Reverse and Remand and Opinion Filed February 16, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-14-01312-CV

CHAN IL PAK, Appellant
V.
AD VILLARAI, LLC, THE ASHLEY NICOLE WILLIAMS TRUST, VILLAS ON RAIFORD CARROLLTON SENIOR HOUSING, LLC, AND VILLAS ON RAIFORD, LLC, Appellees

On Appeal from the 101st Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-13-06030

MEMORANDUM OPINION

Before Justices Francis, Evans, and Stoddart
Opinion by Justice Francis

Chan Il Pak appeals the trial court's judgment awarding damages, attorney's fees, and injunctive relief to appellees. Pak raises several issues, two of which are dispositive of this appeal. He complains (1) the judge who tried the case failed to make findings of fact and conclusions of law and (2) the judge who succeeded him then made findings and conclusions without statutory authority. For the reasons set out below, we agree. Because we further conclude Pak has been harmed, we reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

Appellees sued Pak for breach of contractual and fiduciary duties, declaratory judgment, and injunctive relief related to Pak's conduct in the construction of a government-subsidized

senior housing project in Carrollton, Texas. Pak generally denied the allegations and raised defenses and affirmative defenses. The case was tried by the court without a jury.[1] Shortly after the trial concluded in late 2014, the judge lost his bid for reelection. Before his term ended, he signed a modified final judgment in appellees' favor that ordered declaratory and injunctive relief, awarded monetary damages to appellee Villas on Raiford Carrollton Senior Housing, LLC, and awarded attorney's fees to appellee AD Villarai, LLC.

On December 1, Pak timely filed a request for findings of fact and conclusions of law under Texas Rule of Civil Procedure 296. When the judge failed to respond, Pak filed a timely notice of past-due findings on December 31, which was the last day of the judge's elected term of office. The notice extended the date for filing findings and conclusions to January 10, 2015. *See* TEX. R. CIV. P. 297. Again, the judge did not respond.

The successor judge took office in January 2015. For reasons unclear in the record, on January 5, the district clerk's office re-filed Pak's December 31 notice of past-due findings. The next day, the successor judge signed an order requiring the court reporter to produce the trial record so that she could "timely respond" to the notice of past-due findings and conclusions. Two days later, the judge signed a second order requiring the court reporter to produce the record in "readable format" no later than 5 p.m. that day. That same day, appellees filed proposed findings of fact and conclusions of law. On January 12, the successor judge made findings and conclusions that essentially mirrored those proposed by appellees.

Pak's first two issues are dispositive of this appeal. In those issues, he complains (1) the judge who presided over the trial failed to make findings of fact and conclusions of law despite a timely request and (2) the successor judge who did not hear the evidence made findings and

[1] Following a bench trial in January 2014, the trial court issued an order of permanent injunction removing Pak as manager of the limited liability company that managed Raiford Carrollton Senior Housing, LLC (Villas CSH), owner of the housing project, and enjoining him from participating and/or interfering with the management of Villas CSH. The trial court reserved other issues for later consideration. In October 2014, the remaining issues were tried to the court.

conclusions without statutory authority. Pak argues he is entitled to reversal because, without findings and conclusions, he is forced to "guess at the reasons" the trial court ruled against him. We agree.

We begin with the failure of the former judge to make findings. Texas Rule of Civil Procedure 296 provides a party with the procedural right to request written findings of fact and conclusions of law from the trial court. *See* TEX. R. CIV. P. 296. Rule 297 places a corresponding, mandatory duty on the trial court to make such findings and conclusions when a party makes a timely request. *See* TEX. R. CIV. P. 297; *see also Cherne Indus., Inc. v. Magallanes*, 763 S.W.2d 768, 772 (Tex. 1989); *Larry F. Smith, Inc. v. The Weber Co.*, 110 S.W.3d 611, 614 (Tex. App.—Dallas 2003, pet. denied). The trial court's failure to respond to a timely request is error and is presumed harmful unless the record affirmatively shows that the complaining party has suffered no harm. *Cherne Indus.*, 763 S.W.2d at 772.

After a bench trial in which the judge found in favor of appellees, Pak made a timely request for findings of fact and conclusions of law and also timely notified the judge when the findings were past due. The judge, however, did not respond. Because Pak timely requested findings and conclusions, the judge erred by failing to carry out his mandatory duty to make them.

The judge's successor made findings and conclusions once she took office. We next consider the propriety of her actions.

The Texas Rules of Civil Procedure and the Texas Civil Practice and Remedies Code allow a successor judge to make findings of fact and conclusions of law in certain listed situations—specifically, when the preceding judge has died, resigned, or becomes disabled during the term of office. *See* TEX. R. CIV. P. 18; TEX. CIV. PRAC. & REM. CODE ANN. § 30.002(b) (West 2015). However, when the trial judge has been replaced as the result of an

election, there is no provision allowing the judge's successor who did not participate in the proceedings to make and file findings of fact and conclusions of law. *See Larry F. Smith, Inc.*, 110 S.W.3d at 616; *Liberty Mut. Fire Ins. v. Laca*, 243 S.W.3d 791, 796 (Tex. App.—El Paso 2007, no pet.); *Corpus Christi Hous. Auth. v. Esquivel*, No. 13-10-00145-CV, 2011 WL 2395461, at *2 (Tex. App.—Corpus Christi June 9, 2011, no pet.) (mem. op.).

Here, the judge who tried the case was replaced as the result of an election; thus, the judge succeeding him was without legal authority to make findings of fact and conclusions of law. Because the successor judge had no authority to make findings and conclusions in this case, we conclude they are of no effect.

