# **9 Moore's Federal Practice - Civil § 52.34**

***Moore's Federal Practice - Civil* >  *Volume 9: Analysis: Civil Rules 44–53* > *Volume 9 Analysis: Civil Rules 44–53* > *Chapter 52 Findings and Conclusions by the Court; Judgment on Partial Findings*  > *C. APPELLATE REVIEW OF FINDINGS***

**§ 52.34 Appellate Review in Specific Kinds of Cases**[[1]](#footnote-2)\*

1. **Negligence and Tort Law**

1. **Majority Viewpoint; Negligence—Question of Fact**

Most circuits treat a trial court’s determination of whether established facts constitute negligence or contributory negligence as a question of fact to be reviewed under the clearly erroneous standard.[[2]](#footnote-3)1 This position was buttressed by the Supreme Court’s decision in *McAllister v. United States.*[[3]](#footnote-4)2 In that case the Court was faced with the question of whether the Second Circuit had erred in overruling the district court’s conclusion that the defendant-shipowner’s conduct had created a condition that caused the plaintiff-employee to contract polio. The Court ruled that the clearly erroneous standard had properly been used by the Second Circuit in reviewing the district court’s finding, but that the result it reached under this standard was incorrect on the facts of the case.[[4]](#footnote-5)3 The *McAllister* holding has been cited to support the conclusion that the existence of negligence is a question of fact to be reviewed under the clearly erroneous standard.[[5]](#footnote-6)4

It is somewhat surprising that negligence has been treated as a question of fact in most circuits because, analytically, it can be characterized as a mixed question of law and fact, which is often subject to de novo review (*see* § 52.33).[[6]](#footnote-7)5 This result may be explained by the importance of the individual facts in each negligence case. Although the court’s determination regarding negligence generates a specific rule regarding the conduct of a reasonable person, which is part of the law-making process, the rule relates only to the facts in that particular case. Consequently, it is deemed appropriate to review a determination of negligence under the clearly erroneous standard.

The Ninth Circuit characterizes negligence as a mixed law/fact question subject to review for clear error, because a decision regarding negligence is made by reference to the “data of practical human experience.” Therefore, the trial court’s findings of fact effectively determine the legal conclusions.[[7]](#footnote-8)6

1. **Related Issues Treated as Questions of Fact**

A number of subsidiary issues that arise in negligence cases are also treated as questions of fact, subject to the clearly erroneous rule. Among the issues that have been classified as questions of fact are proximate cause,[[8]](#footnote-9)7 res ipsa loquitur,[[9]](#footnote-10)8 foresee ability,[[10]](#footnote-11)9 and allocation of fault under comparative negligence principles.[[11]](#footnote-12)10

1. **Second Circuit Position; Negligence—Conclusion of Law**

The Second Circuit consistently has held that a finding of negligence is a question of law or at least a mixed question of law and fact subject to de novo review.[[12]](#footnote-13)11 In *Mamiye Bros. v. Barber S.S. Lines Inc.,*[[13]](#footnote-14)12 the court reasoned that:

[a] determination of negligence involves first the formulation and then the application of a standard of conduct to evidentiary facts … . [A] reviewing court has no means of knowing whether [the trial judge] formulated the standard correctly, since he does not charge himself.[[14]](#footnote-15)13

The court perceived the need for uniformity in the decisions within the circuit and noted that “[i]t would be shocking if contrary decisions of two district judges in this circuit on exactly the same facts had to be left standing … .”[[15]](#footnote-16)14

The Second Circuit rejected the argument that the United States Supreme Court’s decision in *McAllister v. United States*[[16]](#footnote-17)15 compels a contrary rule for reviewing determinations of negligence.[[17]](#footnote-18)16 The Second Circuit concluded that the Supreme Court’s holding in *McAllister,* at most, was limited to the conclusion that *causation* was a question of fact, subject to the clearly erroneous rule, and that the Supreme Court did not reach the issue of whether the defendant’s conduct was the “legal” or “proximate” cause of the injury.[[18]](#footnote-19)17

Despite its refusal to abandon its position, the Second Circuit cases seem to reflect a growing reluctance to overturn determinations of negligence made by trial courts.[[19]](#footnote-20)17.1 For example, the court has noted that it would not conduct a broad inquiry into the facts of a negligence case, despite the fact that the issue of negligence was one of law.[[20]](#footnote-21)18 In another case, the Second Circuit noted that the district judge’s conclusions as to negligence would be given “great weight.”[[21]](#footnote-22)19

Furthermore, it should also be noted that while the Second Circuit departs from the other circuits in its treatment of negligence as a question of fact, the circuit follows the majority rule that treats the allocation of negligence between the parties, under the comparative negligence statute, as a question of fact to be reviewed under the clearly erroneous test.[[22]](#footnote-23)20

1. **Appropriate Standard of Care—Conclusion of Law**

While the existence of negligence is considered a question of fact in most circuits, the question of whether the trial court has applied the correct standard of care is generally considered a question of law subject to de novo review.[[23]](#footnote-24)21 It has been observed that nothing said by the United States Supreme Court in *McAllister* “was intended to limit the scope of review in so far as the fixing of the applicable standard of conduct is concerned.”[[24]](#footnote-25)22

1. **Damages**

1. **Damages—Question of Fact**

Great deference is paid to the trial court’s factual findings on damages.[[25]](#footnote-26)23

Damages are treated as findings of fact and reviewed under the clearly erroneous standard.[[26]](#footnote-27)24 This rule is applied to the trial court’s conclusions regarding both the amount[[27]](#footnote-28)25 and the apportionment[[28]](#footnote-29)26 of compensatory and punitive damages.[[29]](#footnote-30)27 Factors in mitigation of damages are also questions of fact to be reviewed under the clearly erroneous standard.[[30]](#footnote-31)28 The review of a district court’s findings as to damages in a bench trial under the clearly erroneous standard should not be confused with the review of the trial judge’s rulings regarding acceptable damages made following a motion for a new trial in a jury trial.

Although the clear-error standard governs review of a trial court’s findings about the general type of damages to be awarded and the rates used to calculate them (e.g., discount rate, reasonable royalty), an abuse-of-discretion standard applies to review of decisions about methodology for calculating rates and amounts.[[31]](#footnote-32)29

1. **Breakdown of Elements of Damages Required**

Specific findings must be made regarding the issue of damages. Appellate courts do not want the entire damages award presented as a lump sum. Instead, they expect the total amount of damages to be itemized and an amount assigned to each individual element of damages.[[32]](#footnote-33)30 Specific findings regarding damages must also be made in default judgments.[[33]](#footnote-34)31 If the trial court fails to specify the basis for the award, thereby making informed review impossible, the appellate court may find it necessary to remand for further findings. For example, remand may be required if:

* The reviewing court is unable to tell how or whether the damages were reduced to present value;[[34]](#footnote-35)32

1. It is impossible to tell if the trial court considered the proper factors in mitigation of damages;[[35]](#footnote-36)33
2. Two items of damages appear to overlap;[[36]](#footnote-37)34
3. The award appears to be excessive or inadequate, and the reviewing court cannot determine how the trial court arrived at the final figure;[[37]](#footnote-38)35 or
4. The reviewing court is unable to determine the propriety of the award.[[38]](#footnote-39)36

However, if the record as a whole provides a sufficient basis for appellate review of the award of damages, the court is unlikely to remand even if a damages award is not broken down.[[39]](#footnote-40)37 If the total award seems proper in light of the totality of the facts presented, the reviewing court may be reluctant to remand for itemization of the award.[[40]](#footnote-41)38

1. **Patent Litigation**

1. **Patent Cases Subject to Clearly Erroneous Rule**

A trial court in a patent case is required to make specific and complete findings of fact,[[41]](#footnote-42)39 which are subject to the clearly erroneous standard of review (*see* § 52.31).[[42]](#footnote-43)40 Yet, the task of distinguishing between law and fact has been particularly difficult in patent litigation because of the complex, technical and scientific issues that are usually involved.[[43]](#footnote-44)41

1. **Validity of Patent—Question of Law**

It is well settled that the ultimate question of patentability is a question of law that may be reviewed by the appellate court de novo.[[44]](#footnote-45)42 The determination of patentability rests on meeting the requirements of the statute, and statutory construction is a question of law. By statute, three factors, novelty, utility, and obviousness, determine whether a device is patentable.[[45]](#footnote-46)43 Therefore, if the reviewing court finds that the standard of invention applied by the trial court is less exacting than that required by statute, the court’s finding of patentability cannot be affirmed as a matter of law.[[46]](#footnote-47)44

1. **Construction of Patent—Question of Law, with Underlying Factual Findings Reviewed for Clear Error**

A “patent claim” is the portion of a patent document that defines the scope of the patentee’s rights. The construction of a patent, including terms of art within its claim, is a matter for the court to determine, even if the construction of a term of art has “evidentiary underpinnings.”[[47]](#footnote-48)45 However, in reviewing a district court’s resolution of a factual dispute underlying the construction of a patent claim, an appellate court must apply a clear-error standard of review.[[48]](#footnote-49)45.1

The Supreme Court has explained how an appellate court should apply the appropriate standards in reviewing a district court’s construction of a patent claim. If the district court reviewed only evidence intrinsic to the patent (the patent claims and specifications, along with the patent’s prosecution history), the judge’s determination amounts solely to a determination of law, and the court of appeals must review that construction de novo.[[49]](#footnote-50)45.2

In some cases, the district court will need to look at extrinsic evidence (for example, the background science or the meaning of a term in the relevant art during the relevant time period) in order to understand the patent claim. If those subsidiary facts are in dispute, the court will need to make subsidiary factual findings based on that extrinsic evidence. These are the “evidentiary underpinnings” of claim construction, and this subsidiary factfinding must be reviewed for clear error on appeal.[[50]](#footnote-51)45.3 After resolving the factual dispute, the district judge will then interpret the patent claim in light of the facts as he or she has found them. This ultimate interpretation is a legal conclusion, and an appellate court will review the district court’s ultimate construction of the claim de novo. But to overturn the district judge’s resolution of an underlying factual dispute, the court of appeals must find that the judge made a clear error.[[51]](#footnote-52)45.4

1. **Novelty, Utility, and Obviousness—Question of Law; Underlying Facts Subject to Clearly Erroneous Rule**

Three factors, novelty, utility, and obviousness, comprise the statutory standard for patentability.[[52]](#footnote-53)46 Taken together, they determine whether a device is patentable. The ultimate meaning of these three terms requires statutory construction and is a question of law, subject to de novo review.[[53]](#footnote-54)47 Yet, the court must examine many underlying facts before construing the statute. The findings of facts that support a conclusion on any of these statutory factors are subject to the clearly erroneous rule.[[54]](#footnote-55)48

The question of obviousness is inextricably linked with the ultimate conclusion of patentability, and, as noted, the court must determine the issue of obviousness as a matter of law. However, resolution of the issue of obviousness of the patent turns on several basic factual inquiries, which are reviewable under the clearly erroneous standard.[[55]](#footnote-56)49 There are numerous fact questions that must be examined on the issue of obviousness. Among them are:

* the scope and content of the prior art;

1. the differences between the prior art and the claimed invention;
2. the level of ordinary skill in the pertinent art at the time of invention; and
3. other objective evidence in support of a determination of non-obviousness.

