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COMMENTS

TRIAL—APEAL AND ERROR—FINDINGS OF FACT*—Rule 52 (B) (a) of the New Mexico Rules of Civil Procedure requires the trial court sitting without a jury to give a written decision consisting of findings of fact and conclusions of law. Findings of fact are useful in three respects: (1) as regards the effect of judgment as estoppel; (2) as an aid to appellate review; (3) as a method to “force the trial court to settle each principal fact issue which the parties have contested.”

To implement these purposes, a trial court in New Mexico must prepare findings of ultimate facts, as distinguished from evidentiary facts. The ultimate facts must be “specific,” not general, findings of fact.

The New Mexico Supreme Court has attempted to make intelligible the *Hoskins v. Albuquerque Bus Co., 382 P.2d 700 (N.M. 1963).


4. See Luna v. Cerrillos Coal R.R., 16 N.M. 71, 84, 113 Pac. 831, 834 (1911) (referring to N.M. Comp. Laws § 2999 (1897), a forerunner to Rule 52(B)):

That such a statute [requiring specific findings of fact] . . . is essential in the review of a cause by the appellate court, is well illustrated by the case at bar. The findings made amount to no more by way of information to this court than would a verdict of not guilty, if the case had gone to a jury. We should have to search through the record of upwards of four hundred pages, to determine whether it contains anything which will support the judgment of the District Court, and, having done that, we should still be in the dark as to whether what we might conclude to be the determining facts are those which the trial court treated as such; or, in other words, whether we are reviewing the findings of fact really made by the trial court, or substituting others made by ourselves.


6. N.M. R. Civ. P. 52 (B) (a) (2).

7. N.M. R. Civ. P. 52 (B) (a) (1) and (6). Subsection (6) is a codification of a long-followed rule first enunciated in Bank of Commerce v. Baird Mining Co., 13 N.M. 424, 431, 85 Pac. 970, 972 (1906), decided under N.M. Comp. Laws § 2999 (1897), that an assignment of error in that the court failed to make “special findings” of fact would not be heard when the omission was not called to the attention of the trial court. In Luna v. Cerrillos Coal R.R., 16 N.M. 71, 82, 113 Pac. 831, 833 (1911), the court inferred from the Baird rule that “if the attention of the court is properly directed to the omission, special findings should be made.” By reasonable inference, the meaning of subsection (6) is that, unless “a party . . . waives” specific findings of fact . . . [by failing] to tender specific findings," N.M. R. Civ. P. 52 (B) (a) (6), the trial court must make specific findings of fact.
enigmatic "ultimate" and "evidentiary" facts of Rule 52 (B);\(^8\) the Rule, however, has been a tool of confusion used to thwart, not demand, uniformity and efficiency in trial court procedure.

*Hoskins v. Albuquerque Bus Co.*\(^9\) was a suit by a passenger on defendant's bus to recover damages for the driver's negligence. The findings of fact of the trial court, conclusive on appeal if supported by substantial evidence,\(^10\) were as fol-

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8. The court has attempted to define that which they require as findings of fact: "[T]he [district] court should make findings of the essential or determining facts on which its conclusion in the case was reached, specific enough to enable this court to review its decision on the same ground on which it was made." Luna v. Cerrillos Coal R.R., 16 N.M. 71, 113 Pac. 831 (1911). "And these findings must be of the ultimate facts which the evidence is intended to establish, sufficient in themselves without inference or comparison, or the weighing of evidence, to justify the application of the legal principles which must determine the case." *Id.* at 85, 113 Pac. at 834. "These were the main issues in the case, the ultimate facts which the Court was required to determine in order to render a judgment." Fraser v. State Savings Bank, 18 N.M. 340, 350-51, 137 Pac. 592, 594 (1913). "[A] finding upon the very issue in the cause is not, in a cause like this, a finding of ultimate fact, but a conclusion." Merrick v. Deering, 30 N.M. 431, 441, 236 Pac. 735, 739 (1925). "Nor do we intend to say that simply designating the winner of the suit is deciding the 'ultimate fact.' In one sense it may be true, but in the sense in which it was used in the Fraser Case, 'ultimate facts' means those basic and controlling facts necessary to be found in order to intelligently apply the law to them and render judgment." Apodaca v. Lueras, 34 N.M. 121, 126, 278 Pac. 197, 199 (1929).

