A conversation with the Court of Appeals

Chief Judge Linda McGee
Judge Donna Stroud
Judge Richard Dietz

District Court Judges Conference
June 2017

Beyond that, the trial court made many more findings—which we need not address in detail here—to support its conclusions. **In fact, we must commend the trial court's very well-organized and thorough order. The findings clearly delineate the circumstances at the time of the prior order, at the time of the current hearing, and the specific findings which the trial court found to support its conclusion of a change of circumstances.**

Laprade v. Barry,
No. COA16-11, 2017
WL 1632607, at *7
(N.C. Ct. App. May 2, 2017)

"In this fourth appeal, Defendant argues that the trial court's latest order suffers from seventeen separate reversible errors. This brings to mind an observation from the U.S. Court of Appeals for the Sixth Circuit which, faced with a similar situation, observed that **"[w]hen a party comes to us with nine grounds for reversing the district court, that usually means there are none.**" Fifth Third Mortg. Co. v. Chi. Title Ins. Co., 692 F.3d 507, 509 (6th Cir.2012)."

Bodie v. Bodie, 239 N.C. App. 281, 282, 768 S.E.2d 879, 880 (2015)

Delay in entry of orders

There's something some lawyers and litigants would like to ask judges….

Why haven't I heard from you?

https://soundcloud.com/bar-none-show/why-havent-i-heard-from-you

Bar None, Dallas Bar Association, Dallas, TX

All courts shall be open;
every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law;
and right and justice shall be administered without favor, denial, or delay.

N.C. Const. art. I, § 18

Delay in entering orders invites ethical problems and problems in the orders.

Delay increases risk of problems under Canon 3, Code of Judicial Conduct:

(4) A judge should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, *neither knowingly initiate nor knowingly consider ex parte or other communications concerning a pending proceeding*. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge.

(5) A judge should *dispose promptly* of the business of the court.

FINDINGS OF FACT

Recitations of evidence are not findings!

If it starts like this, it's probably not a finding of fact:

Mrs. Jones testified that ….

The plaintiff presented evidence that showed…

There is a dispute about …

The parties disagree about…

Defendants contended that …

Plaintiff claims that …, while defendant claims that …..

Don't find "no evidence" of a disputed fact– find "no credible evidence" of the fact.

The Finding: "[T]he evidence shows that plaintiff was able to perform the UPC label position satisfactorily before her injury, and there was **no evidence** that plaintiff sought **medical attention** or otherwise was not **mentally or physically able to perform** the UPC labeler position after her recovery from the [carpal tunnel syndrome] surgery."

The Evidence: "Plaintiff testified that she **had trouble with her hands while labeling**, and the Commission acknowledged, in finding of fact number six, that she also had "**residual symptoms**." In addition, the Court notes that plaintiff made a return visit to her **medical doctor** on 13 April 1999, and that less than a month later, on 10 May 1999, the physician issued further **restrictions on her duties**."

Where to find quick help with an Order:

1. **District Court Bench Books**
2. **Professor Cheryl Howell's great Checklists**

CHECKLIST
REQUIRED FINDINGS

Postseparation Support (PSS)

1. Personal and subject matter jurisdiction
a. Service of process
b. Residence of parties (minimum contacts required for nonresident defendant)
c. PSS requested in an action for divorce, whether absolute or from bed and board, for annulment, or for alimony without divorce
d. PSS requested before entry of divorce
2. Date of marriage and date of separation
3. Findings on the financial needs of the parties, determined by consideration of each of the following, about which evidence is presented:
a. Present actual income of both parties from any source
b. The accustomed standard of living during the marriage
c. The income-earning abilities of each party
d. The debt service obligations of each party

THINGS THAT DO NOT GO TOGETHER:

1. Orange juice and toothpaste
2. Summary judgment orders and findings of fact*

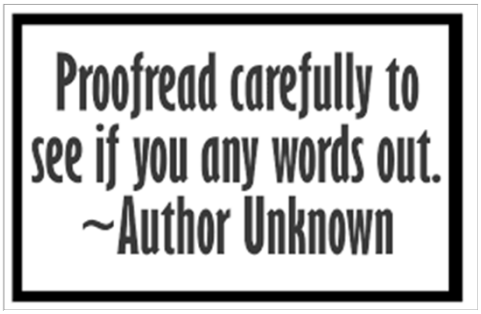
*Except for summary judgment divorces under NCGS §50-10(d)

Summary judgment orders don't have findings of fact.

The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact. …

By making findings of fact on summary judgment, the trial court demonstrates to the appellate courts a fundamental lack of understanding of the nature of summary judgment proceedings. We understand that a number of trial judges feel compelled to make findings of fact reciting those "uncontested facts" that form the basis of their decision. When this is done, any findings should clearly be denominated as "uncontested facts" and not as a resolution of contested facts.

War Eagle, Inc. v. Belair, 204 N.C.App. 548, 694 S.E.2d 497 (2010)



And to see if you left the wrong words in….

But here, the trial court's ultimate conclusion of law concerning the best interests of the juveniles is also internally inconsistent. The court concluded that "it is in the best interest of the juveniles to have their mother's parental rights terminated in that severing the legal relationship would be emotionally unhealthy and damaging to the children." Certainly, the trial court did not terminate respondent's parental rights under a belief that doing so would harm the juveniles and that emotional harm would be in their best interests.