For these purposes, objective evidence may include commercial success due to the invention, failure of others, long-felt need, movement of the skilled in a different direction, skepticism of experts, copying the invention in preference to prior art, and other events proved to have actually occurred. All of these factual determinations are reviewed for clear error.[[56]](#footnote-57)50

1. **Infringement and Equivalence—Question of Law; Underlying Facts Subject to Clearly Erroneous Rule**

The issues of infringement also involve both questions of law and questions of fact. Claim interpretation is the first step in the two-part infringement determination. This aspect of the infringement/equivalence issue presents a legal question, since it involves the application of a legal test or standard. Consequently review of claim interpretation may proceed de novo.[[57]](#footnote-58)51 The second step in the process of determining whether there has been an infringement involves factual issues. When a trial court resolves factual disputes underlying the meaning of claim terms, the appellate court must review these findings under the clearly erroneous rule.[[58]](#footnote-59)52

1. **Special Deference Owed to Trial Court’s Evaluation of Expert Testimony**

In patent cases, great deference is shown to the findings of the trial court, especially when the case involves conflicting expert testimony and complex scientific data.[[59]](#footnote-60)53 While the Rule directs that in all non-jury cases “due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses,”[[60]](#footnote-61)54 this stricture is apparently given extra weight in patent cases. As Justice Jackson stated in *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*:

To no type of case is this last clause more appropriately applicable than to the one before us, where the evidence is largely the testimony of experts as to which a trial court may be enlightened by scientific demonstrations … . The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only “clearly erroneous” findings.[[61]](#footnote-62)55

However, this deference to the district court’s evaluation of the credibility of expert testimony does not require an appellate court to accept an evaluation that is clearly erroneous in light of substantial contrary evidence.[[62]](#footnote-63)56

1. **Employment Discrimination**

1. **Intent to Discriminate—Question of Fact**

The intent to discriminate, often the pivotal issue in Title VII cases, is a question of fact subject to review under the clearly erroneous test. The Court clearly stated that the intent to discriminate “is a pure question of fact, subject to Rule 52(a)’s clearly-erroneous standard. It is not a question of law and not a mixed question of law and fact.”[[63]](#footnote-64)57

In *Pullman-Standard*, the plaintiff brought a Title VII action alleging racial discrimination in the defendant’s use of a seniority system. The Fifth Circuit reversed the district court’s finding that there had been no intent to discriminate. In doing so the Fifth Circuit set aside the finding and made an independent determination on the issue of intent. The Fifth Circuit reviewed the finding of intent de novo, reasoning that intent was the “ultimate fact” in the case. The Supreme Court reversed, holding that the appellate court should have reviewed the finding under the clearly erroneous test and erred by making its own findings on the issue of intent.

The Supreme Court confirmed its holding in *Pullman-Standard* three years later when it decided *Anderson v. City of Bessemer City*.[[64]](#footnote-65)58 In this Title VII case, the Fourth Circuit purported to treat the district court’s finding on intent as a question of fact and concluded that the finding was clearly erroneous. The Court ruled that the appellate court, in fact, had conducted a de novo review on the issue of intent when the district court’s findings were plausible in light of the evidence. The Court therefore reversed, explaining that the appellate court could not disturb the finding even if it would have reached a different conclusion had it been sitting as trier of fact.[[65]](#footnote-66)59

1. **Clearly Erroneous Standard Applicable to Findings on Disparate Impact and Pretext**

The clearly erroneous standard of review is especially appropriate in employment discrimination cases because these cases often require the trial court to weigh the credibility of conflicting lay and expert testimony. For example, these cases frequently involve large quantities of statistical evidence and the competing statistical testimony of experts on the issue of disparate impact. The trial court is entitled to great deference to its determinations regarding witness credibility and whether the statistics presented were sufficiently probative to show discrimination.[[66]](#footnote-67)60 Similarly, the trial court often must evaluate the testimony of conflicting witnesses to determine whether the employer’s actions were motivated by discrimination or by race-neutral criteria such as the employee’s own work history. The Supreme Court has stated that the question of pretext is a “question for the factfinder to answer subject, of course, to appellate review.”[[67]](#footnote-68)61 The trial court’s determinations as to whether the reasons advanced by an employer for failing to hire, firing, or failing to promote an employee are real, are to be reviewed under the clearly erroneous standard.[[68]](#footnote-69)62

Of course, as with all findings based on credibility evidence, the findings of the court on these issues are not immune from review. The appellate court may conclude that the findings based on testimony are clearly erroneous if they are contradicted by documentary or other objective evidence.[[69]](#footnote-70)63

1. **Detailed Findings Usually Required**

Although findings of intent to discriminate cannot be reviewed de novo, a careful review is nevertheless desirable because of the importance of the issues involved and the effect the rulings may have on the interests of many people. For this reason, conclusory findings, or those that contain only “ultimate” facts, are particularly inappropriate in discrimination cases. Appellate courts often demand a rather high degree of detail in the findings in discrimination cases to ensure that the trial court has applied the law correctly.[[70]](#footnote-71)64

1. **Joint Title VII and Civil Rights Claims; Separate Findings Not Required**

When an “equitable” Title VII claim is tried simultaneously with a “legal” civil rights claim,[[71]](#footnote-72)65 the jury’s fact-finding on the § 1981 or § 1983 claim will ordinarily bind the judge on the common factual issues of the Title VIII claim.[[72]](#footnote-73)66 Consequently, it has been held that the judge need not and should not make separate findings of fact on common issues of the Title VII claim because the facts have already been found by the jury.[[73]](#footnote-74)67 If separate issues exist in the equitable claim that do not exist in the legal claim, the court should, of course, make findings on the issues not covered by the jury’s verdict.[[74]](#footnote-75)68

If independent factual findings are not made by the trial judge, the court’s judgment on the Title VII claim is reviewed under Rule 50 standards, i.e., upon motions for judgment as a matter of law (formerly directed verdict or judgment n.o.v. motions), sufficiency of the evidence standard, which is the appropriate standard for the verdict in a jury trial. It is only the trial judge’s own findings in the non-jury portion of the case that are subject to Rule 52’s clearly erroneous standard.[[75]](#footnote-76)69

1. **Contract Litigation**

1. **Contract Construction—Question of Law**

Issues of contract interpretation and construction ordinarily are considered questions of law to be reviewed de novo by the appellate court. This is the prevailing rule in cases where the terms of the contract are unambiguous.[[76]](#footnote-77)70 When the district court’s decision is based on analysis of contractual language and application of principles of contract interpretation, that decision is a matter of law.[[77]](#footnote-78)71

The question of whether the contract is or is not ambiguous is itself a question of law, which also may be reviewed de novo.[[78]](#footnote-79)72 Contract construction usually is considered a question for the court, not only when the terms are subject to only one reasonable interpretation, but also when the terms are subject to one of two interpretations, but no extrinsic evidence is presented to ascertain the parties’ intent. When no extrinsic evidence is involved, the court is actually searching for the legal operation of the words of the contract, i.e., the consequence that the court will ascribe to the use of the words as applied to a particular situation.[[79]](#footnote-80)73 In contrast, when the court looks to extrinsic evidence to determine the meaning of the contract, the construction of the contract is regarded as a question of fact (*see* [b], *below*).

1. **Ambiguous Contract With Extrinsic Evidence—Questions of Fact and Law**

The initial determination that a contract is ambiguous is a question of law subject to de novo review.[[80]](#footnote-81)74 When a contract is ambiguous and its construction turns on the consideration of extrinsic evidence, the district court’s interpretation is reviewed for clear error.[[81]](#footnote-82)75

When a contract is ambiguous, the court may examine extrinsic evidence to determine the intent of the parties, and the trial court’s determination of intent is a finding of fact subject to the clearly erroneous rule.[[82]](#footnote-83)76 However, intent may be considered a legal issue to the extent that no extrinsic evidence is offered to ascertain the intent of the parties, or the contract is unambiguous, and the question of intent becomes just another form of contract interpretation.[[83]](#footnote-84)77

1. **Issues of Modification, Mistake, Abandonment, and Breach—Usually Questions of Fact**

Because the resolution of issues such as modification,[[84]](#footnote-85)78 mutual or unilateral mistake,[[85]](#footnote-86)79 abandonment,[[86]](#footnote-87)80 and breach of contract[[87]](#footnote-88)81 usually cannot be resolved without analyzing extrinsic evidence, these issues are generally considered questions of fact reviewable under the clearly erroneous test. However, if the issues can be resolved by reference to the language of the contract itself, the determination of these questions may be considered a question of law.[[88]](#footnote-89)82

1. **First Amendment Litigation**

1. **Reviewing Court Must Examine Whole Record**

Although an appellate court is free to examine the whole record in any case, the reviewing court in a First Amendment case has an absolute duty to examine the whole record.[[89]](#footnote-90)83 The purpose of this careful review of the record is to ensure that the trial court based its findings and conclusions on legal principles that are consistent with the Constitution.[[90]](#footnote-91)84 Furthermore, it is intended to safeguard against a negative bias toward unpopular but protected speech and provide a mechanism to develop constitutional definitions.

1. **Issue of “Actual Malice” Reviewed De Novo**

In *Bose Corp. v. Consumers Union,* [[91]](#footnote-92)85 the United States Supreme Court required a plenary review on the question of “actual malice” in order “to preserve the precious liberties established and ordained by the Constitution.”[[92]](#footnote-93)86 Although a finding of actual malice involves issues such as intent and knowledge, which are ordinarily questions of fact, the *Bose* Court held that the Rule’s clear error standard does not apply to the question of actual malice in a First Amendment case. The *Bose* Court explained that it was concerned that the meaning of actual malice could not “be expressed in a simple statement” and that it had consequently been unable to articulate a clear, controlling First Amendment standard. Instead, the standard would have to be developed over time through a case-by-case determination.[[93]](#footnote-94)87 By mandating de novo review of the trial court’s application of a First Amendment standard to the facts of a particular case, the Court was ensuring “that the federal courts remain zealous protectors of First Amendment rights.”[[94]](#footnote-95)88

1. **Clearly Erroneous Standard of Review for Facts Underlying Actual Malice Conclusion**

While not expressly ruling on the issue, the Supreme Court in *Bose* [[95]](#footnote-96)89 suggested that the factual determinations underlying a conclusion of actual malice are not subject to de novo review by the appellate court. The Court noted with approval that the First Circuit Court of Appeals refused to question the credibility findings of the fact finder, and the Supreme Court itself did not question them.[[96]](#footnote-97)90 Furthermore, the Court made numerous references to the fact/law distinction of Rule 52 and noted that:

At some point the reasoning by which a fact is “found” crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment.[[97]](#footnote-98)91

This statement would make little sense if conclusions regarding the subsidiary facts leading to a conclusion of actual malice were to be reviewed under the same de novo standard as the ultimate conclusion of actual malice itself. Appellate courts that have ruled on the issue have concluded that it was not the intention of the Supreme Court to mandate a de novo review of all underlying fact issues.[[98]](#footnote-99)92

1. **Conflict Among Circuits Regarding Proper Standard of Review**

When the lower court finds that “actual malice” exists in a particular case, or holds that a governmental restriction on speech is constitutional, there can be no question that the holding in *Bose Corp. v. Consumers Union,* [[99]](#footnote-100)93 requires a de novo review of the issue by the appellate court (*see* [b], *above*). However, when the district court below has found in favor of free expression of First Amendment rights, the circuits are split over the proper standard of review. The Supreme Court has been presented with opportunities to resolve this conflict but has not yet done so.[[100]](#footnote-101)94

A number of circuits that have ruled on the issue have held that *Bose* requires an independent review whenever there is a First Amendment issue in a case, even if the district court has resolved the conflict in favor of First Amendment interests.[[101]](#footnote-102)95 These courts reason that *Bose* required a plenary review in First Amendment cases and did not distinguish between cases in which judgment was in favor of the alleged infringer of First Amendment rights and those in which judgment was in favor of the party whose rights were allegedly violated. The Fifth Circuit explained that “[i]ncluding speech within the protected category requires no less careful an evaluation of constitutionally significant facts than excluding such speech.”[[102]](#footnote-103)96

Other circuits have ruled that if a district court held that the government has unconstitutionally restricted speech, the appellate court should set aside the findings of the district court only if it finds them to be clearly erroneous.[[103]](#footnote-104)97 These courts reason that the presence of a First Amendment issue in a case does not, in and of itself, trigger the rule of independent review of factual findings. They interpret *Bose* to require a plenary review only in cases in which the district court upheld restrictions on the freedom of speech. As noted by the Seventh Circuit:

Independent appellate review of such facts assures that the suppression of protected speech—particularly unpopular or controversial speech—is not insulated from close scrutiny by the straightforward application of the clearly-erroneous rule … . The doctrine of independent review has never been thought to afford special protection for the government’s claim that it has been wrongly prevented from restricting speech.[[104]](#footnote-105)98

1. **Tax Litigation**

1. **Clearly Erroneous Rule Applies to Tax Court Cases**

Rule 52(a)(6) applies equally to findings of fact in tax cases, whether findings are made by a district judge or a judge in the Tax Court.[[105]](#footnote-106)99

1. **Existence of Gift and Motivation and Knowledge of Taxpayer—Questions of Fact**

Resolution of tax cases involves numerous issues that determine whether a taxpayer has adequately complied with the tax laws. Most of these issues are treated as questions of fact subject to the clearly erroneous rule. For example, the Supreme Court has held that it is a question of fact whether a payment to a taxpayer will be considered a gift for tax purposes.[[106]](#footnote-107)100 Similarly, what a particular taxpayer knew at the time of filing a return has been characterized as a question of fact.[[107]](#footnote-108)101

Other questions are not as clear-cut. There has been some confusion among the circuits regarding whether the characterization of property as a capital asset or as property “primarily held for sale to customers in the ordinary course of trade or business” is a question of fact or one of law. This determines whether the profit made on the sale of the property will be treated as a capital gain. Because the purpose of holding property involves issues of intent and motive the issue is generally regarded as a pure question of fact.[[108]](#footnote-109)102

If an issue involves the application of law to fact, an appellate court may characterize it as a mixed question of law and fact (*see* § 52.33). For example, the Second Circuit Court of Appeals held that the question of whether a conveyance was fraudulent is a mixed question of law and fact subject to de novo review.[[109]](#footnote-110)103 The court noted that intent was normally a question of fact, but concluded that a mixed question was present because the issue involved the application of law to fact.