9. A good definition of an ultimate fact is found in 65 C.J. 1190. It is there said: 'Always a relative term, it is difficult to lay down a rule that will exactly prescribe the boundaries within which the "ultimate facts" in every case are confined. They are those found in that vaguely defined field lying between evidential facts on the one side and the primary issue or conclusion of law on the other * * * Considered with reference to the facts or evidence by which they are established or proved, "ultimate facts" are but the logical results of the proofs, or, in other words, mere conclusions of fact. An "ultimate fact" is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts." *Christmas v. Cowden,* 44 N.M. 517, 523, 105 P.2d 484, 487 (1940). "[A fact supporting a judgment operating as an estoppel in a subsequent suit] * * * must be a fact, the determination of which is material, relevant, and necessary to a decision of the case upon its merits * * * It must not be a fact that comes collaterally or incidentally in question * * * or one that is not material or essential to a decision, even though put in issue by the pleadings * * * or evidentiary facts from which the ultimate fact is inferred * * * Our conclusion is that such fact must be an ultimate fact, such as is required in allegations of fact in good pleadings, or in findings of fact in cases tried to the court. It is the ultimate fact, the fact without which the judgment would lack support in an essential particular." *Paulos v. Janetakos,* 46 N.M. 390, 394, 129 P.2d 636, 638 (1942). (Citations omitted.)

10. "Ordinarily, neither the verdict of a jury nor the findings of fact of a trial court will be disturbed in this court when they are supported by any substantial evidence." *Candelaria v. Miera,* 13 N.M. 360, 362, 84 Pac. 1020, 1021 (1906). This early statement of the rule was based on conflicting evidence. The rule has sometimes changed form, and many times misleads the reader by not containing the words "conflicting evidence," or words of similar meaning. For example, in *Maryland Cas. Co. v. Jolly,* 67 N.M. 101, 104, 352 P.2d 1013, 1015 (1960), the court said: "Findings of fact by the trial court, if sup-
[I] That the plaintiff was a passenger on a bus owned and operated by defendants in the City of Albuquerque . . . and as such the defendants were required to exercise the highest degree of care to protect plaintiff and other passengers.

[II] *

[III] That the plaintiff arise from her seat, and was standing in front of the rear door of the bus, waiting to disembark, when the bus driver brought the bus to a sudden stop with a jerk, and simultaneously opening the rear door, resulting in the plaintiff being pitched out of the bus.

[IV] *

[V] That the defendant's bus driver was negligent.

[VI] That the plaintiff was free of contributory negligence and did not assume the risk of her injury.

[VII] *

The conclusions of law of the trial court did not differ in any material respect from the findings.

Defendant requested as findings of fact the uncontradicted testimony of plaintiff that she "stepped down to the last step and put her hand on the door,"15

ported by substantial evidence, are conclusive on appeal . . . ." This statement is not correct unless read into it is the word "ordinarily" as used in the Candelaria case, supra. For, ordinarily there is conflicting evidence upon which the finding is made. A better statement of the rule is found in the recent case of Allsup v. Space, 69 N.M. 353, 361, 367 P.2d 531, 536 (1961): "The trial court's finding on disputed fact questions, when supported by substantial evidence, is conclusive on appeal." [Emphasis added.]


