secondarily with claims or defenses *omitted entirely* from the findings. Claims or defenses only partially submitted and found should also be a primary focus when reviewing the express findings.

Remember the goal if you're the appellant: along with everything else you're supposed to worry about, an appellant wants (a) to defeat any presumed finding on an element of an opponent's claim or defense—i.e., for which the opponent had the burden of proof—and (b) to obtain findings on elements of the appellant's claim or defense if not all elements are in the jury's findings or the trial court's original findings.

A subtle problem in this regard is that in some cases where, say, where an express finding is made on only one element of a claim or defense, it may not be clear what claim or defense that express finding relates to. In a nonjury trial the rule is that "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. What if the express finding could relate to more than one claim or defense that is at issue? An example of the problem was discussed by one court of appeals as follows:

> "In this case, the trial court's findings and conclusions clearly disclose that liability was sought and found against American Industries solely on the basis of its capacity as possessor of the property, not its capacity as lessor (or otherwise). Therefore, the fact that the evidence might have also supported the remaining elements of lessor liability if it had been asserted or that the findings made on possessor liability happen to overlap with some of those needed for lessor liability does not authorize us to impose liability based on presumed omitted elements of lessor liability where the findings and conclusions disclose that the trial court instead imposed liability exclusively on possessor liability and thus neither

[1] Good discussions of the case law in this area appear in various treatises and articles, including Elaine A. Grafton Carlson, 4 McDonald & Carlson, Texas Civil Practice §§ 22:52-22:58, at 484-503 (2d ed. 2001); Richard Orsinger, 6 McDonald, Texas Civil Practice ch. 18 (1992 & Supp. 2002); Jeremy C. Wicker, 1 Texas Civil Trial and Appellate Procedure § 7-10 (2002); id., 2 Texas Civil Trial and Appellate Procedure § 8-6 (2002); and my own article at the Thirteenth Annual Conference on State and Federal Appeals sponsored by the University of Texas School of Law in Austin, Texas, in June 2003.

needed, found, nor omitted any additional findings on the remaining elements of lessor liability."

American Industries, Life Ins. Co. v. Ruvalcaba, 64 S.W.3d 126, 148 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (Edelman, J., concurring).

This is particularly a problem in nonjury cases, because the rule does not provide a basis for deciding the issue. In a jury trial, on the other hand, the test is whether the jury has made findings on a element that is "necessarily referable" to a claim or defense in the case. TEX. R. CIV. P. 279. This issue was addressed in a recent supreme court case, where the court said: "Even if the question could be characterized as a partial submission of the equitable estoppel issue, the language submitted is not 'necessarily referable' to equitable estoppel . . . the question submitted in that case [i.e., the case on which the court of appeals had relied] at least included the necessary elements of false representation, materiality, and reliance, and *did not appear to be submitted as part of some other theory of recovery*, whereas Kenneco's question was submitted as part of its Insurance Code/DTPA claim." *Johnson & Higgins of Texas, Inc. v. Kenneco Energy, Inc.* 962 S.W.2d 507, 515-16 n.4 (Tex. 1998) (emphasis added).

At the very least, the live pleadings, any pretrial order setting forth the parties' contentions, the parties' arguments at trial, and any conclusions of law may provide the most reliable parameters for determining the claims or defenses to which a finding might relate—thus signaling the need to request express findings on omitted elements of that claim or defense.

B. Second Suggestion: Take action to avoid the presumed finding.

The second suggestion is obvious in theory: take action to avoid the presumed finding—i.e., *preserve error.*

In a jury case one avoids the presumed finding by doing what should be second nature anyway in a jury case: depending upon the party's particular burden, you preserve error by objecting to an omission from the charge or by requesting a submission to the charge. The reason is that in jury cases presumed findings are permitted only as to an element "omitted from the charge, without request or objection. . . ." TEX. R. CIV. P. 279; *see Turner, Collie & Braden, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 165 (Tex. 1982) ("Because TCB objected to the omission of an issue inquiring whether the line could be repaired, the trial court cannot be deemed to have made such a finding.").

