SUMMARY JUDGMENTS IN TEXAS: STATE AND FEDERAL PRACTICE*

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INTRODUCTION

Summary judgments in Texas were once rare.[1] However, as Justice Samuel Alito recently observed, times have changed in Texas and elsewhere:

1. *See* William V. Dorsaneo III, *The History of Texas Civil Procedure*, 65 BAYLOR L. REV. 713, 781–82 (2013) (describing Texas courts' early hostility towards summary judgment practice); *see also* William W. Schwarzer et al., THE ANALYSIS AND DECISION OF SUMMARY JUDGMENT

"Every year the courts of appeals decide hundreds of cases in which they must determine whether . . . evidence provided by a plaintiff is just enough to survive a motion for summary judgment or not quite enough."[2] Today, summary judgment practice in Texas state and federal courts has expanded substantially.[3] Indeed, the dispositive impact of summary judgment rulings, together with the procedural changes that have increased the influence of summary judgments on virtually all categories of litigation,[4] have led commentators to characterize summary judgment practice as the "focal point" of modern litigation.[5] Some academics have criticized this "litigation

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MOTIONS A MONOGRAPH ON RULE 56 OF THE FEDERAL RULES OF CIVIL PROCEDURE 1–4 (Federal Judicial Center 1991) (describing courts' early reluctance to embrace summary judgment practice).

2. Salazar-Limon v. City of Houston, 137 S. Ct. 1277, 1277 (2017) (Alito, J., concurring).

3. EDWARD BRUNET ET AL., SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 4:8 (2017) (discussing the "normalization and perhaps even the bureaucratization" of summary judgment practice in federal courts); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1049 (2003) (discussing the increased use of summary judgment motions); *cf.* Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993, 1009–11 (2012) (discussing the rate of reversal of summary judgments in Texas state courts by cause and type of case).

4. *See, e.g.*, Darryl K. Brown, *How to Make Criminal Trials Disappear Without Pretrial Discovery*, 55 AM. CRIM. L. REV. 155, 163 (2018) ("Especially in the wake of a trio of 1986 U.S. Supreme Court decisions, rule changes that made civil summary judgments more likely have been much-discussed contributors in the demise of civil trials."); Brooke D. Coleman, *The* Celotex *Initial Burden Standard and an Opportunity to "Revivify" Rule 56*, 32 S. ILL. U. L.J. 295, 295 (2008) ("Summary judgment, which started as an obscure procedural rule, is now a standard part of the litigation process. The percentage of federal cases ended by summary judgment increased from 3.7% in 1975 to 7.7% in 2000."); Arthur S. Leonard, *Introduction: Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, 57 N.Y.L. SCH. L. REV. 659, 663–64 (2012–2013) (discussing the increased rate of summary judgment dispositions in Title VII cases following the trilogy); Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U. N.H. L. REV. 303, 327 (2016) (discussing the influence of summary judgment in modern litigation); Martin H. Redish, *Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix*, 57 STAN. L. REV. 1329, 1329–30 (2005) ("Changes in the law of summary judgment quite probably explain at least a large part of the dramatic reduction in federal trials."); Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 FORDHAM L. REV. 2241, 2244 (2018) ("[S]ummary judgment is entrenched in the civil system in the United States."); *cf.* Liberato & Rutter, *supra* note 3, at 1009–11.

5. Miller, *supra* note 3, at 1016 (discussing how the unmistakable proliferation in the number of motions for summary judgment filed, and the high costs often associated with litigating these motions, has led some jurists to conclude that attorneys are often too quick to engage in summary judgment practice when clear fact issues exist for trial); Rathod & Vaheesan, *supra* note 4, at 327 ("Due in part to the trilogy, summary judgment has become the focal point of litigation . . . ."); Xavier Rodriguez, *The Decline of Civil Jury Trials: A Positive Development, Myth, or the End of Justice as We Now Know It?*, 45 ST. MARY'S L.J. 333, 344 (2014); Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839, 1851 (2014).

focal point";[6] others have sung its praises.[7] Yet, for better or worse, summary judgment practice has become increasingly important, and the successful civil practitioner in Texas must be familiar with its complexities.

This Article examines the procedural and substantive aspects of summary judgment practice by discussing Texas, U.S. Supreme Court, and Fifth Circuit precedent in light of practice trends and changes in the law. While it also provides an analytical framework for current Texas state and federal summary judgment practice, this Article's primary goal is to serve as a practical reference for trial and appellate lawyers. It seeks to assist the reader in understanding the procedural and substantive aspects of obtaining, opposing, and appealing a summary judgment.[8]

In discussing this influential procedure, this Article proceeds in three main parts. First, Texas summary judgment practice is examined with an emphasis on the procedure outlined in Texas Rule of Civil Procedure 166a, as interpreted by the Texas Supreme Court and Texas courts of appeals. Part Two focuses on federal summary judgment practice, with a particular emphasis on the procedures outlined by Federal Rule of Civil Procedure 56 and shaped by the so-called trilogy of cases announced by the U.S. Supreme Court in its 1986 term—*Celotex*,[9] *Matsushita*,[10] and *Liberty Lobby*.[11] Finally,

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6. *See, e.g.*, Arthur R. Miller, McIntyre *in Context: A Very Personal Perspective*, 63 S.C. L. REV. 465 (2012) (noting the propensity for today's judges to use summary judgments to "inappropriately resolve[] trialworthy disputed fact issues . . . ."); Subrin & Main, *supra* note 5, at 1895 (criticizing the expansion of summary judgment practice in modern litigation as being "arguably unconstitutional, probably inefficient, and especially unfair to certain plaintiffs"); Suja A. Thomas, *Why Summary Judgment is Unconstitutional*, 93 VA. L. REV. 139 (2007) (arguing that summary judgment is unconstitutional).

7. *See, e.g.*, Jack Achiezer Guggenheim, *In Summary It Makes Sense: A Proposal to Substantially Expand the Role of Summary Judgment in Nonjury Cases*, 43 SAN DIEGO L. REV. 319, 320 (2003) (praising summary judgment as "an efficient and just adjudication mechanism"); David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 83 U. CIN. L. REV. 903, 947 (2015) (discussing the benefits of an invigorated summary judgment regime to tort reform).

8. *See generally* DAVID HITTNER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL: 5TH CIRCUIT EDITION ch. 14 (The Rutter Grp.-Thomson Reuters 2014) (discussing federal summary judgment practice); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 53 HOUS. L. REV. 773 (2015) (discussing summary judgment practice in Texas state and federal courts); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1384 (2010) (same)); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409, 413 (2006) (same); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, 6 (2002) (same); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1308 (1998) (same); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 35 S. TEX. L. REV. 9, 12 (1994) (same); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243, 246 (1989) (same); *see also* 3 ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 18 (2d ed. 2018); TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE AND REVIEW § 1.01, at 1-1 to -2 (3d ed. 2018).

9. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

10. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

11. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Part Three offers a comparative overview of state and federal summary judgment practice, discussing important distinctions between the two jurisdictions.

As will be apparent throughout each part of this Article, the burden-shifting framework enunciated by the Court in the trilogy, as well as the Court's clarification of Rule 56's "material fact" standard, not only had widespread ramifications for federal summary judgment practice, but also influenced states, including Texas, to amend their own civil rules to provide for similar procedures.[12] The undeniable and widespread impact of the trilogy prompted former Chief Justice William Rehnquist to characterize *Celotex* as the most important decision of his tenure.[13] Indeed, summary judgment practice may be the most important procedure in the life of many civil cases.

PART 1: STATE SUMMARY JUDGMENT PRACTICE

I. PROCEDURE

Summary judgment practice is procedurally complex. This Section discusses the basic procedural requirements for filing and opposing summary judgment motions.

12. *See, e.g.*, Corey M. Dennis, *Roadmap to Connecticut Procedure*, 83 CONN. B.J. 271, 283 n.60 (2009) ("*Celotex* has been adopted by rule or court decision in a majority of states . . . ." (quoting Waste Conversation Techs., Inc. v. Midstate Recovery, LLC, 2008 Conn. Super. LEXIS 3130, at *78 n.19 (Dec. 3, 2008))); David H. Simmons et al., *The* Celotex *Trilogy Revisited: How Misapplication of the Federal Summary Judgment Standard Is Undermining the Seventh Amendment Right to a Jury Trial*, 1 FLA. A&M U. L. REV. 1, 11 (2006) ("[T]he trilogy and the way in which it is interpreted and applied not only affects litigation in the federal judicial system, but also in numerous states."); Robert W. Clore, Comment, *Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants*, 29 ST. MARY'S L.J. 813, 834 (1998) ("[T]he Trilogy provided persuasive authority for the addition of the no-evidence motion to Texas summary judgment practice. Indeed, most commentators agree that Rule 166a(i) was drafted to mirror federal summary judgment practice.").

13. Telephone Interview with Aaron Streett, Partner, Baker Botts, Former Law Clerk, Chief Justice William H. Rehnquist, U.S. Supreme Court (Sept. 24, 2013). This is a notable declaration, especially considering that his tenure as Chief Justice included such seminal cases as *United States v. Morrison*, *City of Boerne v. Flores*, *United States v. Lopez*, and *South Dakota v. Dole*. United States v. Morrison, 529 U.S. 598 (2000) (commerce clause); City of Boerne v. Flores, 521 U.S. 507 (1997) (Congress's civil rights enforcement power); United States v. Lopez, 514 U.S. 549 (1995) (commerce clause); South Dakota v. Dole, 483 U.S. 203 (1987) (Congress's spending power). Chief Justice Rehnquist's revelation is borne out by the empirical evidence, as gathered by Professor Adam Steinman in a 2010 examination of the most highly cited Supreme Court cases. According to Professor Steinman's research, the summary judgment trilogy of cases were, individually, the three most frequently cited Supreme Court decisions of all time, with *Celotex* and *Liberty Lobby* both garnering more than 120,000 federal citing references as of 2010. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1357 app. (2010).

A. Motion for Summary Judgment

The summary judgment process begins with the filing of a motion for summary judgment.[14] Unless a party to the suit files a motion for summary judgment, no court has the power to render a summary judgment.[15] Even though it properly grants a summary judgment to one party, a court may not grant summary judgment to another party who did not move for summary judgment or join in the moving party's motion.[16]

1. General Requirements and Uses

a. Specification Requirement

A motion for summary judgment must rest on the grounds expressly presented in the motion.[17] Unless a claim or affirmative defense is specifically addressed in the motion for summary judgment, a court cannot grant summary judgment on it.[18] Granting a summary judgment on a claim not addressed in the summary judgment motion, as a general rule, is reversible error.[19] Similarly, a court of appeals commits reversible error when it sua sponte raises grounds to reverse a summary judgment that were not briefed or argued in the appeal.[20]

The motion must state, with specificity, the grounds upon which the movant is relying.[21] The rationale for this requirement is to force the movant

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14. TEX. R. CIV. P. 166a(a)–(b), (i). Prior to the January 1, 1988, amendments to the Texas Rules of Civil Procedure, this Rule was designated 166-A rather than 166a. See TEX. R. CIV. P. 166a historical notes.

15. Daniels v. Daniels, 45 S.W.3d 278, 282 (Tex. App.—Corpus Christi 2001, no pet.); Williams v. Bank One, Tex., N.A., 15 S.W.3d 110, 116 (Tex. App.—Waco 1999, no pet.).

16. McAllen Hosps., L.P. v. State Farm Mut. Ins. Co. of Tex., 433 S.W.3d 535, 542 (Tex. 2014).

17. ExxonMobil Corp. v. Lazy R Ranch, LP, 511 S.W.3d 538, 546–46 (Tex. 2017); McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 339 (Tex. 1993) (quoting Westbrook Constr. Co. v. Fid. Nat'l Bank of Dall., 813 S.W.2d 752, 754–55 (Tex. App.—Fort Worth 1991, writ denied)).

18. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 204 (Tex. 2002); Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 912 (Tex. 1997) (limiting summary judgment to those grounds expressly presented in the motion).

19. Chessher v. Sw. Bell Tel. Co., 658 S.W.2d 563, 564 (Tex. 1983) (per curiam). There are exceptions to this general rule. "Although a trial court errs in granting a summary judgment on a cause of action not expressly presented by written motion, . . . the error is harmless when the omitted cause of action is precluded as a matter of law by other grounds raised in the case." G & H Towing Co. v. Magee, 347 S.W.3d 293, 297–98 (Tex. 2011) (per curiam).

20. Wells Fargo Bank, N.A. v. Murphy, 458 S.W.3d 912, 916 (Tex. 2015).

21. TEX. R. CIV. P. 166a(c); *Brewer & Pritchard*, 73 S.W.3d at 204; Stiles v. Resolution Trust Corp., 867 S.W.2d 24, 26 (Tex. 1993); Great-Ness Prof'l Servs., Inc. v. First Nat'l Bank of Louisville, 704 S.W.2d 916, 918 (Tex. App.—Houston [14th Dist.] 1986, no writ) (misclassifying the specific ground for summary judgment as a "suit on a sworn account" was sufficient to defeat

to define the issues and give the nonmovant adequate notice for opposing the motion.[22]

To determine if the grounds are expressly presented in the motion, neither the court nor the movant may rely on separate supporting briefs or summary judgment evidence.[23] Nonetheless, the motion and brief in support may be combined. As a matter of persuasion, this practice likely is the most effective.

A trial court may not grant more relief than requested in the motion for summary judgment.[24] Because a party can move for partial summary judgment, omission of a claim from a motion for summary judgment does not waive the claim.[25]

An amended or substituted motion for summary judgment supersedes any preceding motion.[26] A ground contained in an initial summary judgment motion, but not included in a later amended motion, may not be used to support the affirmance of a summary judgment on appeal.[27]

b. Categories of Summary Judgments

Summary judgments in state court are divided into two categories. A "traditional" summary judgment is based on the movant's contention that no genuine issue exists for any material fact and that the movant is entitled to judgment as a matter of law.[28] A "no-evidence" summary judgment is based

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summary judgment, even though the affidavit in support and the balance of the motion for summary judgment correctly alluded to a cause of action based upon a breach of a lease agreement).

22. Timpte Indus., Inc. v. Gish, 286 S.W.3d 306, 311 (Tex. 2009); *see also McConnell*, 858 S.W.2d at 343–44 (stating that by requiring movant to expressly set forth grounds in the summary judgment motion, the nonmovant has the grounds for summary judgment narrowly focused and does not have to argue every ground vaguely referred to in the motion).

23. *McConnell*, 858 S.W.2d at 340–41.

24. Walton v. City of Midland, 24 S.W.3d 853, 857 (Tex. App.—El Paso 2000, pet. denied), *abrogated on other grounds by In re* Estate of Swanson, 130 S.W.3d 144, 147 (Tex. App.—El Paso 2003, no pet.); *see also* Said v. Sugar Creek Country Club, No. 14-17-00079-CV, 2018 WL 4177859, at *6 (Tex. App.—Houston [14th Dist.] Aug. 31, 2018, pet. filed) (mem. op.) (holding that the trial court did not grant more relief than requested—when the movant did not mention her allegation of gross negligence in the motion for summary judgment—because the non-movant could not recover exemplary damages after the movant proved as a matter of law that non-movant could not prevail on her underlying negligence claim).

25. McNally v. Guevara, 52 S.W.3d 195, 196 (Tex. 2001) (per curiam).

26. Dall. Indep. Sch. Dist. v. Finlan, 27 S.W.3d 220, 231 (Tex. App.—Dallas 2000, pet. denied); *see also* Padilla v. LaFrance, 907 S.W.2d 454, 459 (Tex. 1995) (stating that a motion for summary judgment would have to be considered an amended or substituted version to supersede the previous motion).

27. State v. Seventeen Thousand & No/100 Dollars U.S. Currency, 809 S.W.2d 637, 639 (Tex. App.—Corpus Christi 1991, no writ) (explaining that an amended motion for summary judgment "supplants the previous motion, which may no longer be considered").

28. TEX. R. CIV. P. 166a(c) (which does not specifically use the term "traditional" summary judgment, but that term is the commonly use short-hand description); *see infra* Part 1.I.A.2

on the movant's contention "that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial."[29] To determine whether a motion requests a traditional or no-evidence summary judgment, the courts rely on the record to determine the nature of a summary judgment motion, regardless of whether the movant asserts a no-evidence or traditional motion for summary judgment.[30]

Motions for summary judgment may be based on the evidence or the absence of evidence. Regardless of its burden of proof at trial, either party may file a motion for summary judgment by establishing each element of its claim or defense.[31] The party without the burden of proof also may file a motion for summary judgment urging that there is no evidence to support the other party's claims or affirmative defenses.[32] A party with the burden of proof should not file a no-evidence summary judgment on its claims or defenses. Because it has the burden of proof on a summary judgment based on an affirmative defense, a defendant may not pursue a no-evidence summary judgment on its affirmative defense.[33]

A summary judgment motion may also be used when the evidence, or lack of evidence, is not the issue in dispute. This type of summary judgment is classified as a type of "traditional" summary judgment. Summary judgment is proper when the parties do not dispute relevant facts.[34] Where "the issues raised are based on undisputed facts, the reviewing court may determine the questions presented as a matter of law."[35] For example, in *Allen*

(discussing traditional motions for summary judgment); *infra* Part 1.III.A (discussing burden of proof for traditional summary judgments).

29. TEX. R. CIV. P. 166a(i) (the name of the heading for this Rule 166a.i. subsection is "No-Evidence Motion"); *see infra* Part 1.I.A.3 (discussing no-evidence motions for summary judgments); *infra* Part 1.III.B (discussing no-evidence summary judgment burden of proof).

30. *See, e.g.*, State v. Ninety Thousand Two Hundred Thirty-Five Dollars & No Cents in U.S. Currency, 390 S.W.3d 289, 292 (Tex. 2013) (considering a motion for summary judgment under standards for a traditional motion, even though the movant's language appeared to assert a no-evidence motion); Binur v. Jacobo , 135 S.W.3d 646, 651 (Tex. 2004) (treating a no-evidence summary judgment as a traditional motion for summary judgment).

31. *See infra* Part 1.III (discussing burden of proof for summary judgments).

32. *See infra* Part 1.III.B (discussing burden of proof for no-evidence summary judgments).

33. Elmakiss v. Rogers, No. 12-09-00392-CV, 2011 WL 3715700, at *9 (Tex. App.—Tyler Aug. 24, 2011, no pet.) (mem. op.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409, 415 (2006)); Franks v. Roades, 310 S.W.3d 615, 621–22 (Tex. App.—Corpus Christi 2010, no pet.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1388–89 (2010)); Mills v. Pate, 225 S.W.3d 277, 290 (Tex. App.—El Paso 2006, no pet.). *But see* Cone v. Fagadau Energy Corp., 68 S.W.3d 147, 156 n.4 (Tex. App.—Eastland 2001, pet. denied) (declaring that a movant may move for no-evidence summary judgment on a question-of-law issue on which it does not bear the burden of proof).

34. Havlen v. McDougall, 22 S.W.3d 343, 345 (Tex. 2000).

35. Lavigne v. Holder, 186 S.W.3d 625, 627 (Tex. App.—Fort Worth 2006, no pet.).

Keller Co. v. Foreman, the supreme court upheld a summary judgment determining the duties owed by a general contractor as a result of an allegedly dangerous condition created by the contractor's work.[36]

Summary judgments frequently are used to construe a statute.[37] Statutory construction is a question of law that is reviewed de novo.[38] An example of statutory construction determined by summary judgment is *Sommers v. Sandcastle Homes.*[39] In it, the supreme court determined a question of first impression on the question of whether all notice is extinguished with the expunction order on a notice of lis pendens. In *Curtis v. Anderson*, the court interpreted Section 1.108 of the Texas Family Code to determine that an agreement concerning the return of an engagement ring must be in writing to be enforceable.[40] In *Exxon Corp. v. Emerald Oil & Gas Co.*, the court determined that the Natural Resources Code created a private cause of action for damages resulting from statutory violations.[41] And in *Loftin v. Lee*, the court construed the Equine Activity Limitation of Liability Act to find limited liability of a riding guide for recovery for injuries sustained by a rider when her horse bolted during a trail ride.[42] In *Patel v. Texas Department of Licensing and Regulation*, the supreme court reversed a summary judgment granted in a declaratory judgment action to determine that a cosmetology scheme for commercial eyebrow threaders violated the substantive due course of law and therefore was unconstitutional.[43]

Similarly, summary judgments may also be used to determine legal questions. For example, in *SCI Texas Funeral Services. v. Nelson*, the supreme court determined that negligent mishandling of a corpse is a legal

36. Allen Keller Co. v. Foreman, 343 S.W.3d 420, 425–26 (Tex. 2011).

37. *See, e.g.*, State v. Morello, 547 S.W.3d 881, 885–86 (Tex. 2018) (construing section 7.101 of the Texas Water Code to determine that an environmental regulation applicable to a "person," did not allow an individual to use the corporate form as a shield when he or she has personally participated in conduct that violates that statute); AHF-Arbors at Huntsville I, LLC v. Walker Cty. Appraisal Dist., 410 S.W.3d 831, 836–39 (Tex. 2012) (construing section 11.182 of the Texas Tax Code to determine whether a community housing organization must have legal title to property to qualify for an exemption).

38. Cadena Commercial USA Corp. v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318, 325 (Tex. 2017).

39. 521 S.W.3d 749 (Tex. 2017).

40. Curtis v. Anderson, 106 S.W.3d 251, 254–56 (Tex. App.—Austin 2003, pet. denied).

41. Exxon Corp. v. Emerald Oil & Gas Co., 331 S.W.3d 419, 422 (Tex. 2010); *see also* PAJ, Inc. v. Hanover Ins. Co., 243 S.W.3d 630, 636–37 (Tex. 2008) (determining the effect on coverage when an insured fails to timely notify its insurer of a claim, but the insurer suffers no harm as a result).

42. Loftin v. Lee, 341 S.W.3d 352, 355–60 (Tex. 2011).

43. 469 S.W.3d 69, 73 (Tex. 2015).

duty where mental anguish damages may be available, and that no contractual relationship is required to recover for those damages.[44]

Summary judgments may be used to construe the meaning of contract provisions.[45] They may also be used to resolve certain jurisdictional claims.[46]

In moving for or responding to a summary judgment, it is important to distinguish whether the summary judgment sought is a traditional or no-evidence summary judgment because different burdens of proof and standards of review apply, and the standards for timing of the motion are different.[47] The fact that a movant attaches evidence to its motion based on subsection (a) or (b) of Texas Rule of Civil Procedure 166a (traditional summary judgment) does not foreclose it from also asserting that there is no evidence of a particular element pursuant to subsection (i) (no-evidence summary judgment).[48] In fact, it may be advisable.[49]

2. Traditional Motion for Summary Judgment

To obtain relief through a traditional motion for summary judgment, the movant must establish that no issue of material fact exists and that it is entitled to judgment as a matter of law.[50] A defendant who moves for summary judgment must either disprove at least one element of each of the plaintiff's causes of action or plead and conclusively establish each essential element of any affirmative defense, thereby rebutting the plaintiff's causes of action.[51] An issue is conclusively established "if

44. SCI Tex. Funeral Servs. v. Nelson, 540 S.W.3d 539, 546 (Tex. 2018).

45. *See, e.g.*, Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661–62 (Tex. 2005) (construing the meaning of a certain notice provision of a commonly used oil and gas operating agreement); *see also infra* Part 1.VII.B (discussing summary judgments in suits on written instruments).

46. *See generally* Rebecca Simmons & Suzette Kinder Patton, *Plea to the Jurisdiction: Defining the Undefined*, 40 ST. MARY'S L.J. 627, 638–39, 681 (2009).

47. *See* Clarendon Nat'l Ins. Co. v. Thompson, 199 S.W.3d 482, 486–87 (Tex. App.—Houston [1st Dist.] 2006, no pet.). A traditional summary judgment is not subject to the same restrictions as a no-evidence summary judgment, which may not be granted until an adequate time for discovery has passed. *See* TEX. R. CIV. P. 166a(a), (i); *infra* Part 1.V.F (discussing standards of review on appeal); *infra* Part 1.I.C (discussing timing of filing a motion for summary judgment).

48. Binur v. Jacobo, 135 S.W.3d 646, 651 (Tex. 2004).

49. *See infra* Part 1.I.A.3 (discussing no-evidence motions for summary judgment).

50. TEX. R. CIV. P. 166a(c); Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009); SAS Inst., Inc. v. Breitenfeld, 167 S.W.3d 840, 841 (Tex. 2005) (per curiam); Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211, 215 (Tex. 2002); *see infra* Part 1.III.A (discussing burden of proof for traditional summary judgments).

51. Nassar v. Liberty Mut. Fire Ins. Co., 508 S.W. 3d 254, 257 (Tex. 2017); Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam).

reasonable minds could not differ about the conclusion to be drawn from the facts in the record."[52]

If the movant's motion and summary judgment evidence facially establish the movant's right to judgment as a matter of law, the burden shifts to the non-movant to raise a genuine, material fact issue sufficient to defeat summary judgment.[53] A fact is material when it "affects the ultimate outcome of the suit under the governing law."[54] "A material fact issue is 'genuine' only if the evidence is such that a reasonable jury could find the fact in favor of the nonmoving party."[55]

In deciding whether there is a disputed fact issue, the court reviews the evidence in the light most favorable to the nonmovant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not.[56] A plaintiff must show entitlement to prevail on each element of the cause of action, except the amount of damages.[57] The evidence raises a genuine issue of fact if "reasonable and fair-minded jurors could differ in their conclusions in light of all" the summary judgment evidence.[58]

Summary judgment may also be appropriate when there is a mixed question of law and fact. For example, in *Helix Energy Solutions Group, Inc. v. Gold*, the supreme court determined that a case involving an injured employee who had been working on a ship did not fall under the Jones Act because the vessel involved was not a "vessel in navigation."[59] While recognizing that analysis of the issue of "vessel in navigation" will often involve fact issues, none were present in this case.[60] Thus, the court applied the law to the undisputed material facts to determine that the ship

52. Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen, 525 S.W.3d 671, 681 (Tex. 2017) (citing Childs v. Haussecker, 974 S.W.2d 31, 44 (Tex. 1998)).

53. M.D. Anderson Hosp. & Tumor Inst. v. Willrich, 28 S.W.3d 22, 23–24 (Tex. 2000) (per curiam); *see infra* Part 1.I.V.B (discussing responding to a traditional motion for summary judgment).

54. Rayon v. Energy Specialties, Inc., 121 S.W.3d 7, 11 (Tex. App.—Fort Worth 2002, no pet.) (citing Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 433 (Tex. App.—Houston [14th Dist.] 1999, no pet.)).

55. *Id.* at 11–12.

56. Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 582 (Tex. 2006); *see* Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009) (citing City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005)).

57. *See, e.g.*, Rivera v. White, 234 S.W.3d 802, 805–06 (Tex. App.—Texarkana 2007, no pet.); Fry v. Comm'n for Lawyer Discipline, 979 S.W.2d 331, 334 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); Green v. Unauthorized Practice of Law Comm., 883 S.W.2d 293, 297 (Tex. App.—Dallas 1994, no writ); Brooks v. Sherry Lane Nat'l Bank, 788 S.W.2d 874, 876 (Tex. App.—Dallas 1990, no writ).

58. Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

59. Helix Energy Sols. Grp., Inc. v. Gold, 522 S.W.3d 427, 444 (Tex. 2017).

60. *Id.* at 439.

was not in navigation and therefore the Jones Act did not apply to the plaintiff.[61]

As noted earlier, summary judgment is appropriate when reasonable minds cannot differ.[62] In those instances, the issue of intent becomes a question of law.[63] Otherwise, intent is a question of fact for the jury's determination.[64]

3. No-Evidence Motion for Summary Judgment

A court's granting of a no-evidence summary judgment is essentially a pretrial directed verdict.[65] Texas Rule of Civil Procedure 166a(i), which provides for no-evidence summary judgments, requires much less from the movant than when moving for a traditional summary judgment.[66] "Under Rule 166a(i), a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial."[67] The movant need not produce any evidence supporting its no-evidence motion.[68] Instead, the mere filing of a proper motion shifts the burden to the nonmovant to come forward with enough evidence to raise a genuine issue of material fact.[69] If the non-movant does not, the court must grant the motion.[70]

While it need not be detailed, the no-evidence summary judgment motion must meet certain requirements. First, the movant must identify the grounds for the motion.[71] The motion also must state the elements for which there is no evidence.[72] A defendant's motion should state the elements of the

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61. *Id.* at 442.

62. Logan v. Mullis, 686 S.W.2d 605, 608 (Tex. 1985).

63. *Id.*

64. *Id.*; *see* Creditwatch, Inc. v. Jackson, 157 S.W.3d 814 (Tex. 2005).

65. Hernandez v. De La Rosa, 172 S.W.3d 78, 80–81 (Tex. App.—El Paso 2005, no pet.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1356 (1998)).

66. *See infra* Part 1.III.B (discussing burden of proof for no-evidence summary judgments).

67. W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005).

68. TEX. R. CIV. P. 166a(i); Home State Cty. Mut. Ins. Co. v. Horn, No. 12-07-00094-CV, 2008 WL 2514332, at *2 (Tex. App.—Tyler June 25, 2008, pet. denied) (mem. op.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1356 (1998)); Branson v. Spiros Partners Ltd., No. 04-07-00007-CV, 2007 WL 4547502, at *2 (Tex. App.—San Antonio Dec. 28, 2007, no pet.) (mem. op.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1356 (1998)).

69. *Home State Cty. Mut. Ins. Co.*, 2008 WL 2514332, at *2; *see also infra* Parts 1.III.B, IV.C (discussing burden of proof for no-evidence summary judgments and how to respond to them, respectively).

70. TEX. R. CIV. P. 166a(i).

71. *Id.*; Sw. Elec. Power Co. v. Grant, 73 S.W.3d 211, 215 (Tex. 2002).

72. Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen, 525 S.W.3d 671, 695 (Tex. 2017) (citing TEX. R. CIV. P. 166a(i)); Timpte Indus., Inc. v. Gish, 286 S.W.3d 306, 310 (Tex. 2009); *see*

plaintiff's cause of action and specifically challenge the evidentiary support for an element of that claim.[73] For example, in a negligence case, it is sufficient to state that there is no evidence of duty, breach, or causation.[74] It is not sufficient to argue that the plaintiffs "have no evidence of any element of this cause of action" and then listing two elements "[b]y way of example."[75] This statement is sufficient only to challenge the listed elements, not all elements of the cause of action.[76]

Likewise, a plaintiff can challenge boilerplate affirmative defenses alleged in the defendant's answer by using a no-evidence summary judgment.[77]

Second, the motion cannot be conclusory or generally allege that there is no evidence to support the claims.[78] In other words, a motion that merely states that there is no evidence to support the other party's claim is insufficient. For example, a no-evidence motion is too general if it states: "[T]here is absolutely no evidence to support [plaintiff's] assertions that [defendant] committed a wrongful foreclosure . . . ."[79] The underlying purpose of the requirement that the motion be specific, not conclusory, is to provide the nonmovant "with adequate information for opposing the motion, and to define the issues."[80] In *Timpte Industries, Inc. v. Gish*, the supreme court applied a "fair notice" standard to determine whether a motion for no-evidence summary judgment was sufficient.[81] The court allowed that the degree of specificity required depends on the case.[82] It determined that a motion was sufficient that stated that "[p]laintiff has presented no evidence of a design

also Smith v. Lagerstam, No. 03-05-00275-CV, 2007 WL 2066298, at *19 (Tex. App.—Austin July 19, 2007, no pet.) (mem. op.) (Patterson, J., dissenting) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409, 416 (2006)).

73. TEX. R. CIV. P. 166a cmt.—1997.

74. Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 436 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

75. *Hansen*, 525 S.W.3d at 671, 696 (Tex. 2017).

76. *Id.* at 695–96.

77. *See infra* Sec. A.3. (Affirmative Defenses).

78. *Smith*, 2007 WL 2066298, at *19.

79. Abraham v. Ryland Mortg. Co., 995 S.W.2d 890, 892 (Tex. App.—El Paso 1999, no pet.); *see also* Meru v. Huerta, 136 S.W.3d 383, 386–87 (Tex. App.—Corpus Christi 2004, no pet.) ("Rule 166a(i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case.").

80. *Timpte Indus., Inc.*, 286 S.W.3d at 311 (analogizing this purpose to the "fair notice" pleading requirements of Rules 45(b) and 47(a)).

81. *Id.* In relying on the fair notice standard, the supreme court in *Timpte Industries, Inc.* appears to overrule courts of appeals' opinions that refuse to extend the fair notice standard to determine whether a motion for no-evidence summary judgment is sufficient, including the following: Holloway v. Tex. Elec. Util. Constr., Ltd., 282 S.W.3d 207, 215 (Tex. App.—Tyler 2009, no pet.); Fieldtech Avionics & Instruments, Inc. v. Component Control.com, Inc., 262 S.W.3d 813, 824 n.4 (Tex. App.—Fort Worth 2008, no pet.); Mott v. Red's Safe & Lock Servs. Inc., 249 S.W.3d 90, 98 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

82. *Timpte Indus., Inc.*, 286 S.W.3d at 311.

defect which was a producing cause of his personal injury" and included a conclusion that essentially repeated the statement of this element with little additional information.[83] The court also noted that such a motion might be insufficient in a complex products or design defect case.[84]

If a no-evidence motion for summary judgment is conclusory, general, or does not state the elements for which there is no evidence, the motion is legally insufficient.

> Thus, a no-evidence motion that lists each element of the plaintiff's claim and then asserts that the plaintiff has no evidence to support "one or more" or "any" of' those elements is insufficient to support summary judgment because this language does not clearly identify which elements, whether some or all, are challenged.[85]

While no evidence need be attached to a no-evidence motion for summary judgment, in some instances it may be advisable to do so in light of summary judgment cases construing *City of Keller v. Wilson*.[86]

In *City of Keller*, the supreme court determined that a matter is conclusively established if reasonable people could not differ concerning the conclusion to be drawn from the evidence.[87] Thus, it concluded that "[t]he standards for taking any case from the jury should be the same, no matter what motion is used."[88] The court noted that appellate courts "do not disregard the evidence supporting the motion."[89] But it added that "although a reviewing court must consider all the summary judgment evidence on file, in some cases that review will effectively be restricted to the evidence contrary to the motion."[90] *City of Keller* has been construed to mean that the appellate court reviewing a summary judgment "must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented."[91] In other words, the final test for a no-evidence review is whether the evidence presented would enable reasonable and fair-

83. *Id.* (alteration in original).

84. *Id.*

85. Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen, 525 S.W.3d 671, 695–96 (Tex. 2017); *see also*, Jose Fuentes Co. v. Alfaro, 418 S.W.3d 280, 287 (Tex. App.—Dallas 2013, pet. denied) (collecting authorities holding that the issue may be raised for the first time on appeal).

86. City of Keller v. Wilson, 168 S.W.3d 802, 822–24 (Tex. 2005).

87. *Id.* at 816.

88. *Id.* at 825.

89. *Id.* at 824–25 (emphasis omitted).

90. *Id.* at 825.

91. Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam) (citing *City of Keller*, 168 S.W.3d at 822–24); *see also* Timpte Indus., Inc. v. Gish, 286 S.W.3d 306, 310 (Tex. 2009) (citing Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 582 (Tex. 2006)); Wal-Mart Stores, Inc. v. Spates, 186 S.W.3d 566, 568 (Tex. 2006) (per curiam) (citing *City of Keller*, 168 S.W.3d at 822–23).

minded people to reach a verdict in favor of the nonmovant in a summary judgment.[92]

4. Combined Traditional and No-Evidence Motions for Summary Judgment

Traditional summary judgment motions under Rules 166a(a) or (b) may be combined with a Rule 166a(i) no-evidence motion.[93] Combined motions are referred to as "hybrid" motions for summary judgment.[94] If a party *with the burden of proof* files both a traditional and no-evidence summary judgment, the court may consider only the traditional motion for summary judgment. If a party has the burden of proof on claims or defenses, it may not properly urge a no-evidence summary judgment to challenge those claims or defenses.[95] For example, in *State Farm Lloyds v. Page*, an insurance company moved for summary judgment on both traditional and no-evidence grounds.[96] In its traditional summary judgment motion, the insurance company argued that its insured's policy afforded no coverage for mold damage to her home or its contents.[97] The company argued alternatively that its insured had no evidence that a covered peril caused the mold contamination or that the insurance company owed more than it had already paid under the policy.[98] The trial court denied the no-evidence motion and granted the company's traditional motion for summary judgment, which the court of appeals reversed, holding that the policy did cover mold damage to the home and its contents.[99] The supreme court considered both points raised by the combined motion, reversing the court of appeals in part on the traditional summary judgment based on principles of contract interpretation and affirming the denial of the no-evidence summary judgment.[100] Sometimes both type

92. *See* Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen, 525 S.W.3d 671, 680 (Tex. 2017) (citing Childs v. Haussecker, 974 S.W.2d 31, 44 (Tex. 1998) ("An issue is conclusively established 'if reasonable minds could not differ about the conclusion to be drawn from the facts in the record.'")).

93. Binur v. Jacobo, 135 S.W.3d 646, 650–51 (Tex. 2004). *Binur*'s implication that the movant's evidence should be disregarded has effectively been supplanted by *City of Keller* and its progeny. *See supra* Part 1.I.A.3.

94. City of Magnolia 4A Econ. Dev. Corp. v. Smedley, 533 S.W.3d 297, 299 (Tex. 2017*)* (per curiam*)*.

95. Rubio v. Martinez, Nos. 13-10-00351-CV, 13-10-00352-CV, 2011 WL 3241905, at *2 (Tex. App.—Corpus Christi July 28, 2011, no pet.) (mem. op.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1388–89 (2010)).

96. State Farm Lloyds v. Page, 315 S.W.3d 525, 527 (Tex. 2010).

97. *Id.* at 531.

98. *Id.*

99. *Id.* at 527.

100. *See id.* at 530–33.

motions result in a loss to the movant. For example, in *Painter v. Amerimex Drilling I, Ltd.*, the supreme court determined that the defendant was not entitled to either a no-evidence or traditional motion for summary judgment on a plaintiff's vicarious liability claim.[101]

5. Drafting a Motion for Summary Judgment

A motion for summary judgment is a "trial on paper."[102] Thus, the hallmarks of a winning trial strategy must be translated to the written word. An empirical study published in 2018 found that the more readable summary judgment briefs were, the more likely they were to prevail. This finding held, even after controlling for attorney experience, law firm resources and repeat-player status before the judge.[103]

Even though it is a battle of paper, summary judgment motions should mirror a good trial presentation to include "a clear theme that grabs the reader's attention, a persuasive story, and, most importantly, a clear analysis of the facts and the law that demonstrates why it should be granted."[104] It is particularly important to be clear and concise in state court, where judges generally do not have law clerks to help them sift through confusing or lengthy summary judgment pleadings.

The key sections of a summary judgment motion or response are set forth below.

Title and Introduction: The practice of being clear and concise begins in the beginning. A noted appellate lawyer advises that the title and introduction should answer three questions:

1) Is the party filing the motion the claimant seeking a traditional summary judgment under Rule 166a(a) or a defendant seeking summary judgment under Rule 166a(b);
2) Is the movant seeking summary judgment on traditional grounds, no-evidence grounds, or both;
3) Is the movant seeking a final or partial summary judgment?[105]

101. Painter v. Amerimex Drilling I. Ltd., 561 S.W.3d 125, 139 (Tex. 2018).

102. Michele L. Maryott, *The Trial on Paper: Key Considerations for Determining Whether to File a Summary Judgment Motion*, 35 LITIG. 36, 39 (2009).

103. Shaun B. Spencer & Adam Feldman, *Words Count: The Empirical Relationship Between Brief Writing and Summary Judgment Success*, 22 LEGAL WRITING: J. LEGAL WRITING INST. 61, 105–106 (2018).

104. Maryott, *supra* note 102 at 39.

105. Kent Rutter, *Summary Judgment Motions and Responses: A Practical Checklist*, 72 THE ADVOC. 30, 30 (2015).

Thus, depending on the answers to these questions, the motion might be entitled "Plaintiff Smith's Traditional Motion for Partial Summary Judgment on Liability."[106]

Grounds: Every ground for summary judgment must appear in the motion itself.[107] In preparing the grounds, a former judge advises using the familiar: the pattern jury charge.[108] When presenting a no-evidence motion, use the relevant pattern jury question to persuade the court that it likely would enter a judgment notwithstanding the verdict in the event the jury were to make a finding adverse to your position.[109]

When drafting a no-evidence section, the movant should specify the element or elements of the plaintiff's claim (or defendant's affirmative defense) for which there is no evidence. A no-evidence motion that lists the elements of a claim and then asserts that the plaintiff has no evidence to support "one or more" or "any of" those elements is insufficient to support summary judgment because it fails to clearly identify which elements are challenged.[110]

Argument*:* The length and nature of the argument will depend on the circumstances of the case. But, under any circumstance, the value of clear, persuasive writing cannot be overstated.[111] Brevity is a virtue. The longer the motion and supporting evidence, the more likely it is to convey a subliminal message that "there must be a fact issue in there somewhere."

The supreme court endorses the use of headings to delineate the basis for summary judgment but does not require it.[112] "If a motion clearly sets forth its grounds and otherwise meets Rule 166a's requirements, it is sufficient."[113] Nonetheless, using headings makes the motion easier to follow and is good advocacy. Because headings provide guideposts, their use is

106. *Id.*

107. Traditional summary judgments cannot be upheld upon grounds not raised in the motion for summary judgment. *See, e.g.*, City of Midland v. O'Bryant, 18 S.W.3d 209, 218 (Tex. 2000); Chessher v. Sw. Bell Tel. Co., 658 S.W.2d 563, 564 (Tex. 1983). This prohibition applies to no-evidence summary judgments as well. *See* Fraud–Tech, Inc. v. Choicepoint, Inc., 102 S.W.3d 366, 387 (Tex. App.—Fort Worth 2003, pet. denied); Callaghan Ranch, Ltd. v. Killiam, 53 S.W.3d 1, 4 (Tex. App.—San Antonio 2000, pet denied); Specialty Retailers, Inc. v. Fuqua, 29 S.W.3d 140, 147–48 (Tex.App.—Houston [14th Dist.] 2000, pet. denied); *see also* TEX. R. CIV. P. 166a cmt. (stating no-evidence motion for summary judgment "must be specific in challenging the evidentiary support for an element of a claim or defense").

108. James M. Stanton, *How to Prevail at a Summary Judgment Hearing*, TEX. LAW., May 21, 2012, at 19.

109. *Id.*

110. Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen, 525 S.W.3d 671, 680 (Tex. 2017).

111. *See generally* Chad Baruch, *Legal Writing: Lessons from the Bestseller List*, 43 TEX. J. BUS. LAW 593 (2009) (advocating the importance of legal writing).

112. Binur v. Jacobo, 135 S.W.3d 646, 651 (Tex. 2004).

113. *Id.*

particularly important for judges who read pleadings in an electronic format.[114]

In drafting the argument, use summary judgment language. Summary judgment language refers to phrases such as "there is no evidence," "as a matter of law," and "the summary judgment evidence establishes." It does not include indefinite language such as that an event occurred "on or about" or the "damages were approximately." Another common mistake is use of language that, if applied literally, would prevent summary judgment disposition. Such language includes phrases such as "the preponderance of the evidence shows," "the credible evidence demonstrates," or "the greater weight of evidence proves." These types of phrases have no place in summary judgment practice because each conveys that there is conflicting evidence, which would prevent rendition of a summary judgment.

Conversely, the nonmovant should use parallel language to show there is a conflict in the evidence, and phrases such as certain evidence "raises a fact issue" are appropriate. If in doubt about the proper summary judgment language, look to opinions dealing with the same issue to borrow proper language for the issue being briefed.

In most instances, the movant should present its no-evidence motion first, because when a motion asserts both no-evidence and traditional grounds, the courts must review the no-evidence grounds first.[115] Upon review of the response to the no-evidence ground, if the court determines that the non-movant has failed to produce legally sufficient evidence to meet his burden, there is no need for it to analyze whether the movant satisfied its burden under the traditional motion for summary judgment.[116]

Evidence: In regard to summary judgment evidence, it need not be set out or described in the motion to be considered.[117] But, here again, the practice of making the motion (or response) easy to follow should continue when reciting the evidence. Even though the rules do not require the motion or response to cite specific pages or lines of summary evidence, "the wise practitioner will do more than the rules require, as it is poor advocacy to leave the court guessing about which portions of the evidence are meant to support which aspects of the motion."[118]

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114. *See* Robert Dubose, LEGAL WRITING FOR THE REWIRED BRAIN: PERSUADING READERS IN A PAPERLESS WORLD 61 (2010).

115. Cmty. Health Sys. Prof'l Servs. Corp., 525 S.W.3d at 680 (citing Ford Motor Co. v. Ridgway, 135 S.W. 3d 598, 600 (Tex. 2004)).

116. Merriman v. XTO Energy, Inc., 407 S.W. 3d 244, 248 (Tex. 2013); Gonzalez v. Ramirez, 463 S.W.3d 499, 502, n.7 (Tex. 2015).

117. Wilson v. Burford, 904 S.W.2d 628, 629 (Tex. 1995) (per curiam).

118. Rutter, *supra* note 105, at 31.

Non-movant's Response: The guidance for drafting a response tracks the advice for drafting the motion. Respond to a motion for summary judgment in clear, concise language presenting evidence to show that a fact issue exists or that the motion is insufficient as a matter of law. In regard to the presentation of evidence, the non-movant is not required to marshal its proof, but must present enough evidence to raise a genuine fact issue on the challenged elements.[119] One of the most difficult strategic decisions to be made by a non-movant is how much of its evidence it should reveal to overcome the summary judgment, without giving the movant a complete preview of its evidence and strategy.

B. Pleadings

The movant should insure that the grounds for the motion for summary judgment are supported by pleadings. Rule 166a(c) provides that the trial court should render summary judgment based on pleadings on file at the time of the hearing.[120] Where there is no live pleading urging a cause of action, there can be no summary judgment.[121]

1. Amended Pleadings

Unless it violates a discovery plan deadline, a party may file an amended pleading after it files its summary judgment motion or response.[122] A summary judgment proceeding is considered a "trial" with respect to filing amended pleadings according to Texas Rule of Civil Procedure 63.[123] Thus, a party should file an amended answer as soon as possible and no later than seven days before the summary judgment hearing.[124] If filed outside the seven-day period, no leave to file amended pleadings is necessary.[125] In computing the seven-day period, the day the party files the amended pleading is not counted, but the day of the hearing on the motion for summary judgment is counted.[126]

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119. TEX. R. CIV. P. 166a, notes and cmts.

120. TEX. R. CIV. P. 166a(c).

121. Daniels v. Daniels, 45 S.W.3d 278, 282 (Tex. App.—Corpus Christi 2001, no pet.). *But see infra* Part 1.IV.A (discussing unpleaded claims); *infra* Part 1.III.A.3 (discussing affirmative defenses).

122. Cluett v. Med. Protective Co., 829 S.W.2d 822, 825–26 (Tex. App.—Dallas 1992, writ denied).

123. Rule 63 provides for timing of amendments and responsive pleadings, including that amended pleadings may be filed without leave of court up to seven days before the date of trial, unless the judge sets a different schedule under Rule 166. TEX. R. CIV. P. 63.

124. *Id.*; Sosa v. Cent. Power & Light, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam).

125. 9029 Gateway S. Joint Venture v. Eller Media Co., 159 S.W.3d 183, 187 (Tex. App.—El Paso 2004, no pet.).

126. *Sosa*, 909 S.W.2d at 895 (citing TEX. R. CIV. P. 4).

Timing requirements for handling supplemental pleadings vary based on when they are filed. To file amended pleadings within seven days of the date of the summary judgment hearing, the non-movant must obtain leave of court.[127] If the motion for leave is filed within seven days of the hearing, the appellate court presumes leave was granted if: "(1) the summary judgment states that all pleadings were considered, (2) the record does not indicate that an amended pleading was *not* considered, and (3) the opposing party does not show surprise."[128] In response, to properly preserve a complaint that a pleading has been filed within seven days of trial, the complaining party must both demonstrate surprise and request a continuance.[129] If the hearing or submission is set or reset, "the key date for purposes of Rule 63 [is] the date of the final hearing from which the summary judgment sprang."[130] The burden is higher on the party amending pleadings once the hearing date on the motion for summary judgment has passed. A party may file an amended pleading before the court signs a judgment only if it secures a written order granting leave to file.[131] If a nonmovant does not obtain the trial court's written permission to amend its pleadings after the hearing date, the movant need not amend or supplement its motion for summary judgment to address those claims.[132] Once it signs an order granting summary judgment, the court loses authority to grant a motion to amend the pleadings.[133]

Plaintiffs sometimes amend their petitions after the defendants file their motions for summary judgment. If the plaintiff amends the petition after being served with a motion for summary judgment, the defendant must file an amended or supplemental motion for summary judgment to address the newly pleaded cause of action.[134] Amending the motion is

127. *Id.*

128. *Eller Media Co.*, 159 S.W.3d at 187; *see also* Cont'l Airlines, Inc. v. Kiefer, 920 S.W.2d 274, 276 (Tex. 1996).

129. Fletcher v. Edwards, 26 S.W.3d 66, 74 (Tex. App.—Waco 2000, pet. denied) (citing Morse v. Delgado, 975 S.W.2d 378, 386 (Tex. App.—Waco 1998, no pet.)).

130. Cantu v. Holiday Inns, Inc., 910 S.W.2d 113, 115 (Tex. App.—Corpus Christi 1995, writ denied). Rule 63 (Amendments and Responsive Pleadings) provides, in part, that parties may amend their pleading up to seven days before the date of trial or thereafter, only if they obtain leave of court. TEX. R. CIV. P. 63.

131. TEX. R. CIV. P. 63; D.R. Horton-Tex., Ltd. v. Savannah Props. Assocs., L.P., 416 S.W.3d 217, 224 (Tex. App.—Fort Worth 2013, no pet.); Hussong v. Schwan's Sales Enters., Inc., 896 S.W.2d 320, 323 (Tex. App.—Houston [1st Dist.] 1995, no writ).

132. Mensa-Wilmot v. Smith Int'l, Inc., 312 S.W.3d 771, 778 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409, 419–20 (2006)).

133. Prater v. State Farm Lloyds, 217 S.W.3d 739, 741 (Tex. App.—Dallas 2007, no pet.).

134. Johnson v. Rollen, 818 S.W.2d 180, 183 (Tex. App.—Houston [1st Dist.] 1991, no writ); *see also* Worthy v. Collagen Corp., 921 S.W.2d 711, 714 & n.1 (Tex. App.—Dallas 1995) (discussing supplemental motions), *aff'd*, 967 S.W.2d 360 (Tex. 1998).

equally necessary for no-evidence summary judgments. If the plaintiff amends its petition adding new causes of action not addressed by the defendant's no-evidence motion for summary judgment, the defendant must file an amended motion for summary judgment identifying the elements of the newly pleaded theories for which there is no evidence.[135] Otherwise, summary judgment on the entirety of the plaintiff's case will be improper because the no-evidence motion fails to address all of the plaintiff's theories of liability.[136] It is not always necessary for the defendant to file an amended or supplemental motion for summary judgment. If an amended petition only "reiterates the same essential elements in another fashion," then the original motion for summary judgment will cover the new variations.[137] Similarly, if a motion for summary judgment is sufficiently broad to encompass later-filed claims, the movant need not amend the motion for summary judgment.[138] Nonetheless, as a matter of effective persuasion, even when the original motion for summary judgment is sufficiently broad to encompass newly added claims, a movant should consider filing a succinct supplemental brief explaining to the court why an amended motion is unnecessary.

Also, when a ground asserted in a motion for summary judgment conclusively negates a common element of the newly and previously pleaded claims, summary judgment may be proper.[139]

In cases with court-ordered discovery plans, the court may set the deadline for amended pleadings before the close of the discovery period.[140] In those instances, movants who wait to move for summary judgment until after the time expires for pleading amendments will not have to amend the summary judgment motion to address amended pleadings filed beyond the deadline without leave of court.

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135. In such a situation, a movant's reply brief that addresses the newly alleged causes of action is "patently insufficient" to form the basis of a no-evidence summary judgment because the nonmovant would have been under no burden to present any evidence to support its newly added claims when responding to the original motion. Specialty Retailers, Inc. v. Fuqua, 29 S.W.3d 140, 148 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

136. Sosa v. Cent. Power & Light, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam).

137. *Specialty Retailers, Inc.*, 29 S.W.3d at 147 (quoting Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 437 (Tex. App.—Houston [14th Dist.] 1999, no pet.)).

138. Methodist Hosp. v. Zurich Am. Ins. Co., 329 S.W.3d 510, 515 n.4 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (citing Espeche v. Ritzell, 123 S.W.3d 657, 664 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

139. Rotating Servs. Indus. v. Harris, 245 S.W.3d 476, 487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

140. TEX. R. CIV. P. 190.4(b)(4).

2. Unpleaded Claims or Affirmative Defenses

Unpleaded claims or affirmative defenses may form the basis for summary judgment if the nonmovant does not object.[141] Specifically, the Texas Supreme Court has held:

> [A]n unpleaded affirmative defense may . . . serve as the basis for a summary judgment when it is raised in the summary judgment motion, and the opposing party does not object to the lack of a [Texas Rule of Civil Procedure] 94 pleading in either its written response or before the rendition of judgment.[142]

Based on the same reasoning, the Eastland Court of Appeals determined that, even though the plaintiff failed to plead the discovery rule, summary judgment was precluded when the defendant did not address it after the plaintiff raised it in response to its motion for summary judgment.[143] The court held that "when a non-movant relies on an unpleaded affirmative defense or an unpleaded matter constituting a confession and avoidance," the movant must object to defeat a motion for summary judgment; otherwise, the issue will be tried by consent.[144]

If the nonmovant objects to an unpleaded claim or affirmative defense used as a basis for a summary judgment, the movant must then amend its pleadings to conform to its motion.[145]

3. Pleading Deficiencies and Special Exceptions

Special exceptions or motions to dismiss, not summary judgment motions, are the proper vehicle to attack pleading deficiencies.[146] Texas

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141. Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754, 756 n.1 (Tex. 2007) (per curiam); Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 495 (Tex. 1991) ("[U]npleaded claims or defenses that are tried by express or implied consent of the parties are treated as if they [were] raised by the pleadings.").

142. *Roark*, 813 S.W.2d at 494; *see also* TEX. R. CIV. P. 94 (concerning pleading affirmative defenses); Finley v. Steenkamp, 19 S.W.3d 533, 541 (Tex. App.—Fort Worth 2000, no pet.) (stating that an unpleaded affirmative defense that is raised in a motion for summary judgment and unchallenged by the nonmovant is a permissible basis for summary judgment); Webster v. Thomas, 5 S.W.3d 287, 288–89 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (discussing the burden of proof when basing a motion for summary judgment on an affirmative defense).

143. Proctor v. White, 172 S.W.3d 649, 652 (Tex. App.—Eastland 2005, no pet.).

144. *Id.*

145. *See* Natividad v. Alexsis, Inc., 875 S.W.2d 695, 699 (Tex. 1994) ("Summary judgment based on a pleading deficiency is proper if a party has had an opportunity by special exception to amend and fails to do so, or files a further defective pleading.").

146. *In re* B.I.V., 870 S.W.2d 12, 13–14 (Tex. 1994) (per curiam); Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983) ("Whether pleadings fail to state a cause of action may not be resolved by summary judgment."); Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 9–10 (Tex. 1974) (concluding that the protective features of the special exception procedure should not be circumvented by summary judgment where the pleadings fail to state a cause of action).

Rule of Civil Procedure 91a, which went into effect on March 1, 2013, permits (through the filing of a motion to dismiss) the dismissal of causes of action that have "no basis in law or fact" when the requirements of the rule are met.[147]

In the context of summary judgment procedure, if a pleading deficiency can be cured by amendment, a summary judgment is not proper.[148] However, a nonmovant must raise a complaint that summary judgment was granted without opportunity to amend or it is waived.[149]

a. Special Exceptions

Special exceptions should be used to challenge the plaintiff's failure to state a cause of action or to force a movant to clarify an unclear or ambiguous motion for summary judgment. The purpose of special exceptions is to compel clarification of pleadings when the pleadings are not clear or sufficiently specific or fail to plead a cause of action.[150] If the nonmovant seeks to challenge the plaintiff's failure to state a cause of action, filing special exceptions is the appropriate method to attack that failure.[151] Special exceptions allow the nonmovant an opportunity to

147. TEX. R. CIV. P. 91a.1; Bart Turner & Assocs. v. Krenke, No. 3:13-CV-2921-L, 2014 WL 1315896, at *3 (N.D. Tex. Mar. 31, 2014) (mem. op.) ("[Rule 91a] now allows a state court to do what a federal court is allowed to do under Federal Rule of Civil Procedure 12(b)(6)."); *see also* TEX. R. CIV. P. 90–91 (providing for special exceptions for defects in pleadings and waiver of defects for failure to specially except). TEX. R. CIV. P. 91a.1 ("A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought. A cause of action has no basis in fact if no reasonable person could believe the facts pleaded."); Wooley v. Schaffer, 447 S.W.3d 71, 74–76 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (deciding as a matter of first impression that a trial court's ruling on a motion to dismiss under Rule 91a is reviewed de novo).

148. *In re B.I.V.*, 870 S.W.2d at 13.

149. San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 209–10 (Tex. 1990) (per curiam) (holding that a trial court's judgment may not be reversed where a party does not present a timely request, objection, or motion to the trial court); Higbie Roth Constr. Co. v. Houston Shell & Concrete, 1 S.W.3d 808, 811 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); Ross v. Arkwright Mut. Ins. Co., 933 S.W.2d 302, 304–05 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (citing *San Jacinto River Auth.*, 783 S.W.2d at 209–10).

150. Friesenhahn v. Ryan, 960 S.W.2d 656, 658–59 (Tex. 1998).

151. TEX. R. CIV. P. 91; *see also* Lavy v. Pitts, 29 S.W.3d 353, 356 (Tex. App.—Eastland 2000, pet. denied) (explaining that the rationale behind special exceptions, even in the context of a motion for summary judgment, is that parties must clearly assert their position in writing). The recent enactment of Rule 91a does not alter the procedure for filing special exceptions, as the new rule "is in addition to, and does not supersede or affect, other procedures that authorize dismissal." TEX. R. CIV. P. 91a.9; City of Austin v. Liberty Mut. Ins., 431 S.W.3d 817, 821 (Tex. App.—Austin 2014, no pet.).

amend before dismissal.[152] There is no general demurrer in Texas.[153] If the court determines the petition is defective, the "court must give the pleader an opportunity to amend his pleadings prior to granting summary judgment or dismissing the case."[154] In certain circumstances, a trial court may dismiss a claim after sustaining special exceptions. For example, in *Baylor University v. Sonnichsen*, the supreme court determined that because the plaintiff could not have corrected the problem (there was no mutual agreement), the trial court did not abuse its discretion by sustaining the defendant's special exceptions and dismissing his breach of contract claim.[155]

Subject to challenges to jurisdiction and venue, a party should file special exceptions identifying and objecting to non-jurisdictional defects apparent on the face of the opponent's pleadings.[156] If identification of the defect depends on information extrinsic to the pleadings themselves, special exceptions are not appropriate.[157] Special exceptions must be directed at the plaintiff's *live* pleadings.[158]

Special exceptions are also the method to force a movant for summary judgment to clarify its position if its motion for summary judgment is unclear or ambiguous. To complain that summary judgment

152. Centennial Ins. Co. v. Commercial Union Ins. Cos., 803 S.W.2d 479, 483 (Tex. App.—Houston [14th Dist.] 1991, no writ).

153. Texas Rule of Civil Procedure 90 discarded the general demurrer. TEX. R. CIV. P. 90; Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 10 (Tex. 1974); *see also General Demurrer*, BLACK'S LAW DICTIONARY 644, 752 (9th ed. 2009) (defining "general demurrer" as "[a]n objection pointing out a substantive defect in an opponent's pleading, such as the insufficiency of the claim or the court's lack of subject-matter jurisdiction; an objection to a pleading for want of substance").