In re A.B., 768 S.E.2d 573 (N.C. Ct. App. 2015)

Be careful with cutting and pasting.

[W]e clarify today that it is not per se reversible error for a trial court's findings of fact to mirror the wording of a party's pleading. It is a longstanding tradition in this State for trial judges to "rely upon counsel to assist in order preparation." In re A.B., 768 S.E.2d 573, 579 (2015). It is no surprise that parties preparing proposed orders might borrow wording from their earlier submissions. We will not impose on our colleagues in the trial division an obligation to comb through those proposed orders to eliminate unoriginal prose. 772 S.E. 2d at 251. In re J.W., 772 S.E.2d 249 (2015)

Form Orders

1. READ the form
2. Fill it out COMPLETELY
3. Make sure the evidence supports what the form says.

Make sure that there is competent evidence to support the findings. Burress v. Burress, 195 N.C.App. 447, 672 S.E.2d 732 (2009)

The handwritten (or typed) findings you add to the form should not conflict with the printed language of the form. In re B.E., 186 N.C.App. 656, 652 S.E.2d 344 (2007)

"While stream of consciousness is a well-recognized literary style, it is not well suited to court orders." Peltzer v. Peltzer, 732 S.E.2d 357, N.C. App. 2012.

Make sure the order is clear on preliminary issues.

What was heard and what wasn't?

Prior orders to consider?

Other related cases?

Any pending motions remaining?

Were they abandoned or dismissed?

Service or notice issues?

Stipulations?

Pretrial orders?

Be careful with Shortcuts.

Shortcuts? Use with caution.

Judicial notice

What can be judicially noticed? What is the legal basis for the notice? Standard of proof?

Incorporation by reference is useful but not a substitute for findings.

Déjà vu?

(But the judge already heard (and decided) this case!)

The Judge's memory (or lack thereof) is not evidence.

The Judge's memory is not evidence.

At the 14 April 2008 hearing on defendant's motion, inter alia, for a new trial, **the trial judge stated that he had presided over the defendant's trial in criminal court** and that at that trial

> we weren't beyond a reasonable doubt which is a higher standard in criminal court but in civil court but that we would be to a preponderance of the evidence. That's why I indicated at that time to the defense attorney that it would probably be appropriate that I hear the civil case so that I can enter the Order having already used a lot of Court time hearing the criminal case and indicated at that time that I would more than likely be inclined to enter that Order.

Although we appreciate the trial court's concern for judicial economy, a judge's own personal memory is not evidence. The trial court does not have authority to issue an order based solely upon the court's own personal memory of another entirely separate proceeding, and it should be obvious that the evidence which must "be taken orally in open court" must be taken in the case which is at bar, not in a separate case which was tried before the same judge. [5] Appellate review of the sufficiency of the evidence to support the trial court's findings of fact is impossible where the evidence is contained only in the trial judge's memory.

Hensey v. Hennessy, 201 N.C.App. 56, 685 S.E.2d 541(2009)

A *nunc pro tunc* order may ~~be entered IF:~~

1. Judge actually made and announced (rendered) the judgment (in sufficient detail) on the date that the order says but it has not been formally entered as a written order yet, AND
2. No "intervening rights" will be prejudiced by the late entry of the order.

No Attorney Stationery!

We note that Judge Webb's order was

printed, signed and filed on the ruled

stationery of Habitat's trial attorney. Without deciding whether this practice violates either the Code of Judicial Conduct or the Revised Rules of Professional Conduct, **we strongly discourage lawyers from submitting or judges from signing orders printed on attorneys' ruled stationery bearing the name of the law firm.** Such orders could call into question the impartiality of the trial court. In re TMH, 186 N.C.App. 451, 652 S.E.2d 1 (2007).

Habitat for Humanity of Moore County, Inc. v. Board of Com'rs of the Town of Pinebluff,187 N.C.App. 764, 653 S.E.2d 886 (2007)

Meet our staff counsel's office!

Interlocutory appeal procedures

Fonts

For cases appealed **on or after January 1, 2017**, Courier fonts are no longer permitted in papers filed with the state appellate courts.

Fonts

This is a proportionally spaced font, Century Schoolbook. The Court of Appeals uses Century Schoolbook font for its opinions. I think proportionally spaced fonts are easier to read and, if nothing else, they look more elegant and professional in my view.

This is a nonproportional (monospaced) font, Courier New. The Court of Appeals used to use Courier New font in its opinions. I don't like this font. It looks like someone wrote this with a typewriter in the 1950s. Why would you want your brief to look like it was written on an old-fashioned typewriter?

Fonts

Full justification doesn't like monospaced fonts

Sentences like this, where your word processing application inserts extra space between words, or even within words, to make the justification work, making the brief even harder to read!

Fonts

Why not Times New Roman?

Fonts

Times New Roman Font


"All the News That's Fit to Print."

The New York Times.

THE WEATHER.

NEW YORK WON'T INSTRUCT FOR TAFT

BEACH MUCH SHAKEN HURRIES TO PARIS

ACID IN BERGEN HILL MENACES NEW TUBES

ROOSEVELT WINS IN ILLINOIS BY 2 TO 1 OVER TAFT

500 REPORTED SLAIN IN MEXICAN BATTLE

Fonts

Century Font