12. "That the plaintiff gave the usual signal to defendants' driver that she wanted off at the intersection of Girard and Central to make a transfer to a second bus." Record, p. 16.
13. "That the bus driver was an employee of defendant and was within the scope of his employment." Record, p. 16.
14. "That as the proximate result of the defendants' negligence, plaintiff is entitled to judgment against the defendants jointly and severally in the sum of Two Thousand Five Hundred and no/100 Dollars. . . ." Record, p. 17.
15. Record, p. 40. (Emphasis added.)
and that she was "late for work and wanted to be the first one off the bus." 16 Defendant requested as a conclusion of law that "the plaintiff was guilty of contributory negligence in failing to hold on to any of the stanchions, poles or rails which were available for her use." 17 These requests were refused and defendant appealed to the New Mexico Supreme Court contending, inter alia, that the trial court made no findings of fact as to plaintiff's conduct to support the conclusion of law that plaintiff was free of contributory negligence, and upon the undisputed testimony, that plaintiff was guilty of contributory negligence because she was holding on to nothing 18 at the time of the accident. 19

_Held, Affirmed:_ "Ultimate findings of fact were made by the trial court and that is sufficient. * * * [A]ll questions of fact material to the conclusion of law . . . were decided and proper findings of fact made." 20

The supreme court iterated its oft said rule that a trial court is not required to make findings of evidentiary facts; 21 but in addition, and inconsistent with its holding that all questions of material fact were decided, the court said that "[e]ven if omissions were made . . . a failure by the trial court to find a material fact must be regarded as a finding against the party having the burden of establishing such fact." 22 So the court referred to defendant's requested, but refused, finding first as an evidentiary fact not required to be found, and next as an omitted material fact, the omission being non-reversible error. 23

17. Record, p. 11. That plaintiff failed to hold on to the stanchions was also her uncontradicted testimony. Note 18 infra contains references to the pages in the record at which this testimony was given. Although an inappropriately drafted requested conclusion of law, in that it included facts as well as law, this conclusion gave the trial court notice of the theory of defendant's case. Such a conclusion is not, however, improper in New Mexico where there is, in fact, an inter-mixture of matters of fact and law in the conclusion of law. See the Morrison case, infra note 30.
18. Record, pp. 40, 41, 45.
21. _Id._ at 705.
22. _Id._ at 706. (Emphasis added.)
23. All questions of material fact were not made if the trial court failed to find a material fact. If, however, this rule (as to omitted facts) is to be applied merely hypothetically in the instant case (e.g., "If material facts had been omitted, then . . ."), and thus not applied inconsistently with the holding that all questions of material fact were decided, then the rule is dictum, inapplicable in Hoskins. Yet if the rule is to be applicable in any case, it should be qualified so as to be applicable only in cases where there was conflicting evidence, or where the trial court had the right to disregard the uncontradicted testimony of a witness. In Hoskins, plaintiff's testimony was uncontradicted; yet the trial court disregarded plaintiff's uncontradicted testimony against her own interest, and believed the remainder of her garbled testimony. See Greenfield v. Bruskas, 41 N.M. 346, 68 P.2d 921 (1937).
If defendant's requested finding 24 is to be considered evidentiary, Rule 52 (B) becomes meaningless; 25 if the finding is to be considered material, then because it consisted of the uncontradicted declaration of plaintiff against her own interest, its omission should be reversible error. 26

Still, consonant with prior cases, 27 a finding of non-negligence of one of the

24. The singular "finding" here is meant to refer in particular to that part of defendant's requested conclusion of law which says that plaintiff did not hold on to anything as she stood ready to leave the bus.

25. For there was no evidence of plaintiff's due care. And since there was no such evidence, if the fact that she did not hold on at the time of the injury is omitted as not being a material fact, the only alternative of the trial court is to "find" that plaintiff was free of contributory negligence. This, however, makes Rule 52 (B) meaningless, as discussed in text infra at 336-39, for the end result is that the findings of fact need consist only of conclusions of law. For example, in Hoskins, the trial court would be required to "find" only four things: (1) defendant was negligent, (2) plaintiff was not contributorily negligent, (3) plaintiff was injured, and (4) defendant's negligence was the proximate cause of plaintiff's injury. And the trial court could conclude in identical language.