154. Moonlight Invs., Ltd. v. John, 192 S.W.3d 890, 893 (Tex. App.—Eastland 2006, pet. denied); *see also Friesenhahn*, 960 S.W.2d at 658 ("When the trial court sustains special exceptions, it must give the pleader an opportunity to amend the pleading.").

155. Baylor Univ. v. Sonnichsen, 221 S.W.3d 632, 635 (Tex. 2007) (per curiam).

156. Fort Bend County v. Wilson, 825 S.W.2d 251, 253 (Tex. App.—Houston [14th Dist.] 1992, no writ) (holding that special exceptions should be used to force clarification of vague pleadings and question the legal sufficiency of the party's petition).

157. Fernandez v. City of El Paso, 876 S.W.2d 370, 373 (Tex. App.—El Paso 1993, writ denied) (stating special exceptions must only address matters on the face of the other party's pleading); O'Neal v. Sherck Equip. Co., 751 S.W.2d 559, 562 (Tex. App.—Texarkana 1988, no writ) (stating that a special exception "cannot inject factual allegations that do not appear" in the other party's pleading).

158. *See* Transmission Exch. Inc. v. Long, 821 S.W.2d 265, 269 (Tex. App.—Houston [1st Dist.] 1991, writ denied) (stating that any complaint regarding a pleading is waived unless specifically included in special exceptions). In *Transmission Exchange Inc. v. Long*, the defendants' statement in their special exceptions that plaintiff's pleading did not advise them of the amounts claimed for fraud damages, was taken as an indication that defendants were aware of and, therefore, on notice of plaintiff's fraud allegations. *Id.* That fact, coupled with the absence of any special exceptions to the vague allegations of fraud in plaintiff's third amended petition and the defendants' failure to object to the submission of special issues on fraud, constituted waiver of any complaint that the judgment for fraud did not conform to the pleadings. *Id.*

grounds are unclear, a nonmovant must specially except to the motion.[159] If the motion fails to state grounds or states some grounds but not others, the nonmovant should challenge these defects as a means to defeat the summary judgment on the merits, not to identify them by special exceptions and thereby prompt the movant to cure them. Any special exception due to a lack of clarity or ambiguity in the motion for summary judgment is likewise subject to the seven-day before the hearing deadline.[160] Amended pleadings may be filed without leave of court up to seven days before the hearing.[161]

The party filing special exceptions should ask for a signed order overruling or sustaining the special exceptions at or before the hearing.[162] The movant should be entitled to a ruling before responding to the motion for summary judgment. Practically, the best way of handling timing in such an instance may be to ask the court for a continuance until it rules on the special exception.

A court will not infer a ruling on the special exception from the disposition of the summary judgment alone.[163]

b. Effect of Amendment and Failure to Amend

As noted above, a motion for summary judgment should not be based on a pleading deficiency (that is subject to a special exception) that could be cured by amendment. If the trial court sustains the special exception, the offending party may replead or it may elect to stand on the pleadings and test the trial court's order on appeal.[164] If the opportunity to amend is given and no amendment is made or instead a further defective pleading is filed, then summary judgment may be proper.[165] If a pleading deficiency is a type that cannot be cured by an amendment, then a special exception is unnecessary

159. Grace Interest, LLC v. Wallis State Bank, 431 S.W.3d 110, 123 (Tex. App.—Houston [14th Dist.] 2013, pet. denied); Lavy v. Pitts, 29 S.W.3d 353, 356 (Tex. App.—Eastland 2000, pet. denied) (citing Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 175 (Tex. 1995)).

160. McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 343 n.7 (Tex. 1993) (finding that any confusion regarding an exception must be responded to in written form, filed, and served at least seven days before the hearing).

161. Sosa v. Cent. Power & Light, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam); *see supra* Part 1.I.B.1 (discussing amended pleadings).

162. *See McConnell*, 858 S.W.2d at 343 n.7.

163. *See* Seim v. Allstate Tex. Lloyds, 551 S.W.3d 161, 165 (Tex. 2018) (citing with approval Well Sols., Inc. v. Stafford, 32 S.W.3d 313, 317 (Tex. App.—San Antonio 200, no pet.)); Franco v. Slavonic Mut. Fire Ins. Ass'n, 154 S.W.3d 777, 785 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

164. D.A. Buckner Constr., Inc. v. Hobson, 793 S.W.2d 74, 75 (Tex. App.—Houston [14th Dist.] 1990, no writ).

165. Haase v. Glazner, 62 S.W.3d 795, 800 (Tex. 2001); Friesenhahn v. Ryan, 960 S.W.2d 656, 658 (Tex. 1998); Natividad v. Alexsis, Inc., 875 S.W.2d 695, 699 (Tex. 1994).

and summary judgment is proper if the facts alleged "establish the absence of a right of action or [create] an insuperable barrier to a right of recovery."[166]

The review of a summary judgment differs when based on the failure of a party to state a claim after either special exceptions or an amendment because review then focuses on the pleadings of the nonmovant.[167] On appeal, review of the sufficiency of the amended pleadings is de novo.[168] The appellate court must take "all allegations, facts, and inferences in the pleadings as true and view[] them in a light most favorable to the pleader."[169] The court will reverse the motion for summary judgment if the pleadings, liberally construed, support recovery under any legal theory.[170] On the other hand, "[t]he reviewing court will affirm the summary judgment only if the pleadings are legally insufficient."[171]

C. Time for Filing Motion for Summary Judgment

The timing of filing a motion for summary judgment depends on whether it is a traditional motion for summary judgment or a no-evidence summary judgment.

1. Traditional Summary Judgment

Rule 166a(a) provides that the party seeking affirmative relief in a lawsuit may file a traditional motion for summary judgment at any time after the adverse party answers the suit.[172] A summary judgment may not be granted for a plaintiff against a defendant who has no answer on file.[173]

166. Swilley v. Hughes, 488 S.W.2d 64, 66–67 (Tex. 1972) (noting that cases where summary judgment is proper, rather than using special exceptions, are limited); *see, e.g.*, White v. Bayless, 32 S.W.3d 271, 274 (Tex. App.—San Antonio 2000, pet. denied) (granting summary judgment without giving the nonmovant an opportunity to cure because the nonmovant's pleading "affirmatively demonstrate[d] that no cause of action exist[ed]"); Trail Enters., Inc. v. City of Houston, 957 S.W.2d 625, 632–33 (Tex. App.—Houston [14th Dist.] 1997, pet. denied) (finding that the statute of limitations ran and plaintiff did not plead the discovery rule).

167. *See* Russell v. Tex. Dep't of Human Res., 746 S.W.2d 510, 512–13 (Tex. App.—Texarkana 1988, writ denied) (explaining that, after amendment, the focus shifts to the answers in the response).

168. *Natividad*, 875 S.W.2d at 699; Hall v. Stephenson, 919 S.W.2d 454, 467 (Tex. App.—Fort Worth 1996, writ denied).

169. *Natividad*, 875 S.W.2d at 699; *Hall*, 919 S.W.2d at 467.

170. Gross v. Davies, 882 S.W.2d 452, 454 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (stating that if liberal construction of a petition shows a valid claim, summary judgment should be reversed); Anders v. Mallard & Mallard, Inc., 817 S.W.2d 90, 93 (Tex. App.—Houston [1st Dist.] 1991, no writ) (holding that a motion for summary judgment must be overruled if liberal construction of the pleading reveals a fact issue).

171. *Natividad*, 875 S.W.2d at 699.

172. TEX. R. CIV. P. 166a(a).

173. Hock v. Salaices, 982 S.W.2d 591, 592 (Tex. App.—San Antonio 1998, no pet.).

A defendant, however, may file a motion for summary judgment at any time,[174] even before answering the lawsuit.[175]

Nonetheless, seldom is a motion for summary judgment appropriate immediately after the defendant has answered. In fact, Rule 166a(g) specifically provides that the court "may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."[176] Examples of proper early-filed motions for summary judgment would be when the case hinges exclusively on the interpretation of a statute, the construction of an unambiguous contract, or application of the statute of limitations when the discovery rule does not apply. On the other hand, if the summary judgment grounds are fact-based, generally the nonmovant will have valid grounds for a continuance to conduct some discovery.[177]

2. No-Evidence Motion for Summary Judgment

The proper timing to file a no-evidence motion for summary judgment is more complicated than that for a traditional motion for summary judgment. Before a no-evidence summary judgment can be filed, there must have been an "adequate time for discovery."[178] This "adequate time for discovery" standard applies only to no-evidence motions for summary judgment.[179] "The rule does not require that discovery must have been completed, only that there was 'adequate time'" for discovery.[180] Specifically, the rule provides in relevant part:

> (i) No-Evidence Motion. *After adequate time for discovery*, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.[181]

The "Notes and Comments" addendum to the rule, which was promulgated in 1997, offers guidance for cases with discovery orders. It provides that "[a] discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the

174. TEX. R. CIV. P. 166a(b).

175. Zimmelman v. Harris County, 819 S.W.2d 178, 181 (Tex. App.—Houston [1st Dist.] 1991, no writ).

176. TEX. R. CIV. P. 166a(g); *see infra* Part 1.I.H (discussing motions for continuance).

177. *See infra* Part 1.I.H (discussing motions for continuance).

178. TEX. R. CIV. P. 166a(i).

179. TEX. R. CIV. P. 166a(a)–(b), (i).

180. Specialty Retailers, Inc. v. Fuqua, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

181. TEX. R. CIV. P. 166a(i) (emphasis added).

contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before."[182]

All cases now have a rule- or court-imposed discovery plan with discovery periods.[183] Rule 190 provides three discovery control plans, each of which has a "discovery period" for all civil cases.[184] Therefore, an "adequate time for discovery" may be measured against the "discovery period" assigned to a given case. The comment to Rule 166a(i) covers what now is called a "Level 3" case, which has a court-imposed discovery plan.[185] Levels 1 and 2 have rule-imposed discovery periods.[186] Thus, if the no-evidence motion for summary judgment is filed after the expiration of the discovery periods, presumptively there will have been an adequate time for discovery.

For Level 1 cases, an adequate time for discovery would occur 180 days after the date on which the first request for discovery is served.[187] The practical effect of this cutoff date is that the case has progressed so far, and the dollars sought are so relatively small,[188] that many defendants will forego filing a no-evidence motion for summary judgment before trial. Also, it will be difficult to get the trial court to rule on the motion for summary judgment in the limited time before trial. For Level 2 cases, an adequate time for discovery would be the discovery cutoff of thirty days before the date set for trial, or nine months after the first oral deposition is taken or the answers to the first written discovery are due, whichever is earlier.[189] In Level 2 family cases, the nonmovant responding to a motion for summary judgment filed thirty days before trial would have had adequate time for discovery.[190] For Level 3 cases, the close of discovery under the court-ordered discovery control plan determines the date after which an adequate time for discovery has passed.[191]

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182. TEX. R. CIV. P. 166a(i) cmt.—1997. Paragraph (i) is the no-evidence summary judgment paragraph in Texas Rule of Civil Procedure 155a.

183. TEX. R. CIV. P. 190 cmt.—1999.

184. TEX. R. CIV. P. 190; *see also* Texas Supreme Court Order of Nov. 9, 1998, Final Approval of Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98-9196, at 1, *reprinted in* 61 TEX. B.J. 1140, 1140 (1998) (declaring that Rule 190 applies to all cases filed on or after January 1, 1999).

185. TEX. R. CIV. P. 190.4.

186. TEX. R. CIV. P. 190.2–.3.

187. TEX. R. CIV. P. 190.2(b)(1); *see also* TEX. R. CIV. P. 190.2(c) (explaining that when a suit no longer meets the criteria for Level 1, discovery reopens and either the Level 2 or Level 3 discovery plan, whichever is applicable, takes effect).

188. Level 1 cases are limited to expedited disputes governed by Texas Rule of Civil Procedure 169 and divorces not involving children in which $50,000 or less is at issue. TEX. R. CIV. P. 190.2(a) (citing TEX. R. CIV. P. 169).

189. TEX. R. CIV. P. 190.3(b)(1)(B).

190. TEX. R. CIV. P. 190.3(b)(1)(A).

191. TEX. R. CIV. P. 190.4(b)(2).

The timing restriction is not absolute. Movants on no-evidence summary judgments may properly file the motion before the expiration of the discovery period.[192] The ability to file a no-evidence motion for summary judgment before the close of discovery supports judicial economy arguments; the presumption against the early filing of motions for summary judgment supports the right to a certain discovery window to allow a nonmovant to secure sufficient evidence to demonstrate the existence of a material fact issue.

In appropriate cases, a movant could show an adequate time for discovery has passed, even though the discovery period has not expired, by convincing the court that the nonmovant's claimed need for discovery is unfounded.[193] The nonmovant opposing an early-filed no-evidence motion for summary judgment should attempt to have it denied as premature by convincing the court that remaining discovery is likely to lead to controverting evidence and that, in any event, he or she is entitled to the additional time under the discovery plan.

Even if the no-evidence motion for summary judgment is filed after the close of discovery,[194] Texas Rule of Civil Procedure 190.5 may provide a basis for a request for continuance of the motion for summary judgment. When a nonmovant contends that he or she has not had an adequate time for discovery, he or she must file an affidavit or a verified motion for continuance explaining the need for further discovery.[195] The court may deny the motion for summary judgment, continue the hearing to allow additional discovery, or "make such other order as is just."[196]

Whether to file a summary judgment early or late in the process depends on several factors.[197] If the motion is likely to rest on purely legal grounds, extensive discovery will not be necessary or helpful to either party. An early filing of a summary judgment motion may provide an early look at the other side's case

192. When determining whether an adequate time for discovery has passed, in addition to the discovery period, courts look to the nature of the causes of action, the type of evidence necessary to controvert the no-evidence motion, the length of time the case has been pending, the length of time the motion has been on file, the amount of discovery that has already occurred, whether the movant has requested stricter time deadlines for discovery, and whether the existing discovery deadlines are specific or vague. Specialty Retailers, Inc. v. Fuqua, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also infra* Part 1.I.H.2 (discussing factors considered in granting continuances).

193. *See Specialty Retailers, Inc.*, 29 S.W.3d at 145 (upholding the trial court's conclusion that an adequate time for discovery had passed despite the fact that the discovery deadline had not yet been reached); *see also infra* Part 1.I.H.2 (discussing factors considered in granting continuances).

194. *See infra* Part 1.I.H (discussing motions for continuance).

195. Tenneco Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 647 (Tex. 1996).

196. TEX. R. CIV. P. 166a(g).

197. *See generally* W. Alan Wright & Thomas E. Kurth, *Tactical Considerations in Summary Judgment Practice*, 64 ADVOC., Fall 2013, at 15, 17 (explaining that the decision to move for summary judgment involves several tactical decisions).

and its evidence. As such, an early filing strategy may benefit the movant's trial preparations and encourage settlement.[198]

Conversely, when summary judgment grounds are fact-based, the movant likely should consider waiting until the close of discovery to seek summary judgment. Thus, a late filing strategy could allow the movant to "lock in" the nonmovant's evidence and testimony.[199]

D. Deadlines for Filing Motion for Summary Judgment

A motion for summary judgment shall be filed and served at least twenty-one days before the time specified for the hearing on the summary judgment.[200] If different parties on the same side of the lawsuit file separate summary judgment motions, each movant should comply with the notice provisions of the rule.[201] Parties may alter the deadlines for filing summary judgment motions by Rule 11 agreement.[202] Periods governing summary judgment procedures are counted in the same manner as for other procedural rules.[203] The day of service of a motion for summary judgment is not to be included in computing the minimum twenty-one-day notice for hearing.[204] However, the day of hearing is included in the computation.[205]

The supreme court has mandated electronic filing in "civil cases, including family and probate cases, by attorneys in appellate courts, district courts, statutory county courts, constitutional county courts, and statutory probate courts."[206] If electronic filing has not been mandated and if the motion is served by mail, three days are added to the twenty-one-day notice period required prior to the hearing.[207]

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198. *Id.*

199. *Id.*

200. TEX. R. CIV. P. 166a(c); Lewis v. Blake, 876 S.W.2d 314, 315 (Tex. 1994) (per curiam); *see also* Krchnak v. Fulton, 759 S.W.2d 524, 528 (Tex. App.—Amarillo 1988, writ denied) (holding that the rule regarding certificate of service "creates a presumption that the requisite notice was served and . . . has the force of a rule of law").

201. *See* Wavell v. Caller-Times Publ'g Co., 809 S.W.2d 633, 636–37 (Tex. App.—Corpus Christi 1991, writ denied) (emphasizing that the notice provisions for summary judgment are strictly construed), *abrogated on other grounds by* Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994).

202. TEX. R. CIV. P. 11 (allowing enforcement of agreements between parties when they are signed and filed, or made in open court and entered on the record); D.B. v. K.B., 176 S.W.3d 343, 347 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

203. Lewis v. Blake, 876 S.W.2d 314, 315–16 (Tex. 1994) (citing TEX. R. CIV. P. 4) (disapproving of a series of appellate court decisions that did not add the extra three days for service by mail or telephonic document transfer).

204. *Id.*

205. *Id.*

206. Order Requiring Electronic Filing in Certain Courts, Misc. Docket No. 12-9208 (Tex. Dec. 11, 2012).

207. *Lewis*, 876 S.W.2d at 315.

The twenty-one-day requirement is strictly construed by the courts and should be carefully followed.[208] Summary judgment evidence may be filed late with leave of court.[209] The party filing the late evidence must obtain a written order granting leave to file.[210] Rule 166a(c) authorizes the court to accept materials filed after the hearing so long as those materials are filed before judgment.[211] If a summary judgment hearing is reset, the twenty-one-day requirement does not apply to the resetting.[212] If the court grants a continuance, the minimum twenty-one-day period notice requirement for submission or hearing does not begin again because the twenty-one-day period is measured from the original filing day.[213]

The nonmovant need only be given a reasonable time in which to prepare and file a response.[214] "Reasonable notice . . . means at least seven days before the hearing on the motion [for summary judgment] because a nonmovant may only file a response to a motion for summary judgment not later than seven days prior to the date of the hearing . . . ."[215]

A party waives its challenge for failure to receive twenty-one days' notice if that party "received notice of the hearing, appeared at it, filed no controverting affidavit, and did not ask for a continuance."[216] "An allegation that a party received less notice than required by statute does

208. Wavell v. Caller-Times Publ'g Co., 809 S.W.2d 633, 637 (Tex. App.—Corpus Christi 1991, writ denied), *abrogated on other grounds by* Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994).

209. Benchmark Bank v. Crowder, 919 S.W.2d 657, 663 (Tex. 1996).

210. *Id.* (finding no order in the record granting the party leave to file an affidavit late and therefore holding that the affidavit was not properly before the court and could not be considered).

211. Beavers v. Goose Creek Consol. I.S.D., 884 S.W.2d 932, 935 (Tex. App.—Waco 1994, writ denied) (citing TEX. R. CIV. P. 166a(c)) (finding that a trial court can accept evidence "after the hearing on the motion and before summary judgment is rendered"); Diaz v. Rankin, 777 S.W.2d 496, 500 (Tex. App.—Corpus Christi 1989, no writ) (holding that the trial court has discretion to allow late filing); Marek v. Tomoco Equip. Co., 738 S.W.2d 710, 713 (Tex. App.—Houston [14th Dist.] 1987, no writ) (concluding that a trial court may consider affidavits filed after the hearing and before judgment when the court gives permission).

212. Birdwell v. Texins Credit Union, 843 S.W.2d 246, 250 (Tex. App.—Texarkana 1992, no writ) ("The twenty-one-day requirement from notice to hearing does not apply to a resetting of the hearing, provided the nonmovant received notice twenty-one days before the original hearing.").

213. Lewis v. Blake, 876 S.W.2d 314, 315–16 (Tex. 1994) (per curiam) (citing TEX. R. CIV. P. 4) (discussing the calculation of the twenty-one-day notice requirement); *see also supra* Part 1.I.D (discussing deadlines for filing motions for summary judgment).

214. *See Birdwell*, 843 S.W.2d at 250 (explaining that the twenty-one-day requirement is intended to give the nonmovant sufficient time to prepare and file a response "for the original setting").

215. LeNotre v. Cohen, 979 S.W.2d 723, 726 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (citing Int'l Ins. Co. v. Herman G. West, Inc., 649 S.W.2d 824, 825 (Tex. App.—Fort Worth 1983, no writ)).

216. Negrini v. Beale, 822 S.W.2d 822, 823 (Tex. App.—Houston [14th Dist.] 1992, no writ); *see also* Morrone v. Prestonwood Christian Acad., 215 S.W.3d 575, 585 (Tex. App.—Eastland 2007, pet. denied) (holding that the nonmovant waived the issue of twenty-one days' notice because the trial record did not show an objection, a request for continuance, or a motion for a new trial).

not present a jurisdictional question and therefore may not be raised for the first time on appeal."[217] It is error for the trial judge to grant a summary judgment without notice of the setting.[218] However, for the error to be reversible, the nonmovant must show harm.[219]

No additional notice is required for the trial court to rehear a previously denied motion for summary judgment.[220]

E. Deadlines for Response

Rule 166a(c) provides that "[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response."[221] The three-day rule for mailing does not apply to the response.[222] For the few courts where mailing is permitted, a response is timely if it is mailed seven days before the hearing date.[223] If the trial court imposes a shorter deadline to file a response, the nonmovant must object to preserve that error for appeal.[224] The seven-day rule applies equally to responses to cross-motions for summary judgment.[225]

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217. *Negrini*, 822 S.W.2d at 823.

218. Milam v. Nat'l Ins. Crime Bureau, 989 S.W.2d 126, 129 (Tex. App.—San Antonio 1999, no pet.).

219. *Id.*

220. Winn v. Martin Homebuilders, Inc., 153 S.W.3d 553, 555–56 (Tex. App.—Amarillo 2004, no pet.).

221. TEX. R. CIV. P. 166a(c).

222. *See* Lewis v. Blake, 876 S.W.2d 314, 315 (Tex. 1994) (per curiam) (disapproving of three courts of appeals' decisions that found the effect of Rule 21a's three-day extension is to allow a party to respond to a summary judgment motion served by mail on the fourth day before the hearing, rather than the seventh as required by Rule 166a(c)).

223. Clendennen v. Williams, 896 S.W.2d 257, 259 (Tex. App.—Texarkana 1995, no writ), *overruled on other grounds by* Mansions in the Forest, L.P. v. Montgomery County, 365 S.W.3d 314 (Tex. 2012) (per curiam); The supreme court has mandated electronic filing in "civil cases, including family and probate cases, by attorneys in appellate courts, district courts, statutory county courts, constitutional county courts, and statutory probate courts." Order Requiring Electronic Filing in Certain Courts, Misc. Docket No. 12-9208 (Tex. Dec. 11, 2012).

224. *See* Richardson v. Johnson & Higgins of Tex., Inc., 905 S.W.2d 9, 12 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (holding that error must be reflected in the appellate record).

225. Murphy v. McDermott Inc., 807 S.W.2d 606, 609 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

A trial court may allow a late response.[226] The nonmovant must obtain leave of court to file a late response.[227] Refusal to permit late filing is discretionary.[228] The standard for allowing a late-filed summary judgment response is a showing of good cause and no undue prejudice.[229]

If a court allows late filing of a response to a motion for summary judgment, the court "must affirmatively indicate in the record acceptance of the late filing."[230] The affirmative indication may be by separate order, by recitation in the summary judgment itself, or an oral ruling contained in the reporter's record of the summary judgment hearing.[231] A Rule 11 agreement[232] "may alter the deadline for filing a response."[233] One court has determined that a docket entry is sufficient to show leave was granted.[234] Nonetheless, obtaining a separate order or having the summary judgment order reflect permission is advisable. Although an oral order recorded in a

226. Farmer v. Ben E. Keith Co., 919 S.W.2d 171, 176 (Tex. App.—Fort Worth 1996, no writ) (finding that the trial court has discretion to accept late-filed summary judgment evidence); Sullivan v. Bickel & Brewer, 943 S.W.2d 477, 486 (Tex. App.—Dallas 1995, writ denied) (noting that a court's acceptance of a late filing of opposing proof is "entirely" discretionary); Ossorio v. Leon, 705 S.W.2d 219, 221 (Tex. App.—San Antonio 1985, no writ) (holding that the court may specifically grant leave to file late responses and consider those documents as proper support for a summary judgment motion).

227. Neimes v. Kien Chung Ta, 985 S.W.2d 132, 139 (Tex. App.—San Antonio 1998, pet. dism'd by agr.) (citing TEX. R. CIV. P. 166a(c)).

228. White v. Indep. Bank, N.A., 794 S.W.2d 895, 900 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (holding that the trial court may refuse affidavits that are filed late); Folkes v. Del Rio Bank & Trust Co., 747 S.W.2d 443, 444 (Tex. App.—San Antonio 1988, no writ) (denying permission to file a late response was not abuse of discretion).

229. Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 687–88 (Tex. 2002); Williams v. Fort Bend Indep. Sch. Dist., No. 01-10-00611-CV, 2011 WL 2504507, at *1 (Tex. App.—Houston [1st Dist.] June 23, 2011, no pet.) (mem. op.). "'Good cause' means the failure to timely file a summary judgment response was due to an accident or mistake and was not intentional or the result of conscious indifference." *Id.* "[E]ven a slight excuse will suffice, especially when delay or prejudice to the opposing party will not result." *Id.* (quoting Boulet v. State, 189 S.W.3d 833, 836 (Tex. App.—Houston [1st Dist.] 2006, no pet.)).

230. *Farmer*, 919 S.W.2d at 176; *see also* Goswami v. Metro. Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988) (holding an amended petition that is part of the record raises a presumption that leave of court was granted); K-Six Television, Inc. v. Santiago, 75 S.W.3d 91, 96 (Tex. App.—San Antonio 2002, no pet.).

231. *Neimes*, 985 S.W.2d at 138; *see also Farmer*, 919 S.W.2d at 176 (finding that a lack of indication in the record showing that leave was obtained leads to a presumption that leave was not obtained).

232. Rule 11 provides in part: "[N]o agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11.

233. Fraud-Tech, Inc. v. Choicepoint, Inc., 102 S.W.3d 366, 377 (Tex. App.—Fort Worth 2003, pet. denied).

234. Shore v. Thomas A. Sweeney & Assocs., 864 S.W.2d 182, 184–85 (Tex. App.—Tyler 1993, no writ) (holding that the docket entry appeared on the record and thus satisfied Texas Rule of Civil Procedure 166a). *But see* Energo Int'l Corp. v. Modern Indus. Heating, Inc., 722 S.W.2d 149, 151–52 (Tex. App.—Dallas 1986, no writ) (stating that a docket entry is inadequate indication of acceptance).

reporter's record (formerly "statement of facts") from the hearing may not be sufficient, one court has held that it was sufficient.[235] In the absence of such an indication, the appellate court will presume that the judge refused the late filing, even if the response appears as part of the appellate transcript.[236]

F. Movant's Reply: Purpose and Deadlines

Aside from the advocacy benefits to filing a reply, the movant must file a reply if he or she intends to object to the nonmovant's evidence. The reply should make any challenges to the nonmovant's summary judgment evidence.[237] "It is appropriate for the trial court to grant leave for the late filing of summary judgment proof when the summary judgment movant is attempting to counter arguments presented in the nonmovant's response."[238]Another reason to reply is to complain about the nonmovant's reliance on an unpleaded affirmative defense or an unpleaded matter constituting a confession and avoidance.[239] The movant must object in its reply to defeat the motion for summary judgment. Otherwise, the issue will be tried by consent.[240]

A reply cannot serve some purposes. A reply may not be used to amend the motion for summary judgment or to raise new and independent summary judgment grounds.[241] Neither may a reply to the nonmovant's response provide the requisite specificity (to state the elements of the claim for which

235. Woodbine Elec. Serv., Inc. v. McReynolds, 837 S.W.2d 258, 261 (Tex. App.—Eastland 1992, no writ) ("It would be exalting form over substance to shut our eyes to the recorded proceedings which occurred in open court . . . ."); *see also Neimes*, 985 S.W.2d at 139 (recommending attorneys ensure their objections are preserved in case of future consideration).

236. Waddy v. City of Houston, 834 S.W.2d 97, 101 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (finding nothing in the record indicating that the trial court granted leave for a late filing, giving rise to a presumption that the court did not consider the late response and, thus, the appellate court could not consider the response).

237. *See* Alaniz v. Hoyt, 105 S.W.3d 330, 339 (Tex. App.—Corpus Christi 2003, no pet.) (observing that failure to file objections in writing or at the hearing results in failure to preserve error for future consideration), *abrogated on other grounds by* Fort Brown Villas III Condo. Ass'n v. Gillenwater, 285 S.W.3d 879 (Tex. 2009) (per curiam).

238. Garcia v. Garza, 311 S.W.3d 28, 36 (Tex. App.—San Antonio 2010, pet. denied); *see* Ferguson v. Tex. Dep't of Transp., No. 11-15-00110-CV, 2017 WL 3923510, at *7 (Tex. App.—Eastland Aug. 31, 2017, no pet.) (mem. op.).

239. Proctor v. White, 172 S.W.3d 649, 652 (Tex. App.—Eastland 2005, no pet.).

240. *Id.*

241. Reliance Ins. Co. v. Hibdon, 333 S.W.3d 364, 378 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (citing Garcia v. Garza, 311 S.W.3d 28, 36 (Tex. App.—San Antonio 2010, pet. denied)). "A motion [for summary judgment] must stand or fall on the grounds expressly presented in the motion." *Id.* (quoting McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 341 (Tex. 1993)).

there is no evidence) required for a no-evidence motion for summary judgment.[242]

Rule 166a does not specify when the movant's reply to the nonmovant's response should be filed. The limited case law that exists indicates that the movant may file a reply up until the day of the hearing.[243] For example, *Reynolds v. Murphy* holds that "a movant's objections to the competency of a nonmovant's evidence that are filed the day of the hearing are not untimely and may be considered and ruled upon by the trial court."[244] Local rules may govern the timing of the reply.[245] Any special exception by the movant concerning vagueness or ambiguity in the nonmovant's response must be made at least three days before the hearing.[246] The seven-day limit before submission in which a nonmovant may submit summary judgment evidence does not apply to the movant's reply.[247]

G. Service

The motion for summary judgment and response should be served promptly on opposing counsel, and a certificate of service should be included in any motion for summary judgment. If notice is not given, the judgment may be reversed on appeal.[248] The nonmovant is entitled to receive specific

242. Barnes v. Tex. A&M Univ. Sys., No. 14-13-00646-CV, 2014 WL 4915499, at *6 (Tex. App.—Houston [14th Dist.] Sept. 30, 2014, no pet.) (citing Meru v. Huerta, 136 S.W.3d 383, 390 n.3 (Tex. App.—Corpus Christi 2004, no pet.)); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, 8–9 (2002).

243. "A movant is entitled to file its reply until the date of the summary judgment hearing." Gomez v. Am. Honda Motor Co., Inc., No. 04-16-00342-CV, 2017 WL 3159703, at *5 (Tex. App.—San Antonio July 26, 2017, pet. denied) (mem. op.) (citing Garcia v. Garza, 311 S.W.3d 28, 36 (Tex. App.—San Antonio 2010, pet. denied)); Wyly v. Integrity Ins. Sols., 502 S.W.3d 901, 907 (Tex. App.—Houston [14th Dist.] 2016, no pet.); *see also* Bates v. Pecos County, 546 S.W.3d 277, 292 (Tex. App.—El Paso 2017, no pet.) (holding that a reply filed four days before the hearing was timely); Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, LLP, 404 S.W.3d 75, 88 & n.4 (Tex. App.—Houston [14th Dist.] 2013, no pet.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1407 (2010)) (noting that a reply may be late filed); Wright v. Lewis, 777 S.W.2d 520, 522 (Tex. App.—Corpus Christi 1989, writ denied) (concluding that there was no harm in allowing objections to be filed before or even on the day of the hearing).

244. Reynolds v. Murphy, 188 S.W.3d 252, 259 (Tex. App.—Fort Worth 2006, pet. denied).

245. *See* DALLAS (TEX.) CIV. DIST. CT. LOC. R. 2.09 ("[R]eply briefs in support of a motion for summary judgment must be filed and served no less than three days before the hearing."); *see also* 151st (TEX.) DIST. CT. LOC. R. (Harris County) (addressing replies in general and cautioning against last-minute replies); 234th (TEX.) DIST. CT. LOC. R. (Harris County) (same); 333rd (TEX.) DIST. CT. LOC. R. (Harris County) (same).

246. *McConnell*, 858 S.W.2d at 343 n.7 (citing TEX. R. CIV. P. 21).

247. Durbin v. Culberson County, 132 S.W.3d 650, 656 (Tex. App.—El Paso 2004, no pet.).

248. Aguirre v. Phillips Props., Inc., 111 S.W.3d 328, 335 (Tex. App.—Corpus Christi 2003, pet. denied); Smith v. Mike Carlson Motor Co., 918 S.W.2d 669, 672 (Tex. App.—Fort Worth 1996, no writ) ("Absence of actual or constructive notice violates a party's due process rights under the Fourteenth Amendment to the federal constitution.").

notice of the hearing or submission date for the motion for summary judgment so that he or she is aware of the deadline for the response.[249] Thus, the nonmovant is entitled to an additional twenty-one days' notice of hearing for amended motions for summary judgment.[250] A certificate of service is prima facie proof that proper service was made.[251] To establish a lack of notice, the nonmovant must introduce evidence to controvert the certificate of service.[252]

One court held that the record need not reflect receipt of notice by the nonmovant.[253] Constructive notice is imputed when the evidence indicates "that the intended recipient engaged in instances of selective acceptance/refusal of certified mail relating to the case."[254]

To preserve a complaint of inadequate notice, a party must object and ask for a continuance.[255] Otherwise, a party may waive the twenty-one-day notice requirement.[256] For example, in *Davis v. Davis*, two parties filed separate motions for summary judgment directed against the appellant.[257] One motion gave the appellant twenty-one days' notice, but the other motion did not.[258] The trial court considered both motions simultaneously.[259] The

249. Martin v. Martin, Martin & Richards, Inc., 989 S.W.2d 357, 359 (Tex. 1998) (per curiam); Okoli v. Tex. Dep't of Human Servs., 117 S.W.3d 477, 479 (Tex. App.—Texarkana 2003, no pet.) (reversing and remanding proceedings to the trial court because plaintiff was not notified of the date of the hearing on summary judgment).

250. Sams v. N.L. Indus., Inc., 735 S.W.2d 486, 488 (Tex. App.—Houston [1st Dist.] 1987, no writ).

251. TEX. R. CIV. P. 21a(e) ("A certificate by a party . . . showing service of a notice shall be prima facie evidence of the fact of service."); *see also* Cliff v. Huggins, 724 S.W.2d 778, 779–80 (Tex. 1987).

252. *Cliff*, 724 S.W.2d at 780 (holding that an offer of proof must be made to rebut the presumption that notice was received); Wilson v. Gen. Motors Acceptance Corp., 897 S.W.2d 818, 820 (Tex. App.—Houston [1st Dist.] 1994, no writ) (stating that the nonmovant must introduce evidence that notice was not received to defeat the prima facie showing of service).

253. Gonzales v. Surplus Ins. Servs., 863 S.W.2d 96, 101 (Tex. App.—Beaumont 1993, writ denied) ("It is not required that the record reflect receipt of notice by non-movant.").

254. *Id.* at 102 (complying with Texas Rule of Civil Procedure 21a is sufficient for constructive notice in such circumstances); *see also* Waggoner v. Breeland, No. 01-10-00226-CV, 2011 WL 2732687, at *3 (Tex. App.—Houston [1st Dist.] July 14, 2011, no pet.) (mem. op.); Approximately $14,980.00 v. State, 261 S.W.3d 182, 189 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

255. *See infra* Part 1.I.H.

256. Negrini v. Beale, 822 S.W.2d 822, 823 (Tex. App.—Houston [14th Dist.] 1992, no writ) (explaining that a party waives the twenty-one-day requirement "where the party received notice of the hearing, appeared at it, filed no controverting affidavit, and did not ask for a continuance"); Brown v. Capital Bank, N.A., 703 S.W.2d 231, 234 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (finding that nonmovant's presentation of facts essential to oppose summary judgment in an oral submission, absent an affidavit stating such reasons, was not sufficient cause for continuance).

257. Davis v. Davis, 734 S.W.2d 707, 708, 712 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

258. *Id.* at 712.

259. *Id.*

appellate court found that the appellant waived any objection to the inadequacy of the notice period because he participated in the hearing without objection and failed to ask for a continuance, rehearing, or new trial.[260] "To hold otherwise would allow a party who participated in the hearing to lie behind the log until after the summary judgment is granted and then raise the complaint of late notice for the first time in a post-trial motion."[261]

Conversely, if a party is not given notice of the hearing or "is deprived of its right to seek leave to file additional affidavits or other written response, . . . it may preserve error in a post-trial motion."[262] For example, in *Tivoli Corp. v. Jewelers Mutual Insurance Co.*, the nonmovant's motion for new trial following the grant of the summary judgment was sufficient to preserve error because the trial judge signed the summary judgment before the date set for submission and the nonmovant had no opportunity to object.[263]

Summary judgment pleadings filed electronically are complete on transmission of the document to the serving party's electronic filing service provider.[264] Time requirements for service may be altered by agreement of the parties[265] and by court order.[266]

H. Continuances

1. General Principles

The summary judgment rule directly and indirectly addresses continuances in two subsections. Rule 166a(g) directly addresses any type of summary judgment continuance by providing:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit

260. *Id.*; *see also* Loc Thi Nguyen v. Short, How, Frels & Heitz, P.C., 108 S.W.3d 558, 560 (Tex. App.—Dallas 2003, pet. denied) (finding that a nonmovant who fails to object to any untimely notices waives any objection); *Negrini*, 822 S.W.2d at 823–24 (finding that appellant waived any error on an issue after he received notice of a hearing, appeared at it, filed no controverting affidavit, and failed to ask for a continuance).

261. May v. Nacogdoches Mem'l Hosp., 61 S.W.3d 623, 626 (Tex. App.—Tyler 2001, no pet.).

262. *Id.*

263. Tivoli Corp. v. Jewelers Mut. Ins. Co., 932 S.W.2d 704, 710 (Tex. App.—San Antonio 1996, writ denied).

264. TEX. R. CIV. P. 21a(a)(1), (b)(3).

265. *See* EZ Pawn Corp. v. Mancias, 934 S.W.2d 87, 91 (Tex. 1996) (per curiam).

266. Hall v. Stephenson, 919 S.W.2d 454, 461 (Tex. App.—Fort Worth 1996, writ denied).

> affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.[267]

Elsewhere, Rule 166a(i) indirectly addresses continuances. Even though there is no specific minimum amount of time that a case must be pending before a trial court can consider a no-evidence motion, Rule 166a(i) provides the basis for a continuance of a no-evidence summary judgment when it authorizes the granting of a no-evidence summary judgment only "[a]fter adequate time for discovery."[268]

Thus, when a nonmovant "contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance."[269] Failure to do so waives the contention on appeal that the nonmovant did not have an adequate time for discovery.[270] As noted earlier, Rule 166a(g) specifically provides that the trial court may deny the motion for summary judgment, continue the hearing to allow additional discovery, or "make such other order as is just."[271]

In contrast to Rule 166a(i), the no-evidence subsection, Rule 166a(b) provides that a defending party may move for traditional summary judgment at any time.[272] Because the rules allow for a defendant to file for a traditional summary judgment at any time, that does not mean that the trial court must grant it. It is not mandatory for the trial court to grant a continuance simply because it is uncontroverted and in proper form.[273]

When reviewing a trial court's order denying a motion for continuance, the courts consider on a case-by-case basis whether the trial court committed a clear abuse of discretion.[274] A trial court "abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial

267. TEX. R. CIV. P. 166a(g).

268. TEX. R. CIV. P. 166a(i).

269. Tenneco Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 647 (Tex. 1996); *see also* Enterprising Gals of Texas, Inc. v. Sprehe, No. 01-17-00063-CV, 2018 WL 3580998, at *1 (Tex. App.—Fort Worth July 26, 2018, no pet. h.) (applying TEX. R. CIV. P. 251, which requires that "no continuance shall be granted except for sufficient cause supported by affidavit, or by consent of the parties or operation of law," to determine the trial court did not abuse its discretion by denying a fourth motion for continuance that was not verified or supported by an affidavit.)

270. Jaimes v. Fiesta Mart, Inc., 21 S.W.3d 301, 304 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); RHS Interests Inc. v. 2727 Kirby Ltd., 994 S.W.2d 895, 897 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

271. TEX. R. CIV. P. 166a(g); *see supra* Part 1.I.C.

272. TEX. R. CIV. P. 166a(b).

273. Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 292 n.142 (Tex. 2004).

274. BMC Software Belg., N.V. v. Marchand, 83 S.W.3d 789, 800 (Tex. 2002).

error of law."[275] The appellate court will not consider on appeal any reasons in support of a motion for continuance that were not presented to the trial court.[276]

2. Factors Considered in Granting Continuances

In determining whether a trial court abuses its discretion in denying a motion for continuance based on the need for additional discovery, the supreme court has considered the following nonexclusive factors: "the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought."[277] Courts of appeals have relied on a more detailed list of the following factors:

> (1) the nature of the case, (2) the nature of the evidence necessary to controvert the no-evidence motion, (3) the length of time the case was active, (4) the amount of time the no-evidence motion was on file, (5) whether the movant had requested stricter deadlines for discovery, (6) the amount of discovery that already had taken place, and (7) whether the discovery deadlines in place were specific or vague.[278]

In *Verkin v. Southwest Center One, Ltd.*, the appellate court found abuse of discretion when the trial court refused to grant a motion for continuance in a case that had been on file less than three months, when the motion stated sufficient good cause, was uncontroverted, and was the first motion for continuance.[279] Conversely, in *Davis v. Bank of America*, the appellate court found a trial court did not abuse its discretion when the case had been pending more than 16 months and the appellant failed to exercise due diligence to obtain any discovery.[280]

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275. *Id.* (quoting Johnson v. Fourth Court of Appeals, 700 S.W.2d 916, 917 (Tex. 1985)).

276. D.R. Horton-Tex., Ltd. v. Savannah Props. Assocs., L.P., 416 S.W.3d 217, 223 n.5 (Tex. App.—Fort Worth 20013, no pet.).

277. Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 161 (Tex. 2004) (citing *BMC Software Belg., N.V.*, 83 S.W.3d at 800–01 (discussing the diligence and length-of-time-on-file factors)); Tenneco Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 647 (Tex. 1996) (materiality and purpose); Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc., 907 S.W.2d 517, 521–22 (Tex. 1995) (per curiam) (materiality); State v. Wood Oil Distrib., Inc., 751 S.W.2d 863, 865 (Tex. 1988) (diligence); *see also* Perrotta v. Farmers Ins. Exch., 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (using these factors to decide whether a trial court abused its discretion in denying a motion for continuance).

278. *D.R. Horton-Tex., Ltd.*, 416 S.W.3d at 223; McInnis v. Mallia, 261 S.W.3d 197, 201 (Tex. App.—Houston [14th Dist.] 2008, no pet.); Brewer & Pritchard, P.C. v. Johnson, 167 S.W.3d 460, 467 (Tex. App.—Houston [14th Dist.] 2005, pet denied.).

279. Verkin v. Sw. Ctr. One, Ltd., 784 S.W.2d 92, 96 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *see also* Levinthal v. Kelsey-Seybold Clinic, P.A., 902 S.W.2d 508, 510, 512 (Tex. App.—Houston [1st Dist.] 1994, no writ).

280. No. 01-17-00230-CV, 2018 WL 3848430, at *3 (Tex. App.—Houston [1st Dist.] Aug. 14, 2018, no pet. h.).

Nonmovants seeking additional time for discovery should "convince the court that the requested discovery is more than a 'fishing' expedition, is likely to lead to controverting evidence, and was not reasonably available beforehand despite [the nonmovant's] diligence."[281] Conclusory allegations will not support a request for continuance.[282] Nonmovants must state what specific depositions or discovery products are material and show why they are material.[283] The party moving for summary judgment, when appropriate, should try to convince the court that the nonmovant's discovery efforts are simply a delay tactic. For example, the motion may be based on incontrovertible facts, involve pure questions of law, or request discovery that relates to immaterial matters.[284]

The no-evidence summary judgment rule specifically provides that a motion for summary judgment can be filed only "[a]fter adequate time for discovery."[285] Thus, nonmovants will argue in their motions for continuance that if they have more time, they will be able to produce enough evidence to defeat the motion. "Whether a non-movant has had adequate time for discovery . . . is 'case specific.'"[286] The factors the courts look to for no-evidence summary judgment continuances, not surprisingly, mirror those articulated for traditional summary judgments. "[T]here is no . . . minimum amount of time that a case must be pending before a trial court may entertain a no-evidence summary-judgment motion . . . ."[287] "The amount of time necessary to constitute 'adequate time' depends on the facts and circumstances of each case."[288]

Factors that a court may consider include "the amount of time the no-evidence motion has been on file, whether the movant has requested stricter time deadlines for discovery, the amount of discovery that has already taken place, and whether the discovery deadlines that are in place are specific or vague."[289]

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281. HITTNER ET AL., *supra* note 8, at 14–117 (emphasis omitted).

282. MKC Energy Invs., Inc. v. Sheldon, 182 S.W.3d 372, 379 (Tex. App.—Beaumont 2005, no pet.).

283. Perrotta v. Farmers Ins. Exch., 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

284. *See, e.g.*, Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc., 907 S.W.2d 517, 521 (Tex. 1995) (per curiam) (stating that in a contract dispute, "discovery sought by [the plaintiff] is not necessary for the application of the contract to its subject matter, but rather goes to the issue of the parties' interpretation of the 'absolute pollution exclusion'").

285. TEX. R. CIV. P. 166a(i).

286. McClure v. Attebury, 20 S.W.3d 722, 729 (Tex. App.—Amarillo 1999, no pet.).

287. McInnis v. Mallia, 261 S.W.3d 197, 202 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *see also* TEX. R. CIV. P. 166a(i).

288. Lucio v. John G. & Marie Stella Kennedy Mem'l Found., 298 S.W.3d 663, 669 (Tex. App.—Corpus Christi 2009, pet. denied); *see also* Rest. Teams Int'l, Inc. v. MG Sec. Corp., 95 S.W.3d 336, 340 (Tex. App.—Dallas 2002, no pet.).

289. Specialty Retailers, Inc. v. Fuqua, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also Lucio*, 298 S.W.3d at 669; Perrotta v. Farmers Ins. Exch., 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

A nonmovant in a no-evidence summary judgment may argue that it is entitled to the entire period allowed by the rule or court-imposed discovery deadlines. Yet, courts have held that the court- or rule-imposed discovery cutoff does not control the decision of whether an adequate time for discovery has elapsed.[290]

In one mass tort case, the court of appeals held that the plaintiffs had enjoyed adequate time for discovery when the case had been pending for ten years, and the plaintiffs had almost a year after the filing of the no-evidence motion to conduct additional discovery.[291] In another case, which included a sixteen-month bankruptcy stay, the court noted that factoring in the bankruptcy stay, a year remained for discovery, and the stay did not prevent the plaintiff from continuing to develop his case for those documents already in his possession.[292] In yet another case, the court held that three years and five months was an adequate time for discovery; the plaintiff had adequate time to conduct discovery on a fraud claim because the evidence necessary to defeat the no-evidence motion—reliance and damages—"is the sort of evidence that should be immediately available to a plaintiff."[293]

In *Ford Motor Co. v. Castillo*, the supreme court determined that neither affidavits nor a verified motion for continuance were necessary when the trial court refused to allow Ford to conduct *any* discovery.[294] The trial court had granted a motion for summary judgment on the plaintiff's breach of a settlement claim in a products liability case. The supreme court determined that the trial court abused its discretion by denying Ford the right to conduct discovery and revised the judgment.[295]

When a party receives notice of the summary judgment hearing in excess of the twenty-one days required by Rule 166a, denial of a motion for continuance based on a lack of time to prepare is not generally an abuse of discretion,[296] although sympathetic trial judges frequently grant them.

290. *See* Branum v. Nw. Tex. Healthcare Sys., Inc., 134 S.W.3d 340, 343 (Tex. App.—Amarillo 2003, pet. denied).

291. *In re* Mohawk Rubber Co., 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, no pet.).

292. McMahan v. Greenwood, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

293. Dickson Constr., Inc. v. Fid. & Deposit Co. of Md., 5 S.W.3d 353, 356 (Tex. App.—Texarkana 1999, pet. denied).

294. Ford Motor Co. v. Castillo, 279 S.W.3d 656, 662 (Tex. 2009).

295. *Id.* at 663.

296. *See* Hatteberg v. Hatteberg, 933 S.W.2d 522, 527 (Tex. App.—Houston [1st Dist.] 1994, no writ); Cronen v. Nix, 611 S.W.2d 651, 653 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

I. Hearing/Submission

The notice provisions under Rule 166a are strictly construed.[297] Notice of hearing for a summary judgment motion is mandatory and essential to due process.[298] A hearing or submission date must be set because the time limits for responding to a motion for summary judgment are keyed to the hearing or submission date. Unless there is a hearing or submission date, the nonmovant cannot calculate its response due date, and its due process rights are violated.[299] In *Ready v. Alpha Building*, the Houston First Court of Appeals determined as inadequate indefinite language in the notice of hearing that the summary judgment would be submitted "after" specified dates.[300]

Notice of a summary judgment hearing must be in writing.[301] Courts consider electronic notice as being in writing. While notice of a hearing is required, an oral hearing is not.[302] The day of submission of a motion for summary judgment has the same meaning as the day of hearing.[303]

A motion for summary judgment is submitted on written evidence.[304] Thus, a hearing on a motion for summary judgment is a review of the written motion, response, reply, if any, and attached evidence.[305] Addressing an issue at oral argument in response to questions from the court is not sufficient to preserve for review a ground that was not raised in the summary judgment motion.[306]

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297. *See, e.g.*, Ready v. Alpha Bldg. Corp., 467 S.W.3d 580, 584 (Tex. App.—Houston [1st Dist.] 2015, no pet.); Nexen Inc. v. Gulf Interstate Eng'g Co., 224 S.W.3d 412, 423 n.14 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

298. *Ready*, 467 S.W.3d at 584.

299. Martin v. Martin, Martin & Richards, Inc. 989 S.W.2d 357, 359 (Tex. 1998) (per curiam); Aguirre v. Phillips Props., Inc., 111 S.W.3d 328, 332 (Tex. App.—Corpus Christi 2003, pet. denied); Courtney v. Gelber, 905 S.W.2d 33, 34–35 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding that even if all assertions in the motion for summary judgment are true, none justify the trial court's ruling on the motion without setting a hearing or submission date); *see also* Mosser v. Plano Three Venture, 893 S.W.2d 8, 12 (Tex. App.—Dallas 1994, no writ) ("The failure to give adequate notice violates the most rudimentary demands of due process of law.").

300. *Ready*, 467 S.W.3d at 585–86.

301. Envtl. Procedures, Inc. v. Guidry, 282 S.W.3d 602, 612 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

302. *Martin*, 989 S.W.2d at 359; Williams v. City of Littlefield, No. 07-07-0435-CV, 2008 WL 4381326, at *2 (Tex. App.—Amarillo Sept. 26, 2008, no pet.) (mem. op.) ("The fact that appellant did not arrive at the courthouse before the completion of the summary judgment hearing is, therefore, irrelevant to the trial court's decision [to grant the summary judgment].").

303. Rorie v. Goodwin, 171 S.W.3d 579, 583 (Tex. App.—Tyler 2005, no pet.).

304. TEX. R. CIV. P. 166a(c).

305. Nguyen v. Short, How, Frels & Heitz, P.C., 108 S.W.3d 558, 561 (Tex. App.—Dallas 2003, pet. denied).

306. McAllen Hosps., L.P. v. State Farm Cty. Mut. Ins. Co. of Tex., 433 S.W.3d 535, 542 (Tex. 2014).

Ordinarily, no oral testimony will be allowed at the hearing on a motion for summary judgment.[307] Furthermore, the court may not consider at the hearing oral objections to summary judgment evidence that are not a part of the properly filed, written summary judgment pleadings.[308] However, the El Paso Court of Appeals considered the reporter's record of the summary judgment hearing to determine that the trial court did not rule on written evidentiary objections.[309] Nonetheless, good practice (and usually required practice) is for all summary judgment pleadings, evidence and rulings to be presented in writing.

If the trial court takes the motion for summary judgment under advisement and one or both of the parties submit additional evidence, each should ask for leave of court and obtain a written order granting leave to file. Summary judgment evidence may be filed late with leave of court. The party filing the late evidence must obtain a written order granting leave to file.[310]

When a trial court is faced with "overlapping and intermingling" motions for summary judgment and other matters, such as challenges to expert witness testimony, that allow oral testimony, the trial court should conduct separate hearings.[311] At the summary judgment hearing, counsel should strenuously oppose any attempt to use oral testimony to deviate from the written documents on file, and the court should neither permit nor consider such testimony.[312] Parties may restrict or expand the issues "expressly presented" in writing if the change meets the requirements of Texas Rule of Civil Procedure 11.[313] "An oral waiver or agreement made in open court satisfies [R]ule 11 if it is described in the judgment or an order of the court."[314] In *Clement v. City of Plano*, the court noted that "the order granting the motion for summary judgment [did] not reflect any agreement . . . . Therefore, counsel's statements at the hearing, standing alone, did

307. TEX. R. CIV. P. 166a(c); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269 n.4 (Tex. 1992); Richards v. Allen, 402 S.W.2d 158, 160–61 (Tex. 1966).

308. *But see* Aguilar v. LVDVD, L.C., 70 S.W.3d 915, 917 (Tex. App.—El Paso 2002, no pet.) (suggesting review of reporter's record would be helpful in ascertaining if a ruling can be implied).

309. *Id.*

310. *See* Benchmark Bank v. Crowder, 919 S.W.2d 657, 663 (Tex. 1996) (finding no order in the record granting the party leave to file an affidavit late and therefore holding that the affidavit was not properly before the court and could not be considered).

311. Liberty Mut. Fire Ins. Co. v. Hayden, 805 S.W.2d 932, 935 (Tex. App.—Beaumont 1991, no writ); *see also infra* Part 1.II.H.1 (discussing expert opinion testimony).

312. . *See* El Paso Assocs., Ltd. v. J.R. Thurman & Co., 786 S.W.2d 17, 19–20 (Tex. App.—El Paso 1990, no writ) (affirming the sustaining of an objection to oral testimony at a summary judgment hearing and declaring that no oral testimony was received); Nash v. Corpus Christi Nat'l Bank, 692 S.W.2d 117, 119 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (concluding that it is improper for a trial court to hear testimony of witnesses at a summary judgment hearing).

313. *See* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 677 (Tex. 1979). Rule 11 provides in part: "[N]o agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11.

314. Clement v. City of Plano, 26 S.W.3d 544, 549 (Tex. App.—Dallas 2000, no pet.), *overruled on other grounds by* Telthorster v. Tennell, 92 S.W.3d 457 (Tex. 2002).

not amount to a [R]ule 11 exception and did not constitute a narrowing of the issues."[315]

The summary judgment hearing generally need not be transcribed. As the court noted in *El Paso Associates, Ltd. v. J.R. Thurman & Co.*, to "permit 'issues' to be presented orally would encourage parties to request that a court reporter record summary judgment hearings, a practice neither necessary, nor appropriate to the purposes of such hearing."[316] Nonetheless, in a 2018 opinion from the Texas Supreme Court, the court quoted the nonmovant's attorney and the trial judge from the summary judgment hearing to provide background on the developments in a case clarifying Texas law on sham affidavits.[317]

J. Rulings and Judgment

After the hearing or submission, the next step is for the court to rule on the motion. The court may act as soon as the date of submission or as late as never. There is generally no procedure for a party to compel the court to rule on a pending motion for summary judgment.[318] Mandamus relief is strictly limited. If the trial judge fails to rule, "even though the delay in ruling on the motion causes expense and inconvenience to the litigants, mandamus is not available to compel the trial judge to rule on the pending motion for summary judgment."[319]

The advantage of obtaining an order from the trial court specifying the basis for the summary judgment—usually a fruitless endeavor anyway—has been removed.[320] Formerly, when a summary judgment order stated the specific grounds upon which it was granted, a party appealing from such order need have shown only that the specific grounds to which the order referred were insufficient to support the order.[321]

However, if any theory advanced in a motion for summary judgment supports the granting of summary judgment, a court of appeals may affirm

315. *Id.*

316. *El Paso Assocs., Ltd.*, 786 S.W.2d at 19.

317. Lujan v. Navistar, Inc., 555 S.W.3d 79, 83–84 (Tex. 2018); *see also infra* Part 1.II.F.5 (discussing Sham Affidavits).

318. C/S Sols., Inc. v. Energy Maint. Servs. Grp., LLC, 274 S.W.3d 299, 308 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing PATTON, *supra* note 8, § 7.04, at 7-8 to -9).

319. *In re* Am. Media Consol., 121 S.W.3d 70, 74 (Tex. App.—San Antonio 2003, no pet.) (quoting PATTON, *supra* note 8, § 7.04, at 7-8 to -9).

320. *See infra* Part 1.V.I. (discussing judgments on appeal and the requirement of the court of appeals to "consider all grounds on which the trial court rules")

321. *See* Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 173 (Tex. 1995) (finding that "[b]ecause the trial court granted [the defendant's] motion without specifying the grounds, the summary judgment will be upheld if either of the theories advanced by [the defendant] are meritorious"); State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374, 380 (Tex. 1993) (holding that if the trial court specifies the reasons for granting judgment, then proving that theory unmeritorious would cause a remand).

regardless of whether the trial court specified the grounds on which it relied.[322] The court of appeals should consider all the grounds on which the trial court rules and may consider all the grounds the trial court does not rule upon.[323] Nonetheless, numerous opinions continue to recite that their consideration of all issues is based on the fact that the trial court did not specify its reason for its ruling, including opinions issued by the Texas Supreme Court.[324]

To ensure the trial court's intent to make a judgment final and appealable, the supreme court suggests the inclusion of the following language in the judgment: "This judgment finally disposes of all parties and all claims and is appealable."[325] The language is not mandatory.

K. Findings of Fact and Conclusions of Law

Occasionally, a trial judge will receive a request to file findings of fact and conclusions of law after the granting of a motion for summary judgment.[326] This request should be denied.[327] Neither findings of fact nor conclusions of law are proper, including on a partial summary judgment and incorporated into findings of fact and conclusions of law in the later-tried bench trial. The reason findings of fact and conclusions of law have no place in summary judgment practice is that the judge has no factual disputes to resolve.[328] The most potential for damage concerns the appellate timetable. Unlike findings of fact and conclusions of law requested in proper circumstances, a request for them will *not* extend the appellate timetable in a summary judgment case.[329]

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322. *See* Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996); *Harwell*, 896 S.W.2d at 173.

323. *Cincinnati Life Ins. Co.*, 927 S.W.2d at 625 (allowing alternative theories would be in the interest of judicial economy).

324. *See, e.g.*, W. Invs., Inc. v. Urena, 162 S.W.3d 547, 550 (Tex. 2005); Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 157 (Tex. 2004); Seim v. Allstate Texas Lloyds, No. 02-16-00050-CV, 2018 WL 5832106 (Tex. App.—Fort Worth Nov. 8, 2018, no pet. h.); Pipkin v. Kroger Tex. L.P., 383 S.W.3d 655, 662 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

325. *In re* Daredia, 317 S.W.3d 247, 248 (Tex. 2010) (per curiam) (quoting Lehmann v. Har-Con Corp., 39 S.W.3d 191, 206 (Tex. 2001)); *see infra* Part 1.V.E (discussing summary judgment appeals and the requirement of finality of judgment).

326. *See, e.g.*, W. Columbia Nat'l Bank v. Griffith, 902 S.W.2d 201, 203 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (noting that the appellant complained that the trial court did not file findings of fact and conclusions of law).

327. *Id.* at 204.

328. Schmitz v. Denton Cty. Cowboy Church, 550 S.W.3d 342, 352 (Tex. App.—Fort Worth 2018, pet. denied) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 52 HOUS. L. REV. 773, 816 (2015)).