In reaching this conclusion, we reject appellees' argument that Pak failed to preserve his complaint by failing to object when the successor judge made the findings. Our rules generally require a party to present a complaint to the trial court by request, objection, or motion with sufficient specificity as a prerequisite to appellate review. *See* TEX. R. APP. P. 33.1(a)(1); *Quinn v. Nafta Traders, Inc.*, 360 S.W.3d 713, 719 (Tex. App.—Dallas 2012, pet. denied) (op. on remand). The purpose of making an objection to a trial court's ruling or procedure is so that the trial court may have the opportunity to correct any errors without the necessity and cost of an appeal. *In re Estate of Womack*, 280 S.W.3d 317, 321 (Tex. App.—Amarillo 2008, pet. denied).

Here, an objection would not have achieved the purpose of the rule. The successor judge made and filed findings two days after they were due. To the extent section 30.002 of the civil practice and remedies code allowed the former judge to make findings after his term expired, he did not do so. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 30.002(a) (providing that district or county judge may file findings of fact and conclusions of law in case if judge's term of office expired before adjournment of court term at which case was tried or during period prescribed for filing findings of fact). Even assuming an objection is necessary when a trial court acts when it

is not authorized to act, the only "correction" could have been for the successor judge to withdraw the unauthorized findings, leaving the parties in the same position as they currently are — without findings and conclusions. Under these circumstances, we cannot conclude an objection was necessary.[2]

We are also unpersuaded by appellees' broad argument that a successor judge can make and file findings so long as the judge who heard the evidence rendered the original judgment. For this proposition, they rely on two cases: *Lykes Brothers Steamship Co. v. Benben*, 601 S.W.2d 418 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) and *Fidelity & Guaranty Life Insurance Co. v. Pina*, 165 S.W.3d 416 (Tex. App.—Corpus Christi 2005, no pet.).

In both *Lykes Brothers* and *Fidelity*, the successor judge made findings in a case where the trial judge had resigned, a circumstance that is expressly listed in rule of civil procedure 18. *See Lykes Bros.*, 601 S.W.2d at 420; *Fid.*, 165 S.W.3d at 420.[3] The specific issue in both cases was whether the successor judge could make findings and conclusions without hearing evidence, since rule 18 does not specifically refer to findings and conclusions. *Lykes Bros.*, 601 S.W.2d at 420; *Fid.*, 165 S.W.3d at 420–21. Both cases ultimately concluded they could. *Lykes Bros.*, 601 S.W.2d at 420; *Fid.*, 165 S.W.3d at 420–21. Because neither case involved a judge replaced by an election, we conclude neither case supports appellees' position that the successor judge here could make findings and conclusions.

[2] To the extent appellees suggest Pak specifically requested the successor judge to make the findings and conclusions by filing a second notice of past-due findings on January 5, 2015, the record does not support their claim. The record shows Pak filed his notice of past-due findings on December 31, 2014. The district clerk's office file-stamped the exact same notice again on January 5, 2015. Thus, the record shows one notice that the clerk's office file-stamped on two different dates—not multiple notices, one of which was directed to the successor judge.

[3] We note the *Fidelity* case mistakenly states that rule 18 allows the "successor to a *retired* or deceased judge" to hear and determine undisposed motions and to approve statements of fact. 165 S.W.3d at 420–21 (emphasis added). The rule, however, actually refers to a predecessor judge who "dies, *resigns*, or becomes unable to hold court . . . ." TEX. R. CIV. P. 18 (emphasis added).

Having determined the former trial judge erred in failing to make findings and conclusions and the successor judge's findings and conclusions are of no effect, we now consider whether Pak has been harmed.

The general rule is that an appellant has been harmed if, under the circumstances of the case, he has to guess at the reason the trial court ruled against him. *Larry F. Smith, Inc.*, 110 S.W.3d at 614. If there is only a single ground of recovery or single defense, an appellant does not usually have to guess at the reasons for the trial court's judgment. *Id.* But in a case such as this one, where there are two or more possible grounds for recovery or defense, an appellant is forced to guess what the trial court found unless findings are provided to him. *Id.* Putting the appellant in the position of having to guess defeats the inherent purpose of rules 296 and 297, which is to "narrow the bases of the judgment to only a portion of [the multiple] claims and defenses, thereby reducing the number of contentions that the appellant must raise on appeal." *Id.*

We conclude the record does not affirmatively show Pak was not harmed by the trial court's failure to respond to Pak's timely request for findings of fact and conclusions of law. Although the preferable remedy is to abate the appeal so that findings can be made, that remedy is not available because the judge who tried the case has been replaced as the result of an election and is no longer available to respond to an order of this Court to make findings and conclusions. *See id.* at 616 (reversing cause and remanding for further proceedings when judge who presided over case had been replaced by an election)*; F.D.I.C. v. Morris*, 782 S.W.2d 521, 524 (Tex. App.—Dallas 1989, no writ) (same); *Liberty Mut. Fire Ins.*, 243 S.W.3d at 796 (same). We sustain Pak's issues one and two. Our disposition of these issues makes it unnecessary to address Pak's remaining issues or appellees' cross appeal. *See* TEX. R. APP. P. 47.1.

We reverse the trial court's judgment and remand for further proceedings consistent with this opinion.

/Molly Francis/
MOLLY FRANCIS
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CHAN IL PAK, Appellant

No. 05-14-01312-CV V.

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Trial Court Cause No. DC-13-06030.
Opinion delivered by Justice Francis;
Justices Evans and Stoddart participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant Chan Il Pak recover his costs of this appeal from appellees Ad Villarai, LLC, The Ashley Nicole Williams Trust, Villas on Raiford Carrollton Senior Housing, LLC, and Villas on Raiford, LLC.

Judgment entered February 16, 2016.