26. The requested finding should have been considered material. See Apodaca v. Lueras, 34 N.M. 121, 123-24, 278 Pac. 197, 198 (1929):

But it may have been that the manner and demeanor of the witnesses as they gave their testimony caused the trial court to believe that maliciously inflicted injury was proven. How can we tell what was in the trial judge's mind as a result of the testimony, where he made no findings? Again, a question arose as to whether it was dark at the time of the accident, so as to make material the question of appellee's failure to carry a light on his bicycle. How dark was it? We cannot tell what the trial court believed about it without a finding on the question. As to [this matter] . . . appellant tendered specific findings, which were refused. There the court stopped, without making findings sufficiently specific to enable us to examine into these matters. It is just such a condition of affairs that our statute was enacted to prevent. [Emphasis added.]

See also, Jontz v. Alderete, 64 N.M. 163, 326 P.2d 95 (1958) (reversible error where findings silent as to speed at which vehicles were traveling, points as to right to way, and the manner in which the parties were operating their vehicles); Greenfield v. Bruskas, 41 N.M. 346, 350, 68 P.2d 921, 924 (1937) (reversible error to refuse requested finding that defendant "turned her car . . . without looking west"). (Emphasis added.)

It is error to fail to find upon a material issue, Apodaca v. Lueras, supra, and Jontz v. Alderete, supra, and it is error to refuse a requested finding of material fact based on uncontradicted testimony, Greenfield v. Bruskas, supra. See State Nat'l Bank v. Cantrell, 46 N.M. 268, 127 P.2d 246 (1942).

27. See, e.g., Moore v. Armstrong, 67 N.M. 350, 355 P.2d 284 (1960); Shephard v. Graham Bell Aviation Serv., 56 N.M. 293, 243 P.2d 603 (1952). But cf. Rea v. Motors Ins. Corp., 48 N.M. 9, 15, 144 P.2d 676, 680 (1944) (conclusion that conduct of wanton, willful driving constituted malicious mischief within insurance coverage was "inappropriately denominated a finding."); Davis v. Severson, 71 N.M. 480, 487, 379 P.2d 774, 778 (1963) (finding that accident causing death did not result from intentional conduct and that driver's operation of car was not heedless or in reckless disregard of others might "more accurately be denominated a conclusion of law."); See also Porter v. Mesilla Valley Cotton Products Co., 42 N.M. 217, 222, 76 P.2d 937, 940 (1938) in which the court held that a particular finding of fact did not consist of facts, but conclusions, and, in dictum, said: "It is like a finding of negligence in place of the facts upon which the court can conclude that there was negligence." (Emphasis added.)

"Proximate cause" has been clearly designated a proper finding, Greenfield v. Brus-
parties was held to be a proper finding. But on the issue of contributory negligence, if the only finding is that of non-negligence, "the trial court may . . . avoid a decision by entering a general judgment which, in the absence of findings, might be erroneously presumed by the appellate court to have been based on a fact decision fitting the result."\textsuperscript{28} And where this occurs, "a litigant might lose without either court actually considering a disputed controlling fact issue."\textsuperscript{29} The \textit{Hoskins} decision is illustrative of this misfortune.

The sole finding as to plaintiff's conduct was that plaintiff was "free of contributory negligence." Thus, the rule of the court that:

\begin{quote}
'Findings are not to be construed with the strictness of special pleadings. It is sufficient if from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the court notwithstanding their want of precision and occasional intermixture of matters of fact and conclusions of law.'\textsuperscript{30}
\end{quote}

has no place in the court's opinion. The finding stands alone. It is not intermixed with law and fact.\textsuperscript{31} It must, in this case, be either a finding of fact or a proof of each finding of fact in the event of a direct appeal from the trial court.