In nonjury cases one avoids the presumed finding by doing what appears counterintuitive: after requesting and receiving original findings, a party flags the issue by asking the trial court for an additional finding on the omitted element. Then, in the typical case, the party *hopes the trial court does nothing.*

The reason is that if the trial court upon timely request refuses to make a finding on the omitted element, the court of appeals will not presume a finding in favor of the judgment as to the omitted element. *Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *National Commerce Bank v. Stiehl*, 866 S.W.2d 706, 707 (Tex. App.—Houston [1st Dist.] 1993, no writ). This follows from the language of the rule that findings are presumed on appeal only as to "*omitted unrequested* elements." TEX. R. CIV. P. 299 (emphasis added).

C. Third suggestion: Don't rely on a glohal request for additional findings.

This suggestion concerns nonjury trials. The timely request for additional findings under rule 298 must actually propose specific findings on the relevant elements. "A bare request is not sufficient; proposed findings must be submitted." *Alvarez v. Espinoza*, 844 S.W.2d 238, 241-42 (Tex. App.—San Antonio 1992, writ dism'd w.o.j.).

The request should therefore clearly identify elements omitted from the original findings and should propose specific findings on those omitted elements. But the question is whether the party should request a finding in support of the judgment against that party—and thereby risk running afoul of the "invited error" doctrine—or should request a finding contrary to that judgment—and risk running afoul of case law stating that a trial court has no obligation to make findings contrary to its judgment.

According to relevant case law, the losing party may avoid a presumed finding by proposing a finding that is *contrary to the trial court's judgment*. *See Vickery v. Commission for Lawyer Discipline*, 5 S.W.3d 241, 255-56 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) ("In other words, Rule 298 creates no presumption. An appellant may request findings that are contrary to the judgment under Rule 298 without fear that the court's failure to make such findings will itself be interpreted as a finding against the appellant."); *Boy Scouts v. Responsive Terminal Sys.*, 790 S.W.2d 738, 742-43 (Tex. App.—Dallas 1990, writ denied) ("This stance against a presumption of support is true even in a case where the party that does not have the burden of proof makes an additional request for a negative finding of fact with regard to an essential element of the opposing party's case.").

But the negative finding cannot be buried in a global request for additional findings, one that does not specifically point out what elements are missing from the trial court's original findings. This is the teaching of *Vickery v. Commission for Lawyer Discipline*, which contains some ambiguous language on this point but which ultimately holds that "a request for negative findings contrary to a court's judgment has no logical or legal significance toward rebutting the presumption of validity *unless the trial court is specifically alerted to the real issue*, i.e., one or more necessary elements have been omitted in the court's original findings." 5 S.W.3d at 256 (emphasis added). In explaining its holding, the court said:

> A request for negative findings will rarely apprise the trial court that it has omitted an essential element in its original findings. . . . Here, Vickery did not make clear the issue he now advances on appeal. . . . Rather, Vickery submitted his requests for findings on the two omitted elements negatively, in the manner least likely to be approved by the trial court. Additionally, the two elements were then "buried" in a voluminous request for other findings that were largely immaterial and frequently repugnant to the judgment . . . did nothing to alert the trial court to the significance of his requests. . . . Were we to permit such a manipulation of the rule, the losing party could inundate the trial judge with requested findings, all of which were immaterial, contrary to the judgment, or slight variations of the original findings without ever disclosing that one such requested finding pertains to an omitted element. . . .
>
> This is not to say the losing party may not submit a request for negative findings or findings contrary to the court's judgment. For example, a hypothetical plaintiff might establish every element of his ground for recovery at trial and deny, but never refute, the defendant's affirmative defense. If the trial court should find for the plaintiff, the defendant must request findings on his affirmative defense or waive it on appeal. Such a request, of course, would be contrary to the court's judgment, but would also be absolutely essential to a proper resolution of the defendant's appeal.