Moore's Federal Practice - Civil

Copyright 2024, Matthew Bender & Company, Inc., a member of the LexisNexis Group.

**End of Document**

1. \*Part C concentrates on appellate review of findings. Counsel should also examine Division VI, *Appellate Jurisdiction and Practice* (Vol. 19), and Division VII, *Federal Rules of Appellate Procedure* (Vols. 20–21), before taking steps to perfect a case for appeal to the court of appeals. If a relatively rare direct appeal to the United States Supreme Court is contemplated, or if a petition for certiorari from a decision of a court of appeals is in order, Division VIII, *Supreme Court Jurisdiction and Practice* (Vol. 22), and Division IX, *Rules of the Supreme Court of the United States* (Vol. 23), should be consulted. [↑](#footnote-ref-2)
2. 1**Negligence is question of fact.**

   1st Circuit Clement v. United States, 980 F.2d 48, 53 (1st Cir. 1992) (district court applied correct standard in determining whether defendant’s negligence was substantial factor in decedent’s suicide and trial court’s findings regarding proximate cause were reviewed for clear error).

   2d Circuit *But cf.* In re City of New York, 522 F.3d 279, 282–283 (2d Cir. 2008) (“It has long been the rule in this circuit that we review a district court’s factual findings for clear error, but we review its ultimate conclusion of negligence *de novo*. … [T]he practice in our Circuit is not so different from that of the other circuits. Because the determination of negligence is so bound up with the specific and complex facts of each individual case, we have stated on more than one occasion that the trial court’s finding should ordinarily stand unless the court manifests an incorrect conception of the applicable law. … [A]lthough appellate courts may differ in their exact formulations, most appear to take an approach that gives more deference to the trial judge when the question is predominantly factual and less deference when the question is predominantly legal.” (internal quotation marks omitted)).

   4th Circuit Vulcan Materials Co. v. Massiah, 645 F.3d 249, 256 (4th Cir. 2011) (“We treat a district court’s findings of negligence as findings of fact reviewable under Fed. R. Civ. P. 52(a) and reverse only if the court’s findings are clearly erroneous or based on a misconception of the appropriate legal standard.” (internal quotation marks and citation omitted)).

   5th Circuit SCF Waxler Marine, L.L.C. v. Aris T M/V, 24 F.4th 458, 470 (5th Cir. 2022) (in admiralty case involving maritime collision, trial court’s allocation of relative fault is treated as finding of fact and will be reviewed for clear error, except that appellate court will disregard factual findings that are based on incorrect legal principle); Ruiz v. Medina, 980 F.2d 1037, 1038 (5th Cir. 1993) (court’s finding that truck driver negligently failed to keep proper lookout and drove at excessive speed was not clear error).

   7th Circuit Glenview Park Dist. v. Melhus, 540 F.2d 1321, 1323 (7th Cir. 1976) (finding of non-negligence in admiralty governed by clear error rule).

   9th Circuit Sutton v. Earles, 26 F.3d 903, 913 (9th Cir. 1994) (trial court’s finding that government was negligent in failing to warn navigators of obstruction in water was not clearly erroneous).

   11th Circuit Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1323 (11th Cir. 1989) (negligence was finding of fact to be reviewed under clearly erroneous standard, even if negligence was “ultimate fact”). [↑](#footnote-ref-3)
3. 2**Supreme Court decision.** McAllister v. United States, 348 U.S. 19, 22–23, 75 S. Ct. 6, 99 L. Ed. 20 (1954) (Supreme Court reversed ruling below as clearly erroneous in favor of officer who alleged he contracted polio as result of government’s negligent maintenance of ship and for negligent treatment thereof). [↑](#footnote-ref-4)
4. 3**Clearly erroneous standard used.** McAllister v. United States, 348 U.S. 19, 20–21, 75 S. Ct. 6, 99 L. Ed. 20 (1954) (Supreme Court reversed ruling as clearly erroneous in favor of officer who alleged he contracted polio as result of government’s negligent maintenance of ship and for negligent treatment thereof). [↑](#footnote-ref-5)
5. 4**McAllister clearly erroneous standard cited.** Miller v. United States, 587 F.2d 991, 994 (9th Cir. 1978) (“… on the basis of *McAllister v. United States,* … the appellate review of a finding of negligence is governed by the clearly erroneous standard”). [↑](#footnote-ref-6)
6. 5**Mixed question of law and fact.** *See* In re City of New York, 522 F.3d 279, 282–283 (2d Cir. 2008) (“The ultimate determination of negligence is a question that contains both factual and legal aspects … .” (citing **Moore’s**)). [↑](#footnote-ref-7)
7. 6**Review for clear error.** Exxon Co. v. Sofec, Inc., 54 F.3d 570, 576 (9th Cir. 1995), *aff’d*, 517 U.S. 830, 116 S. Ct. 1813, 135 L. Ed. 2d 113 (1996) (“A district court’s findings of negligence, including issues of proximate cause, are reviewed under the clearly erroneous standard.”); *see* United States v. McConney, 728 F.2d 1195, 1202 (9th Cir. 1984) (“Because the legal standard for judging whether conduct is negligent requires us to determine, by reference to the data of practical human experience, whether an individual acted reasonably by community standards, the trial court’s findings of fact effectively determine our legal conclusions. Consequently, clearly erroneous review is appropriate.” (internal quotation marks and citation omitted)). [↑](#footnote-ref-8)
8. 7**Proximate cause.** Exxon Co. v. Sofec, Inc., 517 U.S. 830, 840–841, 116 S. Ct. 1813, 135 L. Ed. 2d 113 (1996) (“issues of proximate causation and superseding cause involve application of law to fact, which is left to the fact finder, subject to limited review”).

   1st Circuit Clement v. United States, 980 F.2d 48, 53 (1st Cir. 1992) (district court applied correct standard in determining whether defendant’s negligence was substantial factor in decedent’s suicide, and trial court’s findings regarding proximate cause were reviewed for clear error).

   5th Circuit Johnson v. Sawyer, 980 F.2d 1490, 1500 (5th Cir. 1992), *modified,* 4 F.3d 369 (5th Cir. 1993), *rev’d on other grounds,* 47 F.3d 716 (5th Cir. 1995) (district court’s finding that IRS’s release of information about taxpayer was proximate cause of taxpayer’s forced resignation and subsequent problems was not clearly erroneous).

   8th Circuit Budden v. United States, 15 F.3d 1444, 1448 (8th Cir. 1994) (district court’s finding that actions of deceased helicopter pilot were sole proximate cause of his death was “close call” but not clearly erroneous). [↑](#footnote-ref-9)
9. 8**Res ipsa loquitur.**

   8th Circuit Lone Star Indus., Inc. v. Mays Towing Co., 927 F.2d 1453, 1456 (8th Cir. 1991) (district court did not err in applying res ipsa loquitur to find appellant negligent for sinking of vessel).

   9th Circuit *But cf.* Ashland v. Ling-Temco-Vought, Inc., 711 F.2d 1431, 1437–1438 (9th Cir. 1983) (whether res ipsa loquitur applies to given set of facts is question of law, and whether facts are sufficient to establish elements of res ipsa loquitur is question of fact).

   11th Circuit United States v. Baycon Indus., Inc., 804 F.2d 630, 633 (11th Cir. 1986) (to apply doctrine of res ipsa loquitur to determine negligence in admiralty case was not clearly erroneous). [↑](#footnote-ref-10)
10. 9**Foreseeability.**

    10th Circuit Tinkler v. United States, 982 F.2d 1456, 1469 (10th Cir. 1992) (foreseeability is ultimate question of fact and finding on issue is protected by clearly erroneous standard).

    11th Circuit Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1323 (11th Cir. 1989) (negligence was finding of fact to be reviewed under clearly erroneous standard, even if negligence was “ultimate fact”). [↑](#footnote-ref-11)
11. 10**Allocation of fault a question of fact.**

    1st Circuit Soto v. United States, 11 F.3d 15, 17–18 (1st Cir. 1993) (trial court’s assignment of 90% of fault to plaintiff based on failure to yield right-of-way and 10% to defendant for failing to apply brakes, was not clearly erroneous).

    2d Circuit Getty ***Oil*** Co. v. S.S. Ponce de Leon, 555 F.2d 328, 333–334 (2d Cir. 1977) (allocation of fault in collision case was question of fact for court in non-jury case).

    5th Circuit Ruiz v. Medina, 980 F.2d 1037, 1038 (5th Cir. 1993) (court’s finding that truck driver was 30% responsible reviewed for clear error). [↑](#footnote-ref-12)
12. 11**Negligence reviewed de novo.** Cleary v. United States Lines Co., 411 F.2d 1009, 1010 (2d Cir. 1969) (negligence is reviewable as a matter of law); *accord* Edwards & Hanly v. Wells Fargo Sec. Clearance Corp., 602 F.2d 478, 485 (2d Cir. 1979) (district court’s finding that brokerage firm was not negligent was mixed question of law and fact, and appeals court was not necessarily bound by limitations of Rule 52(a)). [↑](#footnote-ref-13)
13. 12***Mamiye Bros.*** **case.** Mamiye Bros. v. Barber S.S. Lines Inc., 360 F.2d 774 (2d Cir. 1966) (action for negligence against carriers for damages to cargo caused by hurricane flooding). [↑](#footnote-ref-14)
14. 13**Rationale for rule.** Mamiye Bros. v. Barber S.S. Lines Inc., 360 F.2d 774, 776 (2d Cir. 1966) (action for negligence against carriers for damages to cargo caused by hurricane flooding). [↑](#footnote-ref-15)
15. 14**Need for uniformity.** Mamiye Bros. v. Barber S.S. Lines Inc., 360 F.2d 774, 777 (2d Cir. 1966) (action for negligence against carriers for damages to cargo caused by hurricane flooding). [↑](#footnote-ref-16)
16. 15***McAllister*** **case.** McAllister v. United States, 348 U.S. 19, 20–21, 75 S. Ct. 6, 99 L. Ed. 20 (1954) (Supreme Court reversed ruling below as clearly erroneous in favor of officer who alleged he contracted polio as result of government’s negligent maintenance of ship and for negligent treatment thereof). [↑](#footnote-ref-17)
17. 16**McAllister argument considered.** Mamiye Bros. v. Barber S.S. Lines Inc., 360 F.2d 774, 777 (2d Cir. 1966) (action for negligence against carriers for damages to cargo caused by hurricane flooding). [↑](#footnote-ref-18)
18. 17**McAllister distinguished.** Mamiye Bros. v. Barber S.S. Lines Inc., 360 F.2d 774, 777 (2d Cir. 1966) (action for negligence against carriers for damages to cargo caused by hurricane flooding) (action for negligence against carriers for damages to cargo caused by hurricane flooding). [↑](#footnote-ref-19)
19. 17.1**Reluctance to overturn trial courts’ determinations of negligence.** *See* In re City of New York, 522 F.3d 279, 282–283 (2d Cir. 2008) (“It has long been the rule in this circuit that we review a district court’s factual findings for clear error, but we review its ultimate conclusion of negligence *de novo*. … [T]he practice in our Circuit is not so different from that of the other circuits. Because the determination of negligence is so bound up with the specific and complex facts of each individual case, we have stated on more than one occasion that the trial court’s finding should ordinarily stand unless the court manifests an incorrect conception of the applicable law. … [A]lthough appellate courts may differ in their exact formulations, most appear to take an approach that gives more deference to the trial judge when the question is predominantly factual and less deference when the question is predominantly legal.” (internal quotation marks omitted)). [↑](#footnote-ref-20)
20. 18**No broad review of facts.** Dinnerstein v. United States, 486 F.2d 34, 38 (2d Cir. 1973) (negligence reviewable as a matter of law, but reviewing court will not conduct a broad inquiry into facts of the case). [↑](#footnote-ref-21)
21. 19**Great weight.** In re Seaboard Shipping Corp., 449 F.2d 132, 136 (2d Cir. 1971) (clearly erroneous test not applicable to findings of negligence, but district judges conclusion entitled to great weight). [↑](#footnote-ref-22)
22. 20**Allocation a question of fact.** Getty ***Oil*** Co. v. S.S. Ponce de Leon, 555 F.2d 328, 333–334 (2d Cir. 1977) (allocation of fault in collision case was question of fact for court in non-jury case). [↑](#footnote-ref-23)
23. 21**De novo review.**