329. IKB Indus. v. Pro-Line Corp., 938 S.W.2d 440, 443 (Tex. 1997); *see* Linwood v. NCNB Tex., 885 S.W.2d 102, 103 (Tex. 1994) (per curiam). Texas appellate procedure provides that the usual thirty days for perfecting an appeal is extended to ninety days upon the filing of findings of fact and conclusions of law, if they are either required by the rules of civil procedure, or if not

L. Partial Summary Judgments

Motions for partial summary judgment are used to dispose of a portion of the claims or some of the parties in a lawsuit. While they present certain opportunities, they also can give rise to problems. One trap arises when a summary judgment granted for one defendant becomes final even though it does not specifically incorporate a partial summary judgment granted in favor of the only other defendant.[330]

A partial judgment should refer to those specific issues addressed by the partial judgment. In *Greene v. Farmers Insurance Exchange*, the supreme court indirectly approved of the following severance language:

> The parties having agreed to severance of all remaining claims and defenses, so that a final appealable Judgment can and is HEREBY entered in this original cause. All claims, causes, actions or defenses which are not disposed of by judgment on Plaintiff's breach-of-contract cause of action or the severance as described herein are otherwise disposed of and are dismissed.[331]

A partial summary judgment can be made final by requesting a severance of the issues resolved or parties addressed by the motion for partial summary judgment from those issues or parties remaining.[332] "Any claim against a party may be severed and proceeded with separately."[333] "A severance splits a single suit into two or more independent actions, each action resulting in an appealable final judgment."[334] Trial courts have broad discretion to sever claims.[335] A severance is improper only if the trial court abuses its discretion.[336] For example, in *State v. Morello*, the trial court granted a summary judgment against one of

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required, could properly be considered by the appellate court. TEX. R. APP. P. 26.1(a)(4); *see also infra* Part 1.V (discussing summary judgment appeals).

330. Ramones v. Bratteng, 768 S.W.2d 343, 344 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *see also infra* Part 1.V.E (discussing summary judgment appeals and the requirement of finality of judgment).

331. Greene v. Farmers Ins. Exch., 446 S.W.3d 761, 764 n.5 (Tex. 2014) (quoting Greene v. Farmers Ins. Exch., No. DC-08-11723, 2011 WL 8897980 (134th Dist. Ct., Dallas County, Tex. Mar. 21, 2011)).

332. Tex. Lottery Comm'n v. First State Bank of DeQueen, 325 S.W.3d 628, 633 (Tex. 2010); Harris Cty. Flood Control Dist. v. Adam, 66 S.W.3d 265, 266 (Tex. 2001) (per curiam); *see* Hunter v. NCNB Tex. Nat'l Bank, 857 S.W.2d 722, 725 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (stating that a claim is properly severable when: "(1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues." (citing Guar. Fed. Sav. Bank v. Horseshoe Operating Co., 793 S.W.2d 652, 658 (Tex. 1990))).

333. TEX. R. CIV. P. 41.

334. Van Dyke v. Boswell, O'Toole, Davis & Pickering, 697 S.W.2d 381, 383 (Tex. 1985).

335. State v. Morello, 547 S.W.3d 881, 889 (Tex. 2018); Liberty Nat'l Fire Ins. Co. v. Akin, 927 S.W.2d 627, 629 (Tex. 1996).

336. F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 693 (Tex. 2007).

two defendants and a contemporaneous severance.[337] The supreme court determined that the trial court did not abuse its discretion in severing claims in this controversy that involved more than one cause of action, even though the claims were factually intertwined.[338] Similarly, in *Morgan v. Compugraphic Corp.*, the supreme court held that severance was proper in a case against two defendants after summary judgment had been granted against one defendant[339]

Severance of a partial summary judgment does not automatically result in a final, appealable order. All of the parties and issues in the severed part of the case must be disposed of. In *Diversified Financial Systems, Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, the severance order stated that the separate action should "proceed as such to final judgment or other disposition in this Court."[340] The supreme court determined the order clearly precluded a final judgment until the later judgment was signed.[341] An order granting summary judgment concerning a claim but not disposing of all issues presented in a counterclaim is interlocutory.[342]

After an interlocutory, partial summary judgment is granted, the issues it decides cannot be litigated further, unless the trial court sets aside the partial summary judgment or the summary judgment is reversed on appeal.[343] However, a plaintiff may take a nonsuit at any time before the trial court grants a motion for summary judgment.[344] A nonsuit extinguishes a case from the moment the nonsuit is filed.[345] A trial court may not withdraw a partial summary judgment after the close of evidence in such a manner that the party is precluded from presenting the issues decided in the partial summary

337. *Morello*, 547 S.W.3d at 884.

338. *Id*. at 889.

339. Morgan v. Compugraphic Corp., 675 S.W.2d 729, 733–34 (Tex. 1984).

340. Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C., 63 S.W.3d 795, 795 (Tex. 2001) (per curiam).

341. *Id.*; *see also* Thompson v. Beyer, 91 S.W.3d 902, 904 (Tex. App.—Dallas 2002, no pet.) ("As a rule, a severance of an interlocutory judgment into a severed action makes it final if all claims in the severed action have been disposed of, unless the order of severance indicates further proceedings are to be had in the severed action.").

342. Chase Manhattan Bank, N.A. v. Lindsay, 787 S.W.2d 51, 53 (Tex. 1990) (per curiam) ("If a summary judgment does not refer to or mention issues pending in a counterclaim, then those issues remain unadjudicated.").

343. Martin v. First Republic Bank, Fort Worth, N.S., 799 S.W.2d 482, 488–89 (Tex. App.—Fort Worth 1990, writ denied); Linder v. Valero Transmission Co., 736 S.W.2d 807, 810 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

344. Cook v. Nacogdoches Anesthesia Grp., L.L.P., 167 S.W.3d 476, 482 (Tex. App.—Tyler 2005, no pet.).

345. H2O Sols., Ltd. v. PM Realty Grp., LP, 438 S.W.3d 606, 625 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

judgment.[346] A partial summary judgment survives a nonsuit.[347] The nonsuit results in a dismissal with prejudice for the issues decided in the partial summary judgment.[348]

M. Motions for Rehearing

Occasionally, a party in a summary judgment proceeding will file a motion for rehearing or new trial following the granting of a motion for summary judgment.[349] A motion for new trial is unnecessary to preserve complaints directed at the summary judgment "because a motion for new trial is not a prerequisite for an appeal of a summary judgment proceeding."[350] Unless the movant on rehearing shows that the evidence "could not have been discovered through due diligence prior to the ruling on a summary judgment motion," additional evidence may not be considered on rehearing.[351]

However, a motion for new trial is necessary to preserve error concerning arguments related to a party's physical absence from the summary judgment hearing.[352] Another reason to file a motion for new trial is to extend appellate timetables. Just as for an appeal from a jury trial, a motion for new trial following a grant of summary judgment extends appellate timetables.[353] While not technically a request for a new trial, safe practice is to title a motion for rehearing as a "Request for Rehearing and Motion for New Trial" so that there is no issue concerning whether the pleading is sufficient to extend the timetables.

If a court denies a summary judgment motion, it has the authority to reconsider and grant a motion for summary judgment,[354] or change or modify the original order.[355] Motions for new trial are also implicated when a non-

346. Bi-Ed, Ltd. v. Ramsey, 935 S.W.2d 122, 123 (Tex. 1996) (per curiam).

347. *See* Newco Drilling Co. v. Weyand, 960 S.W.2d 654, 656 (Tex. 1998) (per curiam); *see also* Hyundai Motor Co. v. Alvarado, 892 S.W.2d 853, 855 (Tex. 1995) (per curiam) ("To give any force to the partial summary judgment provisions, those judgments must withstand a nonsuit.").

348. *Newco Drilling Co.*, 960 S.W.2d at 656. *But see* Frazier v. Progressive Cos., 27 S.W.3d 592, 594 (Tex. App.—Dallas 2000, pet. dism'd by agr.).

349. Nail v. Thompson, 806 S.W.2d 599, 602 (Tex. App.—Fort Worth 1991, no writ) ("A motion for rehearing is equivalent to a motion for new trial."); Hill v. Bellville Gen. Hosp., 735 S.W.2d 675, 677 (Tex. App.—Houston [1st Dist.] 1987, no writ).

350. Lee v. Braeburn Valley W. Civic Ass'n, 786 S.W.2d 262, 263 (Tex. 1990) (per curiam).

351. McMahan v. Greenwood, 108 S.W.3d 467, 500 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

352. *Lee*, 786 S.W.2d at 262–63; *see also* Monk v. Westgate Homeowners' Ass'n, No. 14-07-00886-CV, 2009 WL 2998985, at *3 (Tex. App.—Houston [14th Dist.] Aug. 11, 2009, no pet.) (mem. op.) (requiring the nonmovant to file a motion for new trial "to notify the trial court that he did not . . . appear at the summary judgment hearing because he did not receive timely notice of it").

353. *See* Padilla v. LaFrance, 907 S.W.2d 454, 458–59 & n.7 (Tex. 1995).

354. Bennett v. State Nat'l Bank, 623 S.W.2d 719, 721 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

355. R.I.O. Sys., Inc. v. Union Carbide Corp., 780 S.W.2d 489, 492 (Tex. App.—Corpus Christi 1989, writ denied).

movant does not respond to a motion for summary judgment. The *Craddock* rule[356] concerning refusal to grant motions for rehearing for default judgments does not apply to summary judgment proceedings in so-called default summary judgments where the nonmovant fails to respond to the motion when it had the opportunity to seek a continuance or obtain permission to file a late response.[357] In *Carpenter v. Cimarron Hydrocarbons Corp.*, the supreme court emphasized that it was not deciding whether *Craddock* would apply when the "nonmovant discovers its mistake after the summary-judgment hearing or rendition of judgment."[358] Then, in *Wheeler v. Green*, the supreme court considered a case in which deemed admissions formed the basis for a summary judgment and were challenged first in a motion for new trial.[359] The court determined that "when a party uses deemed admissions to [attempt] to preclude presentation of the merits of a case, the same due-process concerns arise" as in merits-preclusive sanctions.[360] The court held that under the facts in that case, the trial court should have granted a motion for new trial and allowed the deemed admissions to be withdrawn.[361] A party may properly raise its complaints about lack of notice of a certain submission date in a timely motion for new trial.[362]

Additionally, in *Nickerson v. E.I.L. Instruments, Inc.*, the Houston First Court of Appeals held that the trial court's action in granting the nonmovant's motion for new trial, immediately reconsidering the motion for summary judgment, and again granting judgment, could not cure a defect in notice of the hearing.[363] Once the motion for new trial was granted, the nonmovant should have been given reasonable notice of the hearing.[364]

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356. Under *Craddock*, the trial court abuses its discretion if it denies a motion for a new trial after a default judgment if the nonmovant establishes:

> [1.] [T]he failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; . . . [2.] the motion for a new trial sets up a meritorious defense[;] and [3.] [the motion] is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Craddock v. Sunshine Bus Lines, Inc., 133 S.W.2d 124, 126 (Tex. 1939).

357. *See id.* at 126; Huffine v. Tomball Hosp. Auth., 979 S.W.2d 795, 798–99 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

358. Carpenter v. Cimarron Hydrocarbons Corp., 98 S.W.3d 682, 686 (Tex. 2002).

359. Wheeler v. Green, 157 S.W.3d 439, 441–42 (Tex. 2005) (per curiam).

360. *Id.* at 443.

361. *Id.* at 444.

362. *See* Ready v. Alpha Bldg. Corp., 467 S.W.3d 580 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

363. Nickerson v. E.I.L. Instruments, Inc., 817 S.W.2d 834, 836 (Tex. App.—Houston [1st Dist.] 1991, no writ).

364. *Id.*

The court decided that seven days' notice of the hearing after granting a motion for new trial was reasonable notice.[365]

N. Sanctions

A motion for summary judgment asserting that there is no genuine issue of material fact is not groundless merely by the filing of a response that raises an issue of fact.[366] This tenet is true "even if the response was or could have been anticipated by the movant."[367] Also, denial of a summary judgment alone is not grounds for sanctions.[368]

Rule 166a has its own particular sanctions provision concerning affidavits filed in bad faith. If a trial court concludes that an affidavit submitted with a motion for summary judgment was presented "in bad faith or solely for the purpose of delay," the court may impose sanctions on the party employing the offending affidavits.[369] Such sanctions include the reasonable expenses incurred by the other party, including attorneys' fees, as a result of the filing of the affidavits.[370] Sanctions for submitting affidavits in bad faith may also include holding an offending party or attorney in contempt.[371] The comment to Rule 166a states that no-evidence motions for summary judgment are subject to sanctions provided for under existing law.[372]

II. SUMMARY JUDGMENT EVIDENCE

Rule 166a specifies that the following may constitute summary judgment evidence: deposition transcripts, interrogatory answers, other discovery responses, pleadings, admissions, affidavits (including sworn or certified papers attached to the affidavits), stipulations of the parties, and authenticated or certified public records.[373]

365. *Id.* (holding that the court should have given "at least seven days notice" of the summary judgment hearing).

366. GTE Commc'ns Sys. Corp. v. Tanner, 856 S.W.2d 725, 731 (Tex. 1993).

367. *Id.*

368. *Id.*

369. TEX. R. CIV. P. 166a(h). Sanctions assessed for affidavits made in bad faith must be directed solely against the party, and not the party's attorney. *Id.*; Ramirez v. Encore Wire Corp., 196 S.W.3d 469, 476 (Tex. App.—Dallas 2006, no pet.).

370. TEX. R. CIV. P. 166a(h).

371. *Id.*

372. *Id.*; TEX. R. CIV. P. 166a cmt.—1997.

373. TEX. R. CIV. P. 166a(c).

A. General Principles

When evidence is required, a movant must establish with competent evidence that it is entitled to judgment as a matter of law.[374] In determining whether evidence is competent, the rules of evidence apply equally in trial and summary judgment proceedings.[375] Thus, summary judgment evidence must be presented in a form that would be admissible in a conventional trial proceeding.[376]

Neither the motion for summary judgment, nor the response, even if sworn, is proper summary judgment proof.[377] "When both parties move for summary judgment, the trial court may consider the combined summary-judgment evidence to decide how to rule on the motions."[378] "The proper scope for a trial court's review of evidence for a summary judgment encompasses all evidence on file at the time of the hearing or filed after the hearing and before judgment with the permission of the court."[379]

> A nonmovant responding to a summary judgment motion is not required to "needlessly duplicate evidence [that is] already found in the court's file." Instead, he can request in his motion that the trial court take judicial notice of evidence already in the record or, alternatively, incorporate that evidence in his motion by reference.[380]

Evidence need not be attached to the motion itself, but rather may be attached to the brief in support.[381] The standard of review on appeal of the trial court's admission of summary judgment evidence is abuse of

374. *Id.*

375. Seim v. Allstate Texas Lloyds, 551 S.W.3d 161, 163 (Tex. 2018) (per curiam); Fort Brown Villas III Condo. Ass'n v. Gillenwater, 285 S.W.3d 879, 881–82 (Tex. 2009) (per curiam); United Blood Servs. v. Longoria, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam).

376. Hou-Tex Printers, Inc. v. Marbach, 862 S.W.2d 188, 191 (Tex. App.—Houston [14th Dist.] 1993, no writ) (citing Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1971)).

377. *See Hidalgo*, 462 S.W.2d at 545 ("[W]e refuse to regard pleadings, even if sworn, as summary judgment evidence."); *see also* Webster v. Allstate Ins. Co., 833 S.W.2d 747, 749 (Tex. App.—Houston [1st Dist.] 1992, no writ); Keenan v. Gibraltar Sav. Ass'n, 754 S.W.2d 392, 394 (Tex. App.—Houston [14th Dist.] 1988, no writ) (stating that an affidavit that simply adopts a pleading is insufficient to support a summary judgment motion); Nicholson v. Mem'l Hosp. Sys., 722 S.W.2d 746, 749 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (holding that responses do not constitute summary judgment evidence); Trinity Universal Ins. Co. v. Patterson, 570 S.W.2d 475, 478 (Tex. Civ. App.—Tyler 1978, no writ) (expanding the *Hidalgo* decision to apply to summary judgment motions). For exceptions to this rule, see *infra* Part 1.II.B, discussing pleadings as summary judgment evidence.

378. Jon Luce Builder, Inc. v. First Gibraltar Bank, F.S.B., 849 S.W.2d 451, 453 (Tex. App.—Austin 1993, writ denied) (per curiam).

379. Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 503 (Tex. App.—Houston [1st Dist.] 1995, no writ).

380. Ramirez v. Colonial Freight Warehouse Co., 434 S.W.3d 244, 252 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (alteration in original) (citation omitted) (quoting Saenz v. S. Union Gas Co., 999 S.W.2d 490, 494 (Tex. App.—El Paso 1999, pet. denied)).

381. Wilson v. Burford, 904 S.W.2d 628, 629 (Tex. 1995) (per curiam).

discretion.[382] "To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error probably caused the rendition of an improper judgment."[383] Unlike a trial on the merits, "a summary judgment cannot be based on an attack of a witness's credibility."[384]

A claim of inability to obtain discovery vital to defeat a summary judgment may be waived in the absence of a failure to request a continuance on that basis.[385]

1. Reasonable Juror Standard

Since *City of Keller*, the supreme court applies a "reasonable juror" standard to determine whether a fact issue exists.[386] For example, in *Buck v. Palmer*, the court reversed a summary judgment that held that a minority shareholder's communications were conclusive evidence of dissolution of the joint venture.[387] The court determined that reasonable jurors could differ concerning "whether [a minority owner of a joint venture] intended to dissolve the partnership, merely express a desire to relinquish his interest at a later time, or simply engaged in hyperbole in light of his frustrations with the venture's poor performance."[388]

In *Helix Energy Solutions Group, Inc. v. Gold*,[389] citing *Keller*, the supreme court applied the reasonable jury standard to conclude the evidence was conclusive that a craft was not a "vessel in navigation." Thus, the plaintiff did not have seaman status under the Jones Act. "Typically, evidence is conclusive when 'it concerns physical facts that cannot be denied' or 'when a party admits it is true.'"[390] The court's review of the relevant facts led it to the conclusion that an overhaul rendered the craft incapable of navigation during the plaintiff's entire time onboard.[391] The court noted, "We cannot disregard 'conclusive evidence'—evidence upon which 'reasonable people could not differ in their conclusions.'"[392]

382. United Blood Servs. v. Longoria, 938 S.W.2d 29, 30–31 (Tex. 1997) (per curiam).

383. Patrick v. McGowan, 104 S.W.3d 219, 221 (Tex. App.—Texarkana 2003, no pet.); *see* E-Z Mart Stores, Inc. v. Ronald Holland's A-Plus Transmission & Auto., Inc., 358 S.W.3d 665, 676 (Tex. App.—San Antonio 2011, pet. denied); *see also* TEX. R. APP. P. 44.1(a)(1).

384. State v. Durham, 860 S.W.2d 63, 66 (Tex. 1993).

385. Elizondo v. Krist, 415 S.W.3d 259, 267–69 (Tex. 2013); *see supra* Part 1.I.H. (Continuances).

386. *See infra* Part 1.V.F.

387. Buck v. Palmer, 381 S.W.3d 525, 526, 528 (Tex. 2012) (per curiam).

388. *Id.* at 528.

389. Helix Energy Sols. Grp., Inc. v. Gold, 522 S.W.3d 427, 436 (Tex. 2017).

390. *Id.* at 431 (quoting City of Keller v. Wilson, 168 S.W.3d 802, 816 (Tex. 2005)).

391. *Id*. at 439.

392. *Id*. at 431 (quoting *City of Keller*, 168 S.W.3d at 815).

2. Time for Filing

Summary judgment evidence must be filed by the same deadline as the motion or response it supports.[393] Evidence may be late-filed only with leave of court.[394] There is no deadline by which a reply must be filed, so evidence filed in support of a reply may be filed within twenty-one days of the hearing only with leave of court.[395] If evidence is filed late without leave, that evidence will not be considered as being before the court.[396] "Summary judgment evidence must be submitted, at the latest, by the date the summary judgment was [signed]."[397]

The evidentiary exclusion found in Texas Rule of Civil Procedure 193.6,[398] which applies to the exclusion of evidence due to an untimely response to a discovery request, applies to summary judgment proceedings.[399] Thus, the supreme court has upheld the striking of an expert's affidavit because the plaintiff did not timely disclose the expert under the parties' scheduling order.[400] Under Texas Rule of Civil Procedure 193.6, a party may overcome the exclusion by establishing good cause or the lack of unfair surprise or unfair prejudice.[401]

3. Unfiled Discovery

The Texas Rules of Civil Procedure no longer require the filing of most discovery with the trial court. The discovery material that is not filed is specified

393. TEX. R. CIV. P. 166a(c).

394. Benchmark Bank v. Crowder, 919 S.W.2d 657, 663 (Tex. 1996).

395. *See id.*; Garcia v. Garza, 311 S.W.3d 28, 36 (Tex. App.—San Antonio 2010, pet. denied).

396. *Benchmark Bank*, 919 S.W.2d at 663; *Garcia*, 311 S.W.3d at 36.

397. Priesmeyer v. Pac. Sw. Bank, F.S.B., 917 S.W.2d 937, 939 (Tex. App.—Austin 1996, no writ) (per curiam).

398. Rule 193.6 provides in part:

> (a) *Exclusion of Evidence and Exceptions*. A party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that:
>
> (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or
>
> (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.

TEX. R. CIV. P. 193.6(a).

399. Fort Brown Villas III Condo. Ass'n v. Gillenwater, 285 S.W.3d 879, 881 (Tex. 2009) (per curiam).

400. *Id.* at 882 ("The trial court struck the expert's affidavit and did not consider it in granting the summary judgment.").

401. *Id.* (citing TEX. R. CIV. P. 193.6(b)).

in Rule 191.4(a).[402] Discovery material that must be filed is specified in Rule 191.4(b).[403]

A subsection to the summary judgment rule, Rule 166a(d), requires that a party may either attach the evidence to the motion or response or file a notice containing specific references to the unfiled material to be used, as well as a statement of intent to use the unfiled evidence as summary judgment proof.[404] Specifically, Rule 166a(d) provides:

> (d) *Appendices, References and Other Use of Discovery Not Otherwise on File.* Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.[405]

Thus, Rule 166a(d) provides three methods to present unfiled discovery to the trial court in a summary judgment motion or response. A party may file the discovery with the trial court, file an appendix containing the evidence, or simply file a notice with specific references to the unfiled discovery. If the actual documents are before the trial court, the rule does not require that the proponent of the evidence provide specific references to the discovery for the trial court to consider it.[406] Despite the wording of the rule that makes it appear that a "statement of intent" may be sufficient without the actual proof attached, some courts of

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402. Rule 191.4(a) provides:

> (a) *Discovery Materials Not to Be Filed.* The following discovery materials must not be filed:
>
> (1) discovery requests, deposition notices, and subpoenas required to be served only on parties;
>
> (2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served;
>
> (3) documents and tangible things produced in discovery; and
>
> (4) statements prepared in compliance with Rule 193.3(b) or (d).

TEX. R. CIV. P. 191.4(a).

403. Rule 191.4(b) provides:

> (b) *Discovery Materials to Be Filed.* The following discovery materials must be filed:
>
> (1) discovery requests, deposition notices, and subpoenas required to be served on nonparties;
>
> (2) motions and responses to motions pertaining to discovery matters; and
>
> (3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11.

TEX. R. CIV. P. 191.4(b).

404. TEX. R. CIV. P. 166a(d).

405. *Id.*

406. *Id.*; Barraza v. Eureka Co., 25 S.W.3d 225, 228 (Tex. App.—El Paso 2000, pet. denied).

appeals have refused to consider such proof if the appellate record does not demonstrate that the evidence was filed with the trial court when the motion for summary judgment order was entered.[407]

4. Objections to Evidence

For something as seemingly simple as objecting to evidence, attempts to do so in a summary judgment proceeding are fraught with complications. While these complications continue to exist, in *Seim v. Allstate Texas Lloyds*,[408] the Texas Supreme Court addressed the confusion and resolved many of the conflicts among the courts of appeals.[409]

At its most basic level, the rules of error preservation that apply in trial also apply in summary judgment proceedings.[410] To preserve a complaint for appellate review that summary judgment evidence is inadmissible, (1) a party must complain to the trial court in a timely request, objection, or motion; and (2) the trial court must rule or refuse to rule.[411] Nonetheless, there are multiple issues that must be considered in determining the best practice to follow in objecting to summary judgment evidence.

Explicit ruling generally required. In *Seim v. Allstate Lloyds*, the supreme court resolved the differences among courts of appeals on error preservation of evidentiary objections by approving the approach that, unless the record shows a clearly implied ruling by the trial court, trial courts must expressly rule on evidentiary objections in writing.[412] The court specifically approved of the approach taken by the Houston Fourteenth Court of Appeals and the San Antonio Fourth Court of Appeals.[413] Thus, the court endorsed the following practices:

- Practitioners should incorporate all of their objections to summary judgment evidence in proposed orders granting or denying summary judgment;

407. *See, e.g.*, Gomez v. Tri City Cmty. Hosp., Ltd., 4 S.W.3d 281, 283–84 (Tex. App.—San Antonio 1999, no writ).

408. *See* Seim v. Allstate Tex. Lloyds, 551 S.W.3d 161, 164–66 (Tex. 2018) (per curiam).

409. *See generally*, Lynne Liberato & Natasha Breaux, *Objecting to Summary Judgment Evidence in State Court: Recent Clarifications and Remaining Complications*, HOUSTON LAWYER, October 19, 2018.

410. *Id.*

411. TEX. R. APP. P. 33.1(a); Mansions in the Forest, L.P. v. Montgomery County, 365 S.W.3d 314, 317 (Tex. 2012) (per curiam).

412. *See Seim*, 551 S.W.3d at 166.

413. *Id.* ("We hold that the Fourth and the Fourteenth courts have it right.") *quoting with approval* Dolcefino v. Randolph, 19 S.W.3d 906, 926–27 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

- The party asserting the objections should obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment (or risk waiver);
- The trial court should disclose, in writing, its rulings on all objections to summary judgment evidence at or before the time it enters the order granting or denying the summary judgment.[414]

In limited circumstances a ruling may be implicit. In *Seim*, the court did not close the door to implicit rulings on objections to summary judgment evidence. The *Seim* court cited its decision in *In re Z.L.T.*, noting that the ruling in that case was implicit because the implication was "clear" that the court denied a movant's request.[415] *In re Z.L.T.* did not involve a summary judgment, but rather an inmate request for the court to issue a bench warrant. In evaluating whether the ruling was sufficient to present an issue for appellate review, the court explained that by proceeding to trial without a bench warrant, it was clear that the trial court implicitly denied the inmates request.[416]

In contrast, nothing in the record in *Seim* served to clearly imply a ruling by the trial court on the movant's objections. The court noted: "Indeed, even without the objections, the trial court could have granted summary judgment against the [nonmovants] if it found that their evidence did not generate a genuine issue of material fact."[417] Thus, the court determined that the court of appeals wrongly disregarded the objected to evidence, and it remanded the case for the court of appeals to determine, even with the objections waived and the evidence considered, whether the movant was still entitled to a summary judgment.[418]

Whether a defect is one of form or substance determines whether it can be waived. Failure to object to the form of summary judgment evidence

414. *Id.* (citing *Dolcefino*, 19 S.W.3d at 926); *see also* Exxon Mobil Corp. v. Rincones, 520 S.W.3d 572 (Tex. 2017).

415. *In re* Z.L.T., 124 S.W.3d 163, 165 (Tex. 2003).

416. *Id*. An example of a court holding that a ruling was implicit was where the nonmovant sought more time to obtain a business records affidavit to support an appraisal of the properties in dispute. In *Homes v. WMI Properties I, Ltd.*, the court determined that the granting of the summary judgment was an implicit ruling on the nonmovant's request for additional time to obtain the business records affidavit. Homes v. WMI Props. I, Ltd., No. 09-15-00165-CV, 2016 WL 1468676, at *1 (Tex. App.—Beaumont Apr. 14, 2016, pet. denied). In an example that dealt with the failure of the court to rule on objections, the appellant complained in his motion for new trial following the court's refusal to act on his objections and the trial court refused to rule. Alejandro v. Bell, 84 S.W.3d 383, 388 (Tex. App.—Corpus Christi 2002, no pet.); *see also In re* Estate of Schiwetz, 102 S.W.3d 355, 360–61 (Tex. App.—Corpus Christi 2003, pet. denied).

417. *Seim*, 551 S.W.3d at 166.

418. *Id.*

waives any defects concerning form. Objections to the substance of summary judgment evidence may be raised for the first time on appeal.[419]

In *Seim*, the court addressed this distinction between substantive and form defects. Specifically, it reaffirmed that failure of an affidavit to include a jurat was a defect in form that could not be first complained of on appeal.[420] While *Seim* settled the issue in regard to an affidavit without a jurat, there remain inconsistencies among the courts of appeals concerning characterizations of certain defects as defects of form or of substance.[421] Nonetheless, the implication in the *Seim* case is clear from the supreme court's determination that such an obvious defect as the omission of a jurat (or to otherwise show that an affidavit was sworn to) is a defect in form that is waived without a ruling on the related objection.[422] The supreme court will look with disfavor on determinations that defects concern substance. The wisest practice is to present all objections in writing and obtain a written ruling on them by the trial court.

There are additional requirements to assert objections and secure a written ruling. The objection to summary judgment evidence must be specific.[423] For example, in *Womco, Inc. v. Navistar International Corp.*, the Tyler Court of Appeals held that an objection to a paragraph in an affidavit as a legal conclusion was itself conclusory because it failed to identify which statement in the paragraphs were objectionable or offer any explanation concerning the precise bases for objection.[424] Concerning the requirement for a written ruling, a docket sheet entry does not meet this requirement.[425] In light of the language by the supreme court in *Seim* consistently

419. An objection that affidavit testimony is conclusory is an objection to substance that can be raised for the first time on appeal. Willis v. Nucor Corp., 282 S.W.3d 536, 548–49 (Tex.App.—Waco 2008, no pet.). "[A]ny objections relating to substantive defects (such as lack of relevancy, conclusory) can be raised for the first time on appeal and are not waived by the failure to obtain a ruling from the trial court." McMahan v. Greenwood, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); An objection that alleges that evidence is conclusory is a defect of substance. *Willis*, 282 S.W.3d at 547; Choctaw Props., L.L.C. v. Aledo I.S.D., 127 S.W.3d 235, 241–42 (Tex. App.—Waco 2003, no pet.).

420. *Seim*, 551 S.W.3d at 166 (citing Mansions in the Forest, L.P. v. Montgomery County, 365 S.W.3d 314, 317–18 (Tex. 2012)).

421. For example, some courts have held that an affiant's lack of personal knowledge is a defect in form. Wash. DC Party Shuttle, LLC v. IGuide Tours, LLC, 406 S.W.3d 723, 731–36 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (en banc) (detailing split in authority).

422. *Seim*, 551 S.W.3d at 166.

423. Stewart v. Sanmina Tex. L.P., 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.); Garcia v. John Hancock Variable Life Ins. Co., 859 S.W.2d 427, 434 (Tex. App.—San Antonio 1993, writ denied) ("To preserve error, an objection must state the specific grounds for the requested ruling, if these grounds are not apparent from the context of the objection.").

424. Womco, Inc. v. Navistar Int'l Corp., 84 S.W.3d 272, 281 n.6 (Tex. App.—Tyler 2002, no pet.).

425. Utils. Pipeline Co. v. Am. Petrofina Mktg., 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ).

referring to a "written" ruling, presumably an oral ruling contained in a reporters record would not be sufficient[426]—although arguably the reporters record itself is "written" and therefore could meet with "written" requirement. Absent a proper order sustaining an objection, all of the summary judgment evidence, including any evidence objected to by a party, is proper evidence that will be considered on appeal.[427]

Obtain a ruling at, before, or very near the time the trial court rules on the motion for summary judgment. In *Seim v. Allstate Texas Lloyds*,[428] the supreme court quoted with approval a paragraph from a Houston Fourteenth Court of Appeals case that addressed several aspects of preservation of error of evidentiary objections in summary judgment proceedings. Among those areas addressed in the quoted section of *Dolcefino*, the supreme court emphasized in italics the following sentence: "*In any context, however, it is incumbent upon the party asserting objections to obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment or risk waiver.*"[429] Thus, the court allows that it may not be possible to get a ruling at or before the time of the ruling.

The standard of "very near the time the trial court rules" implies that the party seeking a ruling on evidentiary objections should move quickly to obtain a ruling if the trial court has not ruled. The court also addresses this issue by directing that the trial court should rule on the evidentiary objections at or before its summary judgment ruling. Specifically, earlier in the same paragraph from *Dolcefino* quoted by the supreme court, it noted that "the better practice is for the trial court to disclose, in writing, its rulings on all objections to summary judgment evidence at or before the time it enters the order granting or denying summary judgment."[430]

Opinions from court of appeals issued before *Seim* indicate that as long as the ruling is made before the plenary power of the court expires, there should be no waiver if the court rules on objections after its summary judgment ruling.[431]

In *Eaton Metal Products, L.L.C. v. U.S. Denro Steels, Inc*., the trial court made written rulings sustaining certain objections to the summary judgment evidence, but it did so almost a month after granting the summary judgment.[432]

426. *Seim*, 551 S.W.3d at 165.

427. *See Utils. Pipeline Co.*, 760 S.W.2d at 722–23 (holding that where the appellate record did not contain a written and filed order sustaining an objection to a report as summary judgment evidence, the report was proper evidence included in the record).

428. *Seim*, 551 S.W.3d at 165.

429. *Id.* at 165 (quoting Dolcefino v. Randolph, 19 S.W.3d 906, 926–27 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)).

430. *Id.*

431. Wolfe v. Devon Energy Prod. Co., 382 S.W.3d 434, 448 (Tex. App.—Waco 2012, pet denied).

432. Eaton Metal Prods., L.L.C. v. U.S. Denro Steels, Inc., No.14-09-00757-CV, 2010 WL 3795192, at *2 (Tex. App.—Houston [14th Dist.] Sept. 30, 2010, no pet.) (mem. op.); *see also* Esty v. Beal Bank S.S.B., 298 S.W.3d 280, 291–92 (Tex. App.—Dallas 2009, no pet.).

Nevertheless, the court of appeals held that the objections were not waived because the objections had been filed before the summary judgment hearing and the trial court had noted that it had taken the objections into consideration at the summary judgment hearing.[433] Thus, in signing the written order on the objections, the trial court merely was "memorializing what the Court thought" during the earlier hearing.[434] In *Rankin v. Union Pacific Railroad Co.*, the San Antonio Court of Appeals refused to give effect to a ruling on a motion to strike summary judgment evidence that appeared in an order signed after the trial court had granted the summary judgment.[435] Significantly, the order was signed after the trial court's plenary power had expired.[436]

If the trial court refuses to rule on an objection, file a written objection to its failure to rule. Under the rules of appellate procedure, to preserve a complaint for appellate review that summary judgment evidence is inadmissible, (1) a party must complain to the trial court in a timely request, objection, or motion; and (2) the trial court must rule or refuse to rule and "the complaining party object[] to the refusal."[437] Therefore, if a party properly objects to the summary judgment evidence and the trial court fails to or refuses to rule in writing, that party should object in writing to the trial court's refusal. Simply re-urging the original evidentiary objection is not sufficient.[438]

In *Alejandro v. Bell*, the Corpus Christi Court of Appeals considered a situation where the trial court refused to rule on the nonmovant's objections to the movant's summary judgment evidence.[439] The nonmovant for summary judgment complained in his motion for new trial of the trial court's refusal to rule, and, in doing so, the court held that he preserved his complaint for review.[440]

In light of the 2018 supreme court decision in *Seim v. Allstate Texas Lloyds*, which endorses the timing standard of obtaining a ruling "very near the time the trial court rules on the motion for summary judgment,"[441] careful practice would be to object earlier than the time for filing the motion for new trial.

433. *Eaton Metal Prods.*, 2010 WL 3795192, at *5; *see also Esty*, 298 S.W.3d at 295 (overruling the appellant's complaint about the timeliness of post-judgment orders because neither party requested a ruling on the evidentiary objections at issue until after the entry of final judgment, nor did either party object to the trial court's failure to rule).

434. *Eaton Metal Prods.*, 2010 WL 3795192, at *4.

435. Rankin v. Union Pac. R.R., 319 S.W.3d 58, 65 (Tex. App.—San Antonio 2010, no pet.).

436. *Id.*

437. TEX. R. APP. P. 33.1(a).

438. Ermisch v. HSBC Bank USA, No. 03-16-00080-CV, 2016 WL 6575232, at *2 n.3 (Tex. App.—Austin Nov. 4, 2016, pet. denied) (mem. op.).

439. Alejandro v. Bell, 84 S.W.3d 383, 388 (Tex. App.—Corpus Christi 2002, no pet.).

440. *Id.*

441. Seim v. Allstate Texas Lloyds, 551 S.W.3d 161, 165 (Tex. 2018) (per curiam).

Indeed, based on this timing standard, the Houston First Court of Appeals held that a party waived his complaint about the trial court's failure to rule on his objections to summary judgment evidence by not objecting to the failure soon enough.[442] In that case, *Vecchio v. Jones*, the party initially objected to the trial court's failure to rule on the evidentiary objections almost one year after the court's initial ruling on the partial summary judgment and six months after its amended ruling—but before final judgment issued.[443] Even though he raised the failure-to-rule issue before final judgment and then again in a motion for new trial, the Houston First Court of Appeals held he waived the issue by not timely raising it, relying on the "very near" timing standard from *Dolcefino* that *Seim* endorses.[444] Accordingly, the First Court considered the objected-to evidence when determining the merits of the motion for summary judgment.[445]

Object to rulings that sustain objections to admission of evidence. Courts of appeals ruling on the issue disagree whether a party must object to a trial court's ruling that sustains objections to the admission of summary judgment evidence. The Dallas and El Paso courts of appeals require such an objection to preserve error.[446] The Fort Worth Court of Appeals would have no such requirement.[447] The better reasoned approach should be that there is no requirement. Summary judgment practice tends to mirror trial court procedure and a lawyer need not object to a ruling sustaining an objection at trial to preserve error.

5. Attach Evidence to Motion for/Response to Summary Judgment

Texas Rule of Civil Procedure 166a does not require that evidence be attached to the motion for summary judgment to be considered.[448] The evidence must only be on file at the time of the summary judgment hearing or filed thereafter and before judgment with permission of the court.[449]

442. Vecchio v. Jones, No. 01-12-00442-CV, 2013 WL 3467195, at *13 (Tex. App.—Houston [1st Dist.] July 9, 2013, no pet.).

443. *Id.*

444. *Id.* (quoting Dolcefino v. Randolph, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

445. *See id.* at *11–12.

446. DuBois v. Martin Luther King, Jr., Family Clinic, No. 05-16-01460-CV, 2018 WL 1663787, at *4 (Tex. App.—Dallas Apr. 6, 2018, no pet.) (mem. op.); Brooks v. Sherry Lane Nat'l Bank, 788 S.W.2d 874 (Tex. App.—Dallas 1990, no writ); Cmty. Initiatives. Inc. v. Chase Bank of Tex., 153 S.W.3d 270 (Tex. App.—El Paso 2004, no pet.).

447. Miller v. Great Lakes Mgmt. Serv., Inc., No. 02-16-00087-CV, 2017 WL 1018592, at *8 (Tex. App.—Fort Worth, Mar. 16, 2017, no pet.).

448. TEX. R. CIV. P. 166a(c).

449. *Id.*

If a document is in the court's file at the time of submission of the motion for summary judgment, the trial court may consider it even if it is not re-filed as an attachment to the summary judgment motion. In *Lance v. Robinson*,[450] the supreme court distinguished between the absence of evidence from the summary judgment record and its complete absence from the court's file. If the evidence is completely absent from the court's file, and is necessary to support a summary judgment, this absence constitutes a substantive error that may be raised for the first time on appeal.[451] In *Lance*, the court held that, even though they were not attached to the summary judgment motion, deeds were properly before the trial court because they had been admitted without objection in an earlier temporary injunction hearing. Quoting Texas Rule of Civil Procedure 166a(c), the court noted that if the evidence "is on file at the time of the [summary judgment] hearing or filed thereafter and before the judgment with permission of the court," it may be considered by the court in determining its decision on the motion for summary judgment. Even though it may not cause error, attaching evidence to the motion or response, rather than requiring a court to sift through its files, is good advocacy.

Although the movant has the burden to prove its summary judgment as a matter of law, on appeal the burden shifts to the nonmovant appellant to bring forward the record of the summary judgment evidence to provide appellate courts with a basis to review its claim of harmful error.[452] "If the pertinent summary judgment evidence considered by the trial court is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment."[453]

B. Pleadings as Evidence

Generally, factual statements in pleadings, even if verified, do not constitute summary judgment evidence.[454] However, this rule is not as absolute as it appears. A plaintiff may not use its pleadings as "proof" to defeat an otherwise valid motion

450. Lance v. Robinson, 543 S.W.3d 723 (Tex. 2018).

451. *Id*. (citing MBank Brenham, N.A. v. Barrera, 721 S.W.2d 840, 842 (Tex. 1986) (per curiam)).

452. Enter. Leasing Co. of Houston v. Barrios, 156 S.W.3d 547, 549 (Tex. 2004) (per curiam); *see also* DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 689 (Tex. 1990); Escontrias v. Apodaca, 629 S.W.2d 697, 699 (Tex. 1982); *cf.* TEX. R. APP. P. 34.5(a) (stating that only the items listed in Rule 34.5(a) are included in the appellate record absent a request from one of the parties).

453. *Enter. Leasing Co. of Houston*, 156 S.W.3d at 550; *see also* Crown Life Ins. Co. v. Estate of Gonzalez, 820 S.W.2d 121, 122 (Tex. 1991) (per curiam); *DeSantis*, 793 S.W.2d at 689.

454. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979); Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1971); Cross v. Littlefield, No. 11-14-00224-CV, 2016 WL 6998981, at *2 (Tex. App.—Eastland 2016, no pet.) (mem. op.) (citing Hittner & Liberato, *supra* note 328, at 821 n.341).

for summary judgment by a defendant. However, the defendant may use the plaintiff's pleadings to obtain a summary judgment when the pleadings affirmatively negate the plaintiff's claim.[455] Sworn account cases are also an exception to the rule that pleadings are not summary judgment evidence.[456] When the defendant files no proper verified denial of a suit on a sworn account, the pleadings can be the basis for summary judgment.[457]

Also, an opponent's pleadings may constitute summary judgment proof if they contain judicial admissions, which are statements admitting facts or conclusions contrary to a claim or defense.[458] If not pled in the alternative, assertions of fact in live pleadings of a party constitute formal judicial admissions.[459] Conversely, in *Martinez v. Midland Credit Management, Inc.*, the appellate court refused to consider as summary judgment evidence statements contained in the defendant's original answer, which was timely amended to include a general denial.[460] The court determined that the statements in the superseded pleadings were not "conclusive and indisputable judicial admissions."[461]

In *Hidalgo v. Surety Savings & Loan Ass'n*, the supreme court explained that a summary judgment may be granted on deficiencies in the opposing pleadings.[462] The court stated:

> We are not to be understood as holding that summary judgment may not be rendered, when authorized, *on the pleadings*, as, for example, when suit is on a sworn account under Rule 185, Texas Rules of Civil

455. Washington v. City of Houston, 874 S.W.2d 791, 794 (Tex. App.—Texarkana 1994, no writ) (stating that where a party's pleadings themselves show no cause of action or allege facts that, if proved, establish governmental immunity, the pleadings alone will justify summary judgment); Saenz v. Family Sec. Ins. Co. of Am., 786 S.W.2d 110, 111 (Tex. App.—San Antonio 1990, no writ) (concluding that where a plaintiff pleads facts affirmatively negating his cause of action, he can "plead himself out of court"); Perser v. City of Arlington, 738 S.W.2d 783, 784 (Tex. App.—Fort Worth 1987, writ denied) (determining that the appellants effectively pleaded themselves out of court by affirmatively negating their cause of action).

456. *See, e.g.*, Matador Prod. Co. v. Weatherford Artificial Lift Sys., Inc., 450 S.W.3d 580, 585 n.1 (Tex. App.—Texarkana 2014, pet. denied); Andrews v. E. Tex. Med. Ctr.-Athens, 885 S.W.2d 264, 267 (Tex. App.—Tyler 1994, no writ); *see also infra* Part 1.VII.A (discussing sworn accounts).

457. *Andrews*, 885 S.W.2d at 267; Enernational Corp. v. Exploitation Eng'rs, Inc., 705 S.W.2d 749, 750 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); Waggoners' Home Lumber Co. v. Bendix Forest Prods. Corp., 639 S.W.2d 327, 328 (Tex. App.—Texarkana 1982, no writ).

458. H2O Sols., Ltd. v. PM Realty Grp., LP, 438 S.W.3d 606, 617 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); Lyons v. Lindsey Morden Claims Mgmt., Inc., 985 S.W.2d 86, 92 (Tex. App.—El Paso 1998, no pet.); Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 504 (Tex. App.—Houston [1st Dist.] 1995, no writ).

459. Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 568 (Tex. 2001).

460. Martinez v. Midland Credit Mgmt., Inc., 250 S.W.3d 481, 485–86 (Tex. App.—El Paso 2008, no pet.).

461. *Id.* (citing Sosa v. Cent. Power & Light, 909 S.W.2d 893, 895 (Tex. 1995)).

462. Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1971).

> Procedure, and the account is not denied under oath as therein provided, or when the plaintiff's petition fails to state a legal claim or cause of action. In such cases summary judgment does not rest on proof supplied by pleading, sworn or unsworn, but on deficiencies in the opposing pleading.[463]

The bottom line is that a party may not rely on factual allegations in its motion or response as summary judgment evidence. Those allegations must be supported by separate summary judgment proof. In some limited instances, a party may rely on its opponent's pleadings.

C. Depositions

If deposition testimony meets the standards for summary judgment evidence, it will support a valid summary judgment.[464] Deposition testimony is subject to the same objections that might have been made to questions and answers if the witness had testified at trial.[465] Depositions only have "the force of an out of court admission and may be contradicted or explained in a summary judgment proceeding."[466] Deposition testimony may be given the same weight as any other summary judgment evidence.

Deposition excerpts submitted as summary judgment evidence need not be authenticated.[467] Copies of the deposition pages alone are sufficient.[468]

D. Answers to Interrogatories and Requests for Admissions

1. Evidentiary Considerations

To be considered summary judgment evidence, answers to interrogatories and requests for admissions must be otherwise admissible into

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463. *Id.*

464. Rallings v. Evans, 930 S.W.2d 259, 262 (Tex. App.—Houston [14th Dist.] 1996, no writ); Wiley v. City of Lubbock, 626 S.W.2d 916, 918 (Tex. App.—Amarillo 1981, no writ) (stating that because the deposition testimony was "clear, positive, direct, [and] otherwise free from contradictions and inconsistencies," it met the standards for summary judgment evidence).

465. *See* TEX. R. CIV. P. 199.5(e) (stating that certain objections may be made to questions and answers in a deposition).

466. Molnar v. Engels, Inc., 705 S.W.2d 224, 226 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); Combs v. Morrill, 470 S.W.2d 222, 224 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.).

467. McConathy v. McConathy, 869 S.W.2d 341, 342 (Tex. 1994) (per curiam); Cobb v. Dall. Fort Worth Med. Ctr.—Grand Prairie, 48 S.W.3d 820, 823 (Tex. App.—Waco 2001, no pet.).

468. *McConathy*, 869 S.W.2d at 341–42 (holding that deposition excerpts submitted for summary judgment can be easily verified so that authentication is unnecessary). Any authentication requirement such as that articulated in *Deerfield Land Joint Venture v. Southern Union Realty Co.*, 758 S.W.2d 608, 610 (Tex. App.—Dallas 1988, writ denied), which required that the entire deposition be attached to the motion along with the original court reporter's certificate to authenticate, has been specifically overruled. *McConathy*, 869 S.W.2d at 342.

evidence.[469] Interrogatories should be inspected for conclusions, hearsay, and opinion testimony, which must be brought to the attention of the trial court in a responsive pleading. Answers to requests for admissions and interrogatories may be used only against the responding party.[470] Consistent within the general rule that summary judgment evidence must meet general admissibility standards, a party may not use its own answers to interrogatories[471] or its denials to requests for admissions as summary judgment evidence.[472]

2. Deemed Admissions

Deemed admissions can be competent summary judgment evidence.[473] An unanswered request for admission is automatically deemed admitted without the necessity of a court order,[474] and any matter admitted is conclusively established against the party making the admission unless the court, on motion, allows the withdrawal of the admission.[475] Thus, when a party fails to answer requests for admissions, that party will be precluded from offering summary judgment proof contrary to those admissions.[476] Nevertheless, because of due process concerns associated with the disposition of cases on grounds other than the merits, the supreme court requires a showing of "flagrant bad faith or callous disregard for the rules" to substantiate a summary judgment based solely on deemed admissions.[477] "Using deemed admissions as the basis for summary judgment therefore does not avoid the requirement of flagrant bad faith or callous disregard, the showing necessary to support

469. *See* Farmer v. Ben E. Keith Co., 919 S.W.2d 171, 175 (Tex. App.—Fort Worth 1996, no writ).

470. TEX. R. CIV. P. 197.3; Yates v. Fisher, 988 S.W.2d 730, 731 (Tex. 1998) (per curiam); *see* Thalman v. Martin, 635 S.W.2d 411, 414 (Tex. 1982).

471. TEX. R. CIV. P. 197.3; Morgan v. Anthony, 27 S.W.3d 928, 929 (Tex. 2000) (per curiam); Barragan v. Mosler, 872 S.W.2d 20, 22 (Tex. App.—Corpus Christi 1994, no writ).

472. *Barragan*, 872 S.W.2d at 22; CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc., 809 S.W.2d 577, 584 (Tex. App.—Dallas 1991, writ denied); *see* TEX. R. CIV. P. 198.3.

473. Gellatly v. Unifund CCR Partners, No. 01-07-00552-CV, 2008 WL 2611894, at *4 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet.) (mem. op.).

474. TEX. R. CIV. P. 198.2(c).

475. TEX. R. CIV. P. 198.3; Hartman v. Trio Transp., Inc., 937 S.W.2d 575, 580 (Tex. App.—Texarkana 1996, writ denied); Wenco of El Paso/Las Cruces, Inc. v. Nazario, 783 S.W.2d 663, 665 (Tex. App.—El Paso 1989, no writ) (citing to former TEX. R. CIV. P. 169 (1941, repealed 1999)).

476. State v. Carrillo, 885 S.W.2d 212, 214 (Tex. App.—San Antonio 1994, no writ) (stating that deemed admissions may not be contradicted by any evidence, including summary judgment affidavits); *see* Velchoff v. Campbell, 710 S.W.2d 613, 614 (Tex. App.—Dallas 1986, no writ).

477. Wheeler v. Green, 157 S.W.3d 439, 443 (Tex. 2005) (per curiam) (noting that "absent flagrant bad faith or callous disregard for the rules, due process bars merits-preclusive sanctions"); *see also* Marino v. King, 355 S.W.3d 629, 632–33 (Tex. 2011) (per curiam); Medina v. Raven, 492 S.W.3d 53, 60 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

a merits-preclusive sanction; it merely incorporates the requirement as an element of the movant's summary judgment burden."[478]

Once admissions are made or deemed by the court, they "may not be contradicted by any evidence, whether in the form of live testimony or summary judgment affidavits."[479] However, to be considered as proper summary judgment evidence, the requests must be on file with the court at the time of submission of the motion for summary judgment.[480] Furthermore, deemed admissions as summary judgment evidence must meet the same time constraints as the motion for summary judgment and the response.[481]

"[A] response to a request for admission can only be used against 'the party making the admission.'"[482] Any matter established under Rule 198 (Requests for Admission) (formerly Rule 169) is conclusively established for the party making the admission unless it is withdrawn by motion or amended with permission of the court.[483] "Standards for withdrawing deemed admissions and for allowing a late summary-judgment response are the same. Either is proper upon a showing of (1) good cause, and (2) no undue prejudice."[484] When the need to do so is not discovered before judgment, a request in a motion for new trial may be sufficient to withdraw a deemed admission.[485]

E. Documents

Documents are another type of potential summary judgment evidence that is not filed with the clerk of the court during the course of the pretrial proceedings.[486]

478. *Marino*, 355 S.W.3d at 634.

479. Smith v. Home Indem. Co., 683 S.W.2d 559, 562 (Tex. App.—Fort Worth 1985, no writ); *see also* Henke Grain Co. v. Keenan, 658 S.W.2d 343, 347 (Tex. App.—Corpus Christi 1983, no writ).

480. Vaughn v. Grand Prairie Indep. Sch. Dist., 784 S.W.2d 474, 478 (Tex. App.—Dallas 1989), *rev'd on other grounds*, 792 S.W.2d 944 (Tex. 1990) (per curiam); *see also* Longoria v. United Blood Servs., 907 S.W.2d 605, 609 (Tex. App.—Corpus Christi 1995), *rev'd on other grounds*, 938 S.W.2d 29 (Tex. 1997) (per curiam).

481. TEX. R. CIV. P. 166a(d) (specifying the time requirements for filing and serving discovery products as summary judgment proof).

482. U.S. Fid. & Guar. Co. v. Goudeau, 272 S.W.3d 603, 608 (Tex. 2008) (quoting TEX. R. CIV. P. 198.3).

483. State v. Carrillo, 885 S.W.2d 212, 214 (Tex. App.—San Antonio 1994, no writ); Velchoff v. Campbell, 710 S.W.2d 613, 614 (Tex. App.—Dallas 1986, no writ) (explaining that the party never moved to properly reply); *Home Indem. Co.*, 683 S.W.2d at 562 (referring to former TEX. R. CIV. P. 169 (1941, repealed 1999)).

484. Wheeler v. Green, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam) (citation omitted).

485. *Id.*

486. TEX. R. CIV. P. 166a(d) (describing the use of summary judgment evidence not on file).

1. Attaching Documents to Summary Judgment Motion and Response

A motion for summary judgment must be supported by its proof and not by reference to the pleadings.[487] As such, supporting documents should be attached either to the affidavit that refers to the document[488] or to the motion for summary judgment itself.[489] A nonmovant may use as summary judgment evidence a movant's own exhibit to establish the existence of a fact question.[490]

The importance of attaching all documentation to the motions for summary judgment and to the responses is illustrated in many cases. For example, in *MBank Brenham, N.A. v. Barrera*, the supreme court held that there was no evidence to conflict with the movant's summary judgment proof because, in its answer, the nonmovant failed to attach the opponent's abandoned pleadings, which presumably raised fact issues.[491] The court held that copies of the abandoned pleadings, with supporting affidavits or other authentication as required by Rule 166a, should have been attached to the response.[492]

However, even though a document is not attached to the summary judgment motion, it will be considered summary judgment evidence if it is contained in the court's file at the time of submission of the motion for summary judgment. In *Lance v. Robinson*, the supreme court held that, even though they were not attached to the summary judgment motion, deeds were

487. Cuddihy Corp. v. Plummer, 876 S.W.2d 424, 426 (Tex. App.—Corpus Christi 1994, writ denied).

488. Purported affidavits offered to verify copies of documents that do not contain a jurat must be objected to at the trial court. *See* Mansions in the Forest, L.P. v. Montgomery County, 365 S.W.3d 314, 315 (Tex. 2012) (per curiam); *see also infra* Part 1.II.F.3 (discussing the effect of improper affidavits).

489. MBank Brenham, N.A. v. Barrera, 721 S.W.2d 840, 842 (Tex. 1986) (per curiam); Sorrells v. Giberson, 780 S.W.2d 936, 937–38 (Tex. App.—Austin 1989, writ denied) (reversing judgment for holder of a promissory note when the note was not attached to his affidavit and, thus, not part of the summary judgment record); Trimble v. Gulf Paint & Battery, Inc., 728 S.W.2d 887, 888 (Tex. App.—Houston [1st Dist.] 1987, no writ) ("Verified copies of documents, in order to constitute . . . summary judgment evidence, must be attached to the affidavit."). *But see* Zarges v. Bevan, 652 S.W.2d 368, 369 (Tex. 1983) (per curiam) (stating that absent controverting summary judgment proof, an affidavit attached to a motion for summary judgment that incorporated by reference a certified copy of a note attached to plaintiff's first amended petition was sufficient to prove the movants were owners and holders of the note).

490. Perry v. Houston Indep. Sch. Dist., 902 S.W.2d 544, 547–48 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd w.o.j.); Keever v. Hall & Northway Advert., Inc., 727 S.W.2d 704, 706 (Tex. App.—Dallas 1987, no writ) (explaining that "[a] movant's exhibit can support a motion for summary judgment or it may create a fact question" if it indicates a contradiction in the movant's argument).

491. *MBank Brenham, N.A.*, 721 S.W.2d at 842.

492. *See id.*

proper summary judgment evidence because they had been admitted without objection in an earlier temporary injunction hearing.[493]

Although generally not recommended as good advocacy, the rules also allow parties to rely on discovery products "not on file with the clerk" if they timely file "a notice containing specific references to the discovery . . . together with a statement of intent to use the specified discovery as summary judgment proof[]."[494]

In *Zarges v. Bevan*, the supreme court stated that, absent controverting summary judgment proof, an affidavit attached to a motion for summary judgment that incorporated by reference a certified copy of a note attached to the plaintiff's first amended petition was enough to prove the movants were owners and holders of the note.[495] *Zarges* illustrates again the importance of specifically calling to the court's attention, by appropriate response, defects in the movant's motion.[496]

2. Evidentiary Considerations

Documentation relied on to support a summary judgment must be sound in terms of its own evidentiary value. In *Dominguez v. Moreno*, a trespass to try title case, the plaintiff attached to the summary judgment motion a partial deed from the common source to his father.[497] The "deed" contained no signature, no date, and supplied nothing more than a granting clause and a description of the land.[498] The court held, in essence, that the writing was not a deed and was not a type of evidence that would be admissible at a trial on the merits.[499]

When using an affidavit to authenticate business records, the party offering the records must comply with Texas Rules of Evidence 803(6) and 902(10).[500] Unlike summary judgment affidavits offered to prove up

493. Lance v. Robinson, 543 S.W.3d 723, 732–33 (Tex. 2018).

494. TEX. R. CIV. P. 166a(d).

495. Zarges v. Bevan, 652 S.W.2d 368, 369 (Tex. 1983) (per curiam).

496. *Id.* (finding that the nonmovant failed to controvert the movants' assertions and to object to the sufficiency of their affidavits); Life Ins. Co. of Va. v. Gar-Dal, Inc., 570 S.W.2d 378, 380 (Tex. 1978) (indicating that a properly identified photocopy of a note attached to an affidavit was proper summary judgment evidence and that the defendants waived their right to complain about the form of proof because they failed to object).

497. Dominguez v. Moreno, 618 S.W.2d 125, 126 (Tex. Civ. App.—El Paso 1981, no writ).

498. *Id.*

499. *Id.*

500. Norcross v. Conoco, Inc., 720 S.W.2d 627, 632 (Tex. App.—San Antonio 1986, no writ) (holding that invoices attached to the affidavit in support of the motion for summary judgment were not competent proof because they were not authenticated as required by Texas Rules of Evidence 803(6), 902(10)). Texas Rule of Evidence 803(6) provides an exception to the hearsay rule for "Records of Regularly Conducted Activity." TEX. R. EVID. 803(6). Texas Rule of Evidence 902(10)

elements of a cause of action or defense, a business-records affidavit is sufficient if it substantially complies with these rules.[501] The proponent of evidence is not required to bring forth extrinsic evidence of authenticity as a condition precedent to admissibility for business records that are accompanied by an affidavit that complies with Rule 902(10).[502]

3. Authentication of Documents

The requirement of authentication as a condition precedent to admissibility of evidence may be satisfied by "evidence sufficient to support a finding that the item is what the proponent claims it is."[503] Evidence is authenticated by proof that the challenged evidence is what its proponent claims it to be.[504] Not all evidence need be authenticated. Texas Rule of Civil Procedure 193.7 represents a significant departure from the former requirements to authenticate documents. Under Rule 193.7, documents produced by the opposing party need not be authenticated.

a. Authentication of Producing Party's Documents

Texas Rule of Civil Procedure 193.7 provides that documents produced by the opposing party in response to written discovery are self-authenticating.[505] Specifically, it provides:

> Production of Documents Self-Authenticating.
>
> A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless—within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used—the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting

allows for self-authentication of "Business Records Accompanied by Affidavit." TEX. R. EVID. 902(10).