30. \textit{Hoskins v. Albuquerque Bus Co.}, 382 P.2d 700, 705 (N.M. 1963). This rule seems to have been first stated in \textit{Baker v. Armijo}, 17 N.M. 383, 393, 128 Pac. 73, 76 (1912). Since then, the rule has been the court's most useful tool in deciding the case according to the "equities" of the case. As an example, in \textit{Jontz v. Alderete}, 64 N.M. 163, 326 P.2d 95 (1958), the trial court made inadequate findings of fact to support its conclusion of law that the accident was unavoidable. An injured passenger in one of the automobiles appealed from the judgment. If the supreme court had felt that this party should not recover, it could, without hesitation, have refused to upset the findings and conclusions of the trial court simply because of their intermixture of matters of law and fact. Why? See the earlier case of \textit{White v. Morrison}, 62 N.M. 47, 49-50, 304 P.2d 572, 574 (1956), where the court said:

It is claimed that error was committed in awarding punitive damages where there was no finding of express malice. . . . The court \textit{concluded as a fact} that appellant falsely and maliciously accused appellee of having committed a criminal offense. \textit{Its denomination as a conclusion of law, is unimportant.} If a fair construction of the finding will justify the judgment, it is sufficient notwithstanding the inter-mixture of matters of fact and conclusion of law. [Emphasis added.]

Instead, the \textit{Jontz} court relied on the rule that "a finding of fact must be complete within itself, without reference to the testimony," \textit{Sundt v. Tobin Quarries, Inc.}, 50 N.M. 254, 258, 175 P.2d 684, 686 (1946), and reversed the case. The \textit{Jontz} case, together with the \textit{Apodaca} case, see note 26 \textit{supra}, should have controlled \textit{Hoskins}. Yet the \textit{Hoskins} court must have decided that the equities lay with plaintiff, and the "intermixture of law and fact" rule was useful equipment in deciding the case in her favor.

31. The only other finding of ultimate facts (though the court would now denominate
If it be considered a conclusion of law, then there was no finding of fact to support the conclusion that plaintiff was free of contributory negligence.

If finding plaintiff free of contributory negligence is a proper finding of ultimate fact in and of itself, it must follow that all other facts in negligence cases are immaterial or evidentiary, and may be excluded from the trial court's findings of fact. Under this rule, Findings of Fact Nos. II and III of the Hoskins trial court may be omitted and the decision of the trial court sustained.

them "evidentiary") was Finding No. III, set out in text at 333, supra. But Finding No. III contains no facts pointing the way to plaintiff's due care, or the manner in which she was preparing to alight from the bus. The findings must contain such facts. Jontz v. Alderete, supra note 30. Thus, taking all of the findings together, there is still no "intermixture" sufficient to support a conclusion of law that plaintiff was free of contributory negligence.

In addition, it would be of no help in this case to say, as the court did in Goodwin v. Travis, 58 N.M. 465, 471, 272 P.2d 672, 676 (1954), that "in many instances the ultimate facts to be properly found by a trial court are indistinguishable from and identical to conclusions of law which are also found by the court."

32. See discussion in text at 338, infra.
33. The trial court could have found, as a fact, that plaintiff did not hold on to anything as she was waiting to step from the bus, and then concluded that she was not contributorily negligent. But if the court were to do this, it might be difficult to sustain on appeal. Once the trial court found as a fact that plaintiff did not hold on to anything as she stood at the exit of the bus, the supreme court should not be bound by the trial court's conclusion that plaintiff was free of contributory negligence. See 70 L.Q. Rev. 153, 154 (1954):

Although an appellate court . . . cannot, as a general rule, differ from the conclusion reached by the trial judge concerning the weight to be given to the evidence of any particular witness, as it has not itself heard the witness, there would seem to be no similar reason why it should regard itself bound by the judge's conclusion that the facts, as found by him, did or did not constitute negligence. That is a question of opinion and not a finding of fact. In the present case the point at issue was not based on any conflict of evidence, as there was no substantial dispute concerning the acts done by the plaintiff, but involved the evaluation by the trial judge of undisputed facts in order to determine whether there was a lack of reasonable care on the part of the plaintiff. If the Court of Appeal is bound by such an evaluation it is difficult to see on what ground it can ever disturb "a finding of fact" by a trial judge. . . If a distinction were drawn between "questions of fact" which are questions of fact in the true sense, and "questions of fact" which are really questions of opinion, then some of the confusion in this branch of the law might be avoided.