    1st Circuit Soto v. United States, 11 F.3d 15, 17 (1st Cir. 1993) (district court’s apportionment of liability reviewed for clear error, but if district court applied an erroneous legal standard, review would be de novo).

    9th Circuit USAir, Inc. v. United States Dep’t of Navy, 14 F.3d 1410, 1412 (9th Cir. 1994) (“the existence and extent of the standard of conduct are questions of law, reviewable de novo”).

    11th Circuit Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1322 (11th Cir. 1989) (appropriate standard of care for shipowner to passenger was ordinary reasonable care under the circumstances, which required that owner had actual or constructive notice of risk-creating condition; however, proper review was impossible since trial court failed to make finding as to how long unsafe condition had existed). [↑](#footnote-ref-24)
24. 22**McAllister did not affect review of standard of care.** Miller v. United States, 587 F.2d 991, 994 (9th Cir. 1978) (“… on the basis of *McAllister v. United States,* … the appellate review of a finding of negligence is governed by the clearly erroneous standard”). [↑](#footnote-ref-25)
25. 23**Deference to factual findings on damages.**

    2d Circuit Gonzalez v. United States, 80 F.4th 183, 196 (2d Cir. 2023) (“In assessing the adequacy of the district court’s explanation under Rule 52 for its damages award, we have recognized that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification.” (internal quotation marks omitted)); Vermont Microsystems, Inc. v. Autodesk, Inc., 88 F.3d 142, 151 (2d Cir. 1996) (“The determination of a damage award is not an exact science, and the amount need not be proven with unerring precision.”) (quoting *Del Mar Avionics, Inc. v. Quinton Instrument Co.,* 836 F.2d 1320, 1327 (Fed. Cir. 1987)).

    8th Circuit Gonzalez v. United States, 681 F.3d 949, 952 (8th Cir. 2012) (excessiveness of damages award is matter for trial court, which had benefit of hearing testimony and observing witness demeanor (citing *Solomon Dehydrating Co. v. Guyton*, 294 F.2d 439, 447–448 (8th Cir. 1961))). [↑](#footnote-ref-26)
26. 24**Damages a question of fact.**

    2d Circuit Ingersoll Milling Mach. Co. v. M/V Bodena, 829 F.2d 293, 310 (2d Cir. 1987) (ordinarily, district court’s computation of damages in cargo case is factual determination that will not be disturbed unless it is clearly erroneous).

    5th Circuit Hayes v. United States, 899 F.2d 438, 450 (5th Cir. 1990) (award of damages was factual finding).

    7th Circuit R.E. Davis Chem. Corp. v. Diasonics, Inc., 924 F.2d 709, 712 (7th Cir. 1991) (district court’s conclusions regarding seller’s damages for lost profits would not be overturned unless clearly erroneous, even if appellate court would have used different accounting method to calculate damages); Hagge v. Bauer, 827 F.2d 101, 109 (7th Cir. 1987) (although trial court adopted findings of prevailing party, appellate court recognized that trial court had great discretion in calculating damages, which would not be set aside unless clearly erroneous).

    8th Circuit Arkansas Rice Growers Coop. Ass’n v. Alchemy Inds., Inc., 797 F.2d 565, 570–571 (8th Cir. 1986) (in contract case to recover construction costs from parties who had warranted that plant construction was capable of achieving performance criteria, award of damages was not clearly erroneous).

    9th Circuit Trevino v. United States, 804 F.2d 1512, 1515 (9th Cir. 1986) (award of damages in Federal Tort Claim case would not be set aside unless clearly erroneous).

    11th Circuit Meader Long v. United States, 881 F.2d 1056, 1060–1061 (11th Cir. 1989) (district court’s award of damages for future medical expenses was not clearly erroneous where record contained no evidence that the amount was improper and district court could not be faulted for refusing to speculate). [↑](#footnote-ref-27)
27. 25**Amount reviewed for clear error.**

    2d Circuit Cowan v. Prudential Ins. Co., 852 F.2d 688, 689–690 (2d Cir. 1988) (amount of compensatory damages awarded to black sales agent for discrimination was based not only on determinations of fact, but also on subjective and intangible factors, a more deferential review than clearly erroneous standard would be applied. clear error standard used to review award for back pay).

    5th Circuit Douglass v. Delta Air Lines, Inc., 897 F.2d 1336, 1339 (5th Cir. 1990) (to determine whether trial court’s assessment of damages was clearly erroneous, appellate court compares damages awarded in factually similar cases arising in the same jurisdiction, in order to construct objective framework for comparison).

    7th Circuit Hagge v. Bauer, 827 F.2d 101, 109 (7th Cir. 1987) (although trial court adopted findings of prevailing party, appellate court recognized that trial court had great discretion in calculating damages, and they would not be set aside unless clearly erroneous); Busche v. Burkee, 649 F.2d 509, 518 (7th Cir. 1981) (amount necessary to compensate individual for deprivation of constitutional rights is question of fact that must be reviewed for clear error).

    8th Circuit Gonzalez v. United States, 681 F.3d 949, 952 (8th Cir. 2012) (“The amount of damages entered in a nonjury case is a finding of fact and therefore subject to the ‘clearly erroneous’ standard of review set forth in Fed. R. Civ. P. 52(a); any application of that general standard must take account of the special circumstances in which that kind of factual finding is rendered.” (quoting *Overton v. United States*, 619 F.2d 1299, 1304 (8th Cir. 1980))).

    9th Circuit *Cf.* Laborers Clean-Up Contract Admin. Trust Fund v. Uriarte Clean-Up Serv., Inc., 736 F.2d 516, 520 n.2 (9th Cir. 1984) (in action to recover wages and fringe benefit contributions under collective bargaining agreement, district court’s computation constituted fact finding and was reviewed under clear error standard, but findings would be scrutinized more carefully because the court adopted findings of prevailing party).

    11th Circuit Cole v. United States, 861 F.2d 1261, 1263 (11th Cir. 1988) (determination of damages is factual determination governed by clearly erroneous standard). [↑](#footnote-ref-28)
28. 26**Apportionment reviewed for clear error.**

    1st Circuit Soto v. United States, 11 F.3d 15 (1st Cir. 1993) (district court’s apportionment of liability reviewed for clear error, but if district court applied an erroneous legal standard, review would be de novo).

    2d Circuit Getty ***Oil*** Co. v. S.S. Ponce de Leon, 555 F.2d 328, 333–334 (2d Cir. 1977) (in maritime damages action, location of comparative negligence is a question of fact and on appeal that determination is tested by clear error rule).

    5th Circuit Knotts v. United States, 893 F.2d 758, 762–763 (5th Cir. 1990) (apportionment of fault between parties in tort case could not be altered unless it was clearly erroneous; apportionment of 90% of fault to injured party in FTCA case was not clearly erroneous). [↑](#footnote-ref-29)
29. 27**Applies to compensatory and punitive damages.** Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1198 (6th Cir. 1988) (findings concerning causation, negligence, nuisance, trespass, actual damages and punitive damages are all factual determinations). [↑](#footnote-ref-30)
30. 28**Mitigating factors.** Sellers v. Delgado College, 902 F.2d 1189, 1194 (5th Cir. 1990) (magistrate’s finding that former employee of college failed to exercise reasonable diligence in obtaining substantially equivalent employment was not clearly erroneous). [↑](#footnote-ref-31)
31. 29**Abuse-of-discretion standard applied to review of decisions about methodology.** Home Sav. of Am., FSB v. United States, 399 F.3d 1341, 1346–1347 (Fed. Cir. 2005) (certain subsidiary decisions underlying damage theory are discretionary with trial court, and they are reviewed for abuse of discretion). [↑](#footnote-ref-32)
32. 30**Breakdown of elements.**

    2d Circuit Gibbs v. United States, 599 F.2d 36, 39 (2d Cir. 1979) (district court should specify basis for damages in detail in findings of fact to avoid confusion as well as unnecessary litigation on appeal).

    7th Circuit Jutzi-Johnson v. United States, 263 F.3d 753, 758 (7th Cir. 2001) (pursuant to Fed R. Civ. P. 52(a), when factual issue to be determined is amount of damages,” trial judge must indicate reasoning process connecting evidence to conclusion”).

    8th Circuit Anthan v. Professional Air Traffic Controllers Org., 672 F.2d 706, 711–712 (8th Cir. 1982) (amounts allowed for each item of damages should be stated briefly and clearly so that appellate court can properly appraise elements that entered into award).

    11th Circuit Cole v. United States, 861 F.2d 1261, 1264 (11th Cir. 1988) (district court should itemize damages and take into account required discount rate and tax deductions). [↑](#footnote-ref-33)
33. 31**Findings required for default judgment.** Adriana Int’l Corp. v. Thoeren, 913 F.2d 1406, 1414 (9th Cir. 1990) (since default judgment precludes trial of facts except as to damages, failure to make findings on other issues is not error). *See also* Fed. R. Civ. P. 55 and Ch. 55, *Default.* [↑](#footnote-ref-34)
34. 32**Reduction to present value unclear.**

    2d Circuit O’Connor v. United States, 251 F.2d 939, 943 (2d Cir. 1958) (findings on damages should have explained reason for award and stated the rate of discount).

    6th Circuit Pierce v. New York Cent. R.R. Co., 409 F.2d 1392, 1399 (6th Cir. 1969) (damages should have been broken down into past and future increments so reviewing court could determine whether future damages had been reduced to present value).

    10th Circuit Hull v. United States, 971 F.2d 1499, 1511 (10th Cir. 1992) (trial court should have prepared findings to explain method of discounting of future damages to present value).

    11th Circuit Cole v. United States, 861 F.2d 1261, 1264 (11th Cir. 1988) (district court should itemize damages and take into account required discount rate and tax deductions). [↑](#footnote-ref-35)
35. 33**Factors in mitigation unclear.** Raspisardi v. United Fruit Co., 441 F.2d 1308, 1313 (2d Cir. 1971) (findings did not indicate adequately likelihood of future employment for marine carpenter who lost eye in accident). [↑](#footnote-ref-36)
36. 34**Apparent overlap.**

    5th Circuit Neill v. Diamond M. Drilling Co., 426 F.2d 487, 491–492 (5th Cir. 1970) (remand was necessary in case for injuries to seaman because it appeared that award for loss of physical capacity overlapped with damages for lost wages and further physical pain and mental anguish).