501. Ermisch v. HSBC Bank USA, No. 03-16-00080-CV, 2016 WL 6575232, at *3 (Tex. App.—Austin Nov. 4, 2016, pet. denied) (mem. op.); H2O Sols., Ltd. v. PM Realty Group, LP, 438 S.W.3d 606, 622 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

502. *H2O Sols., Ltd.*, 438 S.W.3d at 622.

503. TEX. R. EVID. 901(a).

504. *H2O Sols., Ltd*., 438 S.W.3d at 622.

505. TEX. R. CIV. P. 193.7.

> to use the document should be given a reasonable opportunity to establish its authenticity.[506]

Thus, a document produced in response to written discovery authenticates that document for use against the producing party.[507] Conversely, a party cannot authenticate a document for its own use by merely producing it in response to a discovery request.[508]

b. Copies

Rule 196.3(b) also allows the producing party to offer a copy of the document unless the authenticity of the document is under scrutiny or because fairness under the circumstances of the case requires production of the original.[509] It provides:

> (b) Copies. The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.[510]

For copies not produced by the opposing party, copies of original documents are acceptable if accompanied by a properly sworn affidavit that states that the attached documents are "true and correct copies of the originals."[511] A copy of a letter, which is unauthenticated, unsworn, and unsupported by affidavit, is not proper summary judgment evidence.[512]

In *Norcross v. Conoco, Inc*., the court reversed a summary judgment on a sworn account because the affiants merely stated that the attached copies of invoices and accounts were correct copies of the original documents.[513] No reference was made concerning the affiant's personal knowledge of the information contained in the attached invoice records.[514] The affiants did not state that the invoices or accounts were just and true, or correct and

506. *Id.*
507. *Id.*
508. Blanche v. First Nationwide Mortg. Corp., 74 S.W.3d 444, 452 (Tex. App.—Dallas 2002, no pet.).
509. TEX. R. CIV. P. 196.3(b).
510. *Id.*
511. Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam); Hall v. Rutherford, 911 S.W.2d 422, 425 (Tex. App.—San Antonio 1995, writ denied).
512. *Hall*, 911 S.W.2d at 426.
513. Norcross v. Conoco, Inc., 720 S.W.2d 627, 632 (Tex. App.—San Antonio 1986, no writ).
514. *Id.*

accurate.[515] Thus, the court concluded that the copies of the invoices were not competent summary judgment proof.[516]

c. Effect on Summary Judgment Practice

Self-authentication eliminates the initial burden of authenticating the opposing party's documents used as evidence in support of a motion for summary judgment or response. Such documents are presumed authentic, unless timely argued otherwise by the producing party.[517] The producing party, however, must still authenticate the document if he or she wants to use it.[518]

Because the objection to authenticity must be made within ten days after "actual notice that the document will be used,"[519] and the response to the motion for summary judgment is due seven days before the summary judgment submission,[520] the objection to authenticity may need to be made before filing the response to the motion for summary judgment. The safer course is to object to lack of authentication within ten days after the motion for summary judgment is filed and not wait until filing the response. The same problem exists for attempts to regain access to documents a party claims were inadvertently disclosed.[521]

As is true at trial, authentication does not establish admissibility.[522] Authentication is but one condition precedent to admissibility.[523]

4. Judicial Notice of Court Records

A trial court may take judicial notice of its own records in a case involving the same subject matter between the same or nearly identical parties.[524] However, on motion for summary judgment, certified copies of court records from a different case, even if pending in the same court, should

515. *Id.*
516. *Id.*
517. TEX. R. CIV. P. 193.7.
518. *Id.*
519. *Id.*
520. TEX. R. CIV. P. 166a(c).
521. *See* TEX. R. CIV. P. 193.3(d) ("A party who produces material or information without intending to waive a claim of privilege does not waive that claim . . . if—within ten days . . . the producing party amends the response . . . .").
522. *See* TEX. R. EVID. 901(a).
523. *Id.*
524. Ball v. Smith, 150 S.W.3d 889, 895 (Tex. App.—Dallas 2004, no pet.); Gardner v. Martin, 345 S.W.2d 274, 276 (Tex. 1961); *cf.* Trevino v. Pemberton, 918 S.W.2d 102, 103 n.2 (Tex. App.—Amarillo 1996, no writ) (recognizing the same authority for appellate courts).

be attached to the motion in the second case.[525] The failure of the movant to attach the records precludes summary judgment.[526]

F. Affidavits and Declarations

Affidavits, which are sworn statements of facts signed by competent witnesses,[527] are the most common form of summary judgment evidence. When an affidavit meets the Government Code's requirements, it may be used as summary judgment evidence if it complies with Texas Rule of Civil Procedure 166a(f).[528]

Declarations are essentially unsworn affidavits, although they must meet specific requirements. They may be used in the place of an affidavit required by a rule.[529] Thus, if they meet the requirements under the Remedies Code, declarations can be substituted for affidavits as summary judgment evidence. Rule 166a provides that a party may move for summary judgment with or without supporting affidavits.[530] However, before the adoption of the no-evidence summary judgment provision, it was unusual for a summary judgment to be granted without supporting affidavits. No-evidence summary judgment motions do not require supporting evidence.[531] In other types of summary judgments, more often than not, affidavits are the vehicle used to show the court that there are no factual questions. Conversely, they are commonly used by the nonmovant to demonstrate a fact issue in response to either no-evidence motions or traditional summary judgment motions. They may also be used to contradict or explain previous testimony.[532]

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525. *See Gardner*, 345 S.W.2d at 276–77 (indicating that because the records referred to in the affidavit supporting the motion for summary judgment were court records of another case, it was reversible error not to attach certified copies of the records to the motion).

526. *Id.* at 277; Chandler v. Carnes Co., 604 S.W.2d 485, 487 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

527. The Government Code defines "affidavit" as "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." TEX. GOV'T CODE ANN. § 312.011(1) (West 2017). That definition contains the "statutory requirements" for an affidavit. Ford Motor Co. v. Leggat, 904 S.W.2d 643, 645–46 (Tex. 1995).

528. *See* TEX. R. CIV. P. 166a(f); Life Ins. Co. of Va. v. Gar-Dal, Inc., 570 S.W.2d 378, 380 (Tex. 1978) (stating that Rule 166a(e) "sets forth the procedure for presenting summary judgment evidence by affidavit").

529. TEX. CIV. PRAC. & REM. CODE § 132.001(a) (West 2017).

530. TEX. R. CIV. P. 166a(a)–(b); *see* Kilpatrick v. State Bd. of Registration for Prof'l Eng'rs, 610 S.W.2d 867, 871–72 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) ("There is no requirement under [Texas Rule of Civil Procedure 166a] making affidavits indispensable to rendition of summary judgment."); *supra* Part 1.II.C (discussing effect of an affidavit that contradicts earlier deposition testimony).

531. TEX. R. CIV. P. 166a(i).

532. *See supra* Part 1.II.C.

1. Form of Affidavits and Declarations

Normally, an affiant includes a jurat to prove that the written statement was made under oath before an authorized officer.[533]

In contrast, a declaration is unsworn. Nonetheless, the Remedies Code sets out specific requirements for an unsworn declaration and failure to meet those requirements would be at an advocate's peril. The declaration must be (1) in writing, (2) subscribed by the person making the declaration as true under penalty of perjury, and (3) include a jurat in a form set out in the Code.[534] The jurat requires the person's full name, date of birth, address, the declaration that it is made under penalty of perjury and is true and correct, along with a line containing the county, state and date of the declaration's execution.[535]

2. Procedural Requirements

Affidavits and declarations must be specific. They must contain specific factual bases that are admissible and upon which conclusions are drawn.[536] The requirements for affidavits under Texas Rule of Civil Procedure 166a(f) provide that the affidavit must show affirmatively that it is based on personal knowledge and that the facts sought to be proved would be "admissible in evidence" at a conventional trial.[537] Statements made in the affidavit need factual specificity concerning time, place, and the exact nature of the alleged facts.[538]

A verification, attached to the motion or response, that the contents are within the affiant's knowledge and are both true and correct does not constitute a proper affidavit in support of summary judgment under Rule

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533. A jurat is a certification by an authorized officer, stating that the writing was sworn to before the officer. Perkins v. Crittenden, 462 S.W.2d 565, 567–68 (Tex. 1970); *see also Jurat*, BLACK'S LAW DICTIONARY 926 (9th ed. 2009) (defining a jurat as a "certification added to an affidavit . . . stating when and before what authority the affidavit . . . was made," and noting that a jurat typically indicates "that the officer administered an oath or affirmation to the signer, who swore to or affirmed the contents of the document").

534. CIV. PRAC. & REM. CODE § 132.001(a).

535. *Id*. § 132.001(d). The Remedies Code section includes the form for a jurat that is to be included in the declaration.

536. Southtex 66 Pipeline Co. v. Spoor, 238 S.W.3d 538, 542 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

537. TEX. R. CIV. P. 166a(f); *see also* Ryland Grp., Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam) (quoting TEX. R. CIV. P. 166a(f)); Humphreys v. Caldwell, 888 S.W.2d 469, 470 (Tex. 1994) (per curiam) ("An affidavit which does not positively . . . represent the facts as disclosed in the affidavit to be true and within the affiant's personal knowledge is legally insufficient.").

538. All Am. Tel., Inc. v. USLD Commc'ns, Inc., 291 S.W.3d 518, 530 (Tex. App.—Fort Worth 2009, pet. denied); *Southtex 66 Pipeline Co.*, 238 S.W.3d at 543.

166a(f).[539] Although frequently used, "magic words" such as "true and correct," or within "personal knowledge" are not required.[540] The key is whether the affidavit clearly shows the affiant is testifying from personal knowledge.[541] For an affidavit to have probative value, an affiant must swear that the facts presented in the affidavit reflect his or her personal knowledge.[542] The affidavit "must *itself* set forth facts and show the affiant's competency," and the allegations contained in the affidavit "must be direct, unequivocal and such that perjury is assignable."[543] In some instances, a court may hold that an affidavit simply stating the affiant's job title is sufficient to show personal knowledge.[544] This practice, however, is ill-advised. In addition to a person's job title or position, affiants should also explain how they became familiar with the facts in the affidavit.[545]

The requirement of Rule 166a(f) that the affidavit affirmatively show that the affiant is competent to testify to the matters contained in the affidavit is not satisfied by an averment that the affiant is over eighteen years of age, of sound mind, capable of making this affidavit, never convicted of a felony, and personally acquainted with the facts herein stated.[546] Rather, the affiant should detail those particular facts that demonstrate that he or she has personal knowledge.[547]

The personal knowledge requirement for affidavits is not met by a statement based upon the affiant's "own personal knowledge and/or knowledge which he has been able to acquire upon inquiry."[548] Such a statement "provide[s] no representation whatsoever" that the facts contained

539. *See* Am. Petrofina, Inc. v. Allen, 887 S.W.2d 829, 830 (Tex. 1994) (citing Keenan v. Gibraltar Sav. Ass'n, 754 S.W.2d 392, 394 (Tex. App.—Houston [14th Dist.] 1988, no writ) (referring to what was then Rule 166a(e))).

540. Churchill v. Mayo, 224 S.W.3d 340, 346–47 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

541. Valenzuela v. State & Cty. Mut. Fire Ins. Co., 317 S.W.3d 550, 553 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (quoting Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1438 (2010)).

542. *In re* E.I. DuPont de Nemours & Co., 136 S.W.3d 218, 224 (Tex. 2004) (per curiam).

543. *Keenan*, 754 S.W.2d at 394.

544. *See* Requipco, Inc. v. Am-Tex Tank & Equip., Inc., 738 S.W.2d 299, 301 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

545. *Valenzuela*, 317 S.W.3d at 553.

546. *See* Wolfe v. C.S.P.H., Inc., 24 S.W.3d 641, 646 (Tex. App.—Dallas 2000, no pet.).

547. *See id.* (finding an affidavit not conclusory when the affiant discussed the sources of her personal knowledge); Coleman v. United Sav. Ass'n of Tex., 846 S.W.2d 128, 131 (Tex. App.—Fort Worth 1993, no writ) (holding that a sufficient affidavit must show affirmatively how the affiant became personally familiar with the facts); Fair Woman, Inc. v. Transland Mgmt. Corp., 766 S.W.2d 323, 323–24 (Tex. App.—Dallas 1989, no writ) (explaining that summary judgment failed despite the lack of a response because the affiant did not state how she had personal knowledge).

548. Humphreys v. Caldwell, 888 S.W.2d 469, 470 (Tex. 1994) (per curiam) (quoting the nonmovant's affidavit).

in the affidavit are true.[549] *Scott & White Memorial Hospital v. Fair* demonstrates how courts may view the personal knowledge requirement.[550] In it, the supreme court reversed a case in which the court of appeals had determined that a hospital grounds supervisor's affidavit could not support a summary judgment concerning whether ice accumulations were in their natural state.[551] The court of appeals rejected the supervisor's testimony because she was not at the scene when the plaintiff's accident occurred nor called to the scene following the accident.[552] The supreme court disagreed.[553] It determined that that the grounds supervisor had sufficient personal knowledge because she personally observed the winter storm and the resulting ice accumulations on the hospital grounds, including the road on which the plaintiff fell.[554]

Phrases such as "I believe" or "to the best of my knowledge and belief" should never be used in a supporting affidavit. Statements based upon the "best of his knowledge" have been held insufficient to support a response raising fact issues.[555] Such statements, according to the Fort Worth Court of Appeals in *Campbell v. Fort Worth Bank & Trust*, are "no evidence at all."[556] The court explained: "A person could testify with impunity that to the best of his knowledge, there are twenty-five hours in a day, eight days in a week, and thirteen months in a year. Such statements do not constitute factual proof in a summary judgment proceeding."[557]

Conversely, *Moya v. O'Brien* suggests that the requirement that the affiant have personal knowledge does not preclude the use of the words "I believe" in a supporting affidavit, if the content of the entire affidavit shows that the affiant has personal knowledge.[558] The court noted, however, that

549. *Id.* at 470–71 (holding affidavits used in a privilege dispute were defective because they failed to show they were based on personal knowledge and did not represent that the disclosed facts were true).

550. Scott & White Mem'l Hosp. v. Fair, 310 S.W.3d 411, 415 (Tex. 2010).

551. *Id.* at 419.

552. *Id.* at 415.

553. *Id.*

554. *Id.*

555. Roberts v. Davis, 160 S.W.3d 256, 263 n.1 (Tex. App.—Texarkana 2005, pet. denied) (holding the affidavit in a defamation case that was based on information "to the best of my knowledge and belief" insufficient to support summary judgment on the basis of the truth of the statement, but holding it may be evidence that the statement was made without malice); Shindler v. Mid-Continent Life Ins. Co., 768 S.W.2d 331, 334 (Tex. App.—Houston [14th Dist.] 1989, no writ); *see* Webster v. Allstate Ins. Co., 833 S.W.2d 747, 749 (Tex. App.—Houston [1st Dist.] 1992, no writ) (holding that the sworn statement made by the plaintiff's attorney that all information was true and correct was insufficient as a summary judgment affidavit).

556. Campbell v. Fort Worth Bank & Trust, 705 S.W.2d 400, 402 (Tex. App.—Fort Worth 1986, no writ).

557. *Id.*

558. Moya v. O'Brien, 618 S.W.2d 890, 893 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (noting a close reading of the affidavits left no doubt that the affiants were speaking

"when the portions of the affidavits containing hearsay are not considered, the remaining statements in the affidavits contain sufficient factual information to sustain the burden of proving the allegations in the motion for summary judgment."[559]

In *Grand Prairie Independent School District v. Vaughan*, the supreme court considered a witness's affidavit in which the words "on or about" were used to refer to a critical date.[560] The court found that "on or about" meant a date of approximate certainty, with a possible variance of a few days, and that the nonmovant never raised an issue of the specific dates.[561]

An affidavit must be in substantially correct form. An affidavit may not be used to authenticate a copy of another affidavit.[562] When the record lacks any indication that a purported affidavit was sworn to by the affiant, the written statement is not an affidavit under the Government Code.[563] However, this defect must be raised at the trial court or it is waived.[564]

3. Substance of Affidavits

Affidavits must set forth facts that would be admissible in evidence.[565] Affidavits cannot be based on subjective beliefs.[566] Nor can they be conclusory.[567] Conclusory affidavits are not probative.[568] A conclusory statement is one that is not susceptible to being readily controverted and does

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from personal knowledge); *see also* Krueger v. Gol, 787 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (finding a failure to specifically state that an affidavit is based on personal knowledge is not fatal if it is clearly shown that the affiant was speaking from personal knowledge).

559. *Moya*, 618 S.W.2d at 893; *accord* Taylor v. Discovery Bank, No. 03-17-00677-CV, 2018 WL 4016611, at *1–*2 (Tex. App.—Austin Aug. 23, 2018, no pet. h.) (considering the affidavit as a whole, the affidavit was sufficient even if the affiant stated that the affidavit was "made on the basis of my personal knowledge").

560. Grand Prairie Indep. Sch. Dist. v. Vaughan, 792 S.W.2d 944, 945 (Tex. 1990) (per curiam) (quoting the movant's affidavit).

561. *Id.*

562. *See* Hall v. Rutherford, 911 S.W.2d 422, 425 (Tex. App.—San Antonio 1995, writ denied).

563. Mansions in the Forest, L.P. v. Montgomery County, 365 S.W.3d 314, 316–17 (Tex. 2012) (per curiam).

564. *Id.* at 317.

565. Cuellar v. City of San Antonio, 821 S.W.2d 250, 252 (Tex. App.—San Antonio 1991, writ denied); *see* Aldridge v. De Los Santos, 878 S.W.2d 288, 296 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.) (holding affidavits unsupported by facts and consisting of legal conclusions do not establish an issue of fact).

566. Tex. Div.-Tranter, Inc. v. Carrozza, 876 S.W.2d 312, 314 (Tex. 1994) (per curiam) (stating that subjective beliefs are nothing more than conclusions).

567. Burrow v. Arce, 997 S.W.2d 229, 235–36 (Tex. 1999); *In re* Am. Home Prods. Corp., 985 S.W.2d 68, 74 (Tex. 1998); Ryland Grp., Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam) ("Conclusory affidavits are not enough to raise fact issues.").

568. *Ryland Grp., Inc.*, 924 S.W.2d at 122.

not provide the underlying facts to support the conclusion.[569] For example, a statement that the affiant is the "owner and holder of the title document and is entitled to possession of this manufactured home" is no more than a legal conclusion insufficient to support a summary judgment.[570] Conclusory statements contained in an affidavit that are unsupported by facts are insufficient to support or defeat summary judgment.[571] Nonetheless, the line separating admissible statements of fact and inadmissible opinions or conclusions cannot always be precisely drawn. One of the policy considerations behind the prohibition against conclusory affidavits is that they are not susceptible to being readily controvertible.[572]

Schultz v. General Motors Acceptance Corp. provides an example of a conclusory affidavit.[573] In *Schultz*, the court held that an affidavit supporting the creditor's motion for summary judgment merely recited a legal conclusion in stating that certain collateral was disposed of "at public sale in conformity with reasonable commercial practices . . . in a commercially reasonable manner."[574] Summary judgment was precluded absent facts concerning the sale of the collateral in question.[575]

Texas courts have considered a number of other evidentiary issues for summary judgment affidavits. First, affidavits may not be based on hearsay.[576] But "[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."[577] Next, affidavits that contradict the plain meaning of a contract and thus violate the parol evidence rule are not competent summary judgment evidence.[578] Third, if the

569. Eberstein v. Hunter, 260 S.W.3d 626, 630 (Tex. App.—Dallas 2008, no pet.).

570. Almance v. Shipley Bros., 247 S.W.3d 252, 255 (Tex. App.—El Paso 2007, no pet.) (quoting the movant's affidavit).

571. 5500 Griggs v. Famcor Oil, Inc., No. 14-15-00151-CV, 2016 WL 3574649, at *3 (Tex. App.—Houston [14th Dist.] June 30, 2016, no pet.).

572. *Ryland Grp.*, 924 S.W.2d at 122. "Readily controvertible" does not mean that the affidavit could have been "easily and conveniently rebutted, but rather indicates that the testimony could have been effectively countered by opposing evidence." Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam).

573. Schultz v. Gen. Motors Acceptance Corp., 704 S.W.2d 797, 798 (Tex. App.—Dallas 1985, no writ).

574. *Id.* (quoting the movant's affidavit).

575. *Id.*

576. Einhorn v. LaChance, 823 S.W.2d 405, 410 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.); *see also* Butler v. Hide-A-Way Lake Club, Inc., 730 S.W.2d 405, 411 (Tex. App.—Eastland 1987, writ ref'd n.r.e.); Lopez v. Hink, 757 S.W.2d 449, 451 (Tex. App.—Houston [14th Dist.] 1988, no writ).

577. TEX. R. EVID. 802; *see* Dolenz v. A. B., 742 S.W.2d 82, 83 n.2 (Tex. App.—Dallas 1987, writ denied) (quoting TEX. R. EVID. 802).

578. D.R. Horton-Tex., Ltd. v. Savannah Props. Assocs., L.P., 416 S.W.3d 217, 228 (Tex. App.—Fort Worth 2013, no pet.); Fimberg v. FDIC, 880 S.W.2d 83, 86 (Tex. App.—Texarkana 1994, writ denied) (citing Rosemont Enters., Inc. v. Lummis, 596 S.W.2d 916, 923–24 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ)).

prerequisites of Texas Rule of Evidence 803(6), which sets out the requirements for admitting a business record into evidence, are not met, a business record may not be proper summary judgment evidence.[579]

4. Effect of Improper Affidavits

Affidavits that do not meet the requirements of Rule 166a will neither sustain nor preclude a summary judgment.[580] When a purported affidavit is submitted without a jurat and without extrinsic evidence showing that it was sworn to before an authorized officer, the opposing party must object, thereby giving the sponsoring party a chance to correct the error.[581] Absent an objection in the trial court, the party challenging the purported affidavit waives this complaint.[582]

After objections are made to affidavits (and assuming that the new affidavit would be timely), affidavits may be supplemented.[583]

5. Sham Affidavits

A trial court may determine that there is no genuine fact issue created by submission of sworn testimony that materially conflicts with the same witness's earlier sworn testimony, unless the proponent of the affidavit offers a sufficient explanation for the conflict.[584]

So-called "sham affidavits" had presented a conflict in the courts of appeals but that conflict was resolved by the supreme court in 2018.[585] A sham affidavit is one that contradicts an affiant's prior testimony on a material issue and is designed to create a fact issue that will preclude a summary judgment.[586]

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579. TEX. R. EVID. 803(6); *see also* Travelers Constr., Inc. v. Warren Bros., 613 S.W.2d 782, 785–86 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (holding an affidavit was defective because it did not satisfy the then-existing requirements for admission of a business record).

580. *See* Box v. Bates, 346 S.W.2d 317, 319 (Tex. 1961) (rejecting an affidavit as conclusory, but still considering other evidence); *see also* Aldridge v. De Los Santos, 878 S.W.2d 288, 296 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.) ("Affidavits containing conclusory statements unsupported by facts are not competent summary judgment proof.").

581. Mansions in the Forest, L.P. v. Montgomery County, 365 S.W.3d 314, 317 (Tex. 2012) (per curiam).

582. *See id.*

583. TEX. R. CIV. P. 166a(f); *see* All Am. Tel., Inc. v. USLD Commc'ns, Inc., 291 S.W.3d 518, 531 n.25 (Tex. App.—Fort Worth 2009, pet. denied) (noting that the movant could have but failed to amend or supplement the affidavit it relied upon during the eight months that elapsed between the nonmovant's objection to lack of detail and specificity and the trial court's sustaining of the objection).

584. Lujan v. Navistar, Inc., 555 S.W.3d 79, 82 (Tex. 2018).

585. *Id.* at 87–90.

586. Farroux v. Denny's Rests., Inc., 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

Review of a trial court's decision to strike an affidavit under the sham affidavit rule is reviewed under an abuse of discretion standard.[587] Nonetheless, the doctrine does not authorize trial courts to strike every affidavit that contradicts the affiant's prior sworn testimony.[588] In *Lujan v. Navistar Co*., the supreme court noted, "to allow every failure of memory or variation in a witness's testimony to be disregarded as a sham would require far too much from lay witnesses . . . ."[589] The court noted that most differences between a witness's deposition and affidavit reflected "human inaccuracy more than fraud."[590] The court offered examples of situations that may justify contradictions as newly discovered evidence and confusion of the witness.[591]

6. Affidavits by Counsel

It is generally not advisable for attorneys to sign affidavits, since affidavits must be based on personal knowledge and not on information or belief.[592] The personal knowledge requirement of Rule 166a(f) has plagued attorneys signing summary judgment affidavits on behalf of their clients. Under Texas Rule of Civil Procedure 14, "[w]henever it may be necessary or proper for any party to a civil suit or proceeding to make an affidavit, it may be made by either the party or his agent or his attorney."[593] While this seemingly approves counsel as an appropriate affiant for all purposes, courts have held that the rule does not obviate the need for personal knowledge of the facts in an affidavit.[594] Merely swearing that the affiant is the attorney of record for a party, and that the facts stated in the motion for summary judgment are within his or her personal knowledge and are true and correct, does not meet the personal knowledge test.[595] This type of affidavit is ineffectual to oppose or support a motion for summary judgment on the

587. *Lujan*, 555 S.W.3d at 84.

588. *Id.* at 85.

589. *Id.* (quoting Tippens v. Celotex Corp., 805 F.2d 949, 953 (11th Cir. 1986)).

590. *Id.* at 88 (citing Cantu v. Peacher, 53 S.W.3d 5, 10 (Tex. App.—San Antonio 2001, pet. denied)).

591. *Id.* at 85.

592. Wells Fargo Constr. Co. v. Bank of Woodlake, 645 S.W.2d 913, 914 (Tex. App.—Tyler 1983, no writ); *see infra* Part 1.II.F.4.

593. TEX. R. CIV. P. 14.

594. *E.g.*, Cantu v. Holiday Inns, Inc., 910 S.W.2d 113, 116 (Tex. App.—Corpus Christi 1995, writ denied) ("A party's attorney may verify the pleading where he has knowledge of the facts, but does not have authority to verify based merely on his status as counsel."); Webster v. Allstate Ins. Co., 833 S.W.2d 747, 749 (Tex. App.—Houston [1st Dist.] 1992, no writ); Soodeen v. Rychel, 802 S.W.2d 361, 363 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

595. *Webster*, 833 S.W.2d at 749; Carr v. Hertz Corp., 737 S.W.2d 12, 13–14 (Tex. App.—Corpus Christi 1987, no writ).

merits, except concerning attorneys' fees.[596] Plus, it may open the attorney to cross-examination. Unless the summary judgment involves attorneys' fees, the attorneys' affidavit should explicitly state that the attorney has personal knowledge of the facts in the affidavit and should recite facts that substantiate the lawyer's alleged personal knowledge.

If counsel is compelled to file an affidavit on the merits of a client's cause of action or defense, one court has suggested the proper procedure:

> While Rule 14 of the Texas Rules of Civil Procedure permits an affidavit to be made by a party's attorney or agent, this rule does not obviate the necessity of showing that the attorney has personal knowledge of the facts, as distinguished from information obtained from the client. Ordinarily, an attorney's knowledge of the facts of a case is obtained from the client. Consequently, if the attorney must act as affiant, the better practice is to state explicitly how the information stated in the affidavit was obtained.[597]

As opposed to the restrictions on an attorney's ability to act as affiants, an attorney may authenticate documents.[598]

G. Other Evidence

Summary judgment proof is not limited to affidavits and discovery materials. Parties can, and have, introduced a variety of additional forms of proof, including stipulations,[599] photographs,[600] testimony from prior trials,[601] transcripts from administrative hearings,[602] court records from other cases,[603]

596. *Carr*, 737 S.W.2d at 13–14; *see, e.g.*, *Webster*, 833 S.W.2d at 749 (holding a sworn statement by an attorney did not present proper summary judgment evidence); *Soodeen*, 802 S.W.2d at 365 (rejecting attorney's affidavit because it did not demonstrate attorney's competence to testify regarding negligent entrustment); Harkness v. Harkness, 709 S.W.2d 376, 378 (Tex. App.—Beaumont 1986, writ dism'd w.o.j.) (requiring an attorney who makes an affidavit to show personal knowledge of the facts); Landscape Design & Constr., Inc. v. Warren, 566 S.W.2d 66, 67 (Tex. Civ. App.—Dallas 1978, no writ) (disallowing attorney's affidavit as not stating personal knowledge of the facts).

597. *Landscape Design*, 566 S.W.2d at 67.

598. Leyva v. Soltero, 966 S.W.2d 765, 768 (Tex. App.—El Paso 1998, no pet.).

599. Kinner Transp. & Enters., Inc. v. State, 614 S.W.2d 188, 189 (Tex. Civ. App.—Eastland 1981, no writ).

600. Langford v. Blackman, 790 S.W.2d 127, 132–33 (Tex. App.—Beaumont 1990) (per curiam), *rev'd per curiam on other grounds*, 795 S.W.2d 742 (Tex. 1990).

601. Murillo v. Valley Coca-Cola Bottling Co., 895 S.W.2d 758, 761–62 (Tex. App.—Corpus Christi 1995, no writ); Kazmir v. Suburban Homes Realty, 824 S.W.2d 239, 244 (Tex. App.—Texarkana 1992, writ denied).

602. Vaughn v. Burroughs Corp., 705 S.W.2d 246, 247 (Tex. App.—Houston [14th Dist.] 1986, no writ).

603. *Murillo*, 895 S.W.2d at 761; Gilbert v. Jennings, 890 S.W.2d 116, 117 (Tex. App.—Texarkana 1994, writ denied).

the statement of facts from an earlier trial (now called the reporter's record),[604] and judicial notice.[605]

H. Expert and Interested Witness Testimony

For many years, Texas courts held that interested or expert witness testimony would not support a summary judgment motion or response.[606] However, the 1978 amendment to Rule 166a specifically permits the granting of a motion for summary judgment based on the uncontroverted testimony of an expert witness if the trier of fact is guided solely by the opinion testimony of experts as to a subject matter or on the testimony of an interested witness.[607] The evidence must meet the following criteria: (1) it is clear, positive, and direct; (2) it is otherwise credible and free from contradictions and inconsistencies; and (3) it could have been readily controverted.[608]

1. Expert Opinion Testimony

a. Requirements for Expert Witness Testimony[609]

Experts are considered interested witnesses, and their testimony is subject to the requirement of being clear, positive, direct, credible, free from contradictions, and susceptible to being readily controverted.[610] An expert's opinion testimony can defeat a claim as a matter of law, even if the expert is an

604. Austin Bldg. Co. v. Nat'l Union Fire Ins. Co., 432 S.W.2d 697, 698–99 (Tex. 1968); Exec. Condos., Inc. v. State, 764 S.W.2d 899, 901 (Tex. App.—Corpus Christi 1989, writ denied).

605. Settlers Vill. Cmty. Improvement Ass'n v. Settlers Vill. 5.6, Ltd., 828 S.W.2d 182, 184 (Tex. App.—Houston [14th Dist.] 1992, no writ).

606. *See, e.g.*, Lewisville State Bank v. Blanton, 525 S.W.2d 696, 696 (Tex. 1975) (per curiam) (holding the affidavit of an interested party will not support a summary judgment but may raise a question of fact); Gibbs v. Gen. Motors Corp., 450 S.W.2d 827, 828–29 (Tex. 1970) (finding expert testimony by affidavit does not establish facts as a matter of law).

607. TEX. R. CIV. P. 166a(c); *see also* Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam) (holding that uncontroverted affidavit of an interested witness may be competent summary judgment evidence); Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam) (holding affidavit of interested witness was admissible as proper summary judgment evidence because it was readily controvertible); Duncan v. Horning, 587 S.W.2d 471, 472–74 (Tex. Civ. App.—Dallas 1979, no writ) (approving affidavit of interested witness as competent summary judgment evidence under Texas Rule of Civil Procedure 166a(c), effective on January 1, 1978).

608. TEX. R. CIV. P. 166a(c); *Trico Techs. Corp.*, 949 S.W.2d at 310.

609. *See generally* Harvey Brown & Melissa Davis, *Eight Gates for Expert Witnesses: Fifteen Years Later*, 52 HOUS. L. REV. 1 (2014) (a comprehensive study discussing the law governing expert witness testimony); David F. Johnson, *Appellate Issues Regarding the Admission or Exclusion of Expert Testimony in Texas*, 52 S. TEX. L. REV. 153, 231–32 (2010).

610. Wadewitz v. Montgomery, 951 S.W.2d 464, 466 (Tex. 1997); Anderson v. Snider, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam).

interested witness.[611] Indeed, summary judgment evidence in the form of expert testimony might be necessary to survive a no-evidence summary judgment.[612]

But "it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness."[613] The requirement applies equally to affidavits in support of a summary judgment and those attempting to defeat one by creating a fact issue.[614] For example, in *Elizondo v. Krist*, the supreme court held that an attorney-expert, however well qualified, could not defeat a summary judgment where there were "fatal gaps in his analysis that leave the court to take his word that the settlement was inadequate."[615] Expert testimony must be comprised of more than conclusory statements and must be specific.[616] Conclusory affidavits are not probative.[617] For example, affidavits that recite that the affiant "estimates," "believes," or has an understanding of certain facts are not proper summary judgment evidence.[618] "Such language does not positively and unqualifiedly represent that the 'facts' disclosed are true."[619]

Likewise, legal conclusions of an expert are not probative to establish proximate cause.[620] "[B]are opinions alone" will not suffice to defeat a claim as a matter of law.[621] "It is incumbent on an expert to connect the data relied on and his or her opinion and to show how that data is valid support for the opinion reached."[622] In one case, an affidavit that did not include the legal basis or reasoning for an attorney's expert opinion that he did not commit malpractice was "simply a sworn denial of [plaintiff's] claims."[623] Because it was conclusory,

611. *Anderson*, 808 S.W.2d at 55.

612. *See* F.W. Indus., Inc. v. McKeehan, 198 S.W.3d 217, 221–22 (Tex. App.—Eastland 2005, no pet.) (affirming no-evidence summary judgment because the nonmovant did not present any expert evidence on causation).

613. City of San Antonio v. Pollock, 284 S.W.3d 809, 816 (Tex. 2009) (quoting Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999)); *accord* Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 232 (Tex. 2004).

614. *Wadewitz*, 951 S.W.2d at 466–67.

615. Elizondo v. Krist, 415 S.W.3d 259, 264 (Tex. 2013).

616. Ryland Grp., Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam); *see Wadewitz*, 951 S.W.2d at 466–67; Lara v. Tri-Coastal Contractors, Inc., 925 S.W.2d 277, 279 (Tex. App.—Corpus Christi 1996, no writ). Under Texas Rule of Evidence 401, "Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more probable or less probable.'" *Coastal Transp. Co.*, 136 S.W.3d at 232 (quoting TEX. R. EVID. 401).

617. *Ryland*, 924 S.W.2d at 122.

618. *Id.*

619. *Id.* (citing Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984)).

620. Barraza v. Eureka Co., 25 S.W.3d 225, 230 (Tex. App.—El Paso 2000, pet. denied).

621. Burrow v. Arce, 997 S.W.2d 229, 235 (Tex. 1999).

622. Whirlpool Corp. v. Camacho, 298 S.W.3d 631, 642 (Tex. 2009).

623. Anderson v. Snider, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam).

the court found it to be incompetent summary judgment evidence.[624] Similarly, a conclusory statement by a Maryland doctor that a Texas doctor was entitled to be paid (and therefore not covered by the Good Samaritan statute) was not sufficient to create a fact issue.[625]

In another example, the supreme court determined that an expert's failure to explain or disprove alternative theories of causation of a fire made his theory speculative and conclusory.[626] In another case, the supreme court found an expert's testimony insufficient to create a fact issue when she opined that the alleged negligent conduct of a hospital caused the plaintiff's injuries without an explanation of how the conduct was the cause in fact of the plaintiff's injuries.[627]

In a recent example of a case in which the supreme court rejected an argument that an expert's testimony was conclusory regarding causation, the court determined that the expert explained the link between the facts that he relied upon and the opinion he reached.[628] The court reversed a summary judgment against the plaintiff, finding non-conclusory the affidavit of an expert in support of a legal malpractice claim against an attorney for negligence in challenging the seizure and seeking return of an airplane seized by the Drug Enforcement Agency.[629] In holding the affidavit was not conclusory, the court explained that that the relevant inquiry regarding the question of whether an affidavit is an *ipse dixit* turns on the inferences, if any, required to bridge the gap between the underlying data and the expert's rationale and conclusion.[630]

A threshold question on admissibility is whether the expert is qualified. "The test for admissibility of an expert's testimony is whether the proponent established that the expert possesses knowledge, skill, experience, training, or education regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject."[631] Also, an expert's affidavit that is based on assumed facts that vary from the actual undisputed facts has no probative force.[632]

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624. *Id.*; *see also* Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 434–35 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (finding an expert's affidavit to be "nothing more than speculation" and thus insufficient to constitute summary judgment evidence).

625. McIntyre v. Ramirez, 109 S.W.3d 741, 745–46, 749–50 (Tex. 2003).

626. Wal-Mart Stores, Inc. v. Merrell, 313 S.W.3d 837, 839–40 (Tex. 2010) (per curiam).

627. IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 803 (Tex. 2004); *see also* Hamilton v. Wilson, 249 S.W.3d 425, 427 (Tex. 2008) (per curiam) (finding that the expert's testimony "was not based on mere possibilities, speculation, or surmise" and thus was proper summary judgment evidence).

628. Starwood Mgmt., LLC v. Swaim, 530 S.W.3d 673, 679–80 (Tex. 2017) (per curiam).

629. *Id*. at 681–82.

630. *Id*. at 680.

631. Downing v. Larson, 153 S.W.3d 248, 253 (Tex. App.—Beaumont 2004) (per curiam), *rev'd per curiam on other grounds*, 197 S.W.3d 303 (Tex. 2006); *see also* Roberts v. Williamson, 111 S.W.3d 113, 120–21 (Tex. 2003).

632. Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995).

Mere conclusions of a lay witness are not competent evidence to controvert expert opinion evidence.[633] For example, whether a causal connection exists "between exposure to a certain chemical and [later] injury or disease requires specialized expert knowledge and testimony because such matters are not within the common knowledge of lay persons."[634] However, on subject matter in which the fact-finder would not be required to be guided solely by the opinion testimony of experts, lay testimony may be permitted.[635]

Under the right circumstances, lay testimony may be accepted over that of experts.[636] Whether expert testimony is required is a question of law.[637] Thus, in a situation where lay testimony is permitted, it can be sufficient to raise a fact issue.[638] For example, in *United States Fire Insurance Co. v. Lynd Co.*, the question of whether hail fell on a particular location on a particular day and whether it caused property damage was not a matter solely within the scope of the expert's knowledge.[639]

Concerning legal fees, what constitutes reasonable fees is a question of fact.[640] However, expert testimony that is clear, direct, and uncontroverted may establish fees as a matter of law.[641] "To constitute proper summary judgment evidence . . . an affidavit [supporting attorneys' fees] must be made on personal knowledge, set forth facts which would be admissible in evidence, and show the affiant's competence."[642] However, the supreme court has given significant leeway on the specificity required when the affidavit is not contested.[643]

An attorney's explanation of how he or she expects an expert to testify, offered in response to a discovery request, is not competent summary judgment evidence.[644]

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633. Nicholson v. Mem'l Hosp. Sys., 722 S.W.2d 746, 751 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *see also* Hernandez v. Lukefahr, 879 S.W.2d 137, 142 (Tex. App.—Houston [14th Dist.] 1994, no writ); White v. Wah, 789 S.W.2d 312, 318 (Tex. App.—Houston [1st Dist.] 1990, no writ).

634. Abraham v. Union Pac. R.R., 233 S.W.3d 13, 18 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

635. *See* McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986).

636. *Id.*

637. Choice v. Gibbs, 222 S.W.3d 832, 836 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

638. *See id.* at 837–38.

639. U.S. Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 218 (Tex. App.—San Antonio 2012, pet. denied).

640. Ragsdale v. Progressive Voters League, 801 S.W.2d 880, 881–82 (Tex. 1990) (per curiam).

641. *Id.* at 882; *see also infra* Part 1.VI (discussing attorneys' fees).

642. Collins v. Guinn, 102 S.W.3d 825, 837 (Tex. App.—Texarkana 2003, pet. denied) (alteration in original) (quoting Merch. Ctr., Inc. v. WNS, Inc., 85 S.W.3d 389, 397 (Tex. App.—Texarkana 2002, no pet.)); *see infra* Part 1.VI (discussing attorneys' fees).

643. *See* Garcia v. Gomez, 319 S.W.3d 638, 640–41 (Tex. 2010).

644. Kiesel v. Rentway, 245 S.W.3d 96, 101 (Tex. App.—Dallas 2008, pet. dism'd).

b. Sufficiency of Expert Opinion

In *E.I. du Pont de Nemours & Co. v. Robinson*, the Texas Supreme Court held that an expert's testimony must be based upon a reliable foundation and be relevant.[645]

The genesis of the standards of reliability and relevance concerning expert testimony was the U.S. Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, which held that under the Federal Rules of Evidence, the trial court "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[646] In *Kumho Tire Co. v. Carmichael*, the Supreme Court extended *Daubert*, holding that the factors enunciated by *Daubert* that a court must consider in making its relevance and reliability determination apply to engineers and other experts who are not scientists.[647] The court must determine, pursuant to Federal Rule of Evidence 702, whether the expert opinion is "scientifically valid," based on factors such as the following: (1) whether the theory or technique has been subjected to peer review and publication; (2) the known or potential rate of error of the technique; and (3) whether the theory or technique is "generally accepted" in the scientific community.[648]

Similarly, Texas Rule of Evidence 702 states, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[649]

The other relevant evidentiary rule, Texas Rule of Evidence 705, provides "[i]f the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible."[650]

These rules impose a gatekeeping obligation on the trial judge to ensure the reliability of all expert testimony.[651] The trial judge fulfills this obligation by determining the following as a precondition to admissibility: (1) the putative expert is qualified as an expert; (2) the expert's testimony has a

645. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995); *see also* Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 904 (Tex. 2004).

646. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993).

647. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

648. *Daubert*, 509 U.S. at 592–94.

649. TEX. R. EVID. 702.

650. TEX. R. EVID. 705(c). Rule 703 allows expert witnesses, in forming their opinions, to rely on facts that would be inadmissible in evidence if such facts are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." TEX. R. EVID. 703.

651. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998) (quoting McKendall v. Crown Control Corp., 122 F.3d 803, 806–07 n.1 (9th Cir. 1997)).

reliable basis in the knowledge and experience of the relevant discipline; and (3) the testimony is relevant.[652]

Use of experts in summary judgment practice requires meeting these standards for experts through summary judgment evidence. Many *Daubert*/*Robinson* battles are causation battles fought at the summary judgment stage. They are a unique mixture of trial and summary judgment practice. Generally, the defendant does one of two things: (1) moves for summary judgment on the grounds that its own expert testimony conclusively disproves causation and the plaintiff's expert testimony does not raise a fact issue on causation because he or she does not pass the *Daubert*/*Robinson* test; or more simply, (2) moves for summary judgment on the grounds that there is no evidence of causation because the plaintiff's causation expert testimony does not pass *Daubert*/*Robinson*. If the movant objects to expert evidence relied upon by the nonmovant based on reliability, "the evidence must be both admissible and legally sufficient to withstand [a] no evidence challenge."[653]

The possible results of failure to meet the *Daubert*/*Robinson* test are demonstrated by *Weiss v. Mechanical Associated Services, Inc*. In *Weiss*, the San Antonio Court of Appeals determined that the trial court did not abuse its discretion in effectively excluding the plaintiff's expert testimony on causation by granting the defendant's motion for summary judgment.[654] The appellate court rejected any evidence by the expert on the grounds that it failed to meet the *Robinson* test.[655]

This ruling carries the following implications: (1) in a summary judgment proceeding, the movant challenging the expert's testimony need not request a *Robinson* hearing and secure a formal ruling from the trial court; and (2) the granting of the summary judgment, even if the order does not mention the expert challenge, in effect, is a ruling sustaining the movant's expert challenge.[656] Conversely, the El Paso Court of Appeals has held that if a trial court agrees that an expert's testimony is admissible, the expert's opinion constitutes more than a scintilla of evidence to defeat a no-evidence summary

652. Volkswagen of Am., Inc. v. Ramirez, 159 S.W.3d 897, 904 (Tex. 2004); E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995).

653. Abraham v. Union Pac. R.R. Co., 233 S.W.3d 13, 17 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); Frias v. Atl. Richfield Co., 104 S.W.3d 925, 928 n.2 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

654. Weiss v. Mech. Associated Servs., Inc., 989 S.W.2d 120, 125–26 (Tex. App.—San Antonio 1999, pet. denied).

655. *Id.* at 124–25.

656. *Id.* at 124 n.6.

judgment.[657] Other courts have implicitly ruled on the reliability of expert testimony at summary judgment.[658]

The Texarkana Court of Appeals in *Bray v. Fuselier*, however, refused to rule that the trial court's granting of summary judgment was an implicit ruling on the *Robinson* challenge because the defendant had made numerous other objections to the plaintiff's summary judgment evidence, and it could be argued that the court's granting of summary judgment was an implicit ruling on any one of these other objections.[659]

An expert's opinion that is unsupported and speculative on its face can be challenged for the first time on appeal.[660]

c. Procedural Issues

Before the advent of no-evidence motions for summary judgment in state practice, courts did not apply evidentiary sanctions and exclusions because a party failed to timely designate an expert witness in a summary judgment proceeding.[661] However, now a party must timely disclose its expert as required by Texas Rule of Civil Procedure 193.6.[662] Otherwise, absent a showing of good cause for the failure to act timely or a lack of unfair surprise or prejudice for the other parties, the trial court may properly exclude that expert's testimony.[663]

A party relying on an expert in either its summary judgment motion or response cannot wait until trial to develop the expert's qualifications. In *United Blood Services v. Longoria*, the Texas Supreme Court required summary judgment proof of an expert's qualifications in support of the response to a motion for summary judgment.[664] Using an abuse of discretion standard, the supreme court upheld the trial court's determination that the expert was not qualified and entered a take-nothing judgment against the

657. Barraza v. Eureka Co., 25 S.W.3d 225, 232 (Tex. App.—El Paso 2000, pet. denied).

658. *See* Emmett Props., Inc. v. Halliburton Energy Servs., Inc., 167 S.W.3d 365, 374 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (affirming no-evidence summary judgment because plaintiffs' expert report was conclusory and failed to consider alternative causes); Martinez v. City of San Antonio, 40 S.W.3d 587, 595 (Tex. App.—San Antonio 2001, pet. denied) ("Although causation may be proved by expert testimony, the probability about which the expert testifies must be more than coincidence for the case to reach a jury.").

659. Bray v. Fuselier, 107 S.W.3d 765, 770 (Tex. App.—Texarkana 2003, pet. denied).

660. *See* Coastal Transp. Co. v. Crown Cent. Petroleum Corp., 136 S.W.3d 227, 233 (Tex. 2004).

661. Fort Brown Villas III Condo. Ass'n v. Gillenwater, 285 S.W.3d 879, 881 (Tex. 2009) (per curiam).

662. TEX. R. CIV. P. 193.6 (providing that a party who fails to timely respond to discovery may not introduce evidence of the material or testimony of a witness not disclosed).

663. *Fort Brown Villas III Condo. Ass'n*, 285 S.W.3d. at 881.

664. United Blood Servs. v. Longoria, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam).

plaintiff who relied on the disqualified expert.[665] The supreme court specifically rejected the approach of waiting for trial.[666]

The proponent of an expert bears the burden of demonstrating an expert's qualifications, reliability, and relevance.[667] "[O]nce a party objects to the expert's testimony, the party offering the expert . . . has the burden of proof to establish that the testimony is admissible."[668] For example, in *Hight v. Dublin Veterinary Clinic*, the court found no abuse of discretion in striking an expert's affidavit.[669] Although the expert's affidavit provided information that the expert reviewed various records and that "certain general principles exist in connection with the use of anesthesia," the affidavit had no information concerning the methodology and the basis underlying the opinion testimony and how they related to the expert's opinion.[670] Without such information, the court found it "impossible to determine the issue of reliability."[671]

The question then becomes how does one qualify an expert and establish reliability and relevance in a summary judgment context? This question is complicated by the significant procedural differences between summary judgment proceedings and expert procedure.

Procedurally, it should be sufficient for a defendant movant to file a no-evidence motion for summary judgment simply challenging the element of causation. The nonmovant would then come forward in its response with its expert testimony establishing causation. Then in its reply, the movant would raise specific challenges to admissibility and legal sufficiency of the expert's testimony.

Another issue that arises is that underlying procedural differences may complicate the decision of how to deal with experts in summary judgment proceedings. When a party submits both a *Robinson* challenge and a no-evidence motion for summary judgment, "the trial court is presented with two different applicable procedures."[672] The implications of these two different applicable procedures follow.

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665. *Id.* at 30–31.

666. *Id.* at 30.

667. *See* TEX. R. EVID. 702; Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805, 807 (Tex. 2002); Fraud-Tech, Inc. v. ChoicePoint, Inc., 102 S.W.3d 366, 382, 384 (Tex. App.—Fort Worth 2003, pet. denied).

668. Barraza v. Eureka Co., 25 S.W.3d 225, 230 (Tex. App.—El Paso 2000, pet. denied) (citing E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995)).

669. Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 619 (Tex. App.—Eastland 2000, pet. denied).

670. *Id.* at 622.

671. *Id.*

672. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 301 (Tex. App.—Beaumont 2010, pet. dism'd) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1450 (2010)).

i. The Evidence Supporting the Summary Judgment Is Evaluated Differently

In a summary judgment hearing, the trial court assumes that all evidence favorable to the nonmovant is true and determines if there is a genuine issue of material fact.[673] In a *Daubert*/*Robinson* hearing, once a party objects to the expert's testimony, the party offering the expert bears the burden of responding to each objection and showing that the testimony is admissible by a preponderance of the evidence.[674] Then, the trial court evaluates the evidence for reliability to determine admissibility.[675]

ii. The Standard of Review Applied on Appeal Is Different

In reviewing the grant of a summary judgment, the appellate review is de novo.[676] In the context of a summary judgment, a trial court's exclusion of expert testimony is reviewed under an abuse of discretion standard.[677]

Although acknowledging that a *Robinson* challenge in the summary judgment context invokes two different standards of review, a Houston court nevertheless concluded that, as a practical matter, any differences could not affect the result on appeal.[678] The court stated:

> In the context of a no evidence motion for summary judgment where, as here, expert evidence relied upon by the nonmovant is objected to by the movant based on reliability, the evidence must be both admissible and legally sufficient to withstand the no evidence challenge. Therefore, contrary to the parties' arguments in this regard, there is no issue here of *which* standard of review to apply (abuse of discretion or legal sufficiency) because both must ultimately be satisfied. Moreover, because we cannot, as a practical matter, envision a situation in which expert testimony would be reliable enough to be admissible or legally sufficient, but not the other, we believe that the decision reached on reliability will produce the same disposition, regardless [of] whether it is viewed from the standpoint of admissibility or legal sufficiency.[679]

673. *See* TEX. R. CIV. P. 166a(c); Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548–49 (Tex. 1985).

674. *See* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995).

675. *See id.* at 557–58.

676. Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005); *see infra* Part 1.V.F (discussing standard of review).

677. McIntyre v. Ramirez, 109 S.W.3d 741, 749 (Tex. 2003).

678. Frias v. Atl. Richfield Co., 104 S.W.3d 925, 928 n.2 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

679. *Id.*; *accord* Abraham v. Union Pac. R.R., 233 S.W.3d 13, 17 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (citing *Frias*, 104 S.W.3d at 928 n.2).

iii. In a Summary Judgment Hearing, Oral Argument Is Typically Not Recorded and Is Not Considered as Evidence

No live testimony may be presented at a summary judgment hearing.[680] Conversely, a *Daubert*/*Robinson* hearing typically is recorded and included in the record on appeal. In a *Daubert*/*Robinson* hearing there is opportunity for live testimony and cross examination of the expert.[681] This form of evidence is especially important when the outcome of the *Daubert*/*Robinson* hearing is case determinative.

These differences create a hybrid and seemingly inconsistent approach between expert and summary judgment procedure. Possibilities of how to deal with experts in summary judgment proceedings include the following:

(a) Daubert/Robinson *Hearing*

The expert's proponent may request a *Daubert*/*Robinson* hearing. In meeting its gatekeeping function, the trial judge must weigh the evidence and the credibility of the witnesses, including the expert.[682] Summary judgment procedure does not allow for this sort of give and take. Thus, if summary judgment opponents submit conflicting affidavits concerning qualifications, reliability, or relevance of one side's expert, the judge logically cannot apply summary judgment standards. A hearing is appropriate. In *Pink v. Goodyear Tire & Rubber Co.*, the Beaumont Court of Appeals required a separate process.[683] It reasoned that by conducting a separate *Daubert*/*Robinson* hearing before considering a no-evidence motion for summary judgment, the trial court applies the processes that are specific to each hearing, provides the parties notice and an opportunity to present the best available evidence, and creates a full record for appellate review.[684]

The Houston Fourteenth Court of Appeals has suggested the use of a *Daubert*/*Robinson* hearing to overcome a challenge to an expert's

680. TEX. R. CIV. P. 166a(c); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269 n.4 (Tex. 1992); s*ee infra* Part 1.I.I. (Hearing and Submission).

681. Pink v. Goodyear Tire & Rubber Co., 324 S.W.3d 290, 301 (Tex. App.—Beaumont 2010, pet. dism'd).

682. *See* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556–58 (Tex. 1995).

683. *Pink*, 324 S.W.3d at 301–02 (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1450 (2010)).

684. *Id.* at 302. ("If the trial court decides the [expert's] affidavit must be stricken because of unreliable foundational data, methodology, or technique, or for some other reason, the trial court may then decide whether to grant the no-evidence summary judgment, or "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.") (quoting TEX. R. CIV. P. 166a(g)).

reliability.[685] However, for strategic purposes, an opponent of the expert may not want an evidentiary hearing. Under the logic of *Weiss*, all the opponent must do is file a motion for summary judgment and object to the expert's affidavit when it is attached as summary judgment evidence to the response.[686] If the court grants the summary judgment, there is no error in failing to conduct a *Daubert*/*Robinson* hearing, and through the granting of the summary judgment motion, the expert's testimony is inferentially ruled unqualified, unreliable, or irrelevant. Thus, unless a nonmovant is certain the judge will not grant the summary judgment, the wise course of action is to arrange for a *Daubert*/*Robinson* hearing.

If the *Daubert*/*Robinson* hearing is conducted at the same time as the summary judgment hearing, do not submit other summary judgment evidence. The case authority is strict that all summary judgment evidence must be in writing and may not be presented at a summary judgment hearing.[687] The wisest course may be to hold the *Daubert*/*Robinson* hearing in advance of the summary judgment hearing. That way, if the judge strikes the expert, the proponent can find another or attempt to bolster that expert.

(b) Deposition of Own Expert

To make a *Daubert/Robinson* showing, a party may have to depose its own expert extensively about the factual basis for his or her opinions and about the scientific foundation for them. Affidavits may be too unwieldy to cover all the grounds necessary to qualify an expert.

(c) Preparation of Detailed Affidavits

Written reports from experts, unless sworn to, are not proper summary judgment evidence.[688] However, because the party challenging the report failed to obtain a ruling on its objection, the Fort Worth Court of Appeals held that an unsworn, stand-alone expert report was "not incompetent" and was the

685. Praytor v. Ford Motor Co., 97 S.W.3d 237, 246 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1348 (1998)).

686. *See* Weiss v. Mech. Associated Servs., Inc., 989 S.W.2d 120, 123–24 (Tex. App.—San Antonio 1999, pet. denied).

687. *See* Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269 & n.4 (Tex. 1992).

688. *See* TEX. R. CIV. P. 166a(f) (requiring that "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein"); Twist v. Garcia, No. 13-05-00321-CV, 2007 WL 2442363, at *5 (Tex. App.—Corpus Christi Aug. 30, 2007, no pet.) (mem. op.) (finding an unsworn expert report to be inadmissible).

"equivalent to sworn testimony."[689] It based its holding on the fact that the supreme court, which had remanded the case, had held that the expert's affidavit had probative value because the party challenging it failed to get a ruling on its objection to the affidavit.[690] The lesson from this case and others is that objections not only need to be made but a ruling must be secured.

If affidavits are used, the affidavits may require publications, articles, or other qualifying materials attached to them.

2. Nonexpert, Interested Witness Testimony

In addition to expert testimony, nonexpert, interested party testimony may provide a basis for summary judgment.[691]

The interested party's testimony must be "clear, positive and direct, otherwise credible . . . and could have been readily controverted."[692] This determination is made on a case-by-case basis.[693] The mere fact that summary judgment proof is self-serving does not necessarily make the evidence an improper basis for summary judgment.[694]

An example of competent interested party testimony is provided by *Texas Division-Tranter, Inc. v. Carrozza*. In *Carrozza*, the supreme court found that in a retaliatory discharge action under the workers' compensation law, interested party testimony by supervisory and administrative personnel established a legitimate, nondiscriminatory reason for the discharge.[695] The court explained that the affidavit testimony could have been readily controverted by facts and circumstances belying the employer's neutral explanation and thereby raising a material issue of fact.[696]

Statements of interested parties, testifying about what they knew or intended, are self-serving and do not meet the standards for summary

689. Seim v. Allstate Texas Lloyds, No. 02-16-00050-CV, 2018 WL 5832106, at *3 n.6 (Tex. App.—Fort Worth Nov. 8, 2018, no pet. h.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 52 HOUS. L. REV. 773, 856 (2015)).

690. *Id.*

691. *E.g.*, Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam); Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam); Danzy v. Rockwood Ins. Co., 741 S.W.2d 613, 614–15 (Tex. App.—Beaumont 1987, no writ).

692. TEX. R. CIV. P. 166a(c); *accord* McMahan v. Greenwood, 108 S.W.3d 467, 480 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

693. Lukasik v. San Antonio Blue Haven Pools, Inc., 21 S.W.3d 394, 399 (Tex. App.—San Antonio 2000, no pet.) (citing TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE AND REVIEW § 6.03[9][a], at 69 (2d ed. 1995)).

694. *Trico Techs. Corp.*, 949 S.W.2d at 310 (citing *Republic Nat'l Leasing Corp.*, 717 S.W.2d at 607); *see* TEX. R. CIV. P. 166a(c).

695. Tex. Div.-Tranter, Inc. v. Carrozza, 876 S.W.2d 312, 313–14 (Tex. 1994) (per curiam).

696. *Id.* at 313.

judgment proof.[697] Issues of intent and knowledge are not susceptible to being readily controverted and, therefore, are not appropriate for summary judgment proof.[698] However, if the affidavits of interested witnesses are detailed and specific, those affidavits may be objective proof sufficient to establish the witnesses' state of mind as a matter of law.[699] To meet the competency standard, interested witness testimony "must demonstrate personal knowledge, must positively and unqualifiedly state that the facts represented as true are true, and must not be conclusory."[700]

III. BURDEN OF PROOF FOR SUMMARY JUDGMENTS

Understanding which party has the burden of proof is fundamental to determining each party's requirements for moving for summary judgment or responding to a motion for summary judgment. The burden of proof on summary judgment is now allocated in the same manner for defendants and plaintiffs in both state and federal court.[701] "[T]he party with the burden of proof at trial will have the same burden of proof in a summary judgment proceeding."[702]

A defendant may move for summary judgment in the following ways:

(1) by establishing that no material issue of fact exists concerning one or more essential elements of the plaintiff's claims;
(2) by establishing all the elements of its affirmative defense;
(3) by asserting through a no-evidence summary judgment that the plaintiff lacks evidence to support an essential element of its claim; or

697. Grainger v. W. Cas. Life Ins. Co., 930 S.W.2d 609, 615 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (citing Clark v. Pruett, 820 S.W.2d 903, 906 (Tex. App.—Houston [1st Dist.] 1991, no writ)). *But see infra* Part 1.VII.G.3 (discussing an exception in media defamation cases that allows state of mind testimony as summary judgment evidence).