The New Mexico Supreme Court avoided this "confusion," by holding the "finding" that plaintiff was free of contributory negligence to be proper. But avoiding the confusion is not enough; the confusion should be stopped, and this could be done simply by making a clear distinction between what is fact and what is opinion.

See also Whitehurst v. Rainbo Baking Co., 70 N.M. 468, 470, 374 P.2d 849, 850 (1962), in which the court laid down the following rule, applicable in Hoskins: "Conclusions of law are reviewable by the Supreme Court, and where the facts are not in dispute this court is not bound by the conclusions of the trial court but may independently draw its own legal conclusions."
It would be everyday usage to say that defendant negligently opened the door while the bus was not completely stopped. But here a distinction must be made: To say that defendant negligently opened the door is a judgment, a conclusion; it is not a fact. To say merely that defendant opened the door while the bus was not completely stopped is a fact. The everyday usage has caused confusion in the trial of cases, and has led the courts to denominate “negligence” as a mixed question of law and fact. Yet logically, and practically, it should never be denominated a proper finding of fact. It is a judgment. Where the Rules call for findings of fact and conclusions of law, the semantic distinction should be made and applied with clarity. If the sole finding is that of negligence, and the conclusion is also that of negligence, the result is merely to say: “I find that defendant did not act as an ordinarily prudent person, and therefore I conclude that he was negligent.”

That a person did not act as an ordinarily prudent person must be based on evidentiary data. Conduct of a person is seen, heard. Conduct is describable in the English language; the description is of a fact. It is an ultimate fact when no more inferences may be drawn from it, when it is ripe to conclude that one did, or did not act prudently. That plaintiff in Hoskins did not hold on to a rail is a description of her conduct, an ultimate fact. That she was, or was not acting prudently is a conclusion of law.

Where evidence is uncontradicted and circumstances are such that the trial court cannot disregard the testimony of a party, the supreme court may itself become trier of fact, and it may conclude from the evidence that a party is neg-

34. The rule of law to be applied to the fact of a person’s conduct is that if \( X \) does not act as a reasonably prudent person, then \( X \) is liable. This is called the test of “negligence.” It is a definition of “negligence.” All that has been accomplished in Hoskins is to lay down the rule of law that the following finding is proper in all negligence cases: “I find \( X \) negligent, therefore he is negligent,” or “I conclude that \( X \) was negligent, therefore I conclude \( X \) was negligent,” or “I am of the opinion that \( X \) was negligent, therefore he is negligent.” This type of finding of fact, however used, abrogates Rule 52(B) of the New Mexico Rules of Civil Procedure enacted by the New Mexico Legislature.

35. If a trial judge gives a “formula instruction,” he must “include each and every element requisite to support a verdict.” McFatridge v. Harlem Globe Trotters, 69 N.M. 271, 278, 365 P.2d 918, 923 (1961). A “formula instruction” is “an instruction which advises the jury that under certain facts therein hypothesized their verdict should be for one of the parties.” Id. at 278, 365 P.2d at 923. Those elements of a person’s conduct which must be included in a formula instruction are those which should be included in the trial court’s findings of fact. There is no reason why the trial court should not be required to so include them.

36. See note 23 supra. And see Wilson v. Schermerhorn, 56 N.M. 512, 514, 245 P.2d 845, 846 (1952): “[A] trial court may not arbitrarily refuse to make a finding of fact based upon undisputed testimony, but this does not mean it cannot refuse to believe such testimony if it believes the party who produces it has put on other perjured testimony, or testimony that appears to be such.”
ligent or not negligent as a matter of law. In the interest of uniformity, the trial judge should be ordered to follow the rules of procedure.

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37. See note 33 supra.

38. In Hoskins, the Court should have either (1) found that plaintiff did not hold on, and then have concluded that she was or was not contributorily negligent, or (2) remanded to the trial court with directions to make proper findings.

It seems to be the practice in many of the lower courts that the judge merely "adopts" the winning party's findings, and puts them in his decision, without carefully noticing their content. In Hoskins, the court adopted plaintiff's requested findings verbatim except in a few immaterial respects.

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