    10th Circuit United States v. Horsfall, 270 F.2d 107, 109–110 (10th Cir. 1959) (apparent duplication in awards for loss of time and permanent disability). [↑](#footnote-ref-37)
37. 35**Award appears excessive or inadequate.** *See* BMW of North America, Inc. v. Gore, 517 U.S. 559, 562–586, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996) in which the Court held that punitive damages awards by state court juries are subject to Fourteenth Amendment due process limitations. While the case does not apply to federal jury awards or to findings and conclusions under Fed. R. Civ. P. 52, it would appear that the Court would apply the same reasoning under the Fifth Amendment, which applies to the federal courts.

    6th Circuit Adkins v. GAF Corp., 923 F.2d 1225, 1232 (6th Cir. 1991) (in product liability case, trial court based damages award on advisory jury’s verdict but failed to make findings on pertinent considerations entering into the award); Traylor v. United States, 396 F.2d 837, 839 (6th Cir. 1968) (award appeared to be inadequate and reviewing court could not tell if trial court included all the elements properly recoverable).

    8th Circuit Hysell v. Iowa Pub. Serv. Co., 534 F.2d 775, 787 (8th Cir. 1976) (award appeared overly generous and remand for itemization was appropriate, since only alternative, order of remittitur, would require conclusory determination in absence of more specific findings of fact). [↑](#footnote-ref-38)
38. 36**Propriety of award in doubt.**

    5th Circuit Adkins v. GAF Corp., 923 F.2d 1225, 1232 (6th Cir. 1991) (since award was made pursuant to advisory jury verdict, appeals court could not indulge in presumption that evidence that was improper had been disregarded).

    8th Circuit *See also* Anthan v. Professional Air Traffic Controllers Org., 672 F.2d 706, 712 (8th Cir. 1982) (insufficient findings to determine if assessment of punitive damages bore any relationship to plaintiff’s injury).

    D.C. Circuit Safer v. Perper, 569 F.2d 87, 100 (D.C. Cir. 1977) (in contracts case in which there was great controversy as to measure and computation of damages, findings did not reveal measure of damages used or way they were calculated). [↑](#footnote-ref-39)
39. 37**Case reviewed on whole record.**

    2d Circuit Gonzalez v. United States, 80 F.4th 183, 196 (2d Cir. 2023) (“In assessing the adequacy of the district court’s explanation under Rule 52 for its damages award, we have recognized that personal injury awards, especially those for pain and suffering, are subjective opinions which are formulated without the availability, or guidance, of precise mathematical quantification. However, even in making those subjective assessments, the district court’s analysis must be sufficiently comprehensive and pertinent to the issues to facilitate appellate review. That is, the district court’s opinion must adequately inform the appellate court of the basis of the decision and permit intelligent appellate review.” (internal quotation marks, citations, and ellipsis omitted)); Gibbs v. United States, 599 F.2d 36, 39 (2d Cir. 1979) (basis of award for hospital and medical expenses and pain and suffering clear from record; appellate review was possible despite trial court’s cursory findings regarding specifics).

    7th Circuit George v. United States, 295 F.2d 310, 311 (7th Cir. 1961) (remand would not be necessary because it was not burdensome to consult record for evidence in support of award of damages). [↑](#footnote-ref-40)
40. 38**Total award seems proper.** Sines v. United States, 430 F.2d 644, 645 (9th Cir. 1970) (findings on damages were somewhat vague, but remand was not necessary because there was no doubt as to propriety of total amount awarded). [↑](#footnote-ref-41)
41. 39**Findings required.**

    9th Circuit Hycon Mfg. Co. v. H. Koch & Sons, 219 F.2d 353, 356 (9th Cir. 1955) (court required to find facts that support novelty, utility and invention, mere conclusions holding patent valid were not enough).

    Fed. Circuit Atlantic Thermoplastics Co. v. Faytex Corp., 5 F.3d 1477, 1479 (Fed Cir. 1993) (court of appeals reversed because district court failed to make adequate findings under former Rule 52(a) (now see Rule 52(a)(1))); *but cf.* Glaverbel Societe Anonyme v. Northlake Mktg., 45 F.3d 1550, 1555–1556 (Fed. Cir. 1995) (assertion that findings were incomplete must include reasonable basis for arguing, in this case, that district court may have had clearly erroneous view of level of ordinary skill, or of prior art or testimony at trial). [↑](#footnote-ref-42)
42. 40**Clearly erroneous rule applies.** Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855–858, 102 S. Ct. 2182, 72 L. Ed. 2d 606 (1982) (in trademark infringement action, Supreme Court reversed decision by Court of Appeals as clearly erroneous because it substituted its interpretation of evidence for that of trial court); Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 274, 69 S. Ct. 535, 93 L. Ed. 672 (1949) (stating rule). For additional cases citing this rule, *see*:

    2d Circuit Digitronics Corp. v. New York Racing Ass’n, 553 F.2d 740, 744 (2d Cir. 1977) (findings regarding issue of obviousness of patent are subject to clearly erroneous rule).

    7th Circuit Wahl v. Carrier Mfg. Co., 358 F.2d 1, 3 (7th Cir. 1966), *modified,* 511 F.2d 209 (7th Cir. 1975) (the technical character of the area does not prevent the application of former Rule 52(a) (now see Rule 52(a)(1), (6))).

    Fed. Circuit Glaverbel Societe Anonyme v. Northlake Mktg., 45 F.3d 1550, 1555 (Fed. Cir. 1995) (factual findings on obviousness issue reviewable under clear error standard); Miles Labs. v. Shandon, Inc., 997 F.2d 870, 877 (Fed. Cir. 1993) (factual underpinnings for legal conclusion of obviousness reviewed under clearly erroneous standard); *see* Hoover Group v. Custom Metalcraft, 66 F.3d 299, 302 (Fed. Cir. 1995) (“Anticipation is a question of fact, and the district court’s finding thereon is reviewed for clear error.”). [↑](#footnote-ref-43)
43. 41**Law/fact distinction difficult.** *See* Armour & Co v. Wilson & Co., 274 F.2d 143, 155 (7th Cir. 1960) (noting that confusion surrounding appropriate standard of review resulted from problems created by semantics). [↑](#footnote-ref-44)
44. 42**Validity—question of law.** Sakraida v. Ag. Pro., Inc., 425 U.S. 273, 280, 96 S. Ct. 1532, 47 L. Ed. 2d 784, *reh’g denied,* 426 U.S. 955 (1976) (ultimate test of patent validity is one of law); *accord* Graham v. John Deere Co., 383 U.S. 1, 17, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966) (although patent validity is ultimately a question of law, the condition of nonobviousness “lends itself to several basic factual inquiries”); Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 153–154, 71 S. Ct. 127, 95 L. Ed. 162 (1950) (combination patent was invalid as uniting elements old in mechanics, performing no additional or different function based on their combination).

    2d Circuit Lemelson v. Topper Corp., 450 F.2d 845, 848 (2d Cir. 1971) (stating rule).

    4th Circuit Blohm & Voss AG v. Prudential-Grace Lines, Inc., 489 F.2d 231, 245 (4th Cir. 1973) (question of validity, is, in final analysis, question of law).

    5th Circuit Up-Right, Inc. v. Safway Prods., Inc., 315 F.2d 23, 27 (5th Cir. 1963) (issue of infringement of patent relating to portable, collapsible scaffolding units may be determined as a question of law).

    6th Circuit Schnadig Corp. v. Gaines Mfg. Co., 494 F.2d 383, 387–388 (6th Cir. 1974) (ultimate question of patent validity is one of law, but findings bearing on novelty and nonobviousness, insofar as they bear upon factual issues, are subject to Rule 52).

    7th Circuit Armour & Co. v. Wilson & Co., 274 F.2d 143, 157 (7th Cir. 1960) (en banc) (“We look at the findings of fact as to invention in the way that such factual determinations are generally reviewed. We examine the standard of invention applied to these facts as a question of law, as we have done in other areas.”). [↑](#footnote-ref-45)
45. 4335 U.S.C. §§ 101–103. [↑](#footnote-ref-46)
46. 44**Less exacting standard.** Great Atlantic & Pacific Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 153–154, 71 S. Ct. 127, 95 L. Ed. 162 (1950) (judgment reversed in patent case where court found that a standard of invention was used in a combination patent, uniting elements old in mechanics and performing no additional or different function, which was less exacting than that required where a combination is made up entirely of old components). [↑](#footnote-ref-47)
47. 45**Construction of patent claim is generally for court to determine.** Markman v. Westview Instruments, Inc., 517 U.S. 370, 372, 390, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996) (construction of patent, including terms of art within its claim, is exclusively within province of court). [↑](#footnote-ref-48)
48. 45.1**Underlying factual findings reviewed for clear error.** Teva Pharm. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 135 S. Ct. 831, 190 L. Ed. 2d 719, 728 (2015) (Fed. R. Civ. P. 52(a)(6) and standard it sets forth must apply when court of appeals reviews district court’s resolution of subsidiary factual matters made in course of its construction of patent claim). [↑](#footnote-ref-49)
49. 45.2**De novo review if claim construction is based only on intrinsic evidence.** Teva Pharm. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 135 S. Ct. 831, 190 L. Ed. 2d 719, 732–733 (2015) (district court’s construction of patent claim, like its interpretation of written instrument, often requires judge only to examine and to construe document’s words without requiring judge to resolve any underlying factual disputes). [↑](#footnote-ref-50)
50. 45.3**Clear-error review of findings based on extrinsic evidence.** Teva Pharm. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 135 S. Ct. 831, 190 L. Ed. 2d 719, 733 (2015) (district court might, e.g., resolve dispute between experts and make factual finding about meaning of particular term of art to person of ordinary skill in that art at time of patented invention). [↑](#footnote-ref-51)
51. 45.4**Ultimate construction of claim is reviewed de novo, but underlying factual findings are reviewed for clear error.** Teva Pharm. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 135 S. Ct. 831, 190 L. Ed. 2d 719, 733–734 (2015) (even if factual finding is close to being dispositive of ultimate legal question of proper meaning of term in context of particular patent, ultimate question of construction remains legal question). [↑](#footnote-ref-52)
52. 4635 U.S.C. §§ 101–103. [↑](#footnote-ref-53)
53. 47**Proper standards question of law.**

    2d Circuit U. S. Philips Corp. v. National Micronetics, Inc., 550 F.2d 716, 719 (2d Cir. 1977) (patent directed to a process for manufacturing bonded magnetic recording head was not invalid for obviousness).

    7th Circuit Panther Pumps & Equip. Co. v. Hydrocraft, Inc., 468 F.2d 225, 227 (7th Cir. 1972) (obviousness is a question of law).

    9th Circuit Sarkisian v. Winn-Proof Corp., 688 F.2d 647, 650 (9th Cir. 1982) (in jury case, court must determine obviousness as matter of law which is subject to independent review, free of the restraining influence of the clearly erroneous rule). [↑](#footnote-ref-54)
54. 48**Underlying factual findings.** Graham v. John Deere Co., 383 U.S. 1, 17, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966) (condition of nonobviousness “lends itself to several basic factual inquiries”).

    2d Circuit Maclaren v. B-I-W Group, Inc., 535 F.2d 1367, 1371 (2d Cir. 1976) (ultimate question of patent validity is one of law, but findings leading to ultimate conclusion will not be disturbed unless clearly erroneous).

    6th Circuit Schnadig Corp v. Gaines Mfg. Co., 494 F.2d 383, 388 (6th Cir. 1974) (findings bearing on novelty and nonobviousness, insofar as they bear upon factual issues, are subject to Rule 52).

    7th Circuit Armour & Co v. Wilson & Co., 274 F.2d 143, 157 (7th Cir. 1960) (“We look at the findings of fact as to invention in the way that such factual determinations are generally reviewed. We examine the standard of invention applied to these facts as questions of law, as we have done in other areas”).

    9th Circuit Carpet Seaming Tape Licensing Corp. v. Best Seam, Inc., 694 F.2d 570, 575 (9th Cir. 1982) (although obviousness is ultimately a question of law and subject to independent review, factual findings made by trial court must be upheld by appellate court unless they are clearly erroneous). [↑](#footnote-ref-55)
55. 49**Factual inquiries reviewed for clear error.** Graham v. John Deere Co., 383 U.S. 1, 17, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966) (condition of nonobviousness “lends itself to several basic factual inquiries”).