Id. at 254-56 (citing *Boy Scouts v. Responsive Terminal System*).

D. Fourth suggestion: In a jury case, challenge the factual sufficiency of the evidence to support possible deemed findings.

This fourth suggestion applies to jury cases only. In a nonjury case, if findings are presumed as a result of the failure to request findings or the failure to request additional findings, the sufficiency of the evidence to support the presumed findings may be challenged for the first time on appeal. *See American Nat'l Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W.2d 274, 278 (Tex. 1990); TEX. R. APP. P. 33.1(d) ("In a nonjury case, a complaint regarding the legal or factual insufficiency of the evidence . . . may be made for the first time on appeal . . .").

But in a jury case the supreme court has suggested that a party seeking to avoid a presumed finding on grounds of factual sufficiency must have raised that issue in the trial court. *See In re J.F.C.*, 96 S.W.3d 256, 275-76 (Tex. 2002) ("It is only when there has been a factual sufficiency challenge that is preserved in the trial court that a deemed finding must be reviewed for factual sufficiency on appeal."). This is not because of Texas Rules of Civil Procedure 324(b)—which requires that a challenge to the factual sufficiency of a jury finding must be raised in a motion for new trial—since the issue here is a the sufficiency of a finding by the court, not the jury. Rather, the reason is that despite the language in rule 279 that a finding will be presumed if there is "factually sufficient evidence" to support it, the supreme court will require only legally sufficient evidence to uphold a deemed finding in a jury case. *See In re J.F.C.*, 96 S.W.3d 256, 276 n.69 (Tex. 2002) ("When that rule was amended in 1988, there was no indication in the record of the rules proceedings that revised Rule 279 was meant to change the prerequisite of 'evidence,' which was maintained in Rule 299, to 'factually sufficient' evidence with respect to deemed findings."); *id.* at 275-76 ("In the absence of a challenge to the factual sufficiency of the evidence, appellate courts must deem an omitted finding in support of a judgment if there is some evidence . . . to support the omitted finding and the other requirements of Rule 279 have been met. "); *see also In re M.S.*, 46 Tex. Sup. Ct. J. 999 (July 3, 2003) (assuming *J.F.C.*'s analysis). *But see Crosbyton Seed Co. v. Mechura Farms*, 875 S.W.2d 353, 364 & n.9 (Tex. App.—Corpus Christi 1994) ("Since actual findings of the omitted items must be supported by factually sufficient evidence, the deemed findings must likewise be supported by factually sufficient evidence.").

Although one may question the supreme court's present interpretation of rule 279 in this regard, the court spoke unequivocally about it and so it appears that for now the court will not consider a factual sufficiency challenge to a deemed finding unless that issue has been preserved by a factual sufficiency challenge in the trial court.

F. Fifth suggestion: on appeal, specifically challenge the deemed finding.

Must the appellate court brief raise a point of error expressly arguing that the court may not deem a finding on an element omitted from the jury's or trial court's findings? There is case law suggesting that a challenge to the express findings is sufficient to preserve the point as to deemed findings:

> The rule that unchallenged findings are binding on the appellate court cannot apply to presumed findings under Tex. R. Civ. P. 299 because these findings do not exist until after the court has determined that they are supported by the evidence, in which case it is too late to challenge the evidence supporting them. When appellants have challenged the express findings to which potential presumed findings relate, we do not believe that appellants are required to explicitly argue against all potential presumed findings under Tex. R. Civ. P. 299.

American Industries, Life Ins. Co. v. Ruvalcaba, 64 S.W.3d 126, 137 n.7 (Tex. App.—Houston

[14th Dist.] 2001, pet. denied). This holding makes some sense and is probably the best rule, but until more courts have spoken on this issue, an appellant should probably inelude a separate point of error that the appellee failed to obtain a finding on an omitted element of whatever claim or defense is at issue, and that because there is insufficient evidence of the pertinent facts no finding can be presumed on that element.

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