698. Murray v. Cadle Co., 257 S.W.3d 291, 302 (Tex. App.—Dallas 2008, pet. denied); *Clark*, 820 S.W.2d at 906; Allied Chem. Corp. v. DeHaven, 752 S.W.2d 155, 158 (Tex. App.—Houston [14th Dist.] 1988, writ denied).

699. *See* Channel 4, KGBT v. Briggs, 759 S.W.2d 939, 941–42 (Tex. 1988); *see also infra* Part 1.VII.G (discussing defamation actions).

700. Evans v. MIPTT, L.L.C., No. 01-06-00394-CV, 2007 WL 1716443, at *3 (Tex. App.—Houston [1st Dist.] June 14, 2007, no pet.) (mem. op.) (citing Ryland Grp., Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam)).

701. *See* TEX. R. CIV. P. 166a cmt.—1997 (referring to a party's claim or defense); Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)) (applying the federal standard of reviewing summary judgments to Texas summary judgment practice); *see also* City of Keller v. Wilson, 168 S.W.3d 802, 825–26 (Tex. 2005); *infra* section III (Comparison of State & Federal Summary Judgment Practice).

702. Barraza v. Eureka Co., 25 S.W.3d 225, 231 (Tex. App.—El Paso 2000, pet. denied).

(4) by proving each element of its counterclaim as a matter of law.[703]

A plaintiff may move for summary judgment in the following ways:

(1) by showing entitlement to prevail as a matter of law on each element of a cause of action, except the amount of damages;
(2) by demonstrating the lack of a genuine issue of material fact concerning an affirmative defense; or
(3) by attacking affirmative defenses through a no-evidence summary judgment.[704]

A. Traditional Summary Judgments

The standard for determining whether a movant for a traditional motion for summary judgment has met its burden is whether the movant has shown that there is no genuine issue of material fact and judgment should be granted as a matter of law.[705] The party with the burden of proof must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the nonmovant's claim or defense as a matter of law.[706]

1. Defendant as Movant

A defendant who conclusively negates a single essential element of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment on that claim.[707] As it relates to negation of an element, summary judgment is proper for a defendant as movant if the defendant establishes that no genuine issue of material fact exists concerning one or more essential elements of the plaintiff's claims.[708] The movant has the burden of proof and all doubts are resolved in favor of the nonmovant.[709]

For example, in *D. Houston, Inc. v. Love*, the supreme court affirmed the appellate court's reversal of a summary judgment granted to a men's club because it failed to negate as a matter of law the duty to take reasonable care

703. *See* TEX. R. CIV. P. 166a.
704. *See id.*
705. Provident Life & Accident Ins. Co. v. Knott, 128 S.W.3d 211, 215–16 (Tex. 2003).
706. Stanfield v. Neubaum, 494 S.W.3d 90, 96 (Tex., 2016); M.D. Anderson Hosp. & Tumor Inst. v. Willrich, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam).
707. KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 79 (Tex. 2015); Nall v. Plunkett, 404 S.W.3d 552, 555 (Tex. 2013); Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494, 508 (Tex. 2010).
708. *See* TEX. R. CIV. P. 166a(c); Helix Energy Sols. Grp., Inc. v. Gold, 522 S.W.3d 427 (Tex. 2017); KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999); Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972).
709. Roskey v. Tex. Health Facilities Comm'n, 639 S.W.2d 302, 303 (Tex. 1982) (per curiam); Leffler v. JP Morgan Chase Bank, N.A., 290 S.W.3d 384, 385 (Tex. App.—El Paso 2009, no pet.).

to prevent its employee from driving after she left work.[710] The employee, an exotic dancer, claimed that the club required her to consume alcohol in sufficient amounts to become intoxicated.[711] She also testified that the club made more money if a customer bought her drinks.[712] She testified she consumed only alcohol purchased for her by customers.[713] When asked in her deposition to admit why she chose to order alcoholic rather than nonalcoholic beverages, she replied, "I wanted to keep my job."[714] The supreme court held that this testimony, though controverted, raised a fact question regarding the club's control over the dancer's decision to consume sufficient alcohol to become intoxicated.[715] Thus, the club did not disprove as a matter of law that it did not exercise sufficient control over the dancer to create a legal duty.[716]

Scott and White Memorial Hospital v. Fair is another example of a traditional motion for summary judgment.[717] The hospital moved for summary judgment, asserting that accumulated ice on which the plaintiff was injured did not pose an unreasonable risk of harm.[718] After the trial court granted summary judgment, the court of appeals reversed, holding that "Scott and White failed to conclusively establish that the ice accumulation was in its natural state and was not an unreasonably dangerous condition."[719] The supreme court reversed the court of appeals, holding that the hospital met its burden to negate the unreasonable risk element of a premises liability claim through affidavit evidence from a local meteorologist, the hospital grounds supervisor, and the plaintiff.[720] The court reasoned that this evidence showed that an ice storm hit the area, causing ice to accumulate on the hospital grounds, including the road where the plaintiff fell.[721] In holding that naturally occurring ice that accumulates without the assistance or involvement of unnatural contact is not an unreasonably dangerous condition sufficient to support a premises liability claim, the court determined that the plaintiffs "did not present any controverting evidence . . . that the ice resulted from something other than the winter storm."[722]

710. D. Houston, Inc. v. Love, 92 S.W.3d 450, 457 (Tex. 2002).
711. *Id.* at 455.
712. *Id.*
713. *Id.* at 456.
714. *Id.* at 455–56 (describing the employee's deposition testimony).
715. *Id.* at 456.
716. *Id.* at 454–56.
717. *See* Scott & White Mem'l Hosp. v. Fair, 310 S.W.3d 411, 412 (Tex. 2010).
718. *Id.*
719. *Id.* (internal quotation marks omitted).
720. *Id.* at 415.
721. *Id.*
722. *Id.*

In another personal injury case, the defendant successfully negated proximate cause in a negligent entrustment case.[723] The supreme court upheld a summary judgment on the basis that an accident that occurs eighteen days after entrustment of a car involved in an accident injuring the plaintiff is too attenuated to be the proximate cause of those injuries.[724]

2. Plaintiff as Movant on Affirmative Claims

When the plaintiff moves for traditional summary judgment on affirmative claims it is in much the same position as a defendant. The plaintiff must show entitlement to prevail on each element of the cause of action,[725] except the amount of damages. Damages are specifically exempted by Rule 166a(a).[726] The plaintiff meets the burden if he or she "produces evidence that would be sufficient to support an instructed verdict at trial."[727]

Where the plaintiff is the movant on its affirmative claims, the plaintiff must affirmatively demonstrate by summary judgment evidence that there is no genuine issue of material fact concerning each element of its claim for relief.[728] If the defendant also has a counterclaim on file, to be entitled to a final summary judgment, the plaintiff must: (1) establish the elements of its cause of action as a matter of law; and (2) disprove at least one element of the defendant's counterclaim as a matter of law.[729]

3. Affirmative Defenses

The defendant urging summary judgment on an affirmative defense is in much the same position as a plaintiff urging summary judgment on an affirmative claim. There are many examples of summary judgments granted when a defendant has moved for summary judgment on an affirmative

723. Allways Auto Grp., Ltd. v. Walters, 530 S.W.3d 147, 149 (Tex. 2017) (per curiam).

724. *Id.* at 148–49.

725. *See, e.g.*, Fry v. Comm'n for Lawyer Discipline, 979 S.W.2d 331, 334 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); Green v. Unauthorized Practice of Law Comm., 883 S.W.2d 293, 297 (Tex. App.—Dallas 1994, no writ); Brooks v. Sherry Lane Nat'l Bank, 788 S.W.2d 874, 876 (Tex. App.—Dallas 1990, no writ); Bergen, Johnson & Olson v. Verco Mfg. Co., 690 S.W.2d 115, 117 (Tex. App.—El Paso 1985, writ ref'd n.r.e.).

726. TEX. R. CIV. P. 166a(c). The exception that the plaintiff need not show entitlement to prevail on damages applies only to the amount of unliquidated damages, not to the existence of damages or loss. Rivera v. White, 234 S.W.3d 802, 805–07 (Tex. App.—Texarkana 2007, no pet.). Unliquidated damages may be proved up at a later date. *Id.*

727. Ardmore, Inc. v. Rex Grp., Inc., 377 S.W.3d 45, 54 (Tex. App.—Houston [1st Dist.] 2012, pet. denied); FDIC v. Moore, 846 S.W.2d 492, 494 (Tex. App.—Corpus Christi 1993, writ denied).

728. *See* TEX. R. CIV. P. 166a; *see also* Certain Underwriters at Lloyd's v. LM Ericsson Telefon, AB, 272 S.W.3d 691, 694 (Tex. App.—Dallas 2008, pet. denied).

729. Taylor v. GWR Operating Co., 820 S.W.2d 908, 910 (Tex. App.—Houston [1st Dist.] 1991, writ denied); Adams v. Tri-Cont'l Leasing Corp., 713 S.W.2d 152, 153 (Tex. App.—Dallas 1986, no writ).

defense.[730] "When a defendant moves for summary judgment based on an affirmative defense, . . . the defendant, as movant, bears the burden of proving each essential element of that defense."[731] The movant-defendant must come forward with summary judgment evidence for each element.[732] Once the movant-defendant conclusively establishes the elements of its affirmative defense, the burden is shifted to the nonmovant-plaintiff to raise a genuine issue of material fact.[733] If the movant fails to conclusively establish the affirmative defense, the nonmovant-plaintiff has no burden to present summary judgment evidence to the contrary.[734] Even so, it is a wise practice to file a response to every summary judgment motion. "[A]n unpleaded affirmative defense may also serve as the basis for a summary judgment when it is raised in the summary judgment motion, and the opposing party does not object to the lack of a [R]ule 94 pleading in either its written response or before the rendition of judgment."[735]

Defendants seeking summary judgment based on the statute of limitations, an affirmative defense, face a dual burden.[736] In *Burns v. Thomas*, the supreme court held that a "defendant seeking summary judgment on the basis of limitations must prove when the cause of action accrued."[737] The defendant must also negate the discovery rule, if it has been

730. *See e.g.* Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 53 (Tex. 2017) (upholding summary judgment defeating a tortious interference claim based on justification).

731. FDIC v. Lenk, 361 S.W.3d 602, 609 (Tex. 2012) (quoting Ryland Grp., Inc. v. Hood, 924 S.W.2d 120, 121 (Tex. 1996) (per curiam)).

732. KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp., 988 S.W.2d 746, 748–49 (Tex. 1999); Am. Petrofina, Inc. v. Allen, 887 S.W.2d 829, 830 (Tex. 1994); Nichols v. Smith, 507 S.W.2d 518, 520 (Tex. 1974) ("[T]he pleading of an affirmative defense will not, in itself, defeat a motion for summary judgment by a plaintiff whose proof conclusively establishes his right to an instructed verdict if no proof were offered by his adversary in a conventional trial on the merits.").

733. *Nichols*, 507 S.W.2d at 521.

734. *See* Torres v. W. Cas. & Sur. Co., 457 S.W.2d 50, 52 (Tex. 1970) (finding that while the plaintiff would suffer a directed verdict at a trial based on the record for failing to carry the burden of proof, the plaintiff has no such burden on defendant's motion for summary judgment); *see also* Deer Creek Ltd. v. N. Am. Mortg. Co., 792 S.W.2d 198, 200–01 (Tex. App.—Dallas 1990, no writ) (noting when the mortgage company sufficiently pleaded and proved release, the burden shifted to the debtor to raise a fact issue concerning a legal justification for setting aside the release).

735. Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 494 (Tex. 1991). Texas Rule of Civil Procedure 94 concerns affirmative defenses. In relevant part, it provides:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

TEX. R. CIV. P. 94.

736. Exxonmobil Corp. v. Lazy R Ranch, LP, 511 S.W.3d 538, 546 n.12 (Tex. 2017); *See infra* Part 1.VII.C (discussing statutes of limitations and statutes of repose).

737. Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990).

raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered or should have discovered the nature of the injury.[738] Thus, when the nonmovant interposes a suspension statute, the burden is on the movant to negate the applicability of the tolling statute.[739] This burden does not apply to a party seeking to negate the discovery rule when the nonmovant has not pleaded or otherwise raised the discovery rule.[740]

A plaintiff who has conclusively established the absence of disputed fact issues in its claim for relief will not be prevented from obtaining summary judgment because the defendant merely pleaded an affirmative defense.[741] The plaintiff is not under any obligation to negate affirmative defenses.[742] Merely pleading of an affirmative defense, without supporting proof, will not defeat an otherwise valid motion for summary judgment.[743]

An affirmative defense will prevent the granting of a summary judgment only if the defendant establishes as a matter of law each element of its affirmative defense by summary judgment evidence.[744] If the defendant establishes an affirmative defense as a matter of law, the burden then shifts back to the plaintiff to raise a fact issue.[745] In conclusively establishing the elements of its claim for the purposes of seeking a summary judgment, a movant is not required to negate or even address affirmative defenses.[746]

738. *Id.* at 267–68; Town of DISH v. Atmos Energy Corp., 519 S.W.3d 605 (Tex. 2017). The discovery rule essentially states that the statute of limitations does not begin to run until discovery of the wrong or until the plaintiff acquires knowledge that, in the exercise of reasonable diligence, would lead to the discovery of the wrong. *See id.*; *see also* Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990); Gaddis v. Smith, 417 S.W.2d 577, 578, 580–81 (Tex. 1967), *superseded by statute on other grounds*, TEX. CIV. PRAC. & REM. CODE ANN. § 74.251 (West 2017).

739. Zale Corp. v. Rosenbaum, 520 S.W.2d 889, 891 (Tex. 1975) (per curiam) (finding the burden was on the movant to prove the affirmative defense of limitations by conclusively establishing lack of diligence and the inapplicability of the tolling statute).

740. *In re* Estate of Matejek, 960 S.W.2d 650, 651 (Tex. 1997) (per curiam); *see also* Camp Mystic, Inc. v. Eastland, 390 S.W.3d 444, 452–53 (Tex. App.—San Antonio 2012, pet. granted, judgm't vacated w.r.m.).

741. Kirby Expl. Co. v. Mitchell Energy Corp., 701 S.W.2d 922, 926 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); Clark v. Dedina, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd).

742. Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc., 106 S.W.3d 118, 124 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

743. Hammer v. Powers, 819 S.W.2d 669, 673 (Tex. App.—Fort Worth 1991, no writ).

744. *See* Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984) (holding that an affidavit supporting an affirmative defense was conclusory, and therefore, not sufficient summary judgment evidence).

745. *See* "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 936–37 (Tex. 1972) (regarding the plea of the affirmative defense of promissory estoppel).

746. ExxonMobil Corp. v. Rincones, 520 S.W.3d 572, 593 (Tex. 2017).

4. Counterclaims

A defendant seeking summary judgment on a counterclaim has the same burden as a plaintiff. It must prove each element of its counterclaim as a matter of law.[747]

B. No-Evidence Summary Judgments

Under the no-evidence summary judgment rule, a party without the burden of proof at trial may move for summary judgment on the basis that the nonmovant lacks evidence to support an essential element of its claim or affirmative defense.[748] A party may never properly urge a no-evidence summary judgment on the claims or defenses on which it has the burden of proof.[749] A defendant cannot file a no-evidence motion for summary judgment on an affirmative defense for which it has the burden of proof at trial.[750]

The thrust of the no-evidence summary judgment rule is to require evidence from the nonmovant.[751] A common use of a no-evidence motion is to challenge an opponent's expert testimony as lacking probative value and thus constituting no evidence.[752]

A no-evidence summary judgment will be upheld if the summary judgment record reveals no evidence of a challenged element. Specifically, if:

(1) there is a complete absence of evidence concerning the challenged element;
(2) the evidence offered to prove a challenged element is no more than a scintilla;
(3) the evidence establishes conclusively the opposite of the challenged element; or

747. *See* Daniell v. Citizens Bank, 754 S.W.2d 407, 408–09 (Tex. App.—Corpus Christi 1988, no writ).

748. TEX. R. CIV. P. 166a(i); KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 79 (Tex. 2015); Nall v. Plunkett, 404 S.W.3d 552, 555 (Tex. 2013) (per curiam).

749. Nowak v. DAS Inv. Corp., 110 S.W.3d 677, 680 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, 62 (2002)).

750. Killam Ranch Props., Ltd. v. Webb County, 376 S.W.3d 146, 157 (Tex. App.—San Antonio 2012, pet. denied) (en banc); Selz v. Friendly Chevrolet, Ltd., 152 S.W.3d 833, 838 (Tex. App.—Dallas 2005, no pet.).

751. *See* Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

752. *See, e.g.*, Wal-Mart Stores, Inc. v. Merrell, 313 S.W.3d 837, 839 (Tex. 2010) (per curiam).

(4) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove the challenged element.[753]

Conceivably, a no-evidence motion for summary judgment could be two pages long and the response two feet thick. The movant need not produce any evidence in support of its no-evidence claim.[754] Instead, the mere filing of a proper motion shifts the burden to the nonmovant to come forward with enough evidence to take the case to a jury.[755] If the nonmovant does not come forward with such evidence, the court must grant the motion.[756]

In *Boerjan v. Rodriguez*, the supreme court recited the type of evidence that presumably could have raised a fact issue in a no-evidence summary judgment granted in a case arising from a fatal accident involving a human smuggler fleeing from a ranch worker employed by the defendant-movant.[757] The plaintiff-nonmovants contended that they raised a fact issue because an eyewitness testified that the ranch worker chased the smuggler at a high speed over unlit roads and thereby created an extreme risk of harm to the decedents.[758] The court determined that the evidence provided no support for such an inference.[759] The witness, who was also traveling in the smuggler's truck with the decedents, testified that the ranch hand's vehicle was "coming behind" for "[q]uite a bit of time."[760] However, the court said this testimony was not sufficient to raise a fact issue because the witness "said nothing about whether [the ranch worker] made any aggressive moves, how closely [he] followed [the smuggler's] truck, or how fast [the ranch hand] was traveling."[761] The court concluded that "[s]imply following a trespasser's truck is a far cry from the sort of objective risk that would give rise to gross negligence."[762]

A no-evidence summary judgment is essentially a pretrial directed verdict.[763] The amount of evidence required to defeat a no-evidence motion

753. Sw. Bell Tel., L.P. v. Emmett, 459 S.W.3d 578, 589 (2015) (*citing* King Ranch, Inc. v. Chapman, 118 S.W.3d 742 (Tex. 2003); City of Keller v. Wilson, 168 S.W.3d 802, 810 (Tex. 2005) (citing Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 362–63 (1960)); *King Ranch, Inc.*, 118 S.W.3d at 751 (citing Calvert, *supra*, at 362–63); *see* Taylor-Made Hose, Inc. v. Wilkerson, 21 S.W.3d 484, 488 (Tex. App.—San Antonio 2000, pet. denied) (citing Calvert, *supra*, at 362–63).

754. TEX. R. CIV. P. 166a(i).

755. Roventini v. Ocular Scis., Inc., 111 S.W.3d 719, 722 (Tex. App.—Houston [1st Dist.] 2003, no pet.) (quoting Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1356 (1998)).

756. TEX. R. CIV. P. 166a(i).

757. Boerjan v. Rodriguez, 436 S.W.3d 307, 309, 311–12 (Tex. 2014) (per curiam).

758. *Id.* at 312.

759. *Id.*

760. *Id.* (internal quotation marks omitted).

761. *Id.*

762. *Id.*

763. Timpte Indus., Inc. v. Gish, 286 S.W.3d 306, 310 (Tex. 2009); Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 581 (Tex. 2006); Jimenez v. Citifinancial Mortg. Co., 169 S.W.3d 423,

for summary judgment parallels the directed verdict and the no-evidence standard on appeal of jury trials.[764] Thus, if the nonmovant brings forth more than a scintilla of evidence, that will be sufficient to defeat a no-evidence motion for summary judgment.[765]

A plaintiff attacking affirmative defenses by way of a no-evidence motion for summary judgment must state the elements of the affirmative defense for which there is no evidence.[766] Thus, the plaintiff must plead with specificity the elements of each affirmative defense that it claims lack evidence.[767]

1. "Reasonable Juror" Test Applied to No-Evidence Summary Judgments

In determining a "no-evidence" issue, the courts "review the evidence presented . . . in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not."[768] "An appellate court reviewing a summary judgment must consider whether reasonable and fair-minded jurors could differ in their conclusions in light of all of the evidence presented."[769] In *Wal-Mart Stores, Inc. v. Spates*, the court noted that it reviewed summary judgments for evidence that "would enable reasonable and fair-minded jurors to differ in their conclusions."[770] In *Spates*, the court reinstated a no-evidence summary judgment on the basis that a reasonable juror could not have found that a Wal-Mart employee had constructive notice of a plastic ring over which a plaintiff had tripped because the only evidence was that the ring was behind an employee's back for thirty to forty-five seconds.[771] The court explained:

> Had there been evidence it had been on the floor for an extended period of time, reasonable jurors might assume that the employee should have

425 (Tex. App.—El Paso 2005, no pet.); *see also* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (comparing summary judgment standard to directed verdict standard in the federal context).

764. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750–51 (Tex. 2003).

765. Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 600 (Tex. 2004).

766. TEX. R. CIV. P. 166a(i).

767. Ebner v. First State Bank of Smithville, 27 S.W.3d 287, 305 (Tex. App.—Austin 2000, pet. denied).

768. *Timpte Indus., Inc.*, 286 S.W.3d at 310 (quoting *Mack Trucks, Inc.*, 206 S.W.3d at 582).

769. Elizondo v. Krist, 415 S.W.3d 259, 271 & n.36 (Tex. 2013) (quoting Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam)).

770. Wal-Mart Stores, Inc. v. Spates, 186 S.W.3d 566, 568 (Tex. 2006) (per curiam) (citing City of Keller v. Wilson, 168 S.W.3d 802, 822–23 (Tex. 2005)).

771. *Id.*

> seen it unless she sidled into the aisle or never took her eyes off the shelves. But on this record, that would be pure speculation.[772]

Thus, the court found that there was no evidence that Wal-Mart should have discovered the six-pack ring that the plaintiff alleged was hazardous.[773]

The supreme court reaffirmed the applicability of the "reasonable juror" test to no-evidence summary judgment review in *Mack Trucks, Inc. v. Tamez*.[774] The court held that the plaintiff's expert testimony on the cause of a post-accident fire in a truck accident case had been properly excluded and, therefore, the no-evidence summary judgment had been correctly granted on causation grounds.[775] Specifically, the court referred to reviewing the evidence presented in the no-evidence motion and disregarding evidence contrary to the nonmovant's position (i.e., the movant's proof) unless a reasonable juror could not disregard that evidence.[776] Thus, the opinion presupposes that the movant for a no-evidence summary judgment may support its motion with proof that cannot be disregarded on appeal.

In another example, the Texas Supreme Court determined that no reasonable juror could find that an employee acted in the course and scope of his employment at the time of an accident despite evidence that the employee received workers' compensation benefits.[777]

When reviewing no-evidence summary judgment appeals, courts of appeals tend to cite the "reasonable juror" standard in general recitations of the law but do not analyze the cases in terms of this standard.[778]

2. Historical Development

Until 1997, summary judgment in federal court differed significantly from summary judgment in Texas state court.[779] The Texas Supreme Court discussed the difference in *Casso v. Brand*.[780] In *Casso*, the supreme court noted the following:

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772. *Id.*
773. *Id.*
774. Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 582 (Tex. 2006).
775. *Id.* at 575–77.
776. *Id.* at 582.
777. Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754, 757–58 (Tex. 2007) (per curiam).
778. *See, e.g.*, Vasquez v. S. Tire Mart, LLC, 393 S.W.3d 814, 817–18, 820–21 (Tex. App.—El Paso 2012, no pet.); *In re* Estate of Abernethy, 390 S.W.3d 431, 435–36, 439 (Tex. App.—El Paso 2012, no pet.); West v. SMG, 318 S.W.3d 430, 437, 440–42 (Tex. App.—Houston [1st Dist.] 2010, no pet.); Rankin v. Union Pac. R.R., 319 S.W.3d 58, 63–68 (Tex. App.—San Antonio 2010, no pet.).
779. *See generally* Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 618–19 (1988) (highlighting the differences in practice, despite the relative similarity in language of the two rules).
780. Casso v. Brand, 776 S.W.2d 551, 555–56 (Tex. 1989).

> Summary judgments in federal courts are based on different assumptions, with different purposes, than summary judgments in Texas. In the federal system, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[781]

The Supreme Court of Texas explained that "federal courts place responsibilities on both movants and non-movants in the summary judgment process."[782] The supreme court specifically refused to follow the federal approach to summary judgments.[783] The court explained: "While some commentators have urged us to adopt the current federal approach to summary judgments generally, we believe our own procedure eliminates patently unmeritorious cases while giving due regard for the right to a jury determination of disputed fact questions."[784]

At the time of *Casso*, the fundamental difference between state and federal summary judgment practice was the showing required by the movant before summary judgment would be granted. The court distinguished the two rules, stating:

> While the language of our rule is similar, our interpretation of that language is not. We use summary judgments merely "to eliminate patently unmeritorious claims and untenable defenses," and we never shift the burden of proof to the non-movant unless and until the movant has "establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law."[785]

In federal court, when the nonmovant bears the burden of proof at trial, that party alone has the burden of presenting competent evidence to avoid summary judgment.[786] Since 1997, this burden on the nonmovant is also the state practice.

On September 1, 1997, Texas experienced a major change in summary judgment practice with the advent of no-evidence summary

781. *Id.* (alteration in original) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)).
782. *Id.* at 556.
783. *Id.*
784. *Id.* at 556–57 (citation omitted) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243, 303–05 (1989)).
785. *Id.* at 556 (alteration in original) (citation omitted) (quoting City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 & n.5 (Tex. 1979)).
786. *See Celotex*, 477 U.S. at 322.

judgments.[787] In other words, the party without the burden of proof at trial (usually the defendant), without having to produce any evidence, may move for summary judgment on the basis that the nonmovant (usually the plaintiff) has no evidence to support an element of its claim (or defense).[788] The advent of the no-evidence summary judgment has provided one of the procedural foundations that has shaped lawsuits in Texas.[789]

C. Both Parties as Movants

Both parties may move for summary judgment.[790] When they do so, the motions are often referred to as cross-motions for summary judgment. When

787. On August 15, 1997, the Texas Supreme Court approved an amendment to Texas Rule of Civil Procedure 166a, which took effect on September 1, 1997. *See* TEX. R. CIV. P. 166a. The amendment added a new subsection (i) to Rule 166a. It reads as follows:

> (i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the [nonmovant] produces summary judgment evidence raising a genuine issue of material fact.

TEX. R. CIV. P. 166a(i).

Part of that August 15, 1997 order approving the rule change reads that "[t]he comment appended to these changes, unlike other notes and comments in the rules, is intended to inform the construction and application of the rule." TEX. R. CIV. P. 166a historical note (internal quotation marks omitted). Thus, in effect, the comment has the force of the rule. It reads:

> This comment is intended to inform the construction and application of the rule. Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case. Paragraph (i) does not apply to ordinary motions for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the [nonmovant's] claim or defense as a matter of law. To defeat a motion made under paragraph (i), the [nonmovant] is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice. A motion under paragraph (i) is subject to sanctions provided by existing law (TEX. CIV. PRAC. & REM. CODE §§ 9.001–10.006) and rules (TEX. R. CIV. P. 13). The denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c).

TEX. R. CIV. P. 166a cmt.—1997.

788. TEX. R. CIV. P. 166a cmt.—1997.

789. See David Peeples, *Lawsuit Shaping and Legal Sufficiency: The Accelerator and the Brakes of Civil Litigation*, 62 BAYLOR L. REV. 339, 357–59 (2010).

790. TEX. R. CIV. P. 166a(a)–(b).

both parties move for summary judgment, each party must carry its own burden, and neither can prevail because of the failure of the other to discharge its burden.[791]

When both parties move for summary judgment and one motion is granted and the other is overruled, all questions presented to the trial court may be presented for consideration on appeal, including whether the losing party's motion should have been overruled.[792] The appellate court reviews both sides' summary judgment evidence and renders the judgment the trial court should have rendered.[793]

The case of *Hall v. Mockingbird AMC/Jeep, Inc.* illustrates an advantage of filing a cross-motion for summary judgment.[794] In *Hall*, the trial court granted a summary judgment for the plaintiff.[795] The court of appeals reversed the trial court's judgment and rendered judgment for the defendant.[796] In the absence of a cross-motion for summary judgment by the defendant, the supreme court reversed and remanded the cause, stating that judgment could not be rendered for the defendant because the defendant did not move for summary judgment.[797]

D. Presumptions at Trial

A presumption at trial operates to establish a fact until rebutted.[798] It must be rebutted with evidence to the contrary. In contrast, in summary judgment procedure, a presumption does not shift the burden to the non-movant.[799] The summary judgment movant must establish conclusively each element of its claim.[800]

In *Chavez v. Kansas City Southern Railway*,[801] the supreme court addressed the distinction between a presumption at trial and presumptions in summary judgment practice. *Chavez* involved a presumption that an attorney retained for settlement has express authority to enter into a settlement

791. *See* Guynes v. Galveston County, 861 S.W.2d 861, 862 (Tex. 1993); Dall. Indep. Sch. Dist. v. Finlan, 27 S.W.3d 220, 226 (Tex. App.—Dallas 2000, pet. denied).

792. City of Richardson v. Oncor Elec. Delivery Co., 539 S.W.3d 252, 259 (Tex. 2018); City of Garland v. Dallas Morning News, 22 S.W.3d 351, 356 (Tex. 2000); *see infra* Part 1.V (discussing appealing a summary judgment).

793. BCCA Appeal Group, Inc. v. City of Houston, 496 S.W.3d 1, 7 (Tex. 2016).

794. *Hall*, 592 S.W.2d at 913–14.

795. *Id.* at 913.

796. *Id.*

797. *Id.* at 914; *see* Chevron, U.S.A., Inc. v. Simon, 813 S.W.2d 491, 491 (Tex. 1991) (per curiam) (holding that the court of appeals erred in rendering judgment for a plaintiff who did not file a cross-motion for summary judgment).

798. Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 80–81 (Tex. 2000).

799. Chavez v. Kansas City S. Ry., 520 S.W.3d 898, 899–900 (Tex. 2017) (per curiam).

800. *Id.* at 901.

801. *Id.* at 900.

agreement on behalf of the client.[802] The court rejected the application of the presumption to the summary judgment procedure. Quoting *Missouri-Kansas-Texas Railroad Co. v. City of Dallas*, the court reiterated fundamental summary judgment law: "'The burdens of proof and presumptions for an ordinary or conventional trial,' we said, 'are immaterial to the burden that a movant for summary judgment must bear.'"[803]

Thus, the movant-defendant in *Chavez*, who was asserting that the plaintiff's attorney had authority to enter into a settlement agreement, had to establish affirmatively there was no genuine issue of material fact that lawyer was authorized to execute the settlement agreement.[804] The court reversed the summary judgment decision because, although there was some evidence to satisfy the defendant's burden, the movant failed to conclusively establish this element of its claim.[805]

IV. RESPONDING TO AND OPPOSING A MOTION FOR SUMMARY JUDGMENT

One of the most important developments in state summary judgment procedure was the Texas Supreme Court's 1979 decision in *City of Houston v. Clear Creek Basin Authority*.[806] It greatly increased the need for non-movants to respond to motions for summary judgment. In *Clear Creek*, the supreme court held that "both the reasons for the summary judgment and the objections to it must be in writing and before the trial judge at the hearing."[807] In so holding, the court considered Rule 166a(c), which states in part: "Issues not expressly presented to the trial court by *written* motion, answer or other response shall not be considered on appeal as grounds for reversal."[808] The court also considered the 1978 addition to Rule 166a, which provides: "Defects in the form of affidavits or attachments will not be grounds for

802. *Id.* The court assumed, without deciding, that the presumption is valid, noting the court of appeals reliance on *Ebner v. First Bank of Smithville*, 27 S.W.3d 287, 300 (Tex. App.—Austin 2000, pet. denied).

803. *Id.*

804. *Id*.

805. *Id*. at 901.

806. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671 (Tex. 1979).

807. *Id.* at 677; *see also* Cent. Educ. Agency v. Burke, 711 S.W.2d 7, 8–9 (Tex. 1986) (per curiam) (reaffirming *Clear Creek Basin Authority* and holding that the court of appeals improperly reversed summary judgment on grounds not properly before the court).

808. *Clear Creek Basin Auth.*, 589 S.W.2d at 676 (emphasis added) (quoting TEX. R. CIV. P. 166a(c)); "'Answer' as used in the summary-judgment rule means an answer to the motion for summary judgment, not an answer to the petition." Reed v. Lake Country Prop. Owners Assoc., Inc., No. 02-17-00136-CV, 2017 WL 6759146, at *3 n.3 (Tex. App.—Fort Worth Dec, 28, 2017, pet. denied) (mem. op) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 52 HOUS. L. REV. 773, 876 (2015)).

reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."[809]

The necessity for a response is more pronounced when the movant has filed a proper no-evidence motion for summary judgment. If in its response, the nonmovant fails to produce summary judgment evidence raising a genuine issue of material fact, the court must grant the motion.[810] In other words, if the motion meets the requirements for a no-evidence summary judgment, the nonmovant *must* file a response.[811]

A. Responding: General Principles

The nonmovant must expressly present to the trial court any reasons for avoiding the movant's right to a summary judgment.[812] In the absence of a response raising such reasons, these matters may not be raised for the first time on appeal.[813] This requirement applies even if the constitutionality of a statute is being challenged.[814]

Defendants are not required to guess what unpleaded claims might apply and then negate them.[815] They are required only to meet the plaintiff's case as pleaded.[816] However, failure to object that an issue was raised for the first time in a response will result in trying the issue by consent in the summary judgment proceeding.[817]

If the movant's grounds are unclear or ambiguous, the nonmovant should specially except and assert that the grounds relied upon by the movant are unclear or ambiguous.[818] A critical feature of many responses is to object to the other side's summary judgment evidence and obtain a written ruling.[819]

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809. *Clear Creek Basin Auth.*, 589 S.W.2d at 677 (quoting TEX. R. CIV. P. 166a(f)).

810. TEX. R. CIV. P. 166a(i).

811. Evans v. MIPTT, L.L.C., No. 01-06-00394-CV, 2007 WL 1716443, at *2 (Tex. App.—Houston [1st Dist.] June 14, 2007, no pet.) (mem. op.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1356 (1998)).

812. McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 343 (Tex. 1993).

813. State Bd. of Ins. v. Westland Film Indus., 705 S.W.2d 695, 696 (Tex. 1986) (per curiam); Griggs v. Capitol Mach. Works, Inc., 701 S.W.2d 238, 238 (Tex. 1985) (per curiam); Mavex Mgmt. Corp. v. Hines Dall. Hotel Ltd. P'ship, 379 S.W.3d 456, 462 (Tex. App.—Dallas 2012, no pet.).

814. City of San Antonio v. Schautteet, 706 S.W.2d 103, 104 (Tex. 1986) (per curiam) (holding that the constitutionality of a city ordinance not raised in the trial court could not be considered on appeal).

815. Via Net v. TIG Ins. Co., 211 S.W.3d 310, 313 (Tex. 2006) (per curiam).

816. SmithKline Beecham Corp. v. Doe, 903 S.W.2d 347, 355 (Tex. 1995).

817. *Via Net*, 211 S.W.3d at 313 (citing Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 495 (Tex. 1991)).

818. McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 342–43 (Tex. 1993) (stating that the failure to specially except runs the risk of having the appellate court find another basis for summary judgment in the vague motion); *see supra* Part 1.I.B.3.a (discussing special exceptions).

819. *See supra* Part 1.II.A.4 (discussing objections to evidence).

A party who raises an affirmative defense in an attempt to defeat a motion for summary judgment must either (1) present a disputed fact issue on the opposing party's failure to satisfy its own burden of proof, or (2) establish at least the existence of a fact issue on each element of its affirmative defense supported by summary judgment evidence.[820]

B. Responding to a Traditional Motion for Summary Judgment

For a traditional motion for summary judgment, it is not necessary, in theory, to file a response to a motion for summary judgment filed by a party with the burden of proof.[821] Failure to file a response does not authorize summary judgment by default.[822] Nonetheless, failing to file a response is not lying behind a log, but laying down your arms. Once the movant with the burden of proof has established the right to a summary judgment on the issues presented, the burden shifts to the nonmovant to disprove or raise an issue of material fact that would preclude summary judgment.[823] Even if the movant's summary judgment evidence is legally insufficient, the nonmovant who receives a motion for summary judgment should always file a written response.[824]

C. Responding to a No-Evidence Summary Judgment Motion

Responding to a no-evidence summary judgment is virtually mandatory.[825] A nonmovant must respond to a no-evidence summary judgment motion by producing summary judgment evidence raising a genuine issue of material fact.[826] If the nonmovant fails to file a response and produce evidence, the nonmovant "is restricted to arguing on appeal that the no-evidence summary judgment is insufficient as a matter of

820. Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc., 106 S.W.3d 118, 124 (Tex. App.–Houston [1st Dist.] 2002, pet. denied).

821. TEX. R. CIV. P. 166a(c); *see* M.D. Anderson Hosp. & Tumor Inst. v. Willrich, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam).

822. Wheeler v. Green, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam); Rhône-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 222–23 (Tex. 1999); Cotton v. Ratholes, Inc., 699 S.W.2d 203, 205 (Tex. 1985) (per curiam) (reasoning that *Clear Creek Basin Authority* did not shift the burden of proof and, thus, the trial court cannot grant summary judgment by default).

823. Katy Venture, Ltd. v. Cremona Bistro Corp., 469 S.W.3d 160, 163 (Tex. 2015); Amedisys, Inc. v. Kingwood Home Health Care, LLC, 437 S.W.3d 507, 511 (Tex. 2014).

824. *See M.D. Anderson Hosp. & Tumor Inst.*, 28 S.W.3d at 23; Cove Invs., Inc. v. Manges, 602 S.W.2d 512, 514 (Tex. 1980).

825. Lee v. Palacios, No. 14-06-00428-CV, 2007 WL 2990277, at *1 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, pet. denied) (mem. op.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409, 488 (2006)).

826. TEX. R. CIV. P. 166a(i); Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 600 (Tex. 2004).

law."[827] The trial court is required to grant a no-evidence summary judgment if the nonmovant produces no summary judgment evidence in response to the summary judgment motion.[828] The nonmovant must present evidence raising a genuine issue of material fact supporting each element contested in the motion.[829] The same principles used to evaluate the evidence for a directed verdict[830] or for the "no-evidence" standard applied to a jury verdict are used to evaluate the evidence presented in response to a no-evidence summary judgment.[831] The nonmovant raises a genuine issue of material fact by producing "more than a scintilla of evidence" establishing the challenged elements' existence and may use both direct and circumstantial evidence in doing so.[832] More than a scintilla exists when the evidence is such that it "would enable reasonable and fair-minded people to differ in their conclusions."[833] Appellate courts "review the evidence presented . . . in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not."[834]

The same summary judgment law applies to evaluate evidence presented in response to a no-evidence summary judgment. Also, the presumption applies equally for no-evidence and traditional motions for summary judgment that evidence favorable to the nonmovant will be taken as true, every reasonable inference will be indulged in favor of the nonmovant, and any doubts will be resolved in the nonmovant's favor.[835]

827. Viasana v. Ward County, 296 S.W.3d 652, 654–55 (Tex. App.—El Paso 2009, no pet.); *see also* Roventini v. Ocular Scis., Inc., 111 S.W.3d 719, 723 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

828. Gallien v. Goose Creek Consol. Indep. Sch. Dist., No. 14-11-00938-CV, 2013 WL 1141953, at *3 (Tex. App.—Houston [14th Dist.] Mar. 19, 2013, pet. denied) (mem. op.) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. TEX. L. REV. 409, 488 (2006)); Watson v. Frost Nat'l Bank, 139 S.W.3d 118, 119 (Tex. App.—Texarkana 2004, no pet.).

829. TEX. R. CIV. P. 166a(i); KCM Fin. LLC v. Bradshaw, 457 S.W.3d 70, 79 (2015); Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 581–82 (Tex. 2006).

830. Timpte Indus., Inc. v. Gish, 286 S.W.3d 306, 310 (Tex. 2009).

831. King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750–51 (Tex. 2003); *see* Universal Servs. Co. v. Ung, 904 S.W.2d 638, 640–42 (Tex. 1995) (holding that the court of appeals erred by failing to reverse the trial court's judgment on jury verdict because there was no evidence to support it); W. Wendell Hall, O.Rey Rodriguez, Rosemarie Kanusky & Mark Emery, *Hall's Standards of Review in Texas*, 42 ST. MARY'S L.J. 2, 157–58 (2010-11) (discussing the no-evidence standard of review).

832. Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 600–01 (Tex. 2004).

833. *Id.* at 601 (quoting Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).

834. *Timpte Indus., Inc.*, 286 S.W.3d at 310 (quoting *Mack Trucks, Inc.*, 206 S.W.3d at 582); City of Keller v. Wilson, 168 S.W.3d 802, 827 (Tex. 2005).

835. Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548–49 (Tex. 1985).

The comment to Rule 166a(i) provides: "To defeat a motion made under paragraph (i), the [nonmovant] is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements."[836] "To marshal one's evidence is to arrange *all of the evidence* in the order that it will be presented at trial."[837] A party is not required to present or arrange all of its evidence in response to a summary judgment motion; its response need only point out evidence that raises a fact issue on the challenged elements.[838] Determining how much evidence is sufficient to defeat a no-evidence summary judgment may involve significant strategic decisions. However, "Rule 166a(i) explicitly provides that, in response to a no-evidence summary judgment motion, the [nonmovant] must present *some summary judgment evidence* raising a genuine issue of material fact on the element attacked, or the motion must be granted."[839] Appellate courts review a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions.[840]

The evidence presented by the nonmovant must qualify as "summary judgment evidence," which is evidence that meets the technical requirements for summary judgment proof.[841] The nonmovant's evidence in response may be deposition excerpts, affidavits, the opponent's answers to interrogatories and requests for admissions, stipulations, certified public records, authenticated documents, and/or other evidence that cases hold is proper summary judgment evidence.[842] Nonsummary judgment evidence, such as unsworn witness statements, experts' reports, or unauthenticated documents (except those produced by the opposing party), is not proper summary judgment evidence and cannot defeat a no-evidence summary judgment motion.[843]

A nonmovant may respond with a nonsuit even after a hearing on a no-evidence motion for summary judgment, so long as the trial court has not ruled on the motion for summary judgment.[844]

836. TEX. R. CIV. P. 166a cmt.—1997; *accord* Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 207 (Tex. 2002).

837. *In re* Mohawk Rubber Co., 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, no pet.).

838. Hamilton v. Wilson, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam).

839. *In re Mohawk Rubber Co.*, 982 S.W.2d at 498.

840. *Hamilton*, 249 S.W.3d at 426 (citing City of Keller v. Wilson, 168 S.W.3d 802, 822 (Tex. 2005)).

841. TEX. R. CIV. P. 166a(i).

842. *See* Llopa, Inc. v. Nagel, 956 S.W.2d 82, 86–88 (Tex. App.—San Antonio 1997, writ denied); *see supra* Part 1.II (discussing summary judgment evidence).

843. *See Llopa, Inc.*, 956 S.W.2d at 87.

844. Pace Concerts, Ltd. v. Resendez, 72 S.W.3d 700, 702 (Tex. App.—San Antonio 2002, pet. denied).

D. Inadequate Responses

Neither the trial court nor the appellate court has the duty to sift through the summary judgment record to see if there are other issues of law or fact that could have been raised by the nonmovant, but were not.[845] For example, a response that merely asserts that depositions on file and other exhibits "effectively illustrate the presence of contested material fact[s]" will not preclude summary judgment.[846] Further, a motion for summary judgment is not defeated by the presence of an immaterial fact issue,[847] nor does suspicion raise a question of fact.[848] Generally, an amended answer by itself will not suffice as a response to a motion for summary judgment.[849]

Absent a written response to a motion for summary judgment, prior pleadings raising laches and the statute of limitations are insufficient to preserve those issues for appeal.[850] An attempt to raise a genuine issue of material fact on each element of an affirmative defense for the first time on appeal is "too little, too late."[851]

845. Walton v. City of Midland, 24 S.W.3d 853, 858 (Tex. App.—El Paso 2000, no pet.), *abrogated on other grounds by In re* Estate of Swanson, 130 S.W.3d 144, 147 (Tex. App.—El Paso 2003, no pet.); Holmes v. Dall. Int'l Bank, 718 S.W.2d 59, 60 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); Wooldridge v. Groos Nat'l Bank, 603 S.W.2d 335, 344 (Tex. Civ. App.—Waco 1980, no writ); *see also* Lee v. Palacios, No. 14-06-00428-CV, 2007 WL 2990277, at *2 (Tex. App.—Houston [14th Dist.] Oct. 11, 2007, pet. denied) (mem. op.).

846. I.P. Farms v. Exxon Pipeline Co., 646 S.W.2d 544, 545 (Tex. App.—Houston [1st Dist.] 1982, no writ) (quoting the defendants' response to the motion for summary judgment).

847. Marshall v. Sackett, 907 S.W.2d 925, 936 (Tex. App.—Houston [1st Dist.] 1995, no writ); Austin v. Hale, 711 S.W.2d 64, 68 (Tex. App.—Waco 1986, no writ); Borg-Warner Acceptance Corp. v. C.I.T. Corp., 679 S.W.2d 140, 144 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

848. Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 210 (Tex. 2002).

849. Hitchcock v. Garvin, 738 S.W.2d 34, 36 (Tex. App.—Dallas 1987, no writ); Meineke Disc. Muffler Shops, Inc. v. Coldwell Banker Prop. Mgmt. Co., 635 S.W.2d 135, 137 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

850. *See* Johnson v. Levy, 725 S.W.2d 473, 476–77 (Tex. App.—Houston [1st Dist.] 1987, no writ) ("Where the non-movant fails to respond [to the movant's motion for summary judgment], the sole issue on appeal is whether the movant's summary judgment proof was sufficient as a matter of law."); Barnett v. Houston Natural Gas Co., 617 S.W.2d 305, 306 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.) (noting that when the nonmovant files no response to a motion for summary judgment, only the legal sufficiency of the grounds expressly raised by the movant's motion can be attacked on appeal); Fisher v. Capp, 597 S.W.2d 393, 396–97 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

851. Reed v. Lake Country Prop. Owners Assoc., Inc., No. 02-17-00136-CV, 2017 WL 6759146, at *3 (Tex. App.—Fort Worth Dec, 28, 2017, pet. denied) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 53 HOUS. L. REV. 773, 876 (2015)).

V. APPEALING SUMMARY JUDGMENTS

Summary judgments are frequently appealed.[852] Generally, an order granting a summary judgment is appealable; an order denying a summary judgment is not.[853] Interlocutory orders are not appealable unless explicitly made so by statute.[854] The denial of a no-evidence summary judgment under Texas Rule of Civil Procedure 166a(i), is no more reviewable by appeal or mandamus than the denial of other motions for summary judgment.[855] Thus, the general rule is that they are not appealable.[856] The exceptions are as follows: (1) when both parties file a motion for summary judgment and one is granted;[857] (2) when the denial of a summary judgment is based on official immunity;[858] (3) when the denial is of a media defendant's motion for summary judgment in a defamation case;[859] (4) when the denial is of a summary judgment motion filed by an electric utility regarding liability in a suit subject to Section 75.022 of the Texas Civil Practice and Remedies Code;[860] and (5) for a permissive appeal when the court of appeals agrees to accept a case.[861]

A. Exception: Both Parties File Motions for Summary Judgment

An exception to the rule that an order denying a summary judgment is not appealable arises when *both* parties file motions for summary judgment, and the court grants one of the motions and overrules the other.[862] When both parties file

852. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 48 HOUS. L. REV. 993, 1009 (2012) [hereinafter Liberato & Rutter, *2012 Study*]; Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 445 (2003) [hereinafter Liberato & Rutter, *2003 Study*].

853. *See* Novak v. Stevens, 596 S.W.2d 848, 849 (Tex. 1980) (explaining that the denial of a motion for summary judgment is not a final order and thus not appealable); Huffines v. Swor Sand & Gravel Co., 750 S.W.2d 38, 41 (Tex. App.—Fort Worth 1988, no writ).

854. Stary v. DeBord, 967 S.W.2d 352, 352–53 (Tex. 1998) (per curiam); William Marsh Rice Univ. v. Coleman, 291 S.W.3d 43, 45 (Tex. App.—Houston [14th Dist.] 2009, pet. dism'd); *see generally* Elizabeth Lee Thompson, *Interlocutory Appeals in Texas: A History*, 48 ST. MARY'S L.J. 65 (2016).

855. TEX. R. CIV. P. 166a cmt.—1997.

856. Hines v. Comm'n for Lawyer Discipline, 28 S.W.3d 697, 700 (Tex. App.—Corpus Christi 2000, no pet.).

857. *See infra* Part 1.V.A (discussing appeals when both parties file motions for summary judgment).

858. *See infra* Part 1.V.B (discussing appeals in sovereign immunity cases).

859. *See infra* Part 1.V.B (discussing appeals in media defamation cases).

860. *See infra* Part 1.V.B (discussing appeals in electric utility cases).

861. *See infra* Part 1.V.C (discussing permissive appeals).

862. Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex., 253 S.W.3d 184, 192 (Tex. 2007); Tobin v. Garcia, 316 S.W.2d 396, 400 (Tex. 1958) (overruling *Rogers v. Royalty Pooling Co.*, 302 S.W.2d 938 (Tex. 1957), which held only the granted motion could be appealed in this

motions for summary judgment and one is granted and the other overruled, the appellate court considers the summary judgment evidence presented by both sides, determines all questions presented, and if the appellate court determines that the trial court erred, renders the judgment the trial court should have rendered.[863] A party appealing the denial of a summary judgment, however, must properly preserve this issue on appeal by raising the failure to grant the motion in the brief.[864] On appeal, the appellate court should render judgment on the motion that should have been granted.[865] However, before a court of appeals may reverse a summary judgment for the other party, both parties must ordinarily have sought final relief in their cross-motions for summary judgment.[866]

In *Cincinnati Life Insurance Co. v. Cates*, the supreme court expanded the ability of the courts of appeals to consider denials of summary judgment motions.[867] In that case, the court directed courts of appeals to consider all summary judgment grounds the trial court rules on, including those on which it denied the summary judgment, and allowed the courts of appeals to consider grounds which were urged and preserved for review but on which the court did not rule.[868]

Even if both parties appeal cross-motions for summary judgment, if the appellate court reverses one, it does not necessarily grant the other. If neither party is entitled to summary judgment, the appellate court must remand to the trial court.[869]

On appeal, the party appealing the denial of the motion for summary judgment must properly preserve this error by raising as a point of error or issue presented the failure of the trial court to grant the appellant's motion.[870]

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scenario); *see supra* Part 1.III.C (discussing burden of proof when both parties move for summary judgment).

863. BCCA Appeal Grp., Inc. v. City of Houston, 496 S.W.3d 1, 7 (Tex. 2016); Merriman v. XTO Energy, Inc., 407 S.W. 3d 244, 248 (Tex. 2013); FDIC v. Lenk, 361 S.W.3d 602, 611 (Tex. 2012); Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London, 327 S.W.3d 118, 124 (Tex. 2010); Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005); Bradley v. State *ex rel.* White, 990 S.W.2d 245, 247 (Tex. 1999).

864. Truck Ins. Exch. v. E.H. Martin, Inc., 876 S.W.2d 200, 203 (Tex. App.—Waco 1994, writ denied) (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 35 S. TEX. L. REV. 9, 46 (1994)); Buckner Glass & Mirror Inc. v. T.A. Pritchard Co., 697 S.W.2d 712, 714–15 (Tex. App.—Corpus Christi 1985, no writ).

865. Members Mut. Ins. Co. v. Hermann Hosp., 664 S.W.2d 325, 328 (Tex. 1984); Cadle Co. v. Butler, 951 S.W.2d 901, 905 (Tex. App.—Corpus Christi 1997, no writ).

866. CU Lloyd's of Tex. v. Feldman, 977 S.W.2d 568, 569 (Tex. 1998) (per curiam).

867. Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 625–26 (Tex. 1996).

868. *Id.* at 627.

869. *See* Baywood Estates Prop. Owners Ass'n. v. Caolo, 392 S.W.3d 776, 785 (Tex. App.—Tyler 2012, no pet.); Emp'rs Reinsurance Corp. v. Gordon, 209 S.W.3d 913, 917 (Tex. App.—Texarkana 2006, no pet.).

870. Truck Ins. Exch. v. E.H. Martin, Inc., 876 S.W.2d 200, 203 (Tex. App.—Waco 1994, writ denied); *see also* Buckner Glass & Mirror Inc. v. T.A. Pritchard Co., 697 S.W.2d 712, 714 (Tex.

If the appellant complains only that the trial court erred in granting the other side's motion for summary judgment and fails to complain that the court denied its own motions, it fails to preserve error on this issue and, if the appellate court reverses, it cannot render but can only remand the entire case.[871]

The appeal should be taken from the summary judgment granted.[872] In *Adams v. Parker Square Bank*, both parties moved for summary judgment.[873] The appellant limited his appeal to the denial of his own summary judgment, rather than appealing from the granting of his opponent's summary judgment.[874] The court held that the appellant should have appealed from the order granting appellee's motion for summary judgment because an appeal does not lie solely from an order overruling a motion for summary judgment.[875]

In the absence of cross-motions for summary judgment, an appellate court may not reverse an improperly granted summary judgment and render summary judgment for the nonmoving party.[876] Cross-motions should be considered by the responding party, when appropriate, to secure on appeal a final resolution of the entire case (i.e., "reversed and rendered" rather than "reversed and remanded").[877]

B. Exceptions: Governmental Immunity; Media Defendants; Electric Utilities

Exceptions to the rule that denials of motions for summary judgment are not appealable are found in the statutes.

Governmental immunity: The Texas Civil Practice and Remedies Code authorizes the appeal of an order denying a summary judgment in immunity cases. Section 51.014(a)(5) provides:

App.—Corpus Christi 1985, no writ); Holmquist v. Occidental Life Ins. Co. of Cal., 536 S.W.2d 434, 438 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

871. Henderson v. Nitschke, 470 S.W.2d 410, 414–15 (Tex. Civ. App.—Eastland 1971, writ ref'd n.r.e.).

872. Adams v. Parker Square Bank, 610 S.W.2d 250, 250–51 (Tex. Civ. App.—Fort Worth 1980, no writ); *see infra* Part 1.V.A (discussing an exception to appealability of denial of summary judgment when both sides file motions for summary judgment).

873. *Adams*, 610 S.W.2d at 250.

874. *Id.*

875. *Id.* at 250–51.

876. Herald-Post Publ'g Co. v. Hill, 891 S.W.2d 638, 640 (Tex. 1994) (per curiam); CRA, Inc. v. Bullock, 615 S.W.2d 175, 176 (Tex. 1981) (per curiam); City of W. Tawakoni v. Williams, 742 S.W.2d 489, 495 (Tex. App.—Dallas 1987, writ denied).

877. *See* Hall v. Mockingbird AMC/Jeep, Inc., 592 S.W.2d 913, 913–14 (Tex. 1979) (per curiam); *see also* Moayedi v. Interstate 35/Chisam Rd., L.P., 438 S.W.3d 1, 2–3, 5–6, 8 (Tex. 2014) (affirming the appellate court's reversal and rendering of a cross-motion for summary judgment in a case involving the interpretation of the Texas Property Code's deficiency judgment statute).

> (a) A person may appeal from an interlocutory order of a district court, county court at law, statutory probate court, or county court that:
>
> . . .
>
> (5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.[878]

This section permits interlocutory appeals filed by individual governmental employees.[879] "Immunity" as used in this section refers to "official immunity."[880] Official immunity is an affirmative defense rendering individual officials immune from liability.[881] In such an interlocutory appeal, the appellate court will only consider those portions of the defendant's motion for summary judgment that relate to "official or quasi-judicial" immunity.[882] If a governmental entity contends only that it is not liable because of *sovereign* immunity, no appeal may be taken from the denial of a summary judgment.[883] A governmental unit's motion for summary judgment challenging a trial court's subject matter jurisdiction is appealable under Section 51.014(a)(8) even though the section refers only to appeals from an order granting or denying a "plea" to the jurisdiction.[884] The supreme court may also exercise its jurisdiction to consider whether the court of appeals had interlocutory jurisdiction.[885]

Media Defendants: The Texas Civil Practice and Remedies Code also allows an appeal from a denial of a summary judgment based on a claim against the media arising under the free speech or free press clauses of the U.S. or Texas constitutions.[886] "[S]ummary judgment is reviewed in public figure or public official defamation cases under the same standard as in other

878. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (West Supp. 2017). *See* McIntyre v. El Paso Indep. Sch. Dist., 499 S.W.3d 820, 822 (Tex. 2016); William Marsh Rice Univ. v. Refaey, 459 S.W.3d 590, 591 (Tex. 2015).

879. *Id.*; *see, e.g.*, Stinson v. Fontenot, 435 S.W.3d 793, 793–94 (Tex. 2014) (per curiam); Franka v. Velasquez, 332 S.W.3d 367, 371 n.9 (Tex. 2011).

880. City of Houston v. Kilburn, 849 S.W.2d 810, 812 n.1 (Tex. 1993) (per curiam); Baylor Coll. of Med. v. Hernandez, 208 S.W.3d 4, 10 (Tex. App.—Houston [14th Dist.] 2006, pet. denied).

881. Kassen v. Hatley, 887 S.W.2d 4, 8 (Tex. 1994).

882. Aldridge v. De Los Santos, 878 S.W.2d 288, 294 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.).

883. *See Kilburn*, 849 S.W.2d at 811–12 (discussing interlocutory appeals from an order denying a motion for summary judgment based on the assertion of *qualified* immunity).

884. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(8) (West 2017); Thomas v. Long, 207 S.W.3d 334, 339 (Tex. 2006).

885. City of Houston v. Estate of Jones, 388 S.W.3d 663, 664 n.1 (Tex. 2012) (per curiam); *see* Klein v. Hernandez, 315 S.W.3d 1, 4 (Tex. 2010).

886. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (West 2017); *see* Freedom Commc'ns, Inc. v. Coronado, 372 S.W.3d 621, 623 (Tex. 2012) (per curiam); Huckabee v. Time Warner Entm't Co., 19 S.W.3d 413, 419–20 (Tex. 2000); Rogers v. Cassidy, 946 S.W.2d 439, 443 (Tex. App.—Corpus Christi 1997, no writ).

cases."[887] This rule does not confer jurisdiction on the appellate court to consider a libel plaintiff's cross-point of error.[888] An appeal in a media defendant summary judgment case does not necessarily stay the trial court proceedings.[889]

Despite the fact that it is an appeal from an interlocutory order, which is usually final at the court of appeals, the legislature has given the supreme court a specific grant of jurisdiction over an order that:

> denies a motion for summary judgment that is based in whole or in part upon a claim against or defense by a member of the electronic or print media, acting in such capacity, or a person whose communication appears in or is published by the electronic or print media, arising under the free speech or free press clause of the First Amendment to the United States Constitution, or Article I, Section 8, of the Texas Constitution, or Chapter 73.[890]

Electric Utilities: Another statute that authorizes an appeal of a denial of a summary judgment is found in Texas Civil Practice and Remedies Code. It permits an electric utility to appeal a denial of a motion for summary judgment in a suit concerning the utility's potential liability for personal injuries sustained on land owned, occupied, or leased by the utility.[891] This narrow avenue of appeal was implemented following the 2013 Texas Legislative Session.[892]

C. Exception: Permissive Appeal

An appellate court may accept jurisdiction over an interlocutory order if both the trial court and the appellate court agree.[893] These appeals are referred to as "permissive" appeals.[894] Under the previous version of the statute, the parties had to agree to the interlocutory appeal. The new version no longer requires such

887. Cox Tex. Newspapers, L.P. v. Penick, 219 S.W.3d 425, 433 (Tex. App.—Austin 2007, pet. denied) (citing *Huckabee*, 19 S.W.3d at 423).