    5th Circuit John Zink Co. v. National Airoil Burner Co., 613 F.2d 547, 550 (5th Cir. 1980) (“obviousness is a question of law; its resolution, however, rests on factual inquiries” that are reviewed under clear error standard).

    7th Circuit Continental Can Co. v. Anchor Hocking Glass Corp., 362 F.2d 123, 124 (7th Cir. 1966) (Rule 52 applies to findings of trial court upon which it predicates conclusion of validity in resolving issue of obviousness).

    9th Circuit Omark Industries, Inc. v. Textron, Inc., 688 F.2d 1242, 1248 (9th Cir. 1982) (“The factual findings underlying the obviousness determination are reviewed under Rule 52(a)’s clearly erroneous standard.”).

    Fed. Circuit Miles Labs. v. Shandon Inc., 997 F.2d 870, 877 (Fed. Cir. 1993) (“This court reviews these factual underpinnings for the legal conclusion of obviousness under the ‘clearly erroneous’ standard”); Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1565–1566 (Fed. Cir. 1987) (clearly erroneous standard applicable to all findings of fact related to obviousness); Kimberly-Clark Corp. v. Johnson & Johnson, 745 F.2d 1437, 1444, 1446 (Fed. Cir. 1984) (on question of obviousness, finding of fact that only difference between two sanitary napkin pads was that one pad had two lines of adhesive strip while other had only one line was clearly erroneous). [↑](#footnote-ref-56)
56. 50**Factual inquires for obviousness.** Graham v. John Deere Co., 383 U.S. 1, 17, 86 S. Ct. 684, 15 L. Ed. 2d 545 (1966) (although patent validity is ultimately a question of law, the condition of nonobviousness “lends itself to several basic factual inquiries”).

    1st Circuit Shanklin Corp. v. Springfield Photo Mount Co., 521 F.2d 609, 616 (1st Cir. 1975) (resolution of issue of obviousness “requires factual inquiry into the scope and content of prior art, the differences between the prior art and the claims in issue, and the level of ordinary skill in the particular art—as well as possible consideration of such secondary factors as commercial success, long felt but unsolved needs, and failure of others”).

    7th Circuit Airlite Plastics Co. v. Plastilite Corp., 526 F.2d 1078, 1080 (8th Cir. 1975) (patent infringement action arising out of manufacture and sale of fishing bobbers closely resembling those of plaintiff).

    9th Circuit Sarkisian v. Winn-Proof Corp., 688 F.2d 647, 650 (9th Cir. 1982) (citing standards set forth in *Graham*).

    Fed. Circuit Glaverbel Societe Anonyme v. Northlake Mktg., 45 F.3d 1550, 1555 (Fed. Cir. 1995) (factual findings on obviousness issue reviewable under clear error standard); Panduit Corp. v. Dennison Mfg. Co., 810 F.2d 1561, 1565–1566 (Fed. Cir. 1987) (clearly erroneous standard applicable to all findings of fact related to obviousness). [↑](#footnote-ref-57)
57. 51**Claim interpretation a matter of law.** Markman v. Westview Instruments, Inc., 517 U.S. 370, 372, 116 S. Ct. 1384, 134 L. Ed. 2d 577 (1996) (interpretation of word “inventory” was issue for judge not jury).

    2d Circuit American Technical Mach. Corp. v. Caparotta, 339 F.2d 557, 560 (2d Cir. 1964) (“while we must accept findings of fact which are not clearly erroneous, we are not so limited as to erroneous views of the proper tests of infringement … . Here the findings of non-injury was based on an unduly narrow definition of the patent’s protection”).

    5th Circuit Ziegler v. Phillips Petroleum Co., 483 F.2d 858, 867 (5th Cir. 1973) (when question of infringement requires district court to construe patent, construction is matter of law and court is not bound by strictures of Rule 52).

    Fed. Circuit Miles Labs. v. Shandon Inc., 997 F.2d 870, 876 (Fed. Cir. 1993) (in resolving issue of infringement, “claim interpretation proceeds as a question of law”). [↑](#footnote-ref-58)
58. 52**Equivalence/infringement a question of fact.** Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 339 U.S. 605, 609–610, 70 S. Ct. 854, 94 L. Ed. 1097, *reh’g denied*, 340 U.S. 845 (1950) (on rehearing of 336 U.S. 271, 69 S. Ct. 535, 93 L. Ed. 672 to determine if patents had been infringed).

    3d Circuit Interdynamics, Inc. v. Wolf, 698 F.2d 157, 176 (3d Cir. 1982) (in reviewing finding of equivalence or infringement determinations of district court must be accepted unless clearly erroneous).

    5th Circuit Ziegler v. Phillips Petroleum Co., 483 F.2d 858, 867 (5th Cir. 1973) (“the question of infringement of a patent is a question of fact”).

    7th Circuit Hickory Springs Mfg. Co. v. Fredman Bros. Furniture Co., 509 F.2d 55, 58 (7th Cir. 1975) (“determination of infringement is normally considered a question of fact”).

    Fed. Circuit Miles Labs. v. Shandon, Inc., 997 F.2d 870, 876 (Fed. Cir. 1993) (underlying factual disputes reviewed for clear error); Lam, Inc. v. Johns-Manville Corp., 718 F.2d 1056, 1065–1066 (Fed Cir. 1983) (trial court’s finding regarding lost profits of patent owner in two-supplier market was not clearly erroneous). [↑](#footnote-ref-59)
59. 53**Findings regarding conflicting testimony.** Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 274–275, 69 S. Ct. 535, 93 L. Ed. 672 (1949), *aff’d*, 339 U.S. 605 (1950) (complex patent case where evidence was largely testimony of experts and trial judge visited laboratories with counsel and experts to observe actual demonstrations of welding as taught by patent and of welding accused of infringement).

    5th Circuit Phillips Petroleum Co. v. Sid Richardson Carbon & Gasoline Co., 416 F.2d 10, 12 (5th Cir. 1969) (case in which much conflicting expert testimony existed was clearly case for application of former Rule 52(a) (now see Rule 52(a)(6))).

    7th Circuit Reese v. Elkhart Welding & Boiler Works, Inc., 447 F.2d 517, 520 (7th Cir. 1971) (in case where findings reviewed under clear error rule there were numerous exhibits and substantial testimony by witnesses). [↑](#footnote-ref-60)
60. 54Fed. R. Civ. P. 52(a)(6). [↑](#footnote-ref-61)
61. 55**Supreme Court view.** Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 274–275, 69 S. Ct. 535, 93 L. Ed. 672 (1949) *aff’d*, 339 U.S. 605 (1950) (complex patent case where large part of evidence was testimony of experts). [↑](#footnote-ref-62)
62. 56**Clearly erroneous evaluation of expert testimony.** Bayer Pharma AG v. Watson Labs., Inc., 874 F.3d 1316, 1324 (Fed. Cir. 2017) (“It is well within the district court’s discretion to credit one expert’s competing testimony over another. We must give due regard to the trial court’s opportunity to judge the witnesses’ credibility. But a district court cannot, through a credibility determination, ignore the wealth of evidence, especially as in this case where the expert did not even address it. The district court’s finding that ODTs were not considered applicable to ED drugs is clearly erroneous in light of Watson’s evidence.” (internal quotation marks and citations omitted)). [↑](#footnote-ref-63)
63. 57**Intent is question of fact.** Pullman-Standard v. Swint, 456 U.S. 273, 287–288, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982) (issue of intent to discriminate in seniority system is a question of fact subject to clearly erroneous rule, not a mixed question of law and fact). [↑](#footnote-ref-64)
64. 58**Holding confirmed.** Anderson v. City of Bessemer City, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (“Because a finding of intentional discrimination is a finding of fact, the standard governing appellate review of a district court’s finding of discrimination is that set forth in Federal Rule of Civil Procedure 52(a)”). [↑](#footnote-ref-65)
65. 59**Findings plausible.** Anderson v. City of Bessemer City, 470 U.S. 564, 576–577, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (Supreme Court reversed Court of Appeals judgment in Title VII sex discrimination action, holding that appellate court had applied ‘clear error’ rule improperly by weighing evidence in record de novo where District Court’s finding was based on essentially undisputed evidence).

    2d Circuit Cornwell v. Robinson, 23 F.3d 694, 706 (2d Cir. 1994) (whether given employment policy evinces intent to discriminate and whether reasons advanced by employer are pretextual are pure questions of fact).

    5th Circuit Anderson v. Douglas & Lomason Co., Inc., 26 F.3d 1277, 1285 (5th Cir. 1994) (due regard must be given to trial court to judge credibility of witnesses).

    7th Circuit Andre v. Bendix Corp., 774 F.2d 786, 801 (7th Cir. 1985) (court of appeals may set aside district court’s factual findings concerning discriminatory intent only if findings are clearly erroneous).

    9th Circuit Odima v. Westin Tucson Hotel, 53 F.3d 1484, 1491 (9th Cir. 1995) (rule applied in disparate treatment case).

    11th Circuit Green v. Sch. Bd. of Hillsborough Cty., 25 F.3d 974, 977 (11th Cir. 1994) (finding on intentional discrimination may be reversed only if clearly erroneous and same standard is applicable when plaintiff’s case was involuntarily dismissed under Rule 41(b)). [↑](#footnote-ref-66)
66. 60**Analysis of statistical evidence.**

    5th Circuit Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1285 (5th Cir. 1994) (due regard must be given to trial court to judge the credibility of witnesses).

    6th Circuit Johnson v. United States Dep’t of Health & Human Servs., 30 F.3d 45, 48 (6th Cir. 1994) (district court’s determination that statistical evidence was insufficient to prove disparate impact was subject to clearly erroneous review).

    7th Circuit EEOC v. Sears, Roebuck & Co., 839 F.2d 302, 310 (7th Cir. 1988) (case contained “a Babel of competing experts, contradictory competing statistical demonstrations and dramatically opposed accounts of crucial events.” This made it necessary for appellate court to defer to district court’s assessment of credibility of lay and expert witnesses). [↑](#footnote-ref-67)
67. 61**Pretext a question of fact.** St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 502, 524, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). [↑](#footnote-ref-68)
68. 62**Clearly erroneous standard applies.**

    2d Circuit Cornwell v. Robinson, 23 F.3d 694, 706 (2d Cir. 1994) (whether employment policy evinces intent to discriminate and whether reasons advanced by employer are pretextual are pure questions of fact subject to clearly erroneous standard upon review).

    3d Circuit Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 525 (3d Cir. 1992) (district court’s resolution of issue of denying woman lawyer’s partnership promotion was pretext, and thus finding of fact subject to clearly erroneous standard).

    5th Circuit Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1285 (5th Cir. 1994) (due regard must be given to trial court to judge the credibility of witnesses).

    7th Circuit Tyson v. Jones & Laughlin Steel Corp., 958 F.2d 756, 759 (7th Cir. 1992) (court of appeals could not redetermine credibility of employer’s witnesses and employee’s testimony to determine discriminatory motive).

    9th Circuit Edwards v. Occidental Chem. Corp., 892 F.2d 1442, 1448 (9th Cir. 1990) (determination that employer’s explanation for promotion decision was pretextual involves factual inquiry and is reviewable under clearly erroneous standard). [↑](#footnote-ref-69)
69. 63**Contradictory objective evidence.** Johnson v. Arkansas State Police, 10 F.3d 547, 552–553 (8th Cir. 1993) (in action brought by African-American state trooper, finding that employer’s actions were not racially motivated, based on state police’s testimony, was clearly erroneous because testimony was contradicted by documentary and objective evidence that provided significant indicia of racial discrimination). [↑](#footnote-ref-70)
70. 64**Detailed findings required.**

    4th Circuit Warren v. Halstead Indus. Inc., 802 F.2d 746, 761–762 (4th Cir. 1986), *reh’g granted,* 814 F.2d 962 (4th Cir. 1987) (district court’s findings failed to indicate on what basis it credited defendant’s testimony over plaintiff’s account and where remanded for clarification).

    5th Circuit Chandler v. City of Dallas, 958 F.2d 85, 89–90 (5th Cir. 1992) (although trial court did not completely fail to make findings, appellate court detected insufficiency in detail and exactness); Ratliff v. Governor’s Highway Safety Program, 791 F.2d 394, 400 (5th Cir. 1986) (trial court could not merely state that plaintiff failed to prove pretext or that there was no evidence of discrimination). [↑](#footnote-ref-71)
71. 6542 U.S.C §§ 1981, 1983. [↑](#footnote-ref-72)
72. 66**Common** **issues.**

    7th Circuit Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132, 1137–1138 (7th Cir. 1992) (vacation of jury verdict on grounds that plaintiff’s allegations did not state claim under § 1981 did not impugn underlying fact findings of jury, therefore trial judge acted correctly in relying on those findings to reach judgment in Title VII action).

    11th Circuit Lincoln v. Board of Regents, 697 F.2d 928, 934 (11th Cir. 1983), (“when legal and equitable actions are tried together, the right to a jury in the legal action encompasses the issues common to both … the judge is of course bound by the jury’s determination of that issue as it affects his disposition of an accompanying equitable claim”). [↑](#footnote-ref-73)
73. 67**Findings not required.** Artis v. Hitachi Zosen Clearing, Inc., 967 F.2d 1132, 1138 (7th Cir. 1992) (“if the court must follow the jury’s verdict it is pointless for it to enter findings of fact and conclusions of law under Rule 52(a)”); Bruno v. City of Crown Point, 950 F.2d 355, 361 n.5 (7th Cir. 1991) (when § 1983 and Title VII claims are tried together, jury’s verdict binds judge, who is not required to make separate factual findings). [↑](#footnote-ref-74)
74. 68**Separate issues.** Lincoln v. Board of Regents, 697 F.2d 928, 934 (11th Cir. 1983) (in Title VII action, trial court made separate findings regarding intent of board of regents of university, finding it guilty of discriminating against employee on the basis of race, although jury in § 1983 claim had exonerated individual employees from liability. Court’s findings were not inconsistent with the jury verdict because liability of board was not predicated on the actions of the exonerated employees but rather on an employee whose actions were not considered by the jury). [↑](#footnote-ref-75)
75. 69**Sufficiency of evidence standard.** Bruno v. City of Crown Point, 950 F.2d 355, 361 n.5 (7th Cir. 1991) (when § 1983 claim and Title VII claim are tried together and the trial court makes no separate findings, the trial court’s judgment on the Title VII claim has same fate as the jury verdict in the § 1983 claim). For further analysis of directed verdict or judgment n.o.v. motions, now phrased as motions for judgment as a matter of law, under Fed. R. Civ. P. 7, 11, 50 and perhaps local rules; *see* Ch. 7, *Pleadings Allowed; Form of Motions and Other Papers*; Ch. 11, *Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions*; Ch. 50, *Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling*. The 28-day filing requirements of Fed. R. Civ. P. 50(b) and (d) may not be enlarged; *see* Fed. R. Civ. P. 6(b)(2) and Ch. 6, *Computing and Extending Time; Time for Motion Papers*. [↑](#footnote-ref-76)
76. 70**Construction a question of law.**

    2d Circuit *Cf.* Antilles S.S. Co. v. Members of American Hull Ins., 733 F.2d 195, 199 (2d Cir. 1984) (question of interpreting contract is “at least a mixed question of law and fact.” Appellate court concluded that trial court’s findings on issue of mutual understanding were clearly erroneous. *See also* J. Newman concurring, arguing that interpretation of contract was matter of law, and appellate judges could reverse if they disagreed with trial court’s conclusions).

    5th Circuit Godchaux v. Conveying Techniques, Inc., 846 F.2d 306, 314 (5th Cir. 1988) (under Louisiana law, interpretation of contract is matter of law if provisions of contract are clear).

    7th Circuit La Salle Nat’l Bank v. Service Merchandise Co., 827 F.2d 74, 78 (7th Cir. 1987) (determination that contract is unambiguous and declaration as to meaning are conclusions of law which may be reviewed de novo).

    9th Circuit ***Kern*** ***Oil*** & Refining Co. v. Tenneco ***Oil*** Co., 792 F.2d 1380, 1383 (9th Cir. 1986) (interpretation is matter of law and freely reviewable).

    11th Circuit Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co., 757 F.2d 1172, 1174 (11th Cir. 1985) (interpretation of insurance contract was matter of law, subject to plenary review). [↑](#footnote-ref-77)
77. 71**Analysis of language.** ***Kern*** ***Oil*** & Refining Co. v. Tenneco ***Oil*** Co., 792 F.2d 1380, 1383 (9th Cir. 1986) (when appellate court restricts review to analysis of language used in contract conclusions of district court may be reviewed as matters of law). [↑](#footnote-ref-78)
78. 72**Ambiguity a question of law.**

    5th Circuit Massengill v. Guardian Management Co., 19 F.3d 196, 201 (5th Cir. 1994) (court of appeals would apply de novo review to make determination as to contract’s facial ambiguity).

    7th Circuit La Salle Nat’l Bank v. Service Merchandise Co., 827 F.2d 74, 78 (7th Cir. 1987) (determination that contract is unambiguous and declaration as to meaning is conclusion of law which may be reviewed de novo).

    8th Circuit John Morrell Co. v. Local Union 304A of United Food & Commercial Workers, 913 F.2d 544, 550 (8th Cir. 1990) (deciding whether contract language is ambiguous is question of law).

    9th Circuit Northwest Envtl. Advocates v. City of Portland, 56 F.3d 979, 982 (9th Cir. 1995) (court reviews de novo determination of whether contract or other legal document is ambiguous).

    11th Circuit Gulf Tampa Drydock Co. v. Great Atlantic Ins. Co., 757 F.2d 1172, 1174 (11th Cir. 1985) (district court’s conclusion as to ambiguity of insurance policy was question of law, subject to plenary review). [↑](#footnote-ref-79)
79. 73**No extrinsic evidence.** Antilles S.S. Co. v. Members of American Hull Ins., 733 F.2d 195, 204 (2d Cir. 1984) (J. Newman, concurring, citing commentators Corbin and Williston). [↑](#footnote-ref-80)
80. 74**Initial determination.** Clardy Mfg. Co. v. Marine Midland Business Loans, 88 F.3d 347, 352, *reh’g denied,* 96 F.3d 1447 (5th Cir. 1996) (noting that it would look to state law to provide the rules of contract interpretation). [↑](#footnote-ref-81)
81. 75**Consideration of extrinsic evidence.** Guidry v. Halliburton Geophysical Servs., Inc., 976 F.2d 938, 940 (5th Cir. 1992) (district court used extrinsic evidence to interpret settlement agreement as to whether it reserved seaman’s claim for maintenance as well as cure, and therefore district court’s interpretation was reviewed for clear error). [↑](#footnote-ref-82)
82. 76**Intent** **is question of fact.** *See* Pullman-Standard v. Swint, 456 U.S. 273, 288, 102 S. Ct. 1781, 72 L. Ed. 2d 66 (1982) (discussing general treatment of intent as question of fact).

    2d Circuit In Time Prods, v. Toy Biz, 38 F.3d 660, 665 (2d Cir. 1994) (in interpreting ambiguous contract, district court’s conclusion regarding intent of parties, based partly on witness credibility, was not clearly erroneous).

    5th Circuit L & A Contracting Co. v. Southern Concrete Servs., 17 F.3d 106, 109 (5th Cir.), *reh’g denied,* 22 F.3d 1096 (1994) (fact-specific inquiry to ascertain intent in ambiguous contract is best performed by district court and its factual determinations will be reversed only if clearly erroneous).

    7th Circuit WH Smith Hotel Servs. v. Wendy’s Int’l, Inc., 25 F.3d 422, 428 (7th Cir. 1994) (district court’s construction of ambiguous sub-operating agreement provision was not clearly erroneous).

    9th Circuit Northwest Envtl. Advocates v. City of Portland, 56 F.3d 979, 982 (9th Cir. 1995) (“If the court must look to extrinsic evidence in order to interpret a writing, its findings of fact are reviewed for clear error”).

    11th Circuit United Benefit Life Ins. Co. v. United States Life Ins. Co., 36 F.3d 1063, 1065 (11th Cir. 1994) (in ambiguous contract, if district court must look to extrinsic evidence to determine intent of parties, district court’s determination of intent is question of fact). [↑](#footnote-ref-83)
83. 77**Unambiguous contract—intent question of law.** National Union Fire Ins. Co. v. Circle, Inc., 915 F.2d 986, 989 (5th Cir. 1990) (if intent is determined solely from language of contract, than contractual interpretation is purely a question of law that is reviewable de novo). [↑](#footnote-ref-84)
84. 78**Modification.**

    8th Circuit Amerdyne, Inc. v. POM, Inc., 760 F.2d 875, 877 (8th Cir. 1985) (court’s finding that plaintiff did not meet burden of proof regarding modification of written agreement alleged to have occurred during telephone conversation would be reviewed under clearly erroneous standard).

    10th Circuit Dime Box Petroleum Corp. v. Louisiana Land & Exploration Co., 938 F.2d 1144, 1149 (10th Cir. 1991) (district court’s finding that agreement was modified and, as modified, was subsequently breached, was not clearly erroneous). [↑](#footnote-ref-85)
85. 79**Mistake.**

    5th Circuit Crosby-Mississippi Resources v. Prosper Energy Corp., 974 F.2d 612, 616 (5th Cir. 1992) (district court’s finding of unilateral mistake would be reviewed for clear error).

    9th Circuit Lundgren v. Freeman, 307 F.2d 104, 115 (9th Cir. 1962) (because finding of mutual mistake was derived in part from trial judge’s experience with human affairs, it was question of fact that could not be set aside unless clearly erroneous). [↑](#footnote-ref-86)
86. 80 **Abandonment.** Wolff & Munier, Inc v. Whiting-Turner Contracting Co., 946 F.2d 1003, 1008 (2d Cir. 1991) (when contract has been abandoned is question of fact and answer to that question cannot be disturbed unless clearly erroneous). [↑](#footnote-ref-87)
87. 81**Breach of contract.**

    2d Circuit Lerman v. Joyce Int’l, Inc., 10 F.3d 106, 109 (3d Cir. 1993) (district court’s finding that breach of contract was material would not be reversed unless clearly erroneous).

    7th Circuit Adams Apple Distrib. Co. v. Papeleras Reunidas, S.A., 773 F.2d 925, 929 (7th Cir. 1985) (determination of whether breach is material is question of fact).

    10th Circuit Valley Nat’l Bank v. Abdnor, 918 F.2d 128, 130 (10th Cir. 1990) (finding of material breach of contract is question of fact controlled by clearly erroneous standard). [↑](#footnote-ref-88)
88. 82**Language of the contract.**

    9th Circuit ***Kern*** ***Oil*** & Refining Co. v. Tenneco ***Oil*** Co., 792 F.2d 1380, 1383 (9th Cir. 1986) (when appellate court restricts review to analysis of language used in contract conclusions of district court may be reviewed as matters of law).