888. Evans v. Dolcefino, 986 S.W.2d 69, 75 (Tex. App.—Houston [1st Dist.] 1999, no pet.), *disapproved of on other grounds by* Turner v. KTRK Television, Inc., 38 S.W.3d 103 (Tex. 2000).

889. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(b) (West 2017) (providing for stays in interlocutory appeals under other exceptions, but not defamation).

890. *Id.* § 51.014(a)(6); McIntyre v. El Paso Indep. Sch. Dist., 499 S.W.3d 820 (Tex. 2016)

891. *Id.* § 51.014(a)(12).

892. *Id.*

893. *Id.* § 51.014(d), (f); *see* TEX. R. CIV. P. 168 (requiring the district to state its "[p]ermission . . . in the order to be appealed"); TEX. R. APP. P. 28.3(a) ("When a trial court has permitted an appeal from an interlocutory order that would not otherwise be appealable, a party seeking to appeal must petition the court of appeals for permission to appeal.").

894. Lynne Liberato & William Feldman, *How To Seek Permissive Interlocutory Appeals in State Court*, APP. ADVOC. (STATE BAR APPELLATE SECTION REPORT), Vol. 26, No. 2 (Winter 2014).

agreement by the nonmovant.[895] To be entitled to a permissive appeal under Section 51.014(d), a party must establish that: "(1) the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation."[896]

This procedure may be useful in a summary judgment context when the parties seek resolution of a determinative issue in a case.[897] For example, in *Jose Carreras, M.D., P.A. v. Marroquin*, the supreme court considered an issue of statutory construction as a result of a permissive appeal from the denial of a motion for summary judgment.[898] The court determined that a plaintiff seeking to toll the statute of limitations in a health care liability case must provide not only pre-suit notice but also the required medical authorization form.[899]

D. Finality of Judgment

As a general rule, an appeal may be prosecuted only from a final judgment.[900] Generally, to be final, a judgment must dispose of all parties and

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895. *See also, e.g.*, Bank of N.Y. Mellon v. Guzman, 390 S.W.3d 593, 596 (Tex. App.—Dallas 2012) ("Pursuant to former section 51.014(d) of the civil practice and remedies code, a district court may order an interlocutory appeal from an otherwise unappealable order in a civil action if the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion, an immediate appeal from the order may materially advance the ultimate termination of the litigation, and the parties agree to the order."). *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (West 2008) ("A district court . . . may issue a written order for interlocutory appeal in a civil action not otherwise appealable under this section if: (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion; (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation; and (3) the parties agree to the order."), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (West 2013) (omitting the requirement that "the parties agree to the order").

896. TEX. CIV. PRAC. & REM. CODE Ann. § 51.014(d) (West 2017); TEX. R. APP. P. 28.3(e)(4); *see also* TEX. R. CIV. P. 168 (stating that district court's permission to appeal must be included in the order and "must identify the controlling question of law as to which there is a substantial ground for difference of opinion, and must state why an immediate appeal may materially advance the ultimate termination of the litigation"); Molinet v. Kimbrell, 356 S.W.3d 407, 409 (Tex. 2011).

897. *See* Diamond Prods. Int'l, Inc. v. Handsel, 142 S.W.3d 491, 494 (Tex. App.—Houston [14th Dist.] 2004, no pet.) ("[P]ermissive appeals should be reserved for determination of controlling legal issues necessary to the resolution of the case."). *See generally* Lynne Liberato & Will Feldman, *How to Seek Permissive Interlocutory Appeals in State Court*, 26 APP. ADVOC., 287 (2013); Warren W. Harris & Lynne Liberato, *State Court Jurisdiction Expanded to Allow for Permissive Appeals*, 65 TEX. B.J. 31, 31 (2002).

898. Carreras v. Marroquin, 339 S.W.3d 68, 69–71 (Tex. 2011); *see also* TIC Energy & Chem., Inc. v. Martin, 498 S.W.3d 68 (Tex. 2016).

899. *Carreras*, 399 S.W.3d at 74.

900. De Los Santos v. Occidental Chem. Corp., 925 S.W.2d 62, 64 (Tex. App.—Corpus Christi), *rev'd on other grounds*, 933 S.W.2d 493 (Tex. 1996) (per curiam); Tingley v. Nw. Nat'l Ins. Co. of Milwaukee, Wis., 712 S.W.2d 649, 650 (Tex. App.—Austin 1986, no writ) (per curiam). *But see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(1)–(12) (providing twelve exceptions to

issues in the case.[901] In *North East Independent School District v. Aldridge*, the Texas Supreme Court articulated the following presumption of finality rule:

> When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, . . . it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.[902]

The rule applicable to summary judgments is different. There is no presumption of finality rule, as discussed in *Aldridge*, that applies to summary judgment cases.[903] If a summary judgment does not dispose of all parties and issues in the pending suit, it is interlocutory and not appealable unless the trial court orders a severance of that phase of the case.[904] In the absence of an order of severance, a party against whom an interlocutory summary judgment has been rendered does not have a right of appeal until the partial judgment is merged into a final judgment, disposing of the whole case.[905] On appeal, a partial summary judgment incorporated into a final judgment is reviewed under the applicable summary judgment standard of review.[906]

In *Lehmann v. Har-Con Corp.*, the Texas Supreme Court modified the procedure for determining whether a judgment is final.[907] That earlier procedure, which had caused a great deal of confusion, had been set out in *Mafrige v.*

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the final judgment rule); *supra* Part 1.V.A–C (discussing exceptions to general rule that appeals may only be taken following final judgment).

901. Cherokee Water Co. v. Ross, 698 S.W.2d 363, 365 (Tex. 1985) (per curiam); N.E. Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966); *De Los Santos*, 925 S.W.2d at 64; *cf.* John v. Marshall Health Servs., Inc., 58 S.W.3d 738, 740 (Tex. 2001) (per curiam) (holding presumption that a judgment rendered after a conventional trial is final was not rebutted because the plaintiff tried his case only against certain defendants, expecting settlement with the others, which did not come to fruition).

902. *N.E. Indep. Sch. Dist.*, 400 S.W.2d at 897–98.

903. Houston Health Clubs, Inc. v. First Court of Appeals, 722 S.W.2d 692, 693 (Tex. 1986) (per curiam).

904. *See* Wheeler v. Yettie Kersting Mem'l Hosp., 761 S.W.2d 785, 787 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Texas Rule of Civil Procedure 41 provides that "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. "A claim may be properly severed if it is part of a controversy which involves more than one cause of action, and the trial judge is given broad discretion in the manner of severance . . . ." Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982); *see, e.g.*, Wausau Underwriters Ins. Co. v. Wedel, 557 S.W.3d 554, 555 (Tex. 2018).

905. *See* Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 510 (Tex. 1995); Mafrige v. Ross, 866 S.W.2d 590, 591 (Tex. 1993), *overruled on other grounds by* Lehmann v. Har-Con Corp., 39 S.W.3d 191 (Tex. 2001); *see also supra* Part 1.I.K (discussing partial summary judgments).

906. *See, e.g.*, Pantaze v. Yudin, 229 S.W.3d 548, 550–51 (Tex. App.—Dallas 2007, pet. dism'd w.o.j.). *See also* Part 1.V.E. (Appealing a Summary Judgment/Finality of Judgment).

907. *Lehmann*, 39 S.W.3d at 192–93.

Ross.[908] Under *Mafrige*, the "Mother Hubbard" provision in a judgment order, stating "all relief not expressly granted [herein] is denied," was sufficient to make an otherwise partial summary judgment final and appealable.[909] If the judgment granted more relief than requested, it was reversed and remanded but not dismissed.[910] Thus, if the summary judgment on claims raised in the motion was proper, the court of appeals was to affirm the judgment of the trial court in part and reverse in part because only a partial summary judgment should have been rendered.[911] The court of appeals was then to remand the case to the trial court for further proceedings.[912] This process caused considerable confusion and sometimes led to unjust results.

In *Lehmann*, the supreme court overruled *Mafrige* to the extent it states that "Mother Hubbard" clauses indicate "that a judgment rendered without a conventional trial is final for purposes of appeal."[913] The court of appeals looks to the record in the case to determine whether an order disposes of all pending claims and parties.[914] "When a trial court grants more relief than requested and, therefore, makes an otherwise partial summary judgment final, that judgment, although erroneous, is final and appealable."[915] In *Lehman*, the Texas Supreme Court also suggested the following language in a judgment to clearly show the trial court's intention that the judgment be final and appealable: "This judgment finally disposes of all parties and all claims and is appealable."[916] Nonetheless, there is no magic language required to determine whether a judgment is final. Instead, finality is determined from the language and record.[917] The court also noted that an order "must be read in light of the importance of preserving a party's right to appeal."[918] It expressly provided that the appellate court could abate the appeal to permit clarification by the trial court if it is uncertain about the

908. *Mafrige*, 866 S.W.2d at 590–92.
909. *Id.* at 590 n.1, 592.
910. *Id.* at 592.
911. *See id.*
912. *Id.*
913. Lehmann v. Har-Con Corp., 39 S.W.3d 191, 203–04 (Tex. 2001); *see also* Braeswood Harbor Partners v. Harris Cty. Appraisal Dist., 69 S.W.3d 251, 252 (Tex. App.—Houston [1st Dist.] 2002, no pet.).
914. *Lehmann*, 39 S.W.3d at 205–06; *see also* Nash v. Harris County, 63 S.W.3d 415, 415–16 (Tex. 2001) (per curiam) (examining complaint, docket sheet, and orders to determine that summary judgment had been granted to individual defendants but not institutional defendants).
915. G & H Towing Co. v. Magee, 347 S.W.3d 293, 298 (Tex. 2011) (per curiam).
916. *Lehmann*, 39 S.W.3d at 206.
917. *In re* Burlington Coat Factory Warehouse of McAllen, Inc., 167 S.W.3d 827, 830–31 (Tex. 2005); Waite v. Woodard, Hall & Primm, P.C., 137 S.W.3d 277, 279 (Tex. App.—Houston [1st Dist.] 2004, no pet.) ("A judgment that actually disposes of all parties and all claims is final, regardless of its language.").
918. *Lehmann*, 39 S.W.3d at 206.

intent of the order.[919] This ruling is consistent with the supreme court's philosophy that form should not be elevated over substance.

Relying on *Lehmann*, the supreme court remanded a case in which a judgment had not disposed of a claim for attorney's fees, but had awarded costs.[920] The court held that the summary judgment was not final because a party could move for a partial summary judgment and there is no presumption that a motion for summary judgment addresses all of the movant's claims.[921] It also noted that awarding costs did not make a judgment final.[922]

Mother Hubbard clauses do not implicitly dispose of claims that have not been expressly mentioned in the summary judgment motion. In *Farm Bureau County Mutual Insurance Co. v. Rogers*,[923] the supreme court refused to presume that the trial court considered the issue of attorney's fees when the movant had failed to request an award of attorney's fees in its motion or to attach evidence supporting its claim for fees. The court held that there must be evidence in the record to prove the trial court's intent to dispose of any remaining issues when it includes a Mother Hubbard clause in an order denying summary judgment.[924] Accordingly, the judgment did not dispose of all parties and claims and was not final.[925]

A defendant (or plaintiff on an affirmative defense) is not entitled to summary judgment on the entire case unless the defendant files a summary judgment that challenges the evidentiary support for every theory of liability alleged.[926] Thus, "the motion for summary judgment . . . must be analyzed in light of the pleadings to ensure that the motion effectively defeats every cause of action raised in the petition."[927] The summary judgment order, however, need not itemize each element of damages pleaded nor must it break down that ruling for each element of duty, breach, and causation.[928] To complain on appeal about the failure of the motion for summary judgment to address all causes of action alleged, the nonmovant appellant should specifically assign that failure as error.[929] The fact that an unserved defendant is not disposed of by the order granting summary judgment does not mean that the order is interlocutory and not appealable.[930] If an examination of the record

919. *Id.*
920. McNally v. Guevara, 52 S.W.3d 195, 196 (Tex. 2001) (per curiam).
921. *Id.*; *see Lehmann*, 39 S.W.3d at 203–05.
922. *McNally*, 52 S.W.3d at 196.
923. 455 S.W.3d 161, 163–65 (Tex. 2015).
924. *Id*. at 164.
925. *Id.*
926. *See* Yancy v. City of Tyler, 836 S.W.2d 337, 341 (Tex. App.—Tyler 1992, writ denied).
927. *Id.*
928. Ford v. Exxon Mobil Chem. Co., 235 S.W.3d 615, 617 (Tex. 2007) (per curiam).
929. Uribe v. Houston Gen. Ins. Co., 849 S.W.2d 447, 450 n.3 (Tex. App.—San Antonio 1993, no writ).
930. M.O. Dental Lab v. Rape, 139 S.W.3d 671, 674–75 (Tex. 2004) (per curiam).

establishes that the plaintiff did not expect to serve the unserved defendant and all parties appear to have treated the order as final, then the summary judgment is final for purposes of appeal.[931] The failure of a party to file a cross-motion for summary judgment does not preclude entry of a final judgment.[932]

Determining whether a summary judgment is final may especially be a problem with multi-party litigation.[933] A summary judgment granted for one defendant is final even though it does not specifically incorporate a previous partial summary judgment granted in favor of the only other defendant.[934] Upon nonsuit of any remaining claims, an interlocutory summary judgment order instantly becomes final and appealable.[935]

Additionally, failure to dispose of or sever a counterclaim results in an interlocutory partial summary judgment, and thus, an appeal from such judgment is not proper.[936] An order granting summary judgment for one claim, but not referring to issues presented in a counterclaim, is an interlocutory judgment.[937] By assuming jurisdiction over a summary judgment that fails to dispose of a counterclaim, the court of appeals commits fundamental error.[938] The supreme court will notice and correct such error even though neither party asserts it.[939] However, relying on *Lehmann*, the Fort Worth Court of Appeals determined that the trial court implicitly denied the appellant's breach of contract counterclaim, which directly conflicted with the trial court's declaratory judgment ruling that the appellees had not breached the contract.[940]

931. *Id.* at 674.

932. Farm Bureau Cty. Mut. Ins. Co. v. Rogers, 455 S.W.3d 161 (Tex. 2015).

933. *See, e.g.*, Schlipf v. Exxon Corp., 644 S.W.2d 453, 454–55 (Tex. 1982) (per curiam) (affirming properly granted summary judgment in a suit involving multiple plaintiffs, defendants, and intervenors).

934. *See* Newco Drilling Co. v. Weyand, 960 S.W.2d 654, 656 (Tex. 1998) (per curiam) (holding that a party with a prior partial summary judgment has a right to appeal that summary judgment when the remainder of the case is disposed of); Ramones v. Bratteng, 768 S.W.2d 343, 344 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

935. Farmer v. Ben E. Keith Co., 907 S.W.2d 495, 496 (Tex. 1995) (per curiam).

936. Tingley v. Nw. Nat'l Ins. Co., 712 S.W.2d 649, 650 (Tex. App.—Austin 1986, no writ) (per curiam).

937. Chase Manhattan Bank, N.A. v. Lindsay, 787 S.W.2d 51, 53 (Tex. 1990) (per curiam).

938. N.Y. Underwriters Ins. Co. v. Sanchez, 799 S.W.2d 677, 679 (Tex. 1990) (per curiam).

939. *Id.*

940. Karen Corp. v. Burlington N. & Santa Fe Ry., 107 S.W.3d 118, 125 (Tex. App.—Fort Worth 2003, pet. denied).

The filing of a cross-action does not, in and of itself, preclude the trial court from granting a summary judgment on all or part of another party's case.[941] A severance would be appropriate in such an instance.[942]

While a severance frequently will be the appropriate method to convert an interlocutory summary judgment into a final appealable summary judgment, severance may not always be proper.

> For a severance to be proper, more than one cause of action must be involved in the controversy, the severed cause must be one that can be asserted independently, and the severed action must not be so interwoven with the remaining action that they involve identical facts and issues or, in certain instances, relate to the same subject matter.[943]

For appeals from probate orders, the supreme court has set out a specific test for finality in probate appeals:

> If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory. For appellate purposes, it may be made final by a severance order, if it meets the severance criteria . . . . In setting this standard, we are mindful of our policy to avoid constructions that defeat bona fide attempts to appeal.[944]

E. Appellate Standard of Review

The propriety of a summary judgment is a question of law.[945] Thus appellate review is de novo.[946] In an appeal from a trial on the merits, the standard

941. C.S.R., Inc. v. Mobile Crane, Inc., 671 S.W.2d 638, 643 (Tex. App.—Corpus Christi 1984, no writ).

942. *See* Waite v. BancTexas-Houston, N.A., 792 S.W.2d 538, 542 (Tex. App.—Houston [1st Dist.] 1990, no writ) (affirming severance of cross-claims after summary judgment granted for plaintiff); *C.S.R., Inc.*, 671 S.W.2d at 643–44 (same).

943. Weaver v. Jock, 717 S.W.2d 654, 662 (Tex. App.—Waco 1986, writ ref'd n.r.e.); *accord* Nicor Exploration Co. v. Fla. Gas Transmission Co., 911 S.W.2d 479, 481–82 (Tex. App.—Corpus Christi 1995, writ denied); S.O.C. Homeowners Ass'n v. City of Sachse, 741 S.W.2d 542, 544 (Tex. App.—Dallas 1987, no writ).

944. Crowson v. Wakeham, 897 S.W.2d 779, 783 (Tex. 1995).

945. *Id.*

946. Sommers v. Sandcastle Homes, 521 S.W.3d 749, 754 (Tex. 2017); Nall v. Plunkett, 404 S.W.3d 552, 555 (Tex. 2013) (per curiam); Buck v. Palmer, 381 S.W.3d 525, 527 (Tex. 2012) (per curiam); Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 661 (Tex. 2005); Provident Life & Accident Ins. Co. v. Knott, 128 S.W.3d 211, 215 (Tex. 2003); Natividad v. Alexsis, Inc., 875 S.W.2d 695, 699 (Tex. 1994).

of review and presumptions run in favor of the judgment.[947] In contrast to an appeal from a summary judgment, the standard of review and presumptions run against the judgment.[948]

The supreme court set out the rules to be followed by an appellate court in reviewing a summary judgment record in often-quoted *Nixon v. Mr. Property Management Co*.[949] The court enumerated the rule as follows:

> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.
>
> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
>
> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.[950]

A traditional summary judgment is properly granted only when a movant establishes that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law.[951] Once the movant has established a right to summary judgment, the nonmovant has the burden to respond to the motion and present to the trial court any issues that would preclude summary judgment.[952]

The Texas Supreme Court's decision in *Gibbs v. General Motors Corp.* sets out the standard of appellate review for traditional summary judgments.[953] In *Gibbs*, the supreme court stated:

> [T]he question on appeal, as well as in the trial court, is *not* whether the summary judgment proof *raises fact issues* with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary judgment proof *establishes as a matter of law*

947. *See* Tex. Dep't of Pub. Safety v. Martin, 882 S.W.2d 476, 482–83 (Tex. App.—Beaumont 1994, no writ).

948. *See* Borrego v. City of El Paso, 964 S.W.2d 954, 956 (Tex. App.—El Paso 1998, pet. denied) ("Unlike other final judgments reviewed on appeal, we do not review the summary judgment evidence in the light most favorable to the judgment of the trial court.").

949. Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548–49 (Tex. 1985).

950. *Id.* (citing Montgomery v. Kennedy, 669 S.W.2d 309, 310–11 (Tex. 1984)); *see also* 20801, Inc. v. Parker, 249 S.W.3d 392, 399 (Tex. 2008); Binur v. Jacobo, 135 S.W.3d 646, 657 (Tex. 2004) (accepting evidence favorable to nonmovant as true).

951. TEX. R. CIV. P. 166a(c). *See generally supra* Part 1.I.A.2.

952. TEX. R. CIV. P. 166A(C); s*ee* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678–79 (Tex. 1979).

953. Gibbs v. Gen. Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970).

> *that there is no genuine issue of fact* as to one or more of the essential elements of the plaintiff's cause of action.[954]

When reviewing a no-evidence summary judgment, the courts generally apply the same legal sufficiency standard applied in reviewing a directed verdict.[955] A no-evidence summary judgment requires the nonmoving party to present evidence raising a genuine issue of material fact supporting each element contested in the motion.[956] When reviewing a no-evidence summary judgment, appellate courts "review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not."[957]

Thus, review of a summary judgment under either a traditional standard or no-evidence standard requires that the evidence presented by both the motion and the response be viewed in the light most favorable to the party against whom the motion was rendered, crediting evidence favorable to that party if reasonable jurors could and disregarding all contrary evidence and inferences unless reasonable jurors could not.[958] Since the supreme court issued *City of Keller v. Wilson*,[959] courts rely on *City of Keller*'s "reasonable jury" standard and a "scintilla of evidence" standard.[960] Less than a scintilla of evidence exists "[w]hen the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence . . . and, in legal effect, [it] is no evidence."[961] More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions" concerning existence of the vital fact.[962] When a party moves for summary judgment on both a no-evidence and a traditional motion for summary judgment, the

954. *Id.*; *see also* Phan Son Van v. Peña, 990 S.W.2d 751, 753 (Tex. 1999) (noting that once a movant proves it is entitled to summary judgment, the burden shifts to the nonmovant to present evidence that raises a fact issue).

955. Painter v. Amerimex Drilling I, Ltd., 561 S.W.3d 125 (Tex. 2018); Mack Trucks, Inc. v. Tamez, 206 S.W.3d 572, 581–82 (Tex. 2006).

956. TEX. R. CIV. P. 166A(I); Timpte Indus., Inc. v. Gish, 286 S.W.3d 306, 310 (Tex. 2009).

957. *Timpte Indus., Inc.*, 286 S.W.3d at 310 (quoting *Mack Trucks, Inc.*, 206 S.W.3d at 582); *see also supra* Part 1.III.B.1.

958. *Timpte Indus., Inc.*, 286 S.W.3d at 310; Wal-Mart Stores, Inc. v. Rodriguez, 92 S.W.3d 502, 506 (Tex. 2002). *See generally supra* Part 1.I.A.2–3.

959. City of Keller v. Wilson, 168 S.W.3d 802 (Tex. 2005).

960. *See, e.g.*, Buck v. Palmer, 381 S.W.3d 525, 527 (Tex. 2012) (per curiam); Rivers v. Charlie Thomas Ford, Ltd., 289 S.W.3d. 353, 358 (Tex. App.—Houston [14th Dist.] 2009, no pet.).

961. Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 601 (Tex. 2004) (first alteration in original) (quoting Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983)).

962. *Id.* (quoting Merrell Dow Pharm., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).

appellate courts first review the judgment under no-evidence standards.[963] If the appellant has failed to produce more than a scintilla of evidence under no-evidence standards, the court has no need to address whether the appellee's summary judgment proof satisfied the burden under traditional summary judgment standards.[964] In other words, if the nonmovant has not satisfied its burden in response to a no-evidence motion for summary judgment, there is no need for the appellate court to analyze whether the movant satisfied its burden under the traditional motion.[965]

For those occasions when a summary judgment denial is appealable, the standard of review is the same.[966] The appellate court will not consider evidence that favors the movant's position unless it is uncontroverted.[967]

Declaratory judgments rendered by summary judgment are reviewed under the same standards as those that govern summary judgments generally.[968] Thus, a declaratory judgment granted on a traditional motion for summary judgment is reviewed de novo.[969]

Issues of statutory construction are reviewed de novo.[970] The court's objective is to give effect to the legislature's intent, and it does so by applying the statutes' words according to their plain and common meaning unless a contrary intention is apparent from the statutes' context.[971]

The standard of review for whether there has been an adequate time for discovery is abuse of discretion.[972] Rulings concerning the admission or exclusion of summary judgment evidence are also reviewed under an

963. Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 45 (Tex. 2017); Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 600 (Tex. 2004). Courts do not always follow this order. For example, in *D.R. Horton-Texas, Ltd. v. Savannah Properties*, the court reviewed a traditional motion for summary judgment first because the movant's release affirmative defense was dispositive. 416 S.W.3d 217, 225 n.7 (Tex. App.—Fort Worth 2013, no pet.).

964. *D.R. Horton-Tex., Ltd.*, 416 S.W.3d at 225 n.7; All Am. Tel., Inc. v. USLD Commc'ns, Inc., 291 S.W.3d 518, 526 (Tex. App.—Fort Worth 2009, pet. denied).

965. Gonzalez v. Ramirez, 463 S.W.3d 499, 502 n.7 (2015); Merriman v. XTO Energy, Inc., 407 S.W. 3d 244, 248 (Tex. 2013).

966. Ervin v. James, 874 S.W.2d 713, 715 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

967. Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965); Corp. Leasing Int'l, Inc. v. Groves, 925 S.W.2d 734, 736 (Tex. App.—Fort Worth 1996, writ denied).

968. Baywood Estates Prop. Owners Ass'n v. Caolo, 392 S.W.3d 776, 780 (Tex. App.—Tyler 2012, no pet.); Hourani v. Katzen, 305 S.W.3d 239, 248 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

969. *In re* Marriage of I.C. & Q.C., 551 S.W.3d 119, 121–22 (Tex. 2018); Wausau Underwriters Ins. Co. v. Wedel, 557 S.W.3d 554, 557 (Tex. 2018) (citing Kachina Pipeline Co. v. Lillis, 471 S.W.3d 445, 449 (Tex. 2015)).

970. Sommers v. Sandcastle Homes, 521 S.W.3d 749, 754 (Tex. 2017); Loaisiga v. Cerda, 379 S.W.3d 248, 254–55 (Tex. 2012).

971. Molinet v. Kimbrell, 356 S.W.3d 407, 411 (Tex. 2011).

972. Specialty Retailers, Inc. v. Fuqua, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see supra* Part 1.I.C (discussing time for filing).

abuse of discretion standard.[973] The decision to grant sanctions is a matter of discretion.[974]

F. Appellate Record

The appellate court may consider only the evidence that is on file before the trial court at the time of the hearing or, with permission of the court, is filed after the hearing but before judgment.[975] When the summary judgment record is incomplete, any omitted documents are presumed to support the trial court's judgment.[976] "Although [the movant] bears the burden to prove its summary judgment as a matter of law, on appeal [the nonmovant] bears the burden to bring forward the record of the summary judgment evidence to provide appellate courts with a basis to review [its] claim of harmful error."[977] Even though referenced in parties' briefs, the court may not consider in an appeal from a summary judgment a witness's testimony at the later bench trial, any summary judgment evidence that was struck by the trial court, or any late summary judgment evidence for which leave to file was denied.[978] Neither can the court consider documents attached to briefs that are not part of the summary judgment record.[979]

In *DeSantis v. Wackenhut Corp.*, the only proof offered by the movant was an affidavit that was not included in the appellate record.[980] The court upheld the summary judgment for the movant because the burden was on the nonmovant challenging the summary judgment to bring forward the record from the summary judgment proceeding in order to prove harmful error.[981] In *DeBell v. Texas General Realty, Inc*., it was clear that the trial court considered at least one deposition that was not brought forward on appeal.[982]

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973. *See* K-Mart Corp. v. Honeycutt, 24 S.W.3d 357, 360 (Tex. 2000) (per curiam).

974. Chapman v. Hootman, 999 S.W.2d 118, 124 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

975. TEX. R. CIV. P. 166a(c); Young v. Gumfory, 322 S.W.3d 731, 738 (Tex. App.—Dallas 2010, no pet.); Wilson v. Thomason Funeral Home, Inc., No. 03-02-00774-CV, 2003 WL 21706065, at *5 n.3 (Tex. App.—Austin July 24, 2003, no pet.) (mem. op.) (quoting Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, 82 (2002)).

976. DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 689 (Tex. 1990); Tate v. E.I. Du Pont de Nemours & Co., 954 S.W.2d 872, 874 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

977. Enter. Leasing Co. of Houston v. Barrios, 156 S.W.3d 547, 549 (Tex. 2004) (per curiam).

978. U.S. Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 215 (Tex. App.—San Antonio 2012, pet. denied).

979. K-Six Television, Inc. v. Santiago, 75 S.W.3d 91, 96–97 (Tex. App.—San Antonio 2002, no pet.).

980. *DeSantis*, 793 S.W.2d at 689.

981. *Id.*

982. DeBell v. Tex. Gen. Realty, Inc., 609 S.W.2d 892, 893 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

The appellate court presumed that the missing deposition would have supported the summary judgment granted by the trial court.[983]

The fact that evidence is not included in a clerk's record or reporter's record does not mean it was not "on file" with the trial court. "An item may be on file with the trial court yet 'omitted' from the record and thus 'supplemented' to the record."[984] If a party discovers something missing from the appellate record that had been filed in the trial court, courts of appeals liberally grant motions to supplement the record.[985]

G. Appellate Briefs

The Texas Rules of Appellate Procedure allow an appellant the option of including points of error or questions presented.[986] For appellants choosing points of error, the supreme court has approved the following single, broad point of error on appeal: "The trial court erred in granting the motion for summary judgment."[987] This wording will allow argument concerning all the possible grounds upon which summary judgment should have been denied.[988] Nonetheless, the appellant must attack each basis on which the summary judgment could have been granted.[989] If it does not make a specific challenge to a ground, whether proper or improper, the summary judgment concerning that ground will

983. *Id.*; *see also* Ingram v. Fred Oakley Chrysler-Dodge, 663 S.W.2d 561, 561–62 (Tex. App.—El Paso 1983, no writ); Castillo v. Sears, Roebuck & Co., 663 S.W.2d 60, 63 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

984. Lance v. Robinson, 543 S.W.3d 723, 733 (Tex. 2018)

985. *See* TEX. R. APP. P. 34.5(c).

986. TEX. R. APP. P. 38.1(f).

987. Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970) (capitalization omitted); *see also* Plexchem Int'l, Inc. v. Harris Cty. Appraisal Dist., 922 S.W.2d 930, 930–31 (Tex. 1996) (per curiam); Cassingham v. Lutheran Sunburst Health Serv., 748 S.W.2d 589, 590 (Tex. App.—San Antonio 1988, no writ) (approving general assignment of error by appellant to allow argument of all possible grounds). *But see* A.C. Collins Ford, Inc. v. Ford Motor Co., 807 S.W.2d 755, 760 (Tex. App.—El Paso 1990, writ denied) (criticizing *Malooly Bros.*). Other, more specific points may be used, but the judgment must be affirmed if there is another possible ground on which the judgment could have been entered. Dubow v. Dragon, 746 S.W.2d 857, 859 (Tex. App.—Dallas 1988, no writ).

988. *Malooly Bros., Inc.*, 461 S.W.2d at 121. *But see* Rodriguez v. Morgan, 584 S.W.2d 558, 558–59 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (limiting appellant's point of error to one ground for granting summary judgment, despite general point of error against summary judgment). Given the *Rodriguez* court's discussion of the lack of briefing on other grounds, this case demonstrates the need to adequately brief each issue raised by the summary judgment, rather than the requirement of separate points of error. *See id.* at 559.

989. Nabors Corporate Servs., Inc. v. Northfield Ins. Co., 132 S.W.3d 90, 95 (Tex. App.—Houston [14th Dist.] 2004, no pet.).

be affirmed.[990] Similarly, if the appellant fails to negate each ground on which the judgment may have been rendered, the appellate court must uphold the summary judgment.[991] When complaining about an evidentiary ruling, an appellant should not only show error, but also that the judgment turns on the particular evidence admitted or excluded.[992]

The appellee in a summary judgment case is in a very different posture on appeal than an appellee in a case that was tried on its merits. Summary judgment review is de novo.[993] Because the appellate court will be reviewing the summary judgment with all presumptions in favor of the appellant, it is not enough for the appellee to rest on the decision of the trial court.[994] An appellee in a summary judgment appeal must thoroughly and carefully brief the case.[995] The appellee should not simply refute the appellant's arguments, but should aggressively present to the appellate court the express reasons why the trial court was correct in granting summary judgment.[996]

Issues not expressly presented to the trial court may not be considered at the appellate level, either as grounds for reversal or as other grounds in support of a summary judgment.[997] If the motion fails to address a claim, the movant is not entitled to summary judgment on that claim and judgment will be reversed and remanded to the trial court if it is based on that claim.[998] In *Combs v. Fantastic Homes, Inc.*, the court defined "issue" within the context of Rule 166a as follows:

> [A] summary judgment cannot be attacked on appeal on a question not presented to the trial court, either as a specific ground stated in the

990. Leffler v. J.P. Morgan Chase Bank, N.A., 290 S.W.3d 384, 386 (Tex. App.—El Paso 2009, no pet.); Broesche v. Jacobson, 218 S.W.3d 267, 274 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); Stewart v. Sanmina Tex. L.P., 156 S.W.3d 198, 206 (Tex. App.—Dallas 2005, no pet.).

991. *Leffler*, 290 S.W.3d at 386.

992. Main v. Royall, 348 S.W.3d 381, 388 (Tex. App.—Dallas 2011, no pet.). To reverse a judgment on the ground of improperly admitted or excluded evidence, a party must show that the error probably caused the rendition of an improper judgment. TEX. R. APP. P. 44.1(a)(1).

993. *See* Provident Life & Accident Ins. Co. v. Knott, 128 S.W.3d 211, 215 (Tex. 2003); *see also supra* Part 1.V.F (discussing appealing summary judgments and the standard of review for summary judgments).

994. Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548–49 (Tex. 1985).

995. Jimenez v. Citifinancial Mortg. Co., 169 S.W.3d 423, 425–26 (Tex. App.—El Paso 2005, no pet.).

996. *See* Dubois v. Harris County, 866 S.W.2d 787, 790 (Tex. App.—Houston [14th Dist.] 1993, no writ).

997. FDIC v. Lenk, 361 S.W.3d 602, 609–10, 609 n.7 (Tex. 2012); Bell v. Showa Denko K.K., 899 S.W.2d 749, 756 (Tex. App.—Amarillo 1995, writ denied); W.R. Grace Co. v. Scotch Corp., 753 S.W.2d 743, 748 (Tex. App.—Austin 1988, writ denied), *disapproved of on other grounds by* Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492 (Tex. 1991); Dickey v. Jansen, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *see also supra* Part 1.I.A (discussing the procedure for summary judgments).

998. Jacobs v. Satterwhite, 65 S.W.3d 653, 655–56 (Tex. 2001) (per curiam); Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 912 (Tex. 1997).

> motion or as a fact issue presented by the opposing party in a written answer or other response. Accordingly, we hold that the opposing party, without filing an answer or other response, may raise for consideration on appeal the insufficiency of the summary-judgment proof to support the specific grounds stated in the motion, but that he may not, in the absence of such an answer or other response, raise any other "genuine issue of material fact" as a ground for reversal. In other words, the opposing party may challenge the grounds asserted by the movant, but he may not assert the existence of "issues" not presented to the trial court by either party.[999]

Even though the court will not consider issues that were not raised in the courts below, parties may construct new arguments in support of those issues properly before the appellate courts.[1000]

Cases disposed of by summary judgment often have voluminous clerk's records.[1001] The importance of meeting the briefing requirements, such as referencing the page of the record where the matter complained of may be easily found, cannot be overemphasized.[1002] Appellate courts will not search the record, with no guidance from an appellant, to determine if a material fact issue was raised by the record.[1003] "Thus, an inadequately briefed issue may be waived on appeal."[1004]

H. Actions by Appellate Courts

An appellate court should consider all summary judgment grounds the trial court rules upon and the movant preserves for appellate review that are necessary for final disposition of the appeal.[1005] It now makes no difference whether the trial court specifies the reason in its order for granting the motion for summary judgment.[1006] When properly preserved for appeal, the court of

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999. Combs v. Fantastic Homes, Inc., 584 S.W.2d 340, 343 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.); *see* Dhillon v. Gen. Accident Ins. Co., 789 S.W.2d 293, 295 (Tex. App.—Houston [14th Dist.] 1990, no writ) ("The judgment of the trial court cannot be affirmed on any grounds not specifically presented in the motion for summary judgment.").

1000. Greene v. Farmers Ins. Exch., 446 S.W.3d 761, 764 n.4 (Tex. 2014).

1001. *See, e.g.*, Montgomery v. Kennedy, 669 S.W.2d 309, 310 (Tex. 1984) (noting the summary judgment record contained over fifteen depositions and other transcripts); Martin v. Martin, 840 S.W.2d 586, 588 (Tex. App.—Tyler 1992, writ denied) (describing the fourteen-volume summary judgment record); A.C. Collins Ford, Inc. v. Ford Motor Co., 807 S.W.2d 755, 760 (Tex. App.—El Paso 1990, writ denied) (questioning the *Malooly* rule where summary judgment record contained a 1,700-page transcript, 1,200-page deposition, and 28 exhibits).

1002. *See, e.g.*, Jimenez v. Citifinancial Mortg. Co., 169 S.W.3d 423, 425–26 (Tex. App.—El Paso 2005, no pet.) (holding appellants waived both issues on appeal due to inadequate briefing). *See generally* TEX. R. APP. P. 38.1–.2 (outlining the requirements of appellate briefs).

1003. Trebesch v. Morris, 118 S.W.3d 822, 825 (Tex. App.—Fort Worth 2003, pet. denied).

1004. *Id.*

1005. Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996).

1006. *See id.*

appeals should review the grounds upon which the trial court granted the summary judgment and those upon which it denied the summary judgment.[1007] In other words, the court of appeals must consider all grounds on which the trial court rules and may consider grounds on which it does not rule "in the interest of judicial economy."[1008] Conversely, the appellate court may not affirm on a ground not presented to the trial court in the motion for summary judgment.[1009] A court of appeals commits reversible error when it sua sponte raises grounds to reverse a summary judgment that were not briefed or argued in the appeal.[1010] In a recent case, the supreme court noted that the trial court's reasoning in its order was helpful.[1011]

If an appellant/petitioner is presented with an appeal in which it initially appears that error was not preserved, it may be appropriate to attempt to define a larger "issue" that would allow a new argument. Even though a party may not raise new issues on appeal, it may present new arguments in support of a ground properly presented to the trial court.[1012] The supreme court extensively addressed the distinction between an "issue" and an "argument" in a case involving construction of the Labor Code.[1013] The court decided that the foremost disputed issue in the case was whether the movant was in the course and scope of her employment when she fell.[1014] The fact that this issue had been raised below allowed her to raise arguments at any time.[1015] Noting that the distinction was narrower under the Labor Code, the court also addressed "our common understanding" of the term "issue."[1016] Quoting Black's Law Dictionary, it wrote that an "issue" is a "point of dispute between two or more parties."[1017] It then explained that a party may waive an issue by failing to present it in to the courts below.[1018] It contrasted issue with "new arguments," which "parties are free to construct" in support of unwaived issues before the court. [1019]

1007. *See id.*
1008. *Id.*
1009. Nall v. Plunkett, 404 S.W.3d 552, 555 (Tex. 2013) (per curiam); State Farm Lloyds v. Page, 315 S.W.3d 525, 532 (Tex. 2010).
1010. Wells Fargo Bank, N.A. v. Murphy, 458 S.W.3d 912, 916 (Tex. 2015).
1011. *See* Compass Bank v. Calleja-Ahedo, 62 Tex. Sup. J. 260, 2018 WL 6713245, at *2 (Dec. 21, 2018).
1012. Greene v. Farmers Ins. Exch., 446 S.W.3d 761, 764 n.4 (Tex. 2014).
1013. State Office of Risk Mgmt. v. Martinez 539 S.W.3d 266, 271–75 (Tex. 2017).
1014. *Id*. at 274.
1015. *Id.* at 275.
1016. *Id.* at 273.
1017. *Id.* (quoting *Issue*, Black's Law Dictionary (10th Ed. 2014)).
1018. *Id.*
1019. *Id.*

Normally, reversal of a judgment for one party will not justify a reversal for other nonappealing parties.[1020] If there are multiple parties and some fail to join in a motion that is granted, they will not be entitled to benefit from the affirmance on appeal and will face those claims not covered by their own motions.[1021] (As a practical matter, the parties could then move for and, assuming the grounds and evidence are the same, obtain a summary judgment from the trial court following remand.)

The San Antonio Court of Appeals, however, applied to a summary judgment the exception to the general rule that would allow reversal for both parties where "the respective rights of the appealing and nonappealing parties are so interwoven or dependent on each other as to require a reversal of the entire judgment."[1022] The court determined that the existence of identical facts and intertwined issues required reversal of summary judgment for an excess insurer upon reversal of summary judgment against a primary insurer.[1023]

Under the Texas Rules of Appellate Procedure, which require each party challenging the judgment to file an independent notice of appeal, it may be necessary to file a separate notice of appeal to properly preserve the claim that the summary judgment could be sustained on a point overruled or not ruled upon by the trial court.[1024]

If the party that loses on appeal from a summary judgment pleaded its case in reliance on controlling precedent that was later overruled, the appellate court may remand for a new trial in the interest of justice rather than render.[1025]

Also, the court of appeals may affirm the liability part of the summary judgment and reverse the damages portion of the summary judgment.[1026] Appellate courts have accessed penalties have been assessed for bringing an appeal that the appellate court held to be taken for delay and without

1020. Turner, Collie & Braden, Inc. v. Brookhollow, Inc., 642 S.W.2d 160, 166 (Tex. 1982).

1021. Boerjan v. Rodriguez, 436 S.W.3d 307, 312 (Tex. 2014).

1022. U.S. Fire Ins. Co. v. Lynd Co., 399 S.W.3d 206, 219–20 (Tex. App.—San Antonio 2012, pet. denied) (quoting *Turner, Collie & Braden, Inc.*, 642 S.W.2d at 166 (noting that, in such a case, it is necessary for the court to reverse the entire judgment to provide full and effective relief to the appellant)).

1023. *Id.* at 220.

1024. *See* TEX. R. APP. P. 25.1(c) ("The appellate court may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause.").

1025. Hamrick v. Ward, 446 S.W.3d 377, 385–86 (Tex. 2014) (clarifying the law of easements and reversing and remanding for the losing party to elect whether to pursue a claim under the new law).

1026. *See, e.g.*, St. Paul Cos. v. Chevron U.S.A., Inc., 798 S.W.2d 4, 7 (Tex. App.—Houston [1st Dist.] 1990, writ dism'd by agr.).

sufficient cause.[1027] Rendition rather than remand is an appropriate remedy if the appellate court specifically indicates that it did not intend to address more than the claims severed.[1028]

The supreme court may consider alternative grounds for affirming the court of appeals' judgment if not reached by the court of appeals.[1029] If a summary judgment is reversed, the parties are not limited to the theories asserted in the original summary judgment at a later trial on the merits.[1030] If a party unsuccessfully moves for summary judgment and later loses in a conventional trial on the merits, an interlocutory order overruling the summary judgment motion is not reviewable on appeal.[1031]

I. Bills of Review

A bill of review is an equitable proceeding by a party to a former action who seeks to set aside a judgment that is no longer appealable or subject to a motion for new trial.[1032] A petitioner must ordinarily plead and prove: (1) a meritorious claim or defense; (2) that he was unable to assert due to the fraud, accident, or wrongful act of his opponent; and (3) unmixed with any fault or negligence of his own.[1033] A summary judgment may be appropriate to challenge whether a party bringing a bill of review has adequately established these requirements.[1034]

1027. *See, e.g.*, Triland Inv. Grp. v. Tiseo Paving Co., 748 S.W.2d 282, 285 (Tex. App.—Dallas 1988, no writ) (noting appellate courts may award damages for an appeal taken for delay, up to 10% of the total damages award).

1028. Greene v. Farmers Ins. Exch., 446 S.W.3d 761, 770–71 (Tex. 2014).

1029. Hemyari v. Stephens, 355 S.W.3d 623, 627 (Tex. 2011) (per curiam).

1030. Hudson v. Wakefield, 711 S.W.2d 628, 630–31 (Tex. 1986); Creative Thinking Sources, Inc. v. Creative Thinking, Inc., 74 S.W.3d 504, 511–12 (Tex. App.—Corpus Christi 2002, no pet.).

1031. Pennington v. Gurkoff, 899 S.W.2d 767, 769 (Tex. App.—Fort Worth 1995, writ denied); Jones v. Hutchinson County, 615 S.W.2d 927, 930 (Tex. Civ. App.—Amarillo 1981, no writ).

1032. Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 407 (Tex. 1987).

1033. *Id.* at 407–08; *see also* Mabon Ltd. v. Afri-Carib Enters., Inc., 369 S.W.3d 809, 812 (Tex. 2012) (per curiam); Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494, 511 n.30 (Tex. 2010); Baker v. Goldsmith, 582 S.W.2d 404, 406–07 (Tex. 1979); Boaz v. Boaz, 221 S.W.3d 126, 131 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

1034. *See, e.g.*, Katy Venture, Ltd. v. Cremona Bistro Corp., 469 S.W.3d 160, 164 (Tex. 2015); PNS Stores, Inc. v. Rivera, 379 S.W.3d 267, 275 (Tex. 2012); Ortega v. First RepublicBank Fort Worth, N.A., 792 S.W.2d 452, 453 (Tex. 1990); Clarendon Nat'l Ins. Co. v. Thompson, 199 S.W.3d 482, 487–88 (Tex. App.—Houston [1st Dist.] 2006, no pet.); Caldwell v. Barnes, 941 S.W.2d 182, 187 (Tex. App.—Corpus Christi 1996), *rev'd on other grounds*, 975 S.W.2d 535, 537 (Tex. 1998); Blum v. Mott, 664 S.W.2d 741, 744–45 (Tex. App.—Houston [1st Dist.] 1983, no writ).

J. Likelihood of Reversal

Related studies of separate court years conducted nine years apart considered reasons for reversal in Texas courts of appeals.[1035] During both of the separate one-year periods reviewed by the studies, more appeals were taken from summary judgments than any other type of judgment.[1036] Conventional wisdom is that summary judgments are frequently reversed.[1037] However, that number is not as frequent as many believe. In fact, between the first study, which examined the 2001–2002 court year, and the second study, which examined the 2010–2011 court year, the percentages shifted so that more jury trials were reversed than summary judgments.[1038] The statewide reversal rate for summary judgments in the earlier study was 33%.[1039] In the more recent study, the rate was 31%.[1040] This compared with the reversal rate of 25% for judgments on jury verdicts in the first study[1041] and 34% in the later study.[1042] The overall reversal rate for all civil appeals was 33% in the earlier study and 36% in the later study.[1043]

Broken down by substance, the most recent study revealed summary judgment reversal rates of 29% in contracts cases, 28% for tort/DTPA (nonpersonal injury) defendants, 24% for personal injury defendants, and 5% for employers or insurers.[1044] Texas courts of appeals reversed 47% of the time because they found a fact issue or some evidence to defeat the summary judgment, 35% because the trial judge made an error of law, and 18% for some procedural defect.[1045] The results of this study further demonstrate the importance of carefully following the technical requirements for summary judgment practice. The relatively high number of reversals of 18% for procedural defects reflects cases where the summary judgment may have

1035. Liberato & Rutter, *2012 Study*, *supra* note 852, at 1009; Liberato & Rutter, *2003 Study*, *supra* note 852, at 445.

1036. Liberato & Rutter, *2012 Study*, *supra* note 852, at 1009; Liberato & Rutter, *2003 Study*, *supra* note 852, at 445–46.

1037. *See* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 675 (Tex. 1979) ("[A] poll of district judges throughout the state reflected many were skeptical about the efficacy of the [summary judgment] rule because of frequent reversals by appellate courts.").

1038. Liberato & Rutter, *2012 Study*, *supra* note 852, at 997.

1039. Liberato & Rutter, *2003 Study*, *supra* note 852 at 446, 471 app. B, fig.10.

1040. Liberato & Rutter, *2012 Study*, *supra* note 852, at 1009, 1035 app. B, fig.10. For both court years, the rates of reversals varied significantly by court of appeals. *Id.*; Liberato & Rutter, *2003 Study*, *supra* note 852, at 446, 471 app. B, fig.10.

1041. Liberato & Rutter, *2003 Study*, *supra* note 852, at 439, 463 app. B, fig.2.

1042. Liberato & Rutter, *2012 Study*, *supra* note 852, at 1002, 1027 app. B, fig.2.

1043. *Id.* at 999, 1026 app. B, fig.1; Liberato & Rutter, *2003 Study*, *supra* note 852, at 436, 462 app. B, fig.1.

1044. Liberato & Rutter, *2012 Study*, *supra* note 852, at 1037 app. B, fig.12.

1045. *Id.* at 1038 app. B, fig.13.

been fundamentally sound, but was reversed because of failure to follow proper procedures.

VI. ATTORNEYS' FEES

The reasonableness of attorneys' fees is generally a fact issue.[1046] Nonetheless, an award of attorneys' fees may be appropriate in a summary judgment proceeding. Attorneys' fees must be specifically pleaded to be recovered.[1047] Failure to specifically request attorneys' fees in the appellate court may not prevent the court from authorizing such an award.[1048]

A. Reasonableness of Fees

Texas law adheres to the "American Rule" with respect to the award of attorneys' fees, which permits the recovery of attorneys' fees from an opposing party only when authorized by contract or statute.[1049] Chapter 38 of the Texas Civil Practice and Remedies Code provides for recovery of attorneys' fees for a list of claims. By far, the most common of these claims is for breach of an oral or written contract.[1050] For a claim for attorneys' fees under Chapter 38, "[t]he court may take judicial notice of the usual and customary attorney's fees" and the case file contents without further evidence being presented.[1051]

Texas courts consider eight factors when determining the reasonableness of attorneys' fees:

> 1. the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
>
> 2. the likelihood . . . that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> 3. the fee customarily charged in the locality for similar legal services;

1046. Haden v. David J. Sacks, P.C., 332 S.W.3d 503, 512 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

1047. Shaw v. Lemon, 427 S.W.3d 536, 539–40 (Tex. App.—Dallas 2014, pet. denied).

1048. *See* Superior Ironworks, Inc. v. Roll Form Prods., Inc., 789 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1990, no writ) ("[A] prayer in a petition for reasonable attorney's fees is sufficient to authorize an award of fees for services in a higher court.").

1049. Tucker v. Thomas, 419 S.W.3d 292, 295 (Tex. 2013).

1050. Texas Civil Practice and Remedies Code Section 38.001 also lists claims for rendered services, performed labor, furnished material, freight or express overcharges, lost or damaged freight, killed or injured stock, and a sworn account. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(1)–(7) (West 2017).

1051. *Id.* § 38.004; *see also* Flint & Assocs. v. Intercontinental Pipe & Steel, Inc., 739 S.W.2d 622, 626 (Tex. App.—Dallas 1987, writ denied) (noting that the trial court properly took judicial notice of all claims that had been filed in the case in determining attorney's fees).

4. the amount involved and the results obtained;

5. the time limitations imposed by the client or by the circumstances;

6. the nature and length of the professional relationship with the client;

7. the experience, reputation, and ability of the lawyer or lawyers performing the services; and

8. whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.[1052]

A trial court, however, "is not required to receive evidence on each of these factors."[1053]

B. Proof Requirements

In support of a motion for summary judgment that includes a request for attorneys' fees, an affidavit by the movant's attorney (that includes his or her opinion on reasonable attorney's fees and the factual basis for that opinion) should be added to the motion for summary judgment.[1054] An attorney's affidavit constitutes expert testimony that will support an award of attorney's fees in a summary judgment proceeding.[1055] Civil Practice and Remedies Code Section 38.003 provides that "usual and customary attorney's fees" are presumed to be reasonable.[1056] Once triggered by an attorney's supporting affidavit, the presumption of reasonableness remains in effect when there is no evidence submitted to challenge the affidavit proof of the summary judgment movant.[1057]

An affidavit filed by a summary judgment movant's attorney that "sets forth [her] qualifications, [her] opinion regarding reasonable attorney's fees, and the basis for [her] opinion will be sufficient to support summary judgment, if uncontroverted."[1058] Under Texas law, "billing records need not

1052. Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex. 1997) (alteration in original); State & Cty. Mut. Fire Ins. Co. v. Walker, 228 S.W.3d 404, 408 (Tex. App.—Fort Worth 2007, no pet.).

1053. *State & Cty. Mut. Fire Ins. Co.*, 228 S.W.3d at 408.

1054. *See* Roberts v. Roper, 373 S.W.3d 227, 233 (Tex. App.—Dallas 2012, no pet.).

1055. Owen Elec. Supply, Inc. v. Brite Day Constr., Inc., 821 S.W.2d 283, 288 (Tex. App.—Houston [1st Dist.] 1991, writ denied); Nguyen Ngoc Giao v. Smith & Lamm, P.C., 714 S.W.2d 144, 148 (Tex. App.—Houston [1st Dist.] 1986, no writ); *see supra* Part 1.II.H.1 (discussing expert witness testimony); *see also* Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A., 666 S.W.2d 549, 554 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd) (holding that the uncontroverted affidavit of attorney was sufficient to prove no material issue as to the reasonableness of the fees); Sunbelt Constr. Corp. v. S & D Mech. Contractors, Inc., 668 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (same).

1056. TEX. CIV. PRAC. & REM. CODE ANN. § 38.003 (West 2017).

1057. *See id.*; Haden v. David J. Sacks, P.C., 332 S.W.3d 503, 513 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

1058. Gaughan v. Nat'l Cutting Horse Ass'n, 351 S.W.3d 408, 422 (Tex. App.—Fort Worth 2011, pet. denied) (quoting Cammack the Cook, L.L.C. v. Eastburn, 296 S.W.3d 884, 894 (Tex.

be introduced to recover attorney's fees."[1059] However, the supreme court encourages their use as evidentiary support when using the lodestar method of calculating fees.[1060]

In *Garcia v. Gomez*, the supreme court took a broad view of the level of specificity required by an attorney testifying on the reasonableness of his fees.[1061] The only evidence of attorney's fees offered was the following: "I'm an attorney practicing in Hidalgo County, doing medical-malpractice law/litigation. I have done it since 1984. For a usual and customary case like this the [sic] fees for handling it up to the point of dismissal, the reasonable and necessary attorney's fee for handling that is 12,200 dollars . . . ."[1062] The supreme court held that "[w]hile the attorney's testimony lacked specifics, it was not, under these circumstances, merely conclusory. It was some evidence of what a reasonable attorney's fee might be in this case."[1063] Significantly, the court noted that the nonmovant "had the means and opportunity to contest the attorney's testimony on what a reasonable attorney[']s fee would be in [the] case, but failed to do so."[1064] The court therefore determined that the nonmovant conceded the reasonableness of the fees as a matter of law.[1065] The lesson seems to be that to defeat the claim, the nonmovant should respond or risk conceding reasonableness as a matter of law. Despite the Texas Supreme Court's decision in *Garcia*, some lower courts seem to be tightening up the requirements to

App.—Texarkana 2009, pet. denied)); Basin Credit Consultants, Inc. v. Obregon, 2 S.W.3d 372, 373 (Tex. App.—San Antonio 1999, pet. denied).

1059. Air Routing Int'l Corp. (Canada) v. Britannia Airways, Ltd., 150 S.W.3d 682, 692 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *see also In re* A.B.P., 291 S.W.3d 91, 99 (Tex. App.—Dallas 2009, no pet.).

1060. City of Laredo v. Montano, 414 S.W.3d 731, 736 (Tex. 2013) (per curiam); El Apple I, Ltd. v. Olivas, 370 S.W.3d 757, 762–63 (Tex. 2012).

1061. Garcia v. Gomez, 319 S.W.3d 638, 641 (Tex. 2010). In *Garcia*, the court was considering testimony in support of fees in a case governed by the Texas Medical Liability Act. *Id.* at 643. *But see El Apple I, Ltd.*, 370 S.W.3d at 763. In *El Apple I*, the supreme court was evaluating the award of attorney's fees in a nonsummary judgment under the lodestar method. *Id.* at 762. The court determined that affidavits of attorneys, standing alone, were insufficient to support a lodestar determination of an attorney's fee award. *Id.* at 763–64. Attorneys must offer proof documenting performance of specific tasks, the time required for those tasks, the person who performed the work, and his or her specific rate. *Id.* at 765. *See generally* Mark E. Steiner, *Will* El Apple *Today Keep Attorneys' Fees Away?*, 19 J. CONSUMER & COM. L. 114, 122 (2016).

1062. Garcia v. Gomez, 286 S.W.3d 445, 447 (Tex. App.—Corpus Christi 2008) (alteration in original), *aff'd in part, rev'd in part*, 319 S.W.3d 638 (Tex. 2010).

1063. *Garcia*, 319 S.W.3d at 641. Later, in *City of Laredo v. Montano*, the court clarified its disapproval of such broad statements to support the reasonableness of fees, noting that the question in *El Apple I* was whether there was a basis to award any fees under the lodestar method. *See Montano*, 414 S.W.3d at 735–37. The fee-shifting statute at issue in *Montano* did not require the use of the lodestar method, but the court reached the same conclusion as it did in *El Apple I*—the attorney's testimony in support of his fees was "devoid of substance," as it was based on conclusory assumptions about the total hours billed. *Id.* at 736.

1064. *Garcia*, 319 S.W.3d at 642.

1065. *Id.*

recover fees on summary judgment. For example, in *ViewPoint Bank v. Allied Property & Casualty Insurance Co.*, the Dallas Court of Appeals addressed an attorneys' fees affidavit that gave "a brief description of the kinds of work done" and then offered an opinion that a specified amount of fees was reasonable.[1066] The opposing party did not challenge the affidavit or present any contradictory evidence in the trial court.[1067] Nonetheless, the court of appeals reasoned that the affidavit did "not state the number of hours expended or the hourly rates charged for the services."[1068] Accordingly, because the court concluded that it had "no way to determine whether the time spent on specific tasks was reasonable or the hourly rates charged were reasonable" the court held that the summary judgment evidence failed to establish as a matter of law the amount of reasonable and necessary attorneys' fees.[1069]

Although not in a summary judgment context, in *Long v. Griffin*,[1070] the supreme court again addressed the level of sufficiency required in an attorneys' fees affidavit. According to the court, the affidavit contained only generalities such as the total hours worked and the categories of tasks performed. "[W]ithout any evidence of the time spent on the specific tasks, the trial court has insufficient information to meaningfully review the fee request."[1071] The court noted that although contemporaneous time records may not exist "the attorneys may reconstruct their work to provide the trial court with sufficient information to allow the court to perform a meaningful review of the fee application[s]."[1072]

C. Summary Judgment Disposition of Attorneys' Fees

When a movant includes attorneys' fees in a summary judgment motion, in effect, the movant has added another cause of action. A challenge to attorneys' fees should be raised in a separate ground in the summary judgment motion.[1073] Pleadings alone, even if sworn to, are insufficient as summary judgment proof on fees.[1074] So, proof must be supplied separately, most likely in the attorney's affidavit with supporting documents. Unless the court has taken judicial notice

1066. ViewPoint Bank v. Allied Prop. & Cas. Ins. Co., 439 S.W.3d 626, 636 (Tex. App.—Dallas 2014, pet. denied).
1067. *Id*.
1068. *Id*. at 637.
1069. *Id*. at 638.
1070. Long v. Griffin, 442 S.W.3d 253, 255 (Tex. 2014) (per curiam).
1071. *Id.*
1072. *Id.* at 256.
1073. *See* Trebesch v. Morris, 118 S.W.3d 822, 827 (Tex. App.—Fort Worth 2003, pet. denied).
1074. Bakery Equip. & Serv. Co. v. Aztec Equip. Co., 582 S.W.2d 870, 873 (Tex. Civ. App.—San Antonio 1979, no writ).

under Section 38.004 of the Civil Practice and Remedies Code, such that no further evidence is necessary, this cause of action in a summary judgment case is measured by the same standard used for summary judgment proof.[1075] If attorneys' fees are recoverable under Section 38.001 of the Civil Practice and Remedies Code,[1076] in addition to the other summary judgment requirements, the time and notice requirements of Section 38.002 must be met to support an award of attorneys' fees.[1077]

The omission of a counterclaim for attorneys' fees from a motion summary judgment does not waive the request for fees, but rather shows that a party has elected to take its claim for attorneys' fees to trial.[1078] However, if a party has a claim for fees, good practice is to advise the court in the motion for summary judgment that it will need to address a claim for fees if it grants summary judgment. This step may help avoid a situation where the court purports to sign a final judgment leaving a fee request unaddressed.

While generally attorneys' fees cannot be awarded by summary judgment if a fact issue exists, declaratory judgment cases are an exception. The Declaratory Judgments Act, found in Chapter 37 of the Texas Civil Practice and Remedies Code, provides for attorneys' fees more broadly than

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1075. TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (West 2017); *see, e.g.*, Freeman Fin. Inv. Co. v. Toyota Motor Corp., 109 S.W.3d 29, 35–36 (Tex. App.—Dallas 2003, pet. denied); *Bakery Equip. & Serv. Co.*, 582 S.W.2d at 873; Lindley v. Smith, 524 S.W.2d 520, 524 (Tex. Civ. App.—Corpus Christi 1975, no writ).

1076. Section 38.001 provides:

> A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:
> (1) rendered services;
> (2) performed labor;
> (3) furnished material;
> (4) freight or express overcharges;
> (5) lost or damaged freight or express;
> (6) killed or injured stock;
> (7) a sworn account; or
> (8) an oral or written contract.

TEX. CIV. PRAC. & REM. CODE ANN. § 38.001.

1077. *Id.* § 38.002. Section 38.002 provides:

> To recover attorney's fees under this chapter:
> (1) the claimant must be represented by an attorney;
> (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
> (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.

Id.

1078. *See* Corral-Lerma v. Border Demolition & Envtl. Inc., 467 S.W.3d 109, 125 (Tex. App.—El Paso 2015, pet. denied) (citing McNally v. Guevara, 52 S.W.3d 195, 196 (Tex. 2001)); *cf.* In Interest of E.S., No. 14-14-00328-CV, 2015 WL 1456979, at *3 (Tex. App.—Houston [14th Dist.] Mar. 26, 2015, no pet.) (summary judgment order was not final because it did not dispose of claims for attorneys' fees).

under other statutes.[1079] It provides that "the court may award costs and reasonable and necessary attorney's fees as are equitable and just."[1080] Because attorneys' fees are left to the discretion of the court, the trial judge may award fees following summary judgment even if a fact issue exists.[1081]

Promissory notes may provide for attorneys' fees in a fixed percentage clause that requires the payment of a stipulated percentage of the unpaid balance upon default.[1082] In a summary judgment proceeding, when the note includes a stipulated percentage of the unpaid balance as attorneys' fees, proof concerning the reasonableness of the fixed percentage fee is not required unless the pleadings and proof challenge the reasonableness of that amount.[1083] Thus, where a nonmovant offers no summary judgment evidence to indicate that the stipulated amount was unreasonable, the trial court's award of attorneys' fees is proper.[1084]

D. Attorneys' Fees on Appeal from Summary Judgment

If both parties file cross-motions for summary judgment, the losing party should explicitly appeal not only the denial of its cross-motion, but also any related failure to award attorneys' fees in its favor, whether in the motion for summary judgment or through a separate trial.[1085]

If the prevailing party's judgment is reversed on appeal, any associated award of attorneys' fees should also be reversed.[1086]

VII. TYPES OF CASES AMENABLE TO SUMMARY JUDGMENT

Some types of cases particularly lend themselves to summary judgment disposition; other categories of cases are not appropriate for

1079. *See* Wells Fargo Bank, N.A. v. Murphy, 458 S.W.3d 912 (2015). *Compare* TEX. CIV. PRAC. & REM. CODE ANN. § 37.009, *with* § 38.001–.002.

1080. TEX. CIV. PRAC. & REM. CODE ANN. § 37.009.

1081. Elder v. Bro, 809 S.W.2d 799, 801 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

1082. *See* Kuper v. Schmidt, 338 S.W.2d 948, 950–51 (Tex. 1960) (discussing the collection of attorneys' fees upon default).

1083. Highlands Cable Television, Inc. v. Wong, 547 S.W.2d 324, 327 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); *see also Kuper*, 338 S.W.2d at 950–51 (allowing for the recovery of attorney's fees by the plaintiff when "no issue of reasonableness is raised by the defendants").

1084. Houston Furniture Distribs., Inc. v. Bank of Woodlake, N.A., 562 S.W.2d 880, 884 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

1085. *See* Tesco Corp. (US) v. Steadfast Ins. Co., No. 01-13-00091-CV, 2015 WL 456466, at *4 (Tex. App.—Houston [1st Dist.] Feb. 3, 2015, pet. denied) (holding that an appeal became moot where the underlying liability claims were resolved and the appellant failed to appeal the denial of fees).

1086. Am. Zurich Ins. Co. v. Samudio, 370 S.W.3d 363, 369 (Tex. 2012).

summary judgment disposition.[1087] This Section examines several categories of cases that are often decided by summary judgment.

A. Sworn Accounts

Motions for summary judgment often are used in suits on sworn accounts.[1088] Texas Rule of Civil Procedure 185 provides that a suit on a sworn account may be proper in the following instances:

> When any action or defense is founded upon an open account or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept . . . .[1089]

An action brought under Rule 185 is one of procedure, not of substantive law, with regard to the evidence necessary to establish a prima facie case of the right to recover.[1090] In a suit on a sworn account, a litigant whose opponent has not filed a proper answer under Rule 185 and Texas Rule of Civil Procedure 93(10)[1091] may secure what is essentially a summary judgment on the pleadings. In effect, noncompliance with these rules concedes that there is no defense.[1092]

If the defendant in a suit on a sworn account fails to file a written denial under oath, that party will not be permitted at trial "to dispute receipt of the

1087. For example, juvenile matters usually are not a proper subject for summary judgment. *See* State v. L.J.B., 561 S.W.2d 547, 549 (Tex. Civ. App.—Dallas 1977), *rev'd on other grounds sub nom.* C.L.B. v. State, 567 S.W.2d 795, 796 (Tex. 1978) (per curiam).

1088. *See, e.g.*, Wright v. Christian & Smith, 950 S.W.2d 411, 412–13 (Tex. App.—Houston [1st Dist.] 1997, no writ) (reversing summary judgment in favor of plaintiff due to an issue of material fact regarding the existence of an enforceable agreement between the parties, an essential element of a cause of action to collect on a sworn account); Jeff Robinson Bldg. Co. v. Scott Floors, Inc., 630 S.W.2d 779, 782 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.) (reversing summary judgment in favor of plaintiff for failure to establish a prima facie sworn account case against the defendants individually).

1089. TEX. R. CIV. P. 185.

1090. Rizk v. Fin. Guardian Ins. Agency, Inc., 584 S.W.2d 860, 862 (Tex. 1979); Meaders v. Biskamp, 316 S.W.2d 75, 78 (Tex. 1958); Hou-Tex Printers, Inc. v. Marbach, 862 S.W.2d 188, 190 (Tex. App.—Houston [14th Dist.] 1993, no writ); *see also* Achimon v. J.I. Case Credit Corp., 715 S.W.2d 73, 76 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (noting that assignee of retail installment contract failed to state a sworn account).

1091. TEX. R. CIV. P. 93(10) (requiring a denial of an account be verified by affidavit).

1092. Enernational Corp. v. Exploitation Eng'rs, Inc., 705 S.W.2d 749, 750 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *see* Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1971); Waggoners' Home Lumber Co. v. Bendix Forest Prods. Corp., 639 S.W.2d 327, 328 (Tex. App.—Texarkana 1982, no writ); *see also supra* Part 1.II.B (discussing pleadings as evidence).

items or services or the correctness of the stated charges."[1093] As a general rule, a sworn account is prima facie evidence of a debt, and the account need not be formally introduced into evidence unless the account's existence or correctness has been denied in writing under oath.[1094]

1. Requirements for Petition

A sworn account petition should be supported by an affidavit that the claim is "within the knowledge of affiant, just and true."[1095] Unless the trial court sustains special exceptions to the pleadings, no particularization or description of the nature of the component parts of the account or claim is necessary.[1096] If special exceptions are filed and sustained, the account (invoice or statement account) should show the nature of the item sold, the date, and the charge.[1097] In addition, if they are challenged by special exceptions, technical and unexplained abbreviations, code numbers, and the like are insufficient to identify items and terms and must be explained.[1098] Also, if special exceptions are sustained, the language used in the account must have a common meaning and must not be of the sort understood only in the industry in which it is used.[1099] If invoicing and billing is done with only computer numbers or abbreviations, a key to this "business shorthand" should be attached to the pleadings or be readily available if repleading is necessary.[1100]

2. Answer/Denial

The answer must consist of a written denial supported by an affidavit denying the account.[1101] When a party suing on a sworn account files a motion

1093. Airborne Freight Corp. v. CRB Mktg., Inc., 566 S.W.2d 573, 574 (Tex. 1978) (per curiam); *see also* Vance v. Holloway, 689 S.W.2d 403, 404 (Tex. 1985) (per curiam) (citing TEX. R. CIV. P. 185); Murphy v. Cintas Corp., 923 S.W.2d 663, 665 (Tex. App.—Tyler 1996, writ denied).

1094. *See Airborne Freight Corp.*, 566 S.W.2d at 575.

1095. TEX. R. CIV. P. 185.

1096. *Enernational Corp.*, 705 S.W.2d at 750 (quoting TEX. R. CIV. P. 185).

1097. Hassler v. Tex. Gypsum Co., 525 S.W.2d 53, 55 (Tex. Civ. App.—Dallas 1975, no writ).

1098. *See id.* (holding the abbreviated product description on the invoices failed to identify the goods sold with reasonable clarity).

1099. *See id.*

1100. *See* Price v. Pratt, 647 S.W.2d 756, 757 (Tex. App.—Corpus Christi 1983, no writ).

1101. *See* TEX. R. CIV. P. 93(10) (requiring an affidavit for "[a] denial of an account which is the foundation of the plaintiff's action"); TEX. R. CIV. P. 185 (requiring that a party who resists a suit on account must file a written denial under oath); *see also* Huddleston v. Case Power & Equip. Co., 748 S.W.2d 102, 103 (Tex. App.—Dallas 1988, no writ). In *Huddleston*, the court held that "a sworn general denial is insufficient to rebut the evidentiary effect of a proper affidavit in support of a suit on account." *Id.* at 103–04. Further, the court held that the "written denial, under oath" mandated under Rule 185 must conform to Rule 93(10), which requires the plaintiff's claim to be put at issue through a special verified denial of the account. *Id.* at 103.

for summary judgment on the ground that the nonmovant's pleading is insufficient under Rule 93(10) because no proper sworn denial is filed, the nonmovant may still amend and file a proper sworn denial.[1102] The nonmovant is not precluded from amending and filing a proper sworn denial *to the suit itself* at any time allowed under Texas Rule of Civil Procedure 63.[1103]

In *Brightwell v. Barlow, Gardner, Tucker & Garsek*, the court considered whether it was proper for the verified denial to appear only in the affidavit in response to the motion for summary judgment but not in the defendant's answer.[1104] The court stated that Rules 185 and 93(k) (now Rule 93(10)), when read together and applied to suits on sworn accounts, mandate that the language needed to "effectively deny . . . the plaintiff's sworn account *must appear in a pleading of equal dignity* with the plaintiff's petition, and therefore must appear in the defendant's answer."[1105]

The filing of a proper, verified denial overcomes the evidentiary effect of a sworn account and forces the plaintiff to offer proof of the claim.[1106]

3. Summary Judgment

There are two distinct grounds upon which a party may move for summary judgment in a suit on a sworn account: (1) the failure of the defendant to file an adequate answer; and (2) the elements of the suit are proved as a matter of law.[1107] In the first instance, the basis for the motion for summary judgment is that the defendant's answer was not a timely filed sworn pleading verified by an affidavit denying the account that is the foundation of the plaintiff's cause of action. In the second, the grounds are that the summary judgment evidence establishes the common law elements of an action.[1108] In response to the ground

1102. Requipco, Inc. v. Am-Tex Tank & Equip., Inc., 738 S.W.2d 299, 303 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); Magnolia Fruit & Produce Co. v. Unicopy Corp. of Tex., 649 S.W.2d 794, 796 (Tex. App.—Tyler 1983, writ dism'd). *But see* Bruce v. McAdoo, 531 S.W.2d 354, 356 (Tex. Civ. App.—El Paso 1975, no writ) (holding that an "amended answer . . . presented more than four years after the original answer and more than a year after the first amended answer" was not timely and was therefore improper).

1103. *See Magnolia Fruit & Produce Co.*, 649 S.W.2d at 797–98. Texas Rule of Civil Procedure 63 concerns amendments and responsive pleadings, including time restrictions.

1104. Brightwell v. Barlow, Gardner, Tucker & Garsek, 619 S.W.2d 249, 251 (Tex. Civ. App.—Fort Worth 1981, no writ).

1105. *Id.* at 253 (emphasis added) (quoting Zemaco, Inc. v. Navarro, 580 S.W.2d 616, 620 (Tex. Civ. App.—Tyler 1979, writ dism'd w.o.j.)); *see* Notgrass v. Equilease Corp., 666 S.W.2d 635, 639 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.) (requiring the denial to be present in an answer).

1106. Rizk v. Fin. Guardian Ins. Agency, Inc., 584 S.W.2d 860, 862 (Tex. 1979); Norcross v. Conoco, Inc., 720 S.W.2d 627, 629 (Tex. App.—San Antonio 1986, no writ).

1107. *See* United Bus. Machs. v. Entm't Mktg., Inc., 792 S.W.2d 262, 263–64 (Tex. App.—Houston [1st Dist.] 1990, no writ).

1108. Pat Womack, Inc. v. Weslaco Aviation, Inc., 688 S.W.2d 639, 641 (Tex. App.—Corpus Christi 1985, no writ).

that the elements of the suit are proved as a matter of law, the nonmovant should show that there is a fact issue. For example, in *Matador Production Co. v. Weatherford Artificial Lift Systems, Inc.*,[1109] the court of appeals held that the nonmovant created a fact issue regarding the amount of materials that was actually provided versus the amount of materials the movant claimed it provided and for which it charged the nonmovant.

Sworn accounts are an exception to the general rule that pleadings are not summary judgment proof. "When a defendant fails to file a verified denial to a sworn account, the sworn account is received as prima facie evidence of the debt and the plaintiff as summary judgment movant is entitled to summary judgment on the pleadings."[1110] Rule 185 also provides that a systematic record, properly verified, "shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath."[1111] Thus, if the affidavit supporting the sworn account petition tracks the language of Rule 185 and meets the personal knowledge requirement of Rule 166a(f), it generally has been considered proper summary judgment proof in the absence of a sufficient answer to the original petition.[1112]

If a defendant files a verified denial, the plaintiff must submit common law proof of its case.[1113] The necessary common law elements of an action are: "(1) that there was a sale and delivery of merchandise, (2) that the amount of the account is just, that is, that the prices are charged in accordance with an agreement, they are the usual, customary and reasonable prices for that merchandise, and (3) that the amount is unpaid."[1114] If the resisting party does not support its claim with an affidavit, the movant is not forced to put on proof of its claim in a summary judgment proceeding and is entitled to summary judgment on the pleadings.[1115]

1109. Matador Prod. Co. v. Weatherford Artificial Lift Sys., Inc., 450 S.W.3d 580, 590 (Tex. App.—Texarkana 2014, pet. denied).

1110. Nguyen v. Short, How, Frels & Heitz, P.C., 108 S.W.3d 558, 562 (Tex. App.—Dallas 2003, pet. denied).

1111. TEX. R. CIV. P. 185.

1112. TEX. R. CIV. P. 166a(f) (requiring affidavits to be made on personal knowledge). Although specifically authorized to make an affidavit under Rule 185, attorneys should do so only if they possess personal knowledge of the facts set forth in the affidavit. TEX. R. CIV. P. 185.

1113. *See Pat Womack, Inc.*, 688 S.W.2d at 641.

1114. *Id.*; *see also* Worley v. Butler, 809 S.W.2d 242, 245 (Tex. App.—Corpus Christi 1990, no writ) (applying these elements in a suit for attorney's fees).

1115. Cespedes v. Am. Express-CA, No. 13-05-385-CV, 2007 WL 1365441, at *5–6 (Tex. App.—Corpus Christi May 10, 2007, no pet.); *see* Schum v. Munck Wilson Mandala, LLP, 497 S.W.3d 121 (Tex. App.—Texarkana 2016, no pet.) (reversing a summary judgment in a suit on a sworn account because material fact issues remained regarding whether fees and expense sought were incurred pursuant to an attorney engagement agreement).

A second affidavit in addition to that attached to the plaintiff's petition may be advisable to support a motion for summary judgment on a sworn account. This second affidavit should set forth, once again, the allegations of the sworn account petition. Strictly speaking, this additional affidavit is unnecessary if the answer on file is insufficient under Rules 185 and 93(10).[1116] If the answer is sufficient under these rules, summary judgment is not precluded, but a second affidavit must be filed substantiating the account as a business record under Texas Rule of Evidence 803(6).[1117]

The attorney opposing a summary judgment in a suit based on a sworn account should immediately determine if a sworn denial in accordance with Rules 93(10) and 185 is already on file. If not, he or she should file one. It is sufficient to file a sworn answer denying the account that is the "foundation of the plaintiff's action."[1118] The filing of an answer in strict compliance with Rules 93(10) and 185 does not, however, preclude the need to also file a written response to a motion for summary judgment.[1119] As a matter of practice, attorneys should *always* file a written response to all motions for summary judgment.[1120]

According to one commentator: "Motions for summary judgment will help ferret out those who file answers to buy time from those with genuine defenses and are also great discovery tools. Well drawn summary judgments often require the debtors' attorneys to have serious talks with their clients about fees, resulting in serious settlement negotiations."[1121]

B. Suits on Written Instruments

Suits on written instruments such as contracts, promissory notes, guarantees, deeds, and leases are commonly the subjects of motions for summary judgment.

1116. TEX. R. CIV. P. 93(10); Special Marine Prods., Inc. v. Weeks Welding & Constr., Inc., 625 S.W.2d 822, 827 (Tex. App.—Houston [14th Dist.] 1981, no writ) (noting that the state of the pleadings and the defendant's failure to file a sufficient sworn denial under Rule 185 provide the basis for summary judgment, not the plaintiff's additional sworn affidavit under Rule 166a).

1117. *See* TEX. R. EVID. 803(6).

1118. TEX. R. CIV. P. 93(10); *see also* TEX. R. CIV. P. 185 (allowing the filing of a written denial that states each and every item that constitutes the foundation of any action or defense as either just and true or unjust and untrue).

1119. *See supra* Part 1.VII.A.3 (discussing responding to and opposing a motion for summary judgment).

1120. *See supra* Parts 1.I.A.1–2, IV.A–C (discussing the general requirements and strategy involved in moving for and opposing summary judgment).

1121. DONNA BROWN, *Anatomy of the Collection Process: An Overview with Efficiency Tips from a Seasoned Collections Lawyer*, *in* STATE BAR OF TEXAS CONTINUING LEGAL EDUCATION PROGRAM, NUTS & BOLTS OF COLLECTIONS AND CREDITORS' RIGHTS COURSE 1, 8 (2008).

A summary judgment is proper in cases involving the interpretation of a writing that is determined to be unambiguous.[1122] The courts may also determine issues of law implicated in written instruments. Thus, for example, in *Moayedi v. Interstate 35/Chisam Road L.P.*,[1123] the supreme court determined for the first time the level of specificity required to waive Section 51.003 of the Property Code, the statutory right to offset for the deficiency owed between fair market value and the foreclosure price of property.[1124]

The court looks to the language of the written instrument in interpreting written instruments. In a case sure to gratify English majors, the court relied on a comma to "bolster" its interpretation of a deed. In *U.S. Shale Energy II, LLC v. Laborde Properties, L.P.*, the court noted that a disputed deed provision contained a clause that was offset by a comma, which indicated it was a nonrestrictive dependent clause. The court was careful to explain that it did "not imply that the use of a single comma is the dispositive consideration here."[1125]

1. Contracts

"Whether a contract is ambiguous is a question of law for the court to decide."[1126] If a contract is worded in such a manner that it can be given a definite or certain legal meaning, then it is not ambiguous.[1127] Instead, a contract is ambiguous if it is susceptible to more than one reasonable interpretation.[1128] Words used in an unambiguous contract are given their plain and ordinary meaning unless the instrument shows that the parties used the words in a technical or different sense.[1129] If the court determines that a contract is

1122. SAS Inst., Inc. v. Breitenfeld, 167 S.W.3d 840, 841 (Tex. 2005) (per curiam). Contract ambiguity creates a fact issue concerning the parties' intent that must be decided by a fact finder. Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1979); Hackberry Creek Country Club, Inc. v. Hackberry Creek Home Owners Ass'n, 205 S.W.3d 46, 56 (Tex. App.—Dallas 2006, pet. denied) (citing Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983)); *see also* R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517, 518 (Tex. 1980) ("The question of whether a contract is ambiguous is one of law for the court.").

1123. Moayedi v. Interstate 35/Chisam Rd., L.P., 438 S.W.3d 1 (Tex. 2014); Kachina Pipeline Co., Inc. v. Lillis, 471 S.W.3d 445, 449 (Tex. 2015).

1124. *Moayedi*, 438 S.W.3d at 5–6.

1125. U.S. Shale Energy II, LLC v. Laborde Props., L.P., 551 S.W.3d 148, 154 (Tex. 2018).

1126. Lopez v. Muñoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 861 (Tex. 2000).

1127. N. Shore Energy L.L.C. v. Harkins, 501 S.W.3d 598, 602 (Tex. 2016) (per curiam); J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003); Am. Mfrs. Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 157 (Tex. 2003); Nat'l Union Fire Ins. Co. of Pittsburgh v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995) (per curiam); *Coker*, 650 S.W.2d at 393.

1128. Milner v. Milner, 361 S.W.3d 615, 619 (Tex. 2012); *J.M. Davidson, Inc.*, 128 S.W.3d at 231.

1129. Consol. Petroleum, Partners, I, LLC v. Tindle, 168 S.W.3d 894, 899 (Tex. App.—Tyler 2005, no pet.).

unambiguous, the interpretation of the contract is a question of law for the court.[1130] Courts may "consult the facts and circumstances surrounding a negotiated contract's execution to aid in the interpretation of its language."[1131] Thus, it may consider "objectively determinable facts and circumstances that contextualize the parties' transaction" and "inform" the meaning of the language used.[1132] But, the courts may not use surrounding circumstances to alter or contradict an unambiguous contract's terms.[1133]

Because ambiguity is a legal question, a court may hold that an agreement is ambiguous even though both parties contend the contract is unambiguous.[1134] An ambiguity does not arise "merely because parties to an agreement proffer different interpretations of a term."[1135]An ambiguity in a contract may be either patent or latent.[1136] When the writing contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue.[1137] A summary judgment may also be used to determine the legal meaning of contractual language. For example, in *Epps v. Fowler*,[1138] the supreme court considered whether a defendant is a prevailing party entitled to attorney's fees when the plaintiff nonsuits a claim without prejudice.[1139] Whether a covenant not to compete is enforceable is a question of law that may be determined by summary judgment.[1140]

1130. Moayedi v. Interstate 35/Chisam Rd., L.P., 438 S.W.3d 1, 7 (Tex. 2014).

1131. Murphy Exp. & Prod. Co.-USA v. Adams, 560 S.W.3d 105, 109 (Tex. 2018) (citing URI, Inc. v. Kleberg County, 543 S.W.3d 755, 757 (Tex. 2018)).

1132. *Id.*

1133. *Id.*

1134. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 231 (Tex. 2003).

1135. DeWitt Cty. Elec. Coop., Inc. v. Parks, 1 S.W.3d 96, 100 (Tex. 1999).

1136. Friendswood Dev. Co. v. McDade & Co., 926 S.W.2d 280, 282–83 (Tex. 1996) (per curiam) (distinguishing a patent ambiguity as one that is "evident on the face of the contract" from a latent ambiguity as one that exists not on the face of the contract but in the contract's failure "by reason of some collateral matter when it is applied to the subject matter with which it deals").

1137. Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1979); Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc., 157 S.W.3d 462, 465 (Tex. App.—Houston [14th Dist.] 2004, no pet.); Donahue v. Bowles, Troy, Donahue, Johnson, Inc., 949 S.W.2d 746, 753 (Tex. App.—Dallas 1997, writ denied).

1138. Epps v. Fowler, 351 S.W.3d 862 (Tex. 2011).

1139. *Id.* at 864. The court held that:

> [S]uch a defendant is not a prevailing party unless the court determines, on the defendant's motion, that the plaintiff took the nonsuit in order to avoid an unfavorable judgment [and] . . . that, because a nonsuit with prejudice immediately alters the legal relationship between the parties by its res judicata effect, a defendant prevails when the plaintiff nonsuits with prejudice.

Id.

1140. Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding, 289 S.W.3d 844, 848 (Tex. 2009).

In construing a written contract, the court's primary concern is to determine the parties' true intentions, as expressed in the instrument.[1141] The court's primary concern is to "construe contracts from a utilitarian standpoint bearing in mind the particular business activity south to be served and avoiding unreasonable constructions when possible and proper."[1142]

Consistent with this approach, the supreme court affirmed a summary judgment that enforced a settlement agreement based on the court's determination that there was an "immaterial variation" between the offer and acceptance.[1143] The offer was "to pay a total sum of $90,000 to settle all claims asserted *or which could have been asserted* by [the plaintiff]," while the plaintiff's letter had accepted only the defendant's "offer to settle all monetary *claims asserted* against [the defendant]."[1144]

2. Deeds

Construction of an unambiguous deed is a question of law to be resolved by the court.[1145] As the supreme court has noted: "As is often the case, the parties here agree that the deed in question is unambiguous but diverge on its proper interpretation."[1146] When construing an unambiguous deed, the duty of the court is to determine the intent of the parties from all of the language within the four corners of the instrument.[1147] All parts of the deed are to be harmonized, construing the instrument to give effect to all of its provisions.[1148] The court must discern the parties' intent from the deed's language in its entirety "without reference to matters of mere form, relative positions of descriptions, technicalities, or arbitrary rules."[1149]

3. Guaranty Instruments

In a suit on a guaranty instrument, a court must construe unambiguous guaranty agreements as any other contract.[1150] A court may grant a summary judgment only if the right to it is established in the record

1141. J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003) (citing R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517, 518 (Tex. 1980)); City of Pinehurst v. Spooner Addition Water Co., 432 S.W.2d 515, 518 (Tex. 1968).

1142. Plains Exp. & Prod. Co. v. Torch Energy Advisors Ic., 473 S.W.3d 296, 305 (Tex. 2015) (quoting Reilly v. Rangers Mgmt., Inc., 727 S.W. 2d 527, 530 (Tex. 1987)).

1143. Amedisys, Inc. v. Kingwood Home Health Care, LLC, 437 S.W.3d 507, 514 (Tex. 2014).

1144. *Id.* at 511.

1145. *Luckel*, 819 S.W.2d at 461.

1146. U.S. Shale Energy II, LLC v. Laborde Props., L.P., 551 S.W.3d 148, 151 (Tex. 2018).

1147. Wenske v. Ealy, 521 S.W.3d 791, 794 (Tex. 2017).

1148. *Id.* at 462.

1149. Stribling v. Millican DPC Partners, LP, 458 S.W.3d 17, 20 (2015) (per curiam) (citing Sun Oil Co. v. Burns, 84 S.W.2d 442, 444 (1935)).

1150. Moayedi v. Interstate 35/Chisam Rd., L.P., 438 S.W.3d 1, 7 (Tex. 2014).

as a matter of law.[1151] "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law."[1152]

4. Promissory Notes

In promissory note cases, the movant should establish that "(1) there is a note; (2) he is the legal owner and holder of the note; (3) the defendant is the maker of the note; and (4) a certain balance is due and owing on the note."[1153] The supporting affidavits generally are provided by the owner and holder of the note, such as a corporate or bank officer.[1154] An example of such a case is *Batis v. Taylor Made Fats, Inc*., in which the court found the plaintiff's summary judgment proof, which consisted of an affidavit by the business records custodian, was sufficient to support a summary judgment.[1155] Failure to attach a copy of the promissory note in a summary judgment motion in a suit on that note is fatal to the summary judgment.[1156] A photocopy of a note attached to the affidavit of the holder who swears that it is a true and correct copy of the note is sufficient as a matter of law to prove the status of owner and holder of the note absent controverting summary judgment evidence.[1157]

In a suit on a promissory note, the plaintiff must establish the amount due on the note.[1158] To establish the amount due under the note, generally an affidavit that sets forth the balance due on a note is sufficient.[1159] Detailed proof of the balance is not required.[1160] Nonetheless, the summary judgment

1151. W. Bank-Downtown v. Carline, 757 S.W.2d 111, 114 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

1152. Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

1153. Blankenship v. Robins, 899 S.W.2d 236, 238 (Tex. App.—Houston [14th Dist.] 1994, no writ).

1154. *See, e.g.*, Jackson T. Fulgham Co. v. Stewart Title Guar. Co., 649 S.W.2d 128, 130 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (referring to an affidavit of the vice president of a title company that stated the company was the holder of the note); Batis v. Taylor Made Fats, Inc., 626 S.W.2d 605, 606–07 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.).

1155. *Batis*, 626 S.W.2d at 606–07.

1156. *See* Sorrells v. Giberson, 780 S.W.2d 936, 937–38 (Tex. App.—Austin 1989, writ denied) (holding that the note could not serve as the basis for summary judgment because the appellee failed to attach a copy of it to the affidavit filed in support of the motion for summary judgment).

1157. Zarges v. Bevan, 652 S.W.2d 368, 369 (Tex. 1983) (per curiam).

1158. *See, e.g.*, Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C., 99 S.W.3d 349, 354 (Tex. App.—Fort Worth 2003, no pet.); Commercial Servs. of Perry, Inc. v. Wooldridge, 968 S.W.2d 560, 564 (Tex. App.—Fort Worth 1998, no pet.).

1159. Martin v. First Republic Bank, Fort Worth, N.S., 799 S.W.2d 482, 485 (Tex. App.—Fort Worth 1990, writ denied).

1160. Hudspeth v. Investor Collection Servs. Ltd. P'ship, 985 S.W.2d 477, 479 (Tex. App.—San Antonio 1998, no pet.).

evidence must clearly establish the amount due on the note.[1161] "[W]here an affidavit submitted in support of summary judgment lumps the amounts due under multiple notes with varying terms and provisions, an ambiguity can arise as to the balance due, precluding summary judgment."[1162]

5. Application of the Parol Evidence Rule

In cases based on written instruments, a common defense both at trial and in response to motions for summary judgment is an allegation of contemporaneous representations (parol evidence) that would entitle the defendant to modify the written terms of the note or contract.[1163] The parol evidence rule generally intends to keep out extrinsic evidence of oral statements or representations relative to the making of a contractual agreement when that agreement is valid and complete on its face.[1164] Parties cannot rely on parol evidence to give the contract a different meaning from that in its language, to alter or contradict the terms of the agreement, to make the language say what it unambiguously does not say or to show that the parties' meant something other than what was in their agreement.[1165] Courts "may not rely on evidence of surrounding circumstances to make the language [of a contract] say what it unambiguously does not say."[1166]

In general, a written instrument that is clear and express in its terms cannot be varied by parol evidence.[1167] Parol evidence cannot be used to supply the essential requirements to satisfy the statute of frauds.[1168]

1161. *See* Bailey, Vaught, Robertson & Co. v. Remington Invs., Inc., 888 S.W.2d 860, 867 (Tex. App.—Dallas 1994, no writ) (holding that summary judgment evidence failed to establish the applicable rate of interest on a promissory note and therefore failed to establish the total amount due).

1162. FFP Mktg. Co. v. Long Lane Master Trust IV, 169 S.W.3d 402, 411–12 (Tex. App.—Fort Worth 2005, no pet.); *see also* Gen. Specialties, Inc. v. Charter Nat'l Bank-Houston, 687 S.W.2d 772, 774 (Tex. App.—Houston [14th Dist.] 1985, no writ) (holding that an affidavit stating a lump sum balance due for seven promissory notes created an ambiguity and precluded summary judgment).

1163. *See, e.g.*, Carter v. Allstate Ins. Co., 962 S.W.2d 268, 270 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (holding that the existence of an oral agreement created a genuine issue of material fact that precluded summary judgment); Hallmark v. Port/Cooper-T. Smith Stevedoring Co., 907 S.W.2d 586, 590 (Tex. App.—Corpus Christi 1995, no writ) ("The parol evidence rule does not preclude enforcement of prior contemporaneous agreements which are collateral to, not inconsistent with, and do not vary or contradict the express or implied terms or obligations thereof.").

1164. TEX. BUS. & COM. CODE ANN. § 2.202 (West 2017). *See generally* Randy Wilson, *Parol Evidence in Breach of Contract Cases*, ADVOC., Summer 2007, at 44.

1165. *See* URI Inc. v. Kleberg County, 543 S.W.3d 755, 764 (Tex. 2018).

1166. First Bank v. Brummit, 519 S.W.3d 95, 110 (Tex. 2017).

1167. *See* Wilson, *supra* note 1164, at 44–46 (analyzing the admissibility of parol evidence).

1168. Ardmore, Inc. v. Rex Grp., Inc., 377 S.W.3d 45, 56 (Tex. App.—Houston [1st Dist.] 2012, no pet.) (citing Wilson v. Fisher, 188 S.W.2d 150, 152 (Tex. 1945)). *But see infra* Part 1.VII.B.2 (Exception to the Parol Evidence Rule).

6. Exception to the Parol Evidence Rule

Parol evidence "can be used to 'explain or clarify the essential terms appearing in the' contract."[1169] When a contract contains ambiguity, courts can admit extraneous evidence to determine the true meaning of the contract.[1170] Parol evidence does not prohibit courts from considering extrinsic evidence of facts and circumstances surrounding the contract's execution as "an aid in construction of the contract's language," but the evidence may only "give the words of a contract a meaning consistent with that to which they are reasonably susceptible, i.e. to 'interpret' contractual terms."[1171] In *URI, Inc. v. Kleberg County*,[1172] the supreme court offered the following example: Extrinsic evidence can be consulted to give meaning to the phrase "the green house on Pecan Street," but it cannot be used to look beyond the language in the contract to show the parties' motive and intentions.[1173]

Another important exception to the parol evidence rule permits extrinsic evidence to show fraud in the inducement of a written contract.[1174] The Texas Supreme Court addressed this problem in *Town North National Bank v. Broaddus*.[1175] In that case, three parties signed a note as obligors.[1176] After default, the bank brought suit against the obligors.[1177] The bank then moved for summary judgment.[1178] Defendants alleged that a bank officer told them

1169. *Ardmore*, 377 S.W.3d at 56–57 (quoting *Wilson*, 188 S.W.2d at 152). The Statute of Frauds provides that a promise or agreement within its terms is unenforceable unless "the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him." TEX. BUS. & COM. CODE ANN. § 26.01(a) (general statute of frauds provisions); *see also* TEX. BUS. & COM. CODE ANN. § 2.201(a) (sale of goods for the price of $500 or more); Padilla v. LaFrance, 907 S.W.2d 454, 460 (Tex. 1995) ("To satisfy the statute of frauds, 'there must be a written memorandum which is complete within itself in every material detail, and which contains all of the essential elements of the agreement, so that the contract can be ascertained from the writings without resorting to oral testimony.'" (quoting Cohen v. McCutchin, 565 S.W.2d 230, 232 (Tex. 1978))).

1170. David J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 450–51 (Tex. 2008) (per curiam).

1171. URI, Inc. v. Kleberg County, 543 S.W.3d 755, 765 (Tex. 2018) (first quoting Sun Oil Co. v. Madeley, 626 S.W.3d, 726, 731 (Tex. 1981); then quoting Nat'l Union Fire Ins. v. CBI Indus., Inc., 907 S.W.2d 517, 521 (Tex. 1995)).

1172. URI, Inc. v. Kleberg County, 543 S.W.3d 755 (Tex. 2018),

1173. *Id*. at 767.

1174. Town N. Nat'l Bank v. Broaddus, 569 S.W.2d 489, 491 (Tex. 1978) (stating that parol evidence is admissible to show that the maker of a note was induced by fraud); Friday v. Grant Plaza Huntsville Assocs., 713 S.W.2d 755, 756 (Tex. App.—Houston [1st Dist.] 1986, no writ) (stating that a successful prima facie showing of fraud in the inducement is an exception to the parol evidence rule); Albritton Dev. Co. v. Glendon Invs., Inc., 700 S.W.2d 244, 246 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (stating that the terms of a negotiable instrument cannot be varied by parol evidence without a showing of a fraudulent scheme or trickery).

1175. *Town N. Nat'l Bank*, 569 S.W.2d at 491.

1176. *See id.* at 490.

1177. *Id.*

1178. *Id.*

that they would not be held liable on the note.[1179] This misrepresentation, they argued, created fraud in the inducement.[1180] The defendants argued that this alleged fraud raised a question of fact precluding a grant of summary judgment.[1181]

The court held that extrinsic evidence is admissible to show fraud in the inducement of a note only if, in addition to the showing that the payee represented to the maker he would not be liable on such note, there is a showing of some type of "trickery, artifice, or device employed by the payee."[1182] "[A] negotiable instrument which is clear and express in its terms cannot be varied by parol agreements or representations of a payee that a maker or surety will not be liable thereon."[1183]

C. Statute of Limitations/Statutes of Repose

Summary judgment may be proper in cases where the statute of limitations[1184] is pleaded as a bar to recovery.[1185] The statute of limitations is an affirmative defense for which the defendant must establish all the elements as a matter of law.[1186] The movant for a summary judgment on the basis of the running of the statute of limitations assumes the burden of showing as a matter of law that the suit is barred by limitations.[1187]

> [T]he defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury.[1188]

1179. *See id.* at 490–91 (illustrating how the bank officer indicated the dismissed third party would be responsible for the note).

1180. *Id.* at 491.

1181. *Id.*

1182. *Id.* at 494.

1183. *Id.* at 491.

1184. *See supra* Part 1.III.A.3 (discussing affirmative defenses).

1185. KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999); *see also* Hall v. Stephenson, 919 S.W.2d 454, 464–65 (Tex. App.—Fort Worth 1996, writ denied) (holding that summary judgment was proper when the suit was filed outside the statute of limitations); Salazar v. Amigos Del Valle, Inc., 754 S.W.2d 410, 412 (Tex. App.—Corpus Christi 1988, no writ) (stating that a party "by moving for summary judgment on the basis of the running of limitations, assumed the burden of showing as a matter of law that limitations barred the suit").

1186. Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 846 (Tex. 2005); *KPMG Peat Marwick*, 988 S.W.2d at 748.

1187. Velsicol Chem. Corp. v. Winograd, 956 S.W.2d 529, 530 (Tex. 1997) (per curiam); Delgado v. Burns, 656 S.W.2d 428, 429 (Tex. 1983) (per curiam).

1188. *KPMG Peat Marwick*, 988 S.W.2d at 748; *see also Diversicare*, 185 S.W.3d at 846; Jennings v. Burgess, 917 S.W.2d 790, 793 (Tex. 1996); Burns v. Thomas, 786 S.W.2d 266, 267

The discovery rule must be negated by the defendant movant only if it is raised.[1189] However, if the plaintiff does not plead it, but raises the discovery rule for the first time in his or her summary judgment response, the defendant's failure to object will result in trying the issue by consent.[1190]

Fraudulent concealment tolls or suspends the running of the statute of limitations.[1191] A party asserting fraudulent concealment as an affirmative defense to statute of limitations must raise the issue and come forward with summary judgment evidence creating a fact issue on each element of fraudulent concealment.[1192]

Any of the plaintiff's claims or defenses pleaded in response to the defendant's affirmative defense on which the plaintiff would have the burden of proof at trial, including the discovery rule, fraudulent concealment, or tolling suspension provision, may be properly challenged by a no-evidence summary judgment motion. "In the summary judgment context, the burden is on the plaintiff asserting an Open Courts exception to the statute of limitations to raise a fact issue demonstrating that she did not have a reasonable opportunity to discover the alleged wrong and bring suit before the limitations period expired."[1193] Even when conclusively established, a plaintiff may invoke equitable estoppel as an affirmative defense in avoidance of a defendant's statute of limitations defense.[1194] The non-moving plaintiff bears the burden of establishing its defense.[1195] Once the movant established that the action is barred, the nonmovant must present summary judgment evidence raising a fact issue on each element of avoidance.[1196]

"If the movant establishes that the statute of limitations bars the action, the nonmovant must then adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations."[1197] The relation back doctrine may save

(Tex. 1990); Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518 n.2 (Tex. 1988); McMahan v. Greenwood, 108 S.W.3d 467, 492 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

1189. Pustejovsky v. Rapid-Am. Corp., 35 S.W.3d 643, 646 (Tex. 2000); *In re* Estate of Matejek, 960 S.W.2d 650, 651 (Tex. 1997) (per curiam). The discovery rule applies to both common law fraud and the DTPA. Gonzales v. Sw. Olshan Found. Repair Co., 400 S.W.3d 52, 58 (Tex. 2013).

1190. *See* Via Net v. TIG Ins. Co., 211 S.W.3d 310, 313 (Tex. 2006) (per curiam).

1191. BP Am. Prod. Co. v. Marshall, 342 S.W.3d 59, 69 (Tex. 2011); Winn v. Martin Homebuilders, Inc., 153 S.W.3d 553, 557–58 (Tex. App.—Amarillo 2004, pet. denied). The same rule applies to fraudulent inducement claims. *See* Hooks v. Samson Lone Star, Ltd. P'ship, 457 S.W.3d 52, 57 (Tex. 2015).

1192. *KPMG Peat Marwick*, 988 S.W.2d at 749.

1193. Walters v. Cleveland Reg'l Med. Ctr., 307 S.W.3d 292, 295 (Tex. 2010).

1194. *See, e.g.*, ExxonMobil Corp. v. Rincones, 520 S.W.3d 572, 593 (Tex. 2017).

1195. *Id.*

1196. *Id.*

1197. Diversicare Gen. Partner, Inc. v. Rubio, 185 S.W.3d 842, 846 (Tex. 2005) (citing *KPMG Peat Marwick*, 988 S.W.2d at 748).

certain claims. The doctrine of relation back prevents a successful statute of limitations claim if the amended petitions relate back to a timely filed claim that does not arise from a wholly different transaction.[1198] The Texas Civil Practice and Remedies Code provides that new facts or claims raised in a later pleading relate back to a timely filed pleading and are not barred unless the amendment or supplemental pleading "is wholly based on a new, distinct, or different transaction or occurrence."[1199] Thus, an original pleading tolls the limitations period for claims asserted in a later, amended pleading if the amended pleading does not allege a wholly new, distinct, or different transaction.[1200] "A 'transaction' is defined as a set of facts that gives rise to the cause of action [on which it is premised]."[1201]

If an exception to defective pleadings is not filed, the pleadings may satisfy the statute of limitations.[1202]

The question of diligence in effecting service when it occurs outside the statute of limitations presents another example of shifting burdens at trial or in a summary judgment proceeding. If a plaintiff files its petition within the limitations period, but obtains service outside the limitations period, service is valid only if the plaintiff exercised diligence in procuring service.[1203] If a defendant affirmatively pleads limitations and shows that service has occurred after the limitations deadline, the burden shifts to the plaintiff to prove his diligence.[1204]

Existence of due diligence in effecting service is usually a fact issue.[1205] However, summary judgment may be appropriate. To obtain summary judgment on the ground that an action was not served within the applicable limitations period, "the movant must show that, as a matter of law, diligence was not used to effectuate service."[1206] The movant may argue that the plaintiff's explanation of its efforts to obtain service demonstrates a lack of diligence as a matter of law when "one or more lapses between service efforts

1198. Long v. State Farm Fire & Cas. Co., 828 S.W.2d 125, 127–28 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (West 1986), *disapproved of on other grounds by* Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 518–19 (Tex. 1998)).

1199. TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (West 2017).

1200. Alexander v. Turtur & Assocs., Inc., 146 S.W.3d 113, 121 (Tex. 2004).

1201. Tex. Disposal Sys. Landfill, Inc. v. Waste Mgmt. Holdings, Inc., 219 S.W.3d 563, 587 (Tex. App.—Austin 2007, pet. denied).

1202. *See* Sullivan v. Hoover, 782 S.W.2d 305, 306–07 (Tex. App.—San Antonio 1989, no writ) (stating that a petition advising the defendant of the nature of the cause of action against him is all that is needed to arrest the statute of limitations).

1203. Ashley v. Hawkins, 292 W.S.3d 175, 179 (Tex. 2009).

1204. *Id.*

1205. Prolx v. Wells, 238 S.W.3d 213, 215 (Tex. 2007).

1206. Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam).

are unexplained or patently unreasonable."[1207] If the plaintiff's explanation for the delay raises a material fact issue concerning his diligence, the summary judgment burden then shifts back to the defendant to conclusively demonstrate why, as a matter of law, the plaintiff provided an insufficient explanation.[1208]

Summary judgment may also be appropriate in a case barred by a statute of repose.[1209] A statute of repose differs from a traditional statute of limitations. A traditional statute of limitations runs from the time that a cause of action accrues, which is not later than when the party first sustains or discovers an injury or damage.[1210] Statutes of repose typically provide a definitive date beyond which an action cannot be filed.[1211] "[W]hile statutes of limitations operate procedurally to bar the enforcement of a right, a statute of repose takes away the right altogether, creating a substantive right to be free of liability after a specified time."[1212] Therefore, a statute of repose can cut off a right of action before an injured party discovers or reasonably should have discovered the defect or injury.[1213]

The Texas statute of repose does not, however, bar an action based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair of an improvement to real property.[1214]

Thus, if the statute of repose period has expired, the nonmovant having an affirmative defense of fraudulent concealment must present enough proof to raise a fact issue; otherwise, summary judgment will be held proper.[1215]

1207. *Prolx*, 238 S.W.3d at 216.

1208. *Id*. For examples of cases in which courts have found a lack of diligence as a matter of law, see Shaw v. Lynch, No. 001-15-00040-CV, 2016 WL 1388986 (Tex. App.—Houston [1st Dist.] Apr. 7, 2016, no pet.) (mem. op.) (holding that the movant did not conclusively establish that plaintiff failed to exercise due diligence in having him served).

1209. *See, e.g.*, Nathan v. Whittington, 408 S.W.3d 870, 876 (Tex. 2013) (per curiam); Zaragosa v. Chemetron Invs., Inc., 122 S.W.3d 341, 345 (Tex. App.—Fort Worth 2003, no pet.) (concluding that summary judgment was proper where the statute of repose barred the plaintiff's products liability claim).

1210. Lambert v. Wansbrough, 783 S.W.2d 5, 6 (Tex. App.—Dallas 1989, writ denied).

1211. Holubec v. Brandenberger, 111 S.W.3d 32, 37 (Tex. 2003).

1212. Methodist Healthcare Sys. of San Antonio, Ltd., v. Rankin, 307 S.W.3d 283, 287 (Tex. 2010) (quoting Galbraith Eng'g Consultants, Inc. v. Pochucha, 290 S.W.3d 863, 866 (Tex. 2009)).

1213. *See Galbraith Eng'g Consultants, Inc.*, 290 S.W.3d at 866 ("Repose then differs from limitations in that repose not only cuts off rights of action after they accrue, but can cut off rights of action before they accrue.").

1214. TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(e)(3) (West 2017); *see also* Ryland Grp., Inc. v. Hood, 924 S.W.2d 120, 121–22 (Tex. 1996) (per curiam) (holding that the statute of repose applied because a witness's affidavit did not raise a fact issue as to the defendant's possible willful and intentional misconduct).

1215. *See Ryland Grp., Inc*., 924 S.W.2d at 121–22.

D. Res Judicata/Collateral Estoppel

Summary judgment is also proper in a case barred by res judicata or collateral estoppel.[1216] Res Judicata prevents the relitigation of a claim or cause of action that has been finally adjudiciated, as well as related matters that, with the use of diligence, should have been litigated in the earlier suit.[1217] Under res judicata (i.e., claim preclusion), a judgment in a first suit precludes a second action by the parties and their privies on matters actually litigated and on causes of action or defenses arising out of the same subject matter that might have been litigated in the first suit.[1218] An affirmative defense, res judicata requires the party asserting it to prove "(1) a prior final determination on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims as were or could have been raised in the first action."[1219]

Relitigation of an issue will be barred by collateral estoppel (i.e., issue preclusion) if: "(1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action; (2) those facts were essential to the judgment in the first action; and (3) the parties were cast as adversaries in the first action."[1220]

1216. *See, e.g.*, Travelers Ins. Co. v. Joachim, 315 S.W.3d 860, 862 (Tex. 2010); Barr v. Resolution Trust Corp. *ex rel.* Sunbelt Fed. Sav., 837 S.W.2d 627, 627–28 (Tex. 1992) (stating that res judicata prevents the relitigation of a claim or a cause of action that has been finally adjudicated and may invoke a motion for summary judgment); Simulis, L.L.C. v. Gen. Elec. Capital Corp., 392 S.W.3d 729, 735 n.7 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) ("When a party seeks to dispose of claims barred by res judicata, collateral estoppel law of the case, and similar theories, it should file a motion for summary judgment."). A determination of fact or law by a lower trial court, including a justice of the peace court, is not res judicata or basis for collateral estoppel in a district court proceeding. Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 919 n.5 (Tex. 2013) (citing TEX. CIV. PRAC. & REM. CODE § 31.004(a), (c)).

1217. *Barr*, 837 S.W.2d at 628.

1218. Gracia v. RC Cola-7-Up Bottling Co., 667 S.W.2d 517, 519 (Tex. 1984). Although closely related, the doctrines of res judicata and collateral estoppel are separately applicable in distinct situations. "Collateral estoppel . . . is more narrow than res judicata in that it only precludes the relitigation of identical issues of facts or law that were actually litigated and essential to the judgment in a prior suit." McKnight v. Am. Mercury Ins. Co., 268 S.W.3d 793, 798 n.5 (Tex. App.—Texarkana 2008, no pet.). Res judicata, which is more broadly applicable, bars a plaintiff from bringing another action on any claims that were actually litigated or that could have been litigated in an original action. *Id.* at 797–98. Despite these clear differences, res judicata is often cited generically in reference to both concepts. *See* Barnes v. United Parcel Serv., Inc., 395 S.W.3d 165, 173 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).

1219. *Joachim*, 315 S.W.3d at 862; Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 652 (Tex. 1996); *see* TEX. R. CIV. P. 94 (identifying res judicata as an affirmative defense).

1220. Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990) (quoting Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984)); *see also* Sysco Food Servs., Inc. v. Trapnell, 890 S.W.2d 796, 801 (Tex. 1994).

The "transactional approach" applies to res judicata.[1221] In other words, a later suit will be barred if it arises out of the same subject matter of a previous suit and, through the exercise of diligence, could have been litigated in an earlier suit.[1222] Issue preclusion or collateral estoppel, as distinguished from res judicata, applies to "any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."[1223] The court in *Acker v. City of Huntsville* stated, "The seminal test for finality sufficient to justify issue preclusion is whether the decision in the prior case is procedurally definite—was it adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered."[1224]

Findings by a federal court beyond those necessary to make a decision are not "actually litigated" or "necessary to the outcome" so they would not form the basis for collateral estoppel or res judicata.[1225]

A partial summary judgment that is interlocutory and non-appealable is not final and cannot support a plea of res judicata.[1226] But, a partial summary judgment may be proper on an issue precluded by collateral estoppel.[1227]

When filing or answering a motion for summary judgment based on res judicata or collateral estoppel, the earlier judgment should be attached to the motion.[1228] This is an example of one of the limited instances when pleadings are proper summary judgment evidence.

1221. *Barr*, 837 S.W.2d at 631 (holding that the scope of res judicata can extend to causes of action or defenses which arise out of the same subject matter litigated in the first suit); *see also* Compania Financiara Libano, S.A. v. Simmons, 53 S.W.3d 365, 367 (Tex. 2001) (per curiam).

1222. *Barr*, 837 S.W.2d at 631.

1223. Acker v. City of Huntsville, 787 S.W.2d 79, 82 (Tex. App.—Houston [14th Dist.] 1990, no writ) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982)); *see also Eagle Props., Ltd.*, 807 S.W.2d at 721 (explaining the rule of collateral estoppel in the context of due process) (quoting Benson v. Wanda Petroleum Co., 468 S.W.2d 361, 363 (Tex. 1971)).

1224. *Acker*, 787 S.W.2d at 82.

1225. Shell Pipeline Corp. v. Coastal States Trading, Inc., 788 S.W.2d 837, 843 (Tex. App.—Houston [1st Dist.] 1990, writ denied), *disapproved of on other grounds by* Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507 (Tex. 1998); *see also* Flippin v. Wilson State Bank, 780 S.W.2d 457, 459 (Tex. App.—Amarillo 1989, writ denied) (discussing the elements of res judicata under federal law); Allen v. Port Drum Co., 777 S.W.2d 776, 777–78 (Tex. App.—Beaumont 1989, writ denied) (stating the federal requirements to barring earlier judgments under the doctrine of res judicata).

1226. Mower v. Boyer, 811 S.W.2d 560, 562 (Tex. 1991) (noting that the interlocutory partial summary judgment was not final because expressly leaving open the issue of consideration did not have a res judicata effect).

1227. *See Barr*, 837 S.W.2d at 628 ("Issue preclusion, or collateral estoppel, prevents relitigation of particular issues already resolved in a prior suit.").

1228. Anders v. Mallard & Mallard, Inc., 817 S.W.2d 90, 94 (Tex. App.—Houston [1st Dist.] 1991, no writ); Chandler v. Carnes Co., 604 S.W.2d 485, 486 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.) (stating that a certified copy of a prior judgment must be attached to a motion for summary judgment to be properly based on the doctrine of res judicata).

E. Equitable Actions

In a case governed by equitable principles, summary judgment presents more potential difficulties than in the usual summary judgment case because there are no clear guidelines for determining what is a material fact.[1229] The main guiding principle in equitable actions is that an unfair or unjust result should be prevented.[1230] While summary judgment may occasionally be appropriate in equity cases, it is not appropriate "where the summary judgment record does not fully develop the facts on which the trial court's equitable discretion must be exercised, and where the facts that are developed, though uncontroverted, can give rise to more than one reasonable inference."[1231]

F. Defamation Actions

Defamation actions are often resolved by summary judgment, not only because of the strong constitutional protections that apply, but also because many of the issues that determine whether summary judgment disposition is proper have been held to be matters of law. It is necessary to understand the elements and fundamentals of defamation law before analyzing these cases in the context of summary judgment practice.

Unlike most summary judgment actions, Texas law allows an interlocutory appeal from a denial of a summary judgment based on a claim against the media arising under the free speech or free press clauses of the U.S. or Texas constitutions.[1232] The standards for reviewing summary judgments in defamation actions are the same as for traditional summary judgments.[1233] The constitutional concerns over defamation do not affect summary judgment standards of review.[1234]

1229. Fleetwood v. Med Ctr. Bank, 786 S.W.2d 550, 556 (Tex. App.—Austin 1990, writ denied).

1230. *See* Johnson v. Cherry, 726 S.W.2d 4, 8 (Tex. 1987) ("The equitable power of the court exists to do fairness . . . .").

1231. *Fleetwood*, 786 S.W.2d at 557.

1232. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (West 2017) (authorizing interlocutory appeal from denial of summary judgment based on a claim against or defense by a member of the media); *see also* KTRK Television, Inc. v. Fowkes, 981 S.W.2d 779, 786 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) ("The legislature has enacted [Section 51.014(a)(6)] to eliminate the chilling effect that the threat of extended litigation has upon the exercise of the protections secured by the First Amendment."); *supra* Part 1.V.B (discussing appealing summary judgments and the exceptions for government immunity and media defendants).

1233. Cox Tex. Newspapers, L.P. v. Penick, 219 S.W.3d 425, 433 (Tex. App.—Austin 2007, pet. denied); Carabajal v. UTV of San Antonio, Inc., 961 S.W.2d 628, 630 (Tex. App.—San Antonio 1998, pet. denied) (citing Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989)).

1234. Neely v. Wilson, 418 S.W.3d 52, 60 (Tex. 2013).

1. Applicable Law

The elements of a defamation claim include "(1) the publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases."[1235] In Texas, libel is a defamatory statement in written form, published to one or more third persons, tending to injure a living person's reputation and, as a result, exposing the person to public hatred, contempt, or ridicule, or causing financial injury.[1236] Where the plaintiff is a public figure, the U.S. Constitution requires more than simple negligence; to prevail, a libel plaintiff must prove "actual malice," in the constitutional sense.[1237]

To publish with actual malice, the defendant must have circulated the defamatory statement knowing that it was false or with "reckless disregard" as to its falsity.[1238] "Reckless disregard" is not negligence. It is "a high degree of awareness of probable falsity" and requires the plaintiff to prove that the defendant "in fact entertained serious doubts as to the truth of his publication."[1239] Failure to investigate or failure to act reasonably before publishing the statement is distinct from actual malice.[1240] These requirements are designed to protect freedom of speech and freedom of the press.[1241]

1235. *In re* Lipsky, 460 S.W.3d 579, 593 (Tex. 2015) (citing WFAA-TV, Inc. v. McLemore, 978 S.W. 2d 568, 571 (Tex. 1998)).

1236. TEX. CIV. PRAC. & REM. CODE ANN. § 73.001; Hill v. Herald-Post Publ'g Co., 877 S.W.2d 774, 778 (Tex. App.—El Paso), *aff'd in part, rev'd in part per curiam*, 891 S.W.2d 638 (Tex. 1994).

1237. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 153 (1967) (stating that given the protections of the First Amendment, public officials can recover for libel only when they can prove deliberate falsehood or reckless publication); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (explaining that public officials must prove actual malice to recover for a defamatory falsehood relating to official conduct); Franco v. Cronfel, 311 S.W.3d 600, 606 (Tex. App.—Austin 2010, no pet.).

1238. *Sullivan*, 376 U.S. at 279–80.

1239. Carr v. Brasher, 776 S.W.2d 567, 571 (Tex. 1989) (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

1240. *See St. Amant*, 390 U.S. at 731 ("[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing.").

1241. For a discussion of the historical precedents protecting these constitutional guarantees, especially the Founding Fathers' views, see *Sullivan*, 376 U.S. at 269–77.

2. Questions of Law

Whether a statement is reasonably capable of a defamatory meaning initially is a question of law for the court.[1242] An allegedly libelous statement should be construed as a whole in light of the surrounding circumstances, considering "how a person of ordinary intelligence would perceive the entire statement."[1243] In *Neely v. Wilson*,[1244] the supreme court focused on assessment of a broadcast's "gist" as being crucial. A broadcast that contains errors in specific details but that correctly conveys the gist of a story is substantially true.[1245] "On the other hand, a broadcast 'can convey a false and defamatory meaning by omitting or juxtaposing facts, even though all the story's individual statements considered in isolation were literally true or non-defamatory.'"[1246] In *Neely*, the supreme court found fact issues existed by applying summary judgment standards to indulge every reasonable inference in the nonmovant's favor and resolving any doubts against the motion.[1247]

Similarly, the Houston First Court of Appeals held that a book as a whole and each of multiple complained of "gists," when viewed in the context of a book as a whole, were not capable of defamatory meaning.[1248] "In short, the book is an account of sharply conflicting, inflammatory, and accusatory trial evidence and argument, peppered with the lawyer-author's opinions about the trial, which ended with the [plaintiff] family being vindicated."[1249]

Earlier cases had held that only if the language is ambiguous or of doubtful import should a jury determine a statement's meaning and its effect on the mind of an ordinary reader.[1250] In *ExxonMobil Corp v. Rincones*, the supreme court determined another defamation-related legal issue on summary judgment. In it, the court expressly declined to recognize a theory of compelled self-defamation either to satisfy the publication element of a defamation claim or to recognize an independent cause of action for compelled self-defamation.[1251]

1242. New Times, Inc. v. Isaacks, 146 S.W.3d 144, 155 (Tex. 2004); Musser v. Smith Protective Servs., Inc., 723 S.W.2d 653, 654 (Tex. 1987); Harvest House Publishers v. Local Church, 190 S.W.3d 204, 210 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

1243. *Musser*, 723 S.W.2d at 655.

1244. Neely v. Wilson, 418 S.W.3d 52 (Tex. 2013).

1245. *Id.* at 63–64; Turner v. KTRK Television, Inc., 38 S.W.3d 103, 115 (Tex. 2000).

1246. *Neely*, 418 S.W.3d at 64 (quoting *Turner*, 38 S.W.3d at 114).

1247. *Id.* at 59–60, 76.

1248. Johnson v. Phillips, 526 SW3d 529, 539 (Tex. App.—Houston [1st Dist.] 2017, pet. denied).

1249. *Id.* at 538.

1250. *Turner*, 38 S.W.3d at 114.

1251. ExxonMobil Corp. v. Rincones, 520 S.W.3d 572, 577 (Tex. 2017). "Compelled self-defamation" arises when a former employee is compelled to publish the defamatory statement to prospective employers when asked why he left his former employment. *Id.* at 580.

"If the evidence is disputed, falsity must be determined by the finder of fact."[1252] Whether a plaintiff is a public figure is an issue of law for the court to decide.[1253]

3. Plaintiff's Burden of Showing Actual Malice

Public figures cannot recover on a claim for defamation absent proof of actual malice.[1254] Actual malice must exist within the mind of the defendant at the time the publication is made.[1255] A libel defendant is entitled to summary judgment if he or she can negate actual malice as a matter of law.[1256] Thus, even though the author's subjective state of mind is at issue, a summary judgment may be properly granted.[1257]

In *Casso v. Brand*, the Texas Supreme Court first held that an interested party can negate actual malice as a matter of law through his or her affidavit concerning state of mind and lack of actual malice.[1258] This decision specifically overruled earlier decisions to the contrary.[1259]

In *Carr v. Brasher*, decided the same day as *Casso*, the Texas Supreme Court again affirmed summary judgment for libel defendants in a case where the defendants negated actual malice with their own affidavits.[1260] Thus, through affidavits of interested witnesses, such as the publisher, editor, or reporter, the media defendant may negate actual malice as a matter of law.[1261] A libel plaintiff must ordinarily produce independent evidence of actual malice in order to refute the defendant's denial.[1262] Therefore, summary judgment is proper where a defendant denies actual malice and the plaintiff is unable to offer proof that actual malice exists.[1263]

1252. Bentley v. Bunton, 94 S.W.3d 561, 587 (Tex. 2002).

1253. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 328, 352 (1974) (upholding ruling that plaintiff was not a public figure before sending the case to the jury); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 811 (Tex. 1976) (reviewing the appeals court's determination that plaintiff was both a public official and a public figure).

1254. New Times, Inc. v. Isaacks, 146 S.W.3d 144, 161 (Tex. 2004).

1255. *See* Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995) (holding that employer's qualified privilege to discuss employee wrongdoing is defeated if motivated by actual malice at the time of publication).

1256. Freedom Newspapers of Tex. v. Cantu, 168 S.W.3d 847, 853 (Tex. 2005); Huckabee v. Time Warner Entm't Co., 19 S.W.3d 413, 420 (Tex. 2000).

1257. Casso v. Brand, 776 S.W.2d 551, 558 (Tex. 1989).

1258. *Id.* at 559; *see also* Hearst Corp. v. Skeen, 159 S.W.3d 633, 637 (Tex. 2005) (finding libel defendant's affidavit stating his belief that the article was true negated actual malice).

1259. *Casso*, 776 S.W.2d at 557–59.

1260. Carr v. Brasher, 776 S.W.2d 567, 571 (Tex. 1989).

1261. *Freedom Newspapers of Tex.*, 168 S.W.3d at 853.

1262. *Id.*; *Casso*, 776 S.W.2d at 558–59; *Carr*, 776 S.W.2d at 571.

1263. *Casso*, 776 S.W.2d at 558; *Carr*, 776 S.W.2d at 571; Cox Tex. Newspapers, L.P. v. Penick, 219 S.W.3d 425, 445–46 (Tex. App.—Austin 2007, pet. denied).

4. Qualified Privilege

A qualified privilege exists for statements, made in good faith on a subject in which the maker has an interest or duty, to another person having a corresponding interest or duty.[1264] Assertion of a qualified privilege is an affirmative defense.[1265] Thus, a defendant bears the burden to conclusively establish each element of the privilege to prevail on its summary judgment motion.[1266]

To prevail on this qualified privilege, a defendant must show that the alleged defamatory statement: "(1) was made without malice; (2) concerned a subject matter of sufficient interest to the author or was in reference to a duty owed by the author; and (3) was communicated to another party with a corresponding interest or duty."[1267]

As noted, when a defendant in a defamation suit moves for summary judgment on the basis of qualified privilege, the defendant has the burden of conclusively proving that the statements were not made with malice.[1268] "A good faith belief in the truth of a statement may be evidence that the statement was made without malice, but it is not sufficient . . . to prove that the statement is actually true."[1269]

G. Governmental Immunity

Governmental immunity may be raised in a plea to the jurisdiction or in a motion for summary judgment.[1270] When evidence has been submitted to the trial court, the procedure to determine a plea to the jurisdiction mirrors that of a traditional motion for summary judgment.[1271] The plaintiff has the initial burden of alleging facts that affirmatively establish subject-matter jurisdiction.[1272] The movant challenging jurisdiction satisfies bears the initial burden to present evidence establishing lack of

1264. Roberts v. Davis, 160 S.W.3d 256, 263 (Tex. App.—Texarkana 2005, pet. denied); *see also* Dixon v. Sw. Bell Tel. Co., 607 S.W.2d 240, 242 (Tex. 1980).

1265. Saudi v. Brieven, 176 S.W.3d 108, 118 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); Gonzales v. Levy Strauss & Co., 70 S.W.3d 278, 283 (Tex. App.—San Antonio 2002, no pet.).

1266. *See Gonzales*, 70 S.W.3d at 282.

1267. Bryant v. Lucent Techs., Inc., 175 S.W.3d 845, 851 (Tex. App.—Waco 2005, pet. denied).

1268. Martin v. Sw. Elec. Power Co., 860 S.W.2d 197, 199 (Tex. App.—Texarkana 1993, writ denied).

1269. *Roberts*, 160 S.W.3d at 262–63 n.1.

1270. *See* Harris County v. Sykes, 136 S.W.3d 635, 638 (Tex. 2004).

1271. *See* Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217, 228 (Tex. 2004) (citing TEX. R. CIV. P. 166a(c)); *see also* City of Houston v. Ellis, No. 01-17-00423-CV, 2018 WL 4087415 (Tex. App.—Houston [1st Dist.] Aug. 28, 2018, no pet. h.).

1272. Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993).

jurisdiction as a matter of law.[1273] If it meets that burden, the burden then shifts to the plaintiff to demonstrate that a disputed issue of material fact exists regarding the jurisdiction.[1274] If the evidence creates a fact issues regarding jurisdiction, the trial court does not rule on the plea, but instead submits the issue to the factfinder in a trial on the merits.[1275] Conversely, if the relevant evidence is undisputed or fails to raise a fact question on the jurisdictional issue, the trial court rules on the plea as a matter of law.[1276]

Official immunity is an affirmative defense.[1277] "Thus, the burden is on the defendant to establish all elements of the defense."[1278] A government official is entitled to the benefit of official immunity so long as the official is: (1) acting within the course and scope of his or her authority; (2) performing discretionary functions; and (3) acting in good faith.[1279]

To prove good faith, a government official must show that his or her acts were within the realm of what a reasonably prudent government official could have believed was appropriate at the time.[1280] This standard is met when the government official shows that the reasonably prudent government official, under the same or similar circumstances, would have believed that the benefit to the community from the activity in question substantially outweighed the risk of harm from the activity.[1281] To controvert the government official's summary judgment proof on good faith, "the plaintiff must show that 'no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts.'"[1282]

The Texas Tort Claims Act's election of remedies provision provides another potential avenue of relief for a government employee who is named as a defendant in the same lawsuit as the governmental unit for which she works. When a plaintiff sues both a government agency and one of the agency's employees in the same lawsuit, the employee must be immediately dismissed upon the filing of a motion.[1283] A motion for

1273. *Miranda*, 133 S.W.3d at 227–28.
1274. *Id*. at 228.
1275. *Id.* at 227–28.
1276. *Id.* at 228.
1277. Univ. of Houston v. Clark, 38 S.W.3d 578, 580 (Tex. 2000); City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994).
1278. *Chambers*, 883 S.W.2d at 653.
1279. Telthorster v. Tennell, 92 S.W.3d 457, 461 (Tex. 2002); Gidvani v. Aldrich, 99 S.W.3d 760, 763 (Tex. App.—Houston [1st Dist.] 2003, no pet.).
1280. *Chambers*, 883 S.W.2d at 656–57.
1281. *Id.* at 656.
1282. *Id.* at 657 (quoting Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified per curiam*, 14 F.3d 583 (11th Cir. 1994)).
1283. TEX. CIV. PRAC. & REM. CODE ANN. § 101.106 (West 2017).

summary judgment is an appropriate vehicle for an agency or employee to make such an assertion.[1284]

Unlike most other denials of motions for summary judgment, summary judgment denials in governmental immunity cases may be appealed.[1285]

H. Family Law Cases

Even though family law cases are necessarily fact driven, summary judgment disposition can be an effective way to partially or fully resolve some family law matters. The following are among the most common.

1. Enforceability of Premarital, Marital Property, and Mediated Settlement Agreements

The enforceability of premarital and marital property agreements may be determined by summary judgment disposition.[1286] Generally, premarital agreements are interpreted like other written instruments.[1287] If a movant seeks to enforce the agreement, he or she may move for summary judgment relying only on the agreement itself.[1288] The agreement itself is sufficient evidence on which to move for summary judgment because, under Family Code Section 4.006, there is a rebuttable presumption that the agreement is enforceable.[1289] The party challenging the agreement as unenforceable has the burden to prove the agreement is unenforceable.[1290] Upon the filing of the motion for summary judgment, the burden shifts to the nonmovant to come forward with enough evidence to raise a fact issue on whether the agreement is unenforceable.[1291]

1284. Alexander v. Walker, 435 S.W.3d 789, 790 (Tex. 2014).

1285. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5); *see* Univ. of Tex. Sw. Med. Ctr. of Dall. v. Margulis, 11 S.W.3d 186, 187–88 (Tex. 2000) (per curiam); Hays County v. Hays Cty. Water Planning P'ship, 69 S.W.3d 253, 257 (Tex. App.—Austin 2002, no pet.) ("The statute authorizing interlocutory appeals is strictly construed because it is an exception to the general rule that only a final judgment is appealable."); *see also supra* Part 1.V.B (discussing appealing summary judgments and the governmental immunity exception).

1286. *See* Beck v. Beck, 814 S.W.2d 745, 746, 749 (Tex. 1991) (holding premarital agreements constitutional); Thurlow v. Thurlow, No. 09-06-00522 CV, 2007 WL 5760841, at *4 (Tex. App.—Beaumont Nov. 26, 2008, pet. denied) (affirming the trial court's ruling on summary judgment that the premarital agreement at issue was enforceable).

1287. *In re* Marriage of I.C. and Q.C., 551 S.W.3d 119, 122 (Tex. 2018).

1288. *See* Grossman v. Grossman, 799 S.W.2d 511, 513 (Tex. App.—Corpus Christi 1990, no writ).

1289. *See* TEX. FAM. CODE ANN. § 4.006 (West 2017).

1290. *Grossman*, 799 S.W.2d at 513 (citing TEX. FAM. CODE ANN. § 5.46, *repealed by* Act of Mar. 13, 1997, 75th Leg., R.S., ch. 7, § 3, 1997 Tex. Gen. Laws 8, 43 (current version at TEX. FAM. CODE ANN. § 4.006)).

1291. *Id.*

If the defendant is relying on an involuntary execution defense, the plaintiff may consider filing a no-evidence motion for summary judgment.[1292] To defeat summary judgment, the nonmovant must present enough evidence to raise a fact issue concerning whether the agreement was entered into voluntarily.[1293]

The Family Code provides that an unconscionable agreement or one not voluntarily entered into is not enforceable.[1294] Whether the agreement was unconscionable when it was signed is a matter of law to be decided by the court.[1295] The Houston Fourteenth Court of Appeals noted that an early determination of unconscionability is a better practice than waiting for submission of the case to a jury.[1296] Summary judgment may be one way for the trial court to make this determination early in the proceedings. In considering premarital agreements, the supreme court cautions that parties have the "utmost liberty" to contract and "when entered into freely and voluntarily shall be held sacred and shall be enforced by the Courts."[1297] Accordingly, the supreme court upheld a summary judgment denying a wife's request for rescission of a premarital agreement in which her attempt at rescission triggered a clause under the agreement under which she lost a $5 million payment otherwise due to her.[1298]

Mediated settlement agreements may also be the source for summary judgment disposition. In *Loya v. Loya*,[1299] the supreme court considered whether a mediated settlement agreement partitioned a discretionary employee bonus the husband received nine months after the decree was entered. Upholding the trial court's summary judgment, the supreme court agreed that the mediated settlement agreement partitioned the bonus.[1300]

2. Interpretation of Divorce Decrees

To resolve a dispute over property, a motion for summary judgment may be proper to ask the court to interpret a divorce decree. If the divorce decree,

1292. *See, e.g.*, Sheshunoff v. Sheshunoff, 172 S.W.3d 686, 700–01 (Tex. App.—Austin 2005, pet. denied) (upholding partial summary judgment in favor of the party seeking to enforce a marital property agreement after determining that the nonmovant failed to raise a fact issue regarding involuntary execution).

1293. *See id.* at 691–92, 699–700.

1294. TEX. FAM. CODE ANN. §§ 4.006(a).

1295. *Id.* §§ 4.006(b), 4.105(b).

1296. Blonstein v. Blonstein, 831 S.W.2d 468, 472 (Tex. App.—Houston [14th Dist.]), *writ denied*, 848 S.W.2d 82 (Tex. 1992) (per curiam).

1297. *In re* Marriage of I.C. and Q.C., 551 S.W.3d 119, 119, 124 (Tex. 2018) (quoting Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905, 912 (Tex. 2007)).

1298. *Id.* at 124–25.

1299. Lova v. Lova, 526 S.W.3d 448 (Tex. 2017).

1300. *Id*. at 453.

when read as a whole, is unambiguous concerning the property's disposition, the court may grant a summary judgment to effectuate the order in light of the literal language used.[1301] Thus, even when a divorce decree does not contain express language disposing of a certain piece of property (for example, the house your client inherited), the court may still grant a summary judgment if the decree indicates the divorce court's decision to award the property solely to one spouse.[1302]

A motion for summary judgment may also be used to dispose of disputes that are barred by an agreement incident to divorce that a party would not re-open the divorce and that had been incorporated into the divorce decree.[1303]

3. Interpretation or Application of Law

A motion for summary judgment is also appropriate when the resolution of a question involving the interpretation or application of law will resolve a family law issue. The courts have determined the following through summary judgment disposition:

- An agreement concerning the return of an engagement ring must be in writing to be enforceable.[1304]
- A court cannot divide military benefits as community property in a former spouse's partition suit if the final divorce decree, issued before June 25, 1981, does not divide the benefits or reserve jurisdiction to divide those benefits.[1305]
- An employer may not be held liable for failing to prevent two employees from engaging in extramarital relations.[1306]
- An employer does not have a duty to voluntarily disclose the existence and nature of an employee's benefits to the employee's spouse.[1307]

1301. Wilde v. Murchie, 949 S.W.2d 331, 332 (Tex. 1997) (per curiam) (citing Acosta v. Acosta, 836 S.W.2d 652, 654 (Tex. App.—El Paso 1992, writ denied)); Lohse v. Cheatham, 705 S.W.2d 721, 726 (Tex. App.—San Antonio 1986, writ dism'd).

1302. *Wilde*, 949 S.W.2d at 333.

1303. *See, e.g.*, Smith v. Ferguson, 160 S.W.3d 115, 120, 123–24 (Tex. App.—Dallas 2005, pet. denied) (holding husband's claim was barred by release provision in an agreement incident to divorce that stated he would not "reopen" the divorce case).

1304. Curtis v. Anderson, 106 S.W.3d 251, 254–55 (Tex. App.—Austin 2003, pet. denied) (interpreting Section 1.108 of the Texas Family Code).

1305. Havlen v. McDougall, 22 S.W.3d 343, 345–46 (Tex. 2000).

1306. Helena Labs. Corp. v. Snyder, 886 S.W.2d 767, 768 (Tex. 1994) (per curiam).

1307. Medenco, Inc. v. Myklebust, 615 S.W.2d 187, 189 (Tex. 1981).

- The United States may not be ordered to pay a former spouse directly her portion of her ex-spouse's military retirement benefits based on sovereign immunity.[1308]
- An agreement concerning the support of a non-disabled child over eighteen is not enforceable when the agreed order incorporating the agreement does not expressly provide that the agreement's terms are enforceable as contract terms.[1309]

4. Res Judicata/Collateral Estoppel

Another situation that may call for summary judgment disposition is when a family law issue has previously been litigated either in Texas or in another state. Res judicata and collateral estoppel precepts also apply in family law cases.[1310] For example, in *Mossler v. Shields*, a woman was estopped from bringing an action seeking to establish the existence of a common law marriage because a divorce action, making the same claim, had been dismissed with prejudice by another Texas court.[1311] Likewise, summary judgment has been used to dispose of an action that was already litigated to final judgment in another state. In *Purcell v. Bellinger*, the Texas Supreme Court affirmed a summary judgment barring a paternity action in Texas after the issue had been litigated to final judgment in New York.[1312]

5. Characterization of Property

Property possessed by either spouse is presumed to be community property.[1313] However, traditional summary judgment may be used in some instances to establish the separate nature of such property. Partial summary judgment is available if a movant can present uncontroverted evidence he or she owned the property before the marriage and, without interruption, throughout the marriage.[1314] Partial summary judgment may also be appropriate to present uncontroverted evidence that a bank account is separate property and that the

1308. United States v. Stelter, 567 S.W.2d 797, 799 (Tex. 1978) (reversing the trial court's summary judgment that allowed garnishment of a husband's military benefits and dismissed the proceedings).

1309. Elfeldt v. Elfeldt, 730 S.W.2d 657, 658 (Tex. 1987).

1310. *See, e.g.*, Purcell v. Bellinger, 940 S.W.2d 599, 600–02 (Tex. 1997) (per curiam) (holding that res judicata barred a subsequent paternity suit in Texas brought by the mother after her initial petition for paternity was dismissed with prejudice in New York).

1311. Mossler v. Shields, 818 S.W.2d 752, 753–54 (Tex. 1991) (per curiam).

1312. *Purcell*, 940 S.W.2d at 600–02.

1313. TEX. FAM. CODE ANN. § 3.003(a) (West 2017).

1314. *See* Dawson-Austin v. Austin, 920 S.W.2d 776, 791 (Tex. App.—Dallas 1996) (holding entire value of corporation to be husband's separate property because the husband acquired the shares before marriage and never acquired additional shares or divested himself of any shares during the marriage), *rev'd on other grounds*, 968 S.W.2d 319 (Tex. 1998).

interest earned on the account (which is community property) was not commingled with the account.[1315]

6. Existence of the Marital Relationship

An informal ("common law") marriage claim may also be disposed of by summary judgment. A party that alleges an informal marriage must prove that: (1) the parties agreed to be married; (2) after the agreement they lived in Texas together as husband and wife; and (3) they represented to others that they were married.[1316] Also, both parties must possess the legal capacity to marry.[1317] A motion for summary judgment can challenge the validity of an informal marriage either by the movant disproving one of the elements or by filing a no-evidence motion claiming that the nonmovant has no evidence to support one or more of the elements.[1318] For example, summary judgment has been used to dismiss a divorce action where one of the parties to the alleged informal marriage was under the age of eighteen and there was no evidence that the legal requirements for written or judicial consent under the Family Code were met.[1319]

I. Insurance Matters

Summary judgments are common in actions involving insurance, including policy interpretation.[1320] The general rules of contract construction govern insurance policy interpretation.[1321] However, there are differences in the way insurance policies are interpreted that affect summary judgment practice. For example, the policy is construed against the insurer when ambiguous policy terms permit more than one reasonable interpretation.[1322] This is particularly the case when the policy terms exclude or limit

1315. Pace v. Pace, 160 S.W.3d 706, 714–15 (Tex. App.—Dallas 2005, pet. denied).

1316. TEX. FAM. CODE ANN. § 2.401(a)(2) (West 2017).

1317. Kingery v. Hintz, 124 S.W.3d 875, 877 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (citing Villegas v. Griffin Indus., 975 S.W.2d 745, 749 (Tex. App.—Corpus Christi 1998, pet. denied)).

1318. *See Kingery*, 124 S.W.3d at 878–79; *see also* TEX. R. CIV. P. 166a(i).

1319. *Kingery*, 124 S.W.3d at 878–79.

1320. *See generally* Wright & Kurth, *supra* note 197, at 15, 24.

1321. JAW The Pointe, L.L.C. v. Lexington Ins. Co., 460 S.W.3d 597, 603 (Tex. 2015); Tex. Farmers Ins. Co. v. Murphy, 996 S.W.2d 873, 879 (Tex. 1999); State Farm Life Ins. Co. v. Beaston, 907 S.W.2d 430, 433 (Tex. 1995); *see also* Aubris Res. LP v. St. Paul Fire & Marine Ins. Co., 566 F.3d 483, 486 (5th Cir. 2009) ("Under Texas law, the same general rules apply to the interpretation of contracts and insurance policies.").

1322. *See* State Farm Fire & Cas. Co. v. Vaughan, 968 S.W.2d 931, 933 (Tex. 1998) (per curiam); Nat'l Union Fire Ins. Co. of Pittsburg v. Hudson Energy Co., 811 S.W.2d 552, 555 (Tex. 1991); *see also* Certain Underwriters at Lloyds, London v. Law, 570 F.3d 574, 577 (5th Cir. 2009) ("If . . . ambiguity is found, the contractual language will be 'liberally' construed in favor of the insured." (citing Barnett v. Aetna Life Ins. Co., 723 S.W.2d 663, 666 (Tex. 1987))).

coverage.[1323] If terms in insurance policies are subject to more than one reasonable construction, they are interpreted in favor of coverage.[1324]

There are many examples of insurance contracts being interpreted differently from other contracts and it is important to keep this fact in mind. For example, when interpreting form policies prescribed by the Texas Department of Insurance, the courts will look to every day meaning of its words to the general public, not the intent of the parties.[1325]

When construing an insurance policy, the courts ordinarily determine and give effect to the parties' intent as expressed by the words they chose to effectuate their agreement.[1326] However, if the policy forms are mandated by the Texas Department of Insurance, the actual intent of the parties is not material.[1327]

McAllen Hospitals, L.P. v. State Farm Mutual Insurance Co. of Texas[1328] is another example of a case involving insurance. In it, the supreme court determined that a hospital's charges were not "paid" by a settling defendant's carrier under the Hospital Lien Statute and the Uniform Commercial Code.[1329] The carrier had made the check payable to the settling plaintiffs and the hospital, but the hospital did not receive notice that settlement funds had been delivered to the patients and it was not reimbursed for the treatment costs. Thus, the court determined that if the payee who presented the draft for payment does so without the endorsement of the other payee, the drawer's obligation to the payee whose endorsement was not obtained is not discharged.[1330]

Summary judgment may be appropriate in cases involving a *Stowers* cause of action. A *Stowers* cause of action arises when an insurer negligently fails to settle a claim covered by an applicable policy within policy limits.[1331] To prove a *Stowers* claim, the insured must establish that: (1) the claim is within the scope of coverage; (2) a demand was made that was within policy limits; and (3) the demand was such that an ordinary, prudent insurer would have accepted it, considering the likelihood and degree of the insured's potential exposure.[1332] To prevail on a *Stowers* claim in a summary judgment

1323. *See Vaughan*, 968 S.W.2d at 933.
1324. *JAW The Pointe, L.L.C.*, 460 S.W.3d at 603.
1325. Green v. Farmers Ins. Exch., 446 S.W.3d 761, 766 (Tex. 2014).
1326. *In re* Deep Water Horizon, 470 S.W.3d 452, 464 (Tex. 2015).
1327. Wausau Underwriters Ins. Co. v. Wedel, 557 S.W.3d 554, 557 (Tex. 2018).
1328. McAllen Hosps., L.P. v. State Farm Cty. Mut. Ins. Co. of Tex., 433 S.W.3d 535 (Tex. 2014).
1329. *Id.* at 536.
1330. *Id.* at 536–37, 540.
1331. *See* G.A. Stowers Furniture Co. v. Am. Indem. Co.,15 S.W 2d 544, 547–48 (Tex. Comm'n App. 1929, holding approved).
1332. Seger v. Yorkshire Ins. Co., Ltd, 503 S.W.3d 388, 395–96 (Tex. 2016).

proceeding, the movant must establish each of these elements as a matter of law.[1333]

J. Oil and Gas Cases

Summary judgment disposition is appropriate in many cases involving oil and gas disputes. The primary reason for summary judgments' common use in oil and gas cases is that they often involve written documents.[1334] Because they are usually based on the interpretation of written instruments, most motions for summary judgment in oil and gas cases are traditional, rather than no-evidence, summary judgments.

Commentators caution that key language within the four corners of oil and gas instruments frequently control the outcome in oil and gas cases.[1335] And they are correct. In fact, because oil and gas interests fundamentally are interests in real property, they must be reduced to writing to satisfy the Statute of Frauds and the Property Code.[1336] The writings fall into a handful of different types of documents. The most common are oil & gas leases, joint operating agreements, farmout agreements, production sharing agreements, and easements and rights-of-way.

As with any contract, in construing an oil and gas lease (or other document), the court seeks to ascertain the true intentions of the parties as expressed in the writing itself.[1337] Addressing oil and gas leases specifically and where the lease expressly defines the duty, the courts will not impose a more stringent obligation unless it is clear that the parties intended to do so.[1338] The court may consult the facts and circumstances surrounding a negotiated contract's execution to aid the interpretation of its language.[1339] Because mineral leases transfer and affect title to real property interests, they are subject to special constructions rules that apply particularly to agreements governing property rights.[1340]

1333. *Id.* at 400–01.

1334. *See, e.g.*, Murphy Exp. & Prod. Co.—USA v. Adams, 560 S.W.3d 105, 109 (Tex. 2018) (interpretation of an offset provision in a lease); Davis v. Mueller, 528 S.W.3d 97, 99–100 (Tex. 2017) (suit to quiet title based on a conveyance of mineral interests); *see generally infra* sect. IV.B. (Suits on Written Instruments).

1335. Derek Cook & Harper Estes, *Persuasion Inside Four Corners: How Principles of Oil and Gas Instrument Construction Drive Oil and Gas Litigation*, 35 LITIG. 1 (2018).

1336. TEX. PROP. CODE ANN. § 5.021 (Vernon 1984); s*ee supra* Part 1.VII.B (Suits on Written Instruments).

1337. *Murphy Exp. & Prod. Co.*, 560 S.W.3d at 108; Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 333 (Tex. 2011).

1338. Exxon Corp. v. Emerald Oil & Gas Co., 348 S.W.3d 194, 215 (Tex. 2011).

1339. URI, Inc. v. Kleberg County, 543 S.W.3d 755, 765 (Tex. 2018).

1340. Endeavor Energy Res., L.P. v. Discovery Operating, Inc., 554 S.W.3d 586, 595 (Tex. 2018) (citing Bruce M. Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Constructions*, 24 TEX. TECH L. REV. 1 (1993)).

A recent set of "double fraction" cases reaffirmed the supreme court's "commitment to a holistic approach aimed at ascertaining intent from all words and parts of the conveying instrument."[1341] ("Double fraction" cases arise when a mineral deed expresses a royalty interest as the product of two fractions.[1342]) In *Hysaw v. Dawkins*,[1343] the supreme court considered the double fraction issue in the context of a will-construction dispute, applied its holistic approach to contract construction and, in doing so, it refused to apply a "bright line" rule of construction.[1344]

In the second double fractional royalty interest case, *US Shale II v. Laborde Properties L.P.*,[1345] the supreme court addressed construction of a deed. It found the deed unambiguously reserved a floating 1/2 interest (rather than a fixed interest) in the royalty in all oil, gas, or other minerals produced from the conveyed property by examining the "language and structure of the reservation at issue—our sole guide in ascertaining the intent of the parties to this deed."[1346]

As a practical matter, with so-called "standard" agreements being commonplace, industry participants have developed their own "standard" jargon, as well as industry custom and usage practices. These standard agreements and standard jargon can be an aide to litigation by acting as a shortcut and speeding up the process.[1347] But these standard agreements and standard jargon can also be an obstacle to resolution of disputes when seemingly common words and phrases have meanings and understandings within the industry that are not readily apparent to those outside the industry. When insiders use so-called "standard" jargon, the insiders' real objectives and true obligations may become obscured, particularly when dealing with a landowner or a royalty holder, who may not be fully cognizant of the industry meaning. Thus, use of standard jargon may call into question the parties' intentions and even raise a question concerning whether there has been a true "meeting of the minds" sufficient to form a contract.[1348]

These factors provide a foundation for two distinct trends. First, trial court judges increasingly grant motions for summary judgment (under the rationale that if the parties are using "standard" documents, with a built-in

1341. Hysaw v. Dawkins, 483 S.W.3d 1 (Tex. 2016); U.S. Shale Energy II v. Laborde Prop., L.P. 551 S.W.3d 148 (Tex. 2018).

1342. *Hysaw*, 483 S.W.3d at 1 (using as an example of a double fraction royalty interest, a royalty interest expressed in an instrument as "1/2 of the usual 1/8").

1343. *Id.*

1344. *Id.* at 12.

1345. U.S. Shale Energy II v. Laborde Prop., L.P. 551 S.W.3d 148 (Tex. 2018).

1346. *Id.* at 150.

1347. Written interview with Chuck Brownman, Oil and Gas Adjunct Professor at South Texas College of Law Houston (January 9, 2019).

1348. *Id.*

pattern of industry usage and jargon, the clauses in dispute would not be ambiguous, so the parties' intent becomes irrelevant and a non-factor). Second, appellate courts reverse the trial courts' rulings, either (1) by reversing the summary judgment because of the existence of an ambiguity,[1349] or (2) by finding the summary judgment unambiguous but reversing the summary judgment and rendering judgment for the cross-movant.[1350]

An example of a reversal holding for the cross-movant is *North Shore Energy v. Harkins*,[1351] in which the supreme court considered the interpretation of an option contract between landowners and an oil and gas company. Both sides filed motions for summary judgment urging their interpretations of the land description in the contract. The court determined that the landowners' interpretation was the only reasonable interpretation and reversed the trial court's summary judgment.[1352]

An example of a type of summary judgment that does not depend on contract construction is found in *ExxonMobil v. Lazy R Ranch*.[1353] In it, ExxonMobil moved for summary judgment on the ground that ground water contamination claims were barred by the statute of limitations to defeat a landowner's claim for environmental remediation. The court determined that the company was entitled to summary judgment on claims relating to two abandoned sites but not to two others that were still in use.[1354] Summary judgments may also be used to interpret statutes relating to oil and gas. For example, in *Exxon Corp. v. Emerald Oil & Gas Co*., the court determined that the Natural Resources Code created a private cause of action for damages resulting from statutory violations.[1355]

Finally, in a recent case of first impression, the supreme court affirmed a summary judgment that defeated a trespass claim. It determined that a trespass claim was not supported by a plaintiff lessee's loss of minerals from a well being drilled by an adjacent mineral estate lease from the surface

1349. *See e.g.* ConocoPhillips v. Koopmann, 547 S.W.3d 858, 865 (Tex. 2017).

1350. *See e.g.* U.S. Shale Energy II v. Laborde Prop., L.P. 551 S.W.3d 148, 151 (Tex. 2018) (noting, "[a]s is often the case, the parties here agree the deed in question is unambiguous but diverge on its proper interpretation").

1351. N. Shore Energy v. Harkins, 501 S.W.3d 598 (Tex. 2017) (per curiam).

1352. *Id.* at 604.

1353. 511 S.W.3d 538 (Tex. 2017).

1354. *Id.* at 545.

1355. Exxon Corp. v. Emerald Oil & Gas Co., 331 S.W.3d 419, 422 (Tex. 2010); *see also* PAJ, Inc. v. Hanover Ins. Co., 243 S.W.3d 630, 636–37 (Tex. 2008) (determining the effect on coverage when an insured fails to timely notify its insurer of a claim but the insurer suffers no harm as a result).

through the plaintiff's mineral estate to reach minerals in an adjacent property.[1356]

PART 2: FEDERAL SUMMARY JUDGMENT PRACTICE

I. PROCEDURE FOR SUMMARY JUDGMENTS

Federal Rule of Civil Procedure 56 sets forth the procedures governing the litigation of motions for summary judgment in federal court.[1357] Rule 56(a) mandates that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[1358] While federal law governs other procedural issues concerning summary judgment motions, such as evidentiary, timing, and stylistic matters,[1359] whether federal or state substantive law applies depends on the underlying basis for the federal court's exercise of subject matter jurisdiction. Federal substantive and procedural law governs cases arising under a court's federal question

1356. *See, e.g.*, Lightning Oil Co. v. Anadarko E&P Onshore, LLC, 520 S.W.3d 39, 43 (Tex. 2017).

1357. Rule 56 was significantly amended in 2010, resulting in technical changes to the rules surrounding federal court summary judgment practice. FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments ("Rule 56 is revised to improve the procedures for presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts.").

1358. FED. R. CIV. P. 56(a). The amended Rule thus includes more mandatory language—"shall" has replaced "should"—and a slightly altered standard of review—"genuine *dispute* as to any material fact" has replaced "genuine *issue* as to any material fact"—than its pre-amendment predecessor. The "shall" replacing "should" is a return to pre-2007 amendment language. FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments. Although the language of the Rule has changed, the familiar standard—whether there is a genuine *issue* of material fact (as opposed to a genuine *dispute* of material fact)—is still frequently employed by courts and litigants in their standards of review. *See, e.g.*, Clayton v. ConocoPhillips Co., 722 F.3d 279, 290 (5th Cir. 2013) ("A grant of summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law."); Ass'n of Taxicab Operators USA v. City of Dallas, 720 F.3d 534, 537 (5th Cir. 2013) ("We may grant summary judgment if the record, viewed in the light most favorable to the nonmovant, demonstrates that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." (internal quotation marks omitted)). In addition, the Advisory Committee has made clear that the standard itself has not changed, even if the words used slightly have. FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments ("The standard for granting summary judgment remains unchanged."). Nonetheless, practitioners should strive to correctly quote the updated standard of review. While misquoting the standard of review may give an impression to the court that the lawyer is unfamiliar with critical changes to the law governing summary judgment practice in federal court, correctly quoting the updated language of Rule 56 demonstrates to the court the practitioner's ability not only to accurately recite the law, but also to competently relate the facts of the case, and ultimately uphold a judgment on appeal. *See* Judge David Hittner & Matthew Hoffman, *Notable Issues in Federal Summary Judgment Practice*, 67 ADVOC., Summer 2014, at 31, 31–32.

1359. FED. R. EVID. 101 (evidence); FED. R. CIV. P. 56(e) (sufficiency of affidavits); FED. R. CIV. P. 56(b), (c) (timing); FED. R. CIV. P. 7(b) (form).

jurisdiction.[1360] In diversity cases, by contrast, applicable state law governs substantive issues and federal law governs procedural issues.[1361]

The primary procedural issue a practitioner should be aware of when litigating summary judgment motions in federal court is the burden-shifting framework enunciated by the Supreme Court's 1986 summary judgment trilogy of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, *Anderson v. Liberty Lobby, Inc.*, and *Celotex Corp. v. Catrett*.[1362] In *Matsushita* and *Liberty Lobby*, the Court expounded on the "material fact" standard, while in *Celotex* the Court initially outlined the manner in which the burden shifts from the movant to the nonmovant in a typical summary judgment.[1363] As described by one commentator, "*Celotex* has made it easier to make the motion, and *Anderson* and *Matsushita* have increased the chances that it will be granted."[1364] Since the trilogy, summary judgment practice has become an increasingly important part of federal civil procedure.[1365] This section discusses threshold procedural requirements for filing and opposing summary judgment motions in federal court.[1366]

A. Timing

Summary judgment motions generally may be filed at any time until thirty days after the close of discovery.[1367] Litigants should be aware that

1360. *See* 28 U.S.C. § 1331 (2018); FED. R. CIV. P. 1.

1361. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Cerda v. 2004–EQR1 L.L.C., 612 F.3d 781, 786 (5th Cir. 2010).

1362. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–50 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 322–24 (1986). Notably, both *Matsushita* and *Celotex* were 5–4 decisions, while *Liberty Lobby* was 6–3. *Celotex* came to the Supreme Court on certiorari from the U.S. Court of Appeals for the District of Columbia, where Judge Robert Bork had filed a dissenting opinion in a 2–1 decision. Catrett v. Johns-Manville Sales Corp., 756 F.2d 181, 187 (D.C. Cir. 1985) (Bork, J., dissenting), *rev'd sub nom.* Celotex Corp. v. Catrett, 477 U.S. 317 (1986), *remanded sub nom.* to Catrett v. Johns-Manville Sales Corp., 826 F.2d 33 (D.C. Cir. 1987). On remand from the Supreme Court, the D.C. Circuit held that the materials submitted by the plaintiff showed a genuine issue of material fact. *Johns-Manville Sales Corp.*, 826 F.2d at 39–40 ("While the four items [of evidence] taken individually provide less than overpowering support for [the plaintiff's] position, their cumulative effect is, we believe, sufficient to defeat the summary judgment motion.").

1363. *Matsushita*, 475 U.S. at 587; *Liberty Lobby*, 477 U.S. at 247–48; *Celotex*, 477 U.S. at 323–24.

1364. Miller, *supra* note 3, at 1041; *see also* Logan, *supra* note 7, at 937 (noting that *Celotex*, *Liberty Lobby*, and *Matsushita* "provided federal trial judges greater latitude to resolve the merits of a case without a full presentation of the facts to a jury."). For a discussion of the summary judgment motion's evolutionary effect on federal courts' dockets, see Subrin & Main, *supra* note 5, at 1843–55.

1365. *See supra* note 4.

1366. *Matsushita*, *Liberty Lobby*, and *Celotex* are discussed in more detail below. *See infra* Part 2.III.A.

1367. FED. R. CIV. P. 56(b).

local district court rules may differ; courts may set alternative deadlines in scheduling orders and often do.[1368] Nonmovants may object to the timing of a summary judgment motion on the basis that they have not had adequate time to conduct discovery.[1369] Such an objection should be accompanied by an affidavit or declaration stating specific reasons why the party cannot present facts to justify its opposition and requesting that the court either deny consideration of the motion, allow time to take additional discovery, or provide any other related relief.[1370]

B. Notice and Hearing

Oral hearings for summary judgment motions are not required under the Federal Rules and consequently are rarely granted.[1371] The Rules likewise do not provide for a specific time by which motions must be served upon the opposing party.[1372] Courts are generally permitted to rule on summary judgment motions without first giving the parties advance notice of the court's intention to decide the motion by a certain date.[1373] As such, federal courts typically rule on such motions solely based on the parties' submissions.[1374] Attorneys who wish to have an oral hearing before the court's ruling should consult the relevant local rules and the individual judge's procedures and consider filing a motion specifically requesting an oral hearing.[1375] One option that may be available to secure a hearing may be the so-called "Young Lawyer" rules. The procedures of several federal district court judges in Texas include "Young Lawyer" rules, stating the court

1368. *Id.*; *see also, e.g.*, N.D. & S.D. MISS. R. 7(b)(2)(D) ("Unless otherwise ordered by the Case Management Order, all case-dispositive motions . . . must be filed no later than fourteen calendar days after the discovery deadline.").

1369. FED. R. CIV. P. 56(d).

1370. *Id.*

1371. *See* FED. R. CIV. P. 56; N.D. TEX. CIV. R. 7.1(g) ("Unless otherwise directed by the presiding judge, oral argument on a motion will not be held.").

1372. *See* FED. R. CIV. P. 56. Prior to the timing amendments to Rule 56 in 2009, a summary judgment motion was required to "be served at least 10 days before the day set for the hearing." FED. R. CIV. P. 56(c) (2008) (amended 2009); *see also* Atkins v. Salazar, 677 F.3d 667, 678 n.15 (5th Cir. 2011) (per curiam) (explaining that the pre-2009 version of Rule 56(c) required "the nonmoving party [to] be served with a summary judgment motion at least ten days prior to the time fixed for the hearing, so as to afford the nonmoving party 'an opportunity to respond and to develop the record in opposition to requested summary judgment'" (quoting John Deere Co. v. Am. Nat'l Bank, Stafford, 809 F.2d 1190, 1192 & n.2 (5th Cir. 1987))).

1373. Hall v. Smith, 497 F. App'x 366, 374 (5th Cir. 2012) (per curiam) (quoting Daniels v. Morris, 746 F.2d 271, 275–76 (5th Cir. 1984)).

1374. *See* Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge's Perspective on Their History, Function, and Future*, 10 J. APP. PRAC. & PROCESS 247, 255 (2009).

1375. *See, e.g.*, S.D. TEX. CIV. R. 7.5 ("If a party views oral argument as helpful to the Court, the motion or response may include a request for it.").

will be more inclined to grant an oral hearing upon a representation from a party that a less-experienced lawyer will be handling argument.[1376]

Under Federal Rule of Civil Procedure 12(d), if a court considers matters outside the pleadings as part of a Rule 12(b)(6) motion, the court must treat the motion as one for summary judgment, rather than a Rule 12(b)(6) motion to dismiss, and afford the nonmovant a reasonable opportunity to present evidence.[1377] Notice is considered sufficient as long as the nonmovant knows that the court may convert the motion to dismiss into one for summary judgment.[1378] An express warning by the court that it plans to convert the motion is unnecessary—the nonmovant merely must be aware that the movant has submitted matters outside the pleadings for the court's review.[1379]

Notice issues also arise when courts enter summary judgment sua sponte. District courts have the power to enter summary judgment sua sponte after providing notice and allowing a reasonable time for the parties to respond with evidence.[1380] The court of appeals reviews for harmless error a district court's grant of summary judgment sua sponte without notice.[1381] If the losing party has no additional evidence or if such evidence would not

1376. *See, e.g.*, *Judge Barbara Lynn's Procedures* § II(c), http://www.txnd.uscourts.gov/judge/chief-district-judge-barbara-mg-lynn [https://perma.cc/UC4R-J8VQ] ("In those instances where the Court is inclined to rule on the papers, a representation that the argument would be handled by a young lawyer will weigh in favor of holding a hearing."); *Judge Alfred Bennett's Procedures* § A(5), http://www.txs.uscourts.gov/sites/txs/files/Bennett.pdf [https://perma.cc/U7L2-27YB] ("The Court strongly encourages litigants to be mindful of opportunities for young lawyers (i.e., lawyers practicing for less than seven years) to conduct hearings before the Court, particularly for motions where the young lawyer drafted or contributed significantly to the underlying motion or response.").

1377. FED. R. CIV. P. 12(d). Documents that are attached to a motion to dismiss and that are referred to in the plaintiff's complaint and central to his claim are considered part of the pleadings. Kopp v. Klein, 722 F.3d 327, 333 (5th Cir. 2013). A court may also properly take judicial notice of adjudicative facts under Federal Rule of Evidence 201 when considering a Rule 12(b)(6) motion to dismiss without converting the motion to dismiss into a motion for summary judgment. Funk v. Stryker Corp., 631 F.3d 777, 782–83 (5th Cir. 2011); *see also* Norris v. Hearst Trust, 500 F.3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record."). Moreover, "where a motion for summary judgment is solely based on the pleadings or only challenges the sufficiency of the plaintiff's pleadings, then such a motion should be evaluated in much the same way as a Rule 12(b)(6) motion to dismiss." St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440 (5th Cir. 2000).

1378. Guiles v. Tarrant Cty. Bail Bond Bd., 456 F. App'x 485, 487 (5th Cir. 2012) (per curiam) (citing Isquith *ex rel.* Isquith v. Middle S. Utils., Inc., 847 F.2d 186, 195 (5th Cir. 1988)).

1379. *Id.* (citing *Isquith*, 847 F.2d at 195–96).

1380. FED. R. CIV. P. 56(f); Atkins v. Salazar, 677 F.3d 667, 678 (5th Cir. 2011) (per curiam). "[The Fifth Circuit has] stated that adequate notice for a sua sponte grant of summary judgment is '10 days before the time fixed for the hearing'. . . . [However], we note that [Rule 56(c)] was amended in 2010 and 2011 . . . [and] no longer contains this ten-day notice requirement." J.D. Fields & Co. v. U.S. Steel Int'l, Inc., 426 F. App'x 271, 280 n.9 (5th Cir. 2011) (citations omitted).

1381. Sayles v. Advanced Recovery Sys., Inc., 865 F.3d 246, 248–49 (5th Cir 2017); Spring St. Partners-IV, L.P. v. Lam, 730 F.3d 427, 436 (5th Cir. 2013) (quoting *Atkins*, 677 F.3d at 678).

have raised a genuine dispute of material fact, a grant of summary judgment will likely be affirmed.[1382] If, however, the district court's sua sponte grant of summary judgment foreclosed the losing party from presenting a potentially valid defense or potentially relevant evidence, the district court's order may be reversed.[1383] The Fifth Circuit has stated that summary judgments may be vacated when the district court failed to provide any notice prior to a sua sponte grant of summary judgment, even when the entry of summary judgment may have been appropriate on the merits.[1384]

C. Deadline to Respond

Rule 56(c) formerly required a party opposing summary judgment to respond within twenty-one days.[1385] As altered by the 2010 amendments, however, Rule 56 does not establish an explicit deadline to respond.[1386] Rather, a district court's local rules or scheduling orders may specify a date by which a response must be filed.[1387] Because the rules vary between districts—even districts within the same circuit—attorneys should consult the local rules of the district in which their case is pending. In both the Southern and the Northern Districts of Texas, for example, the response must be filed within twenty-one days of the filing of the motion, while the Eastern

1382. *See, e.g.*, *Sayles*, 865 F.3d at 249 (affirming the district court's sua sponte grant of summary judgment when the losing party represented that no factual disputes remained and admitted it had no additional evidence); *see also* Tolbert v. Nat'l Union Fire Ins. Co., 657 F.3d 262, 271–72 (5th Cir. 2011) (affirming the district court's sua sponte grant of summary judgment when the appellant failed to explain on appeal the relevance of the evidence he was unable to offer in support of his dismissed claim).

1383. *See* JNV Aviation, L.L.C. v. Flight Options, L.L.C., 495 F. App'x 525, 532 (5th Cir. 2012) (per curiam) (reversing the district court's sua sponte issuance of summary judgment where the parties were prepared to offer expert testimony on the disputed issue at trial); Mannesman Demag Corp. v. M/V Concert Express, 225 F.3d 587, 595 (5th Cir. 2000) (finding reversible error and reversing the district court when a party was not able to present a potentially valid defense prior to the court's sua sponte grant of summary judgment).

1384. *Atkins*, 677 F.3d at 678 (quoting Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 28 F.3d 1388, 1398 (5th Cir. 1994)).

1385. FED. R. CIV. P. 56(c) (2009) (amended 2010). The timing provisions of Rule 56 went through three iterations in a three-year period between 2008 and 2010. In 2008, the ten-day rule required a motion to be served "at least 10 days before the day set for the hearing." FED. R. CIV. P. 56(c) (2008) (amended 2009). 2009 amendments abrogated this rule and replaced it with a requirement that "a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later." FED. R. CIV. P. 56(c) (2009) (amended 2010). One year later, in 2010, the present form of the Rule was adopted, which contains no timing requirements for a responding party. FED. R. CIV. P. 56(c) (2010) (current).

1386. *See* FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments ("The timing provisions in former subdivisions (a) and (c) are superseded.").

1387. As envisioned by the Advisory Committee Notes to the 2010 amendments, "[s]cheduling orders or other pretrial orders can regulate timing to fit the needs of the case." FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments.

District of Texas sets fourteen days from the date of service as the deadline.[1388] Like responses, the former Rule 56 timing rules governing replies have been abrogated, and local rules and procedures should instead be referenced.[1389]

Wholesale failure to respond is construed as a representation of no opposition under the local rules of many jurisdictions, and such a failure may lead to the entry of summary judgment against the nonresponding party.[1390] However, summary judgment cannot be granted solely on the basis of a nonmovant's failure to respond.[1391] Instead, summary judgment may only be granted if the moving party satisfies its initial burden of demonstrating that there is no genuine dispute as to any material fact.[1392]

D. Discovery

Rule 56(d) gives a court broad authority to fashion the appropriate relief necessary when a nonmovant demonstrates to the court that it needs additional discovery before responding to a summary judgment motion.[1393]

1388. S.D. TEX. CIV. R. 7.3; N.D. TEX. CIV. R. 7.1(e); E.D. TEX. CIV. R. 7(e); *see also* W.D. TEX. CIV. R. 7(e)(2) (fourteen days from filing); W.D. LA. CIV. R. 7.5 (twenty-one days from service); M.D. LA. CIV. R. 7.4 (twenty-one days from service); E.D. LA. CIV. R. 7.5 (eight days before the noticed submission date); N.D. & S.D. MISS. CIV. R. 7(b)(4) (fourteen days from service).

1389. *See* FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments. For example, the Local Rules of the Southern District of Texas, amended in November 2018, now require a reply to be filed "within 7 days from the date the response is filed." S.D. TEX. CIV. R. 7.4; N.D. TEX. CIV. R. 7.1(f) ("Unless otherwise directed by the presiding judge, a party who has filed an opposed motion may file a reply brief within 14 days from the date the response is filed.").

1390. *See, e.g.*, Garner v. Christu Health, No. H-10-3947, 2011 WL 5979220, at *1 (S.D. Tex. Nov. 29, 2011) ("The court granted defendants' motion for summary judgment as being unopposed when plaintiff failed to respond as ordered."); *see also* S.D. TEX. CIV. R. 7.4 ("Failure to respond will be taken as a representation of no opposition."); W.D. TEX. CIV. R. 7(e)(2) ("If there is no response filed within the time period prescribed by this rule, the court may grant the motion as unopposed.").

1391. Alsobrook v. GMAC Mortg., L.L.C., 541 F. App'x 340, 342 (5th Cir. 2013) (per curiam); *see also* Luera v. Kleberg County, 460 F. App'x 447, 449 (5th Cir. 2012) (per curiam) ("We have approached the automatic grant of a dispositive motion, such as a grant of summary judgment based solely on a litigant's failure to respond, with considerable aversion; and we have permitted such dismissals only when there is a record of extreme delay or contumacious conduct."); Watson v. United States, 285 F. App'x 140, 143 (5th Cir. 2008) (per curiam) ("We have previously recognized the power of district courts to adopt local rules requiring parties who oppose motions to file statements of opposition. However, we have not approved the automatic grant, upon failure to comply with such rules, of motions that are dispositive of the litigation." (citations omitted) (internal quotation marks omitted)).

1392. *Alsobrook*, 541 F. App'x at 342; *see also* Ervin v. Sprint Commc'ns Co., 364 F. App'x 114, 116 (5th Cir. 2010) (per curiam) (affirming the district court's grant of summary judgment based upon the finding that, regardless of the plaintiff's failure to respond, the defendant had offered evidence sufficient to meet its summary judgment burden).

1393. FED. R. CIV. P. 56(d); *see also* Bradley Scott Shannon, *Why Denials of Summary Judgment Should Be Appealable*, 80 TENN. L. REV. 45, 57 (2012) ("[S]ubdivision [56(d)] virtually assures that a plaintiff will get the time necessary to amass the information that she needs to avoid

A nonmovant must enunciate specific reasons, by affidavit or declaration,[1394] why it is unable to present facts essential to justify its opposition.[1395] Upon the nonmovant's request, the court may defer consideration of the summary judgment motion, allow additional time for the nonmovant to conduct discovery, or "issue any other appropriate order."[1396] Failure by a nonmovant to seek relief under Rule 56(d) could lead to the court's consideration and entry of summary judgment,[1397] as well as the nonmovant's waiver of a prematurity argument on appeal.[1398]

Although the Fifth Circuit has previously commented that "a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course,"[1399] such relief is not automatic, and a party's failure to timely file or to articulate specific facts in support of its motion for continuance are grounds for denial.[1400] The plain

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an adverse ruling. . . ."). A district court's denial of a Rule 56(d) motion is reviewed on appeal for abuse of discretion. Curtis v. Anthony, 710 F.3d 587, 594 (5th Cir. 2013) (per curiam).

1394. Pre-amendment Rule 56 did not explicitly allow the use of declarations when seeking a continuance. FED. R. CIV. P. 56(f) (2009).

1395. FED. R. CIV. P. 56(d); *see also* Prospect Capital Corp. v. Mutual of Omaha Bank, 819 F.3d 754, 757 (5th Cir. 2016) ("[A] party must 'set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion.'" (quoting Am. Family Life Assurance Co. of Columbus v. Biles, 714 F.3d 887, 894 (5th Cir. 2013))); Juarez v. Brownsville Indep. Sch. Dist., No. B-09-14, 2010 WL 1667788, at *14 (S.D. Tex. Apr. 23, 2010) (granting the plaintiff's request for additional discovery when the plaintiff demonstrated specifically who he needed to depose, the testimony he sought to elicit from such deposition, and the relevancy of the testimony to the pending motion for summary judgment).

1396. FED. R. CIV. P. 56(d). Unlike the current version of the Rule as provided in Rule 56(d), prior to the 2010 amendments, Rule 56(f)(2) specifically mentioned a court's power to "order a continuance." FED. R. CIV. P. 56(f) (2009). The 2010 Advisory Committee Notes clarify that the former Rule 56(f) is carried over without substantial change into the current Rule 56(d), such that "[a] party who seeks relief under subdivision (d) may seek an order deferring the time to respond to the summary-judgment motion." FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments.

1397. *See* FED. R. CIV. P. 56(e)(2), (3) (permitting the court to consider facts not adequately responded to as undisputed and allowing the entry of summary judgment based on such a failure by the nonmovant).

1398. Jenkins v. Bristol-Myers Squibb Co., 689 F. App'x 793, 797 (5th Cir. 2017) (per curium) ("We have repeatedly 'foreclosed a party's contention on appeal that it had inadequate time to marshal evidence to defend against summary judgment when the party did not seek Rule 56(d) relief before the district court issued its summary judgment ruling.'" (alterations omitted) (quoting Ferrant v. Lowe's Home Ctrs., Inc., 494 F. App'x 458, 463 (5th Cir. 2012))); *see also* Carner v. La. Health Serv. & Indem. Co., 442 F. App'x 957, 961 (5th Cir. 2011) (per curiam); Tate v. Starks, 444 F. App'x 720, 730 & n.12 (5th Cir. 2011) (Smith, J., dissenting).

1399. Six Flags, Inc. v. Westchester Surplus Lines Ins. Co., 565 F.3d 948, 963 (5th Cir. 2009) (quoting Int'l Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1267 (5th Cir. 1991)); *see also* Castro v. Tex. Dep't Criminal Justice, 541 F. App'x 374, 377 (5th Cir. 2013) ("Rule 56(d) is broadly favored and should be liberally granted." (internal quotation marks omitted)).

1400. *See* Martins v. BAC Home Loans Servicing, L.P., 722 F.3d 249, 257 (5th Cir. 2013) (affirming the district court's denial of a motion for continuance that was filed late and that failed to state specific facts in support); *Biles*, 714 F.3d at 893–95 (evaluating the sufficiency of the

language of Rule 56(d) requires specific reasons to support a motion for continuance,[1401] the burden is on the party seeking discovery,[1402] and appellate review is limited by an abuse of discretion standard.[1403] For these reasons, a party seeking a continuance should craft its motion with the goal of convincing the court that the requested relief is more than a mere fishing expedition, is likely to lead to relevant and controverting evidence, and is not due to the moving party's own lack of diligence.[1404] When seeking a continuance, a party should consider filing discovery requests concurrently with a Rule 56(d) motion.

In contrast, the party moving for summary judgment and opposing a Rule 56(d) continuance should, if relevant, argue that the nonmovant's discovery requests are simply a delay tactic. When ruling on a Rule 56(d) motion, a district court "may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts."[1405] Moreover, the Fifth Circuit has held that a "plaintiff's entitlement to discovery prior to a ruling on a summary judgment motion may be cut off when, within the trial court's discretion, the record indicates that further discovery will not likely produce facts necessary to defeat the motion."[1406] As such, when seeking denial of a continuance, a party should emphasize to the court if the Rule 56(d) motion is based on vague or undisputed facts, involves pure questions of law, or relates to immaterial issues.[1407]

Ultimately, the determination of whether a movant's motion for summary judgment is premature may be tied closely to the time the case has been pending. In *Celotex*, for example, the Supreme Court found that the one

purported discovery—a deposition—to conclude that the district court's denial was not an abuse of discretion, given that the deposition would not have influenced the outcome of the case).

1401. FED. R. CIV. P. 56(d).

1402. Davila v. United States, 713 F.3d 248, 264 (5th Cir. 2013).

1403. Curtis v. Anthony, 710 F.3d 587, 594 (5th Cir. 2013) (per curiam).

1404. *See* Winfrey v. San Jacinto County, 481 F. App'x 969, 982–83 (5th Cir. 2012) (ruling that the district court abused its discretion by failing to allow the nonmovant the opportunity to conduct additional discovery on a key issue when the nonmovant identified fifteen additional areas of discovery that were allegedly necessary to adequately respond); State Farm Fire & Cas., Co. v. Whirlpool Corp., No. 3:10-CV-1922-D, 2011 WL 3567466, at *3–4 (N.D. Tex. Aug. 15, 2011) (granting the plaintiff's Rule 56(d) motion when the plaintiff provided evidence of correspondence between the parties indicating a prior agreement to exchange discovery).

1405. *Biles*, 714 F.3d at 894 (quoting Raby v. Livingston, 600 F.3d 552, 561 (5th Cir. 2010)).

1406. Larry v. Grice, 156 F.3d 181, 181 (5th Cir. 1998) (per curiam) (quoting Cormier v. Pennzoil Expl. & Prod. Co., 969 F.2d 1559, 1561 (5th Cir. 1992)).

1407. *See Biles*, 714 F.3d at 894–95 (affirming the district court's denial of a Rule 56(d) motion on the finding that the requested discovery would have produced facts related to a material issue); Zieche v. Burlington Res. Inc. Emp. Change in Control Severance Plan, 506 F. App'x 320, 324 n.4 (5th Cir. 2013) (per curiam) (finding appellant's request for discovery to be "moot" given the failure of his claim as a matter of law); Luera v. Kleberg County, 460 F. App'x 447, 450–51 (5th Cir. 2012) (per curiam) (agreeing with the district court that the plaintiff's Rule 56(d) motion lacked specificity as to the purportedly discoverable facts).

year between the commencement of the lawsuit and the filing of the summary judgment motion was a sufficient time for discovery.[1408] By contrast, the Fifth Circuit has reversed a summary judgment when filed shortly after the answer to the complaint and before either party had conducted any discovery.[1409] As little as nine months may constitute an adequate time for discovery under existing precedent.[1410]

II. STANDARDS OF PROOF FOR SUMMARY JUDGMENT MOTIONS

A. When the Movant Bears the Burden of Proof

Rule 56 no longer expressly segregates the ability of a "claiming party" or "defending party" to move for summary judgment, but a claimant's burden remains unchanged.[1411] The language of Rule 56(a) states that any party may move for summary judgment by identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought.[1412] To obtain summary judgment, a claimant must demonstrate affirmatively by admissible evidence that there is no genuine dispute as to any material fact concerning each element of its claim for relief.[1413] If the defendant has asserted an affirmative defense, the plaintiff must identify the lack of any genuine dispute as to any material fact concerning that defense.[1414] Because the defendant has the ultimate burden of proof on affirmative defenses, the plaintiff need only demonstrate the absence of evidence on the affirmative defense.[1415]

1408. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986).

1409. Fano v. O'Neill, 806 F.2d 1262, 1266 (5th Cir. 1987).

1410. Transamerica Ins. Co. v. Avenell, 66 F.3d 715, 721 (5th Cir. 1995).

1411. *See* FED. R. CIV. P. 56(a) ("Motion for Summary Judgment or Partial Summary Judgment. A *party* may move for summary judgment, identifying each claim or defense . . . on which summary judgment is sought." (emphasis added)). For a detailed discussion of the procedural requirements a moving party must satisfy when seeking summary judgment, see HITTNER ET AL., *supra* note