    D.C. Circuit United States v. Pollard, 959 F.2d 1011, 1023 n.6 (D.C. Cir. 1992) (when issues of interpretation and construction predominate in breach of contract claim, court of appeals regards issue of breach as question of law to be reviewed de novo; however, when breach determination rests primarily on analysis of facts, court will reverse only if clearly erroneous). [↑](#footnote-ref-89)
89. 83**Duty to review.** New York Times v. Sullivan, 376 U.S. 254, 284–286, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (in cases where speech may be legitimately regulated, the court “examine[s] for [itself] the statements in issue and the circumstances under which they were made to see … whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect”). [↑](#footnote-ref-90)
90. 84**Consistent with** **Constitution.** New York Times v. Sullivan, 376 U.S. 254, 285, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (in action for libel against New York Times, Supreme Court held that First Amendment does not protect libelous publications). [↑](#footnote-ref-91)
91. 85**Actual malice—de novo review.** Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 501, 104 S. Ct. 1949, 80 L. Ed. d 502 (1984) (determination of “actual malice” in defamation suit is held to de novo review and not to clearly erroneous standard of former Fed. R. Civ. P. 52(a) (*now see* Fed. R. Civ. P. 52(a)(6))). [↑](#footnote-ref-92)
92. 86**Preserve precious liberties.** Bose Corp. v. Consumers Union, 466 U.S. 485, 511, 104 S. Ct. 1949, 80 L. Ed. 2d 502, *reh’g denied,* 467 U.S. 1267 (1984) (determination of “actual malice” in defamation suit is held to de novo review and not to clearly erroneous standard of former Fed. R. Civ. P. 52(a) (*now see* Fed. R. Civ. P. 52(a)(6))). [↑](#footnote-ref-93)
93. 87**Case-by-case determination.** Bose Corp. v. Consumers Union, 466 U.S. 485, 503, 104 S. Ct. 1949, 80 L. Ed. 2d 502, *reh’g denied,* 467 U.S. 1267 (1984) (determination of “actual malice” in defamation suit is held to de novo review and not to clearly erroneous standard of former Fed. R. Civ. P. 52(a) (*now see* Fed. R. Civ. P. 52(a)(6))); *see also* Miller v. Fenton, 474 U.S. 104, 113, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985) (in First Amendment libel cases, where relevant legal principle can be given meaning only through application to particular circumstances of case, “the Court has been reluctant to give the trier of fact’s conclusions presumptive force and, in so doing, strip a federal appellate court of its primary function as an expositor of law”). [↑](#footnote-ref-94)
94. 88**Protection of First Amendment rights.** AIDS Action Committee v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 7 (1st Cir. 1994) (after de novo review of findings, court of appeals agreed with district court’s conclusion that M.B.T.A., in refusing to use plaintiff’s advertisements had engaged in content discrimination, which gave rise to appearance of viewpoint discrimination, and that it had failed to explain that appearance away). [↑](#footnote-ref-95)
95. 89**Factual determinations not subject to de novo review.** Bose Corp. v. Consumers Union, 466 U.S. 485, 501, 104 S. Ct. 1949, 80 L. Ed. 2d 502, *reh’g denied,* 467 U.S. 1267 (1984) (determination of “actual malice” in defamation suit is held to de novo review and not to clearly erroneous standard of former Fed. R. Civ. P. 52(a) (*now see* Fed. R. Civ. P. 52(a)(6))). [↑](#footnote-ref-96)
96. 90**Refusal to second guess.** Bose Corp. v. Consumers Union, 466 U.S. 485, 511–513, 104 S. Ct. 1949, 80 L. Ed. 2d 502, *reh’g denied,* 467 U.S. 1267 (1984) (determination of “actual malice” in defamation suit is held to de novo review and not to clearly erroneous standard of former Fed. R. Civ. P. 52(a) (*now see* Fed. R. Civ. P. 52(a)(6))). [↑](#footnote-ref-97)
97. 91**Crossing the line.** Bose Corp. v. Consumers Union, 466 U.S. 485, 501 n.17 104 S. Ct. 1949, 80 L. Ed. 2d 502, *reh’g denied,* 467 U.S. 1267 (1984) (determination of “actual malice” in defamation suit is held to de novo review and not to clearly erroneous standard of former Fed. R. Civ. P. 52(a) (*now see* Fed. R. Civ. P. 52(a)(6))). [↑](#footnote-ref-98)
98. 92**Underlying fact.**

    5th Circuit Bartimo v. Horsemen’s Benevolent & Protective Ass’n, 771 F.2d 894, 897 (5th Cir. 1985) (“this limitation is at least implicit in *Bose* and mandated by considerations of economy, the nature of appellate review and the advantageous position of the fact finder to make such decisions”).

    8th Circuit *See* Families Achieving Independence and Respect v. Nebraska Dep’t of Soc. Servs., 111 F.3d 1408, 1411 (8th Cir. 1997) (in First Amendment case, circuit court independently reviews evidentiary basis of critical facts, giving due regard to trial court’s opportunity to observe demeanor of witnesses; noncritical facts are reviewed under clear error standard).

    D.C. Circuit Tavoulareas v. Piro, 759 F.2d 90, 106–109 (D.C. Cir. 1985) (independent judgment by reviewing court is applied only to ultimate conclusion of clear and convincing proof of actual malice and not to each separate fact determination that forms basis for ultimate conclusion of actual malice). [↑](#footnote-ref-99)
99. 93**De novo review required.** Bose Corp. v. Consumers Union, 466 U.S. 485, 501, 104 S. Ct. 1949, 80 L. Ed. 2d 502, *reh’g denied,* 467 U.S. 1267, 104 S. Ct. 3561, 82 L. Ed. 2d 863 (1984) (determination of “actual malice” in defamation suit is held to de novo review and not to clearly erroneous standard of former Fed. R. Civ. P. 52(a) (*now see* Fed. R. Civ. P. 52(a)(6))). [↑](#footnote-ref-100)
100. 94**Conflict unresolved.** *See* Don’s Porta Signs, Inc. v. City of Clearwater, 485 U.S. 981, 981, 108 S. Ct. 1280, 99 L. Ed. 2d 491 (1988) (White, J., dissenting from denial of certiorari). [↑](#footnote-ref-101)
101. 95**Reviewing de novo.**

     1st Circuit AIDS Action Comm. v. Massachusetts Bay Transp. Auth., 42 F.3d 1, 7 (1st Cir. 1994) (after de novo review of findings, court of appeals agreed with district court’s conclusion that M.B.T.A., in refusing to use plaintiff’s ads had engaged in content discrimination, which gave rise to appearance of viewpoint discrimination, and that it had failed to explain that appearance away).

     5th Circuit Bartimo v. Horsemen’s Benevolent & Protective Ass’n, 771 F.2d 894, 896–898 (5th Cir. 1985) (district court’s finding that plaintiff failed to prove actual malice was reviewed de novo, however, this level of scrutiny was limited to ultimate factual finding of actual malice element).

     10th Circuit Hardin v. Sante Fe Reporter, Inc., 745 F.2d 1323, 1326 (10th Cir. 1984) (appeals court followed admonition in *Bose* to review entire record, and upheld district court’s conclusion that no actual malice existed).

     11th Circuit Don’s Porta Signs, Inc. v. City of Clearwater, 829 F.2d 1051, 1053 n.9 (11th Cir. 1987) (appeals court stated that it was not bound by clearly erroneous rule in determining whether commercial speech regulation directly advances governments’s goals or is more extensive than necessary).

     D.C. Circuit Tavoulareas v. Piro, 759 F.2d 90, 107 (D.C. Cir. 1985), *reh’g granted,* 763 F.2d 1472 (1985) (court of appeals reviewed de novo district court’s judgment n.o.v. in favor of defendants on ground that actual malice was not sufficiently demonstrated). [↑](#footnote-ref-102)
102. 96**Evaluation of constitutional facts.** Bartimo v. Horsemen’s Benevolent & Protective Ass’n, 771 F.2d 894, 897 (5th Cir. 1985) (in defamation action district court’s findings that plaintiff failed to prove actual malice was reviewed de novo, however, this level of scrutiny was limited to ultimate factual finding of actual malice element). [↑](#footnote-ref-103)
103. 97**Clearly erroneous standard.**

     7th Circuit Planned Parenthood Ass’n v. Chicago Transit Auth., 767 F.2d 1225, 1229 (7th Cir. 1985) (clearly erroneous standard was applicable to trial court’s findings in case where transit authority challenged injunction that prohibited it from refusing to sell advertising space to non-profit organization that provided family planning services).

     9th Circuit Daily Herald Co. v. Munro, 838 F.2d 380, 383 (9th Cir. 1988) (district court’s findings were received for clear error where court found that statute which prevented exit polling within 300 feet of polling place was unconstitutional as applied to the media). [↑](#footnote-ref-104)
104. 98**Purpose of independent review.** Planned Parenthood Ass’n v. Chicago Transit Auth., 767 F.2d 1225, 1229 (7th Cir. 1985) (clearly erroneous standard was applicable to trial court’s findings in case where transit authority challenged injunction that prohibited it from refusing to sell advertising space to non-profit organization that provided family planning services). [↑](#footnote-ref-105)
105. 99**Rule 52 applicable.** Commissioner v. Duberstein, 363 U.S. 278, 291, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960) (pursuant to IRC § 7482(a), decisions by Tax Court shall be reviewed “in the same manner and to the same extent as decisions of the district court in civil actions tried without a jury …”).

     2d Circuit United States v. McCombs, 30 F.3d 310, 327 (2d Cir. 1994) (magistrate judge’s finding that taxpayers took property subject to, rather than in assumption of mortgage was clearly erroneous. Erroneous findings of fact as well as errors of law required remand for further findings after correction of errors of law and fact).

     5th Circuit McGee v. Commissioner, 979 F.2d 66, 69 (5th Cir. 1992) (clearly erroneous standard was proper standard of review for Tax Court’s determination that taxpayer did not qualify for innocent spouse relief).

     6th Circuit Roth Steel Tube Co. v. Commissioner, 800 F.2d 625, 629 (6th Cir. 1986) (findings of fact by Tax Court regarding whether advances to subsidiary corporation were capital contributions or loans were reviewed under clearly erroneous standard).

     9th Circuit Stewart v. Commissioner, 714 F.2d 977, 990 n.17 (9th Cir. 1983) (findings of fact by tax court are not to be set aside unless clearly erroneous). [↑](#footnote-ref-106)
106. 100**Gift question of fact.** Commissioner v. Duberstein, 363 U.S. 278, 288–290, 80 S. Ct. 1190, 4 L. Ed. 2d 1218 (1960) (“primary weight in this area must be given to conclusions of trier of fact”). [↑](#footnote-ref-107)
107. 101**Knowledge of taxpayer.** McGee v. Commissioner, 979 F.2d 66, 69 (5th Cir. 1992) (clearly erroneous standard was proper standard of review for tax court’s determination that taxpayer did not qualify for innocent spouse relief). [↑](#footnote-ref-108)
108. 102**Question of fact.** Byram v. United States, 705 F.2d 1418, 1421–1424 (5th Cir. 1983) (finding that property had been held as capital investment, not in ordinary course of business, was not clearly erroneous).

     5th Circuit Byram v. United States, 705 F.2d 1418, 1421–1424 (5th Cir. 1983) (finding that property had been held as capital investment, not in ordinary course of business, was not clearly erroneous).

     6th Circuit Philhall Corp. v. United States, 546 F.2d 210, 215 (6th Cir. 1976) (in deciding propriety of judgment n.o.v., appellate court treated issue as one of fact and ruled that district court was not clearly wrong in concluding that property in question was not capital asset).

     8th Circuit Municipal Bond Corp. v. Commissioner, 382 F.2d 184, 189 (8th Cir. 1967) (Tax Court’s determination that taxpayer acquired property primarily for sale was clearly erroneous as there was no substantial evidence to support finding).

     9th Circuit Parkside, Inc., v. Commissioner, 571 F.2d 1092, 1094 (9th Cir. 1977) (citing **Moore’s,** determination of status of taxpayer’s real estate holdings was question of fact “arguably mixed with law” subject to clearly erroneous standard, because resolution of issue relied on trial judge’s “experience within the wellsprings of human conduct” rather than on standards of statutory application); Commissioner v. Smith, 397 F.2d 804, 804 (9th Cir. 1968) (applying clearly erroneous standard and affirming Tax Court finding that vacated home was being held for production of income); *but see* Cruttenden v. Commissioner., 644 F.2d 1368, 1374 n.6 (9th Cir. 1981) (stating that standard of review in such cases was “somewhat unclear” but noting that it was unnecessary to decide proper standard since appeals court agreed with trial court’s conclusions).

     10th Circuit Brown v. Commissioner, 448 F.2d 514, 516 (10th Cir. 1971) (finding of Tax Court on question of whether property was held for sale would not be overturned unless conclusion was clearly erroneous). [↑](#footnote-ref-109)
109. 103**Mixed law/fact question.** *See, e.g.,* United States v. McCombs, 30 F.3d 310, 316–317 (2d Cir. 1994) (in action seeking declaration of validity of federal tax liens and avoidance of transfer of property by taxpayer to taxpayer’s daughter, district court found daughter to be a responsible person within the meaning of 26 U.S.C. § 6672 which was a mixed question of fact and law). [↑](#footnote-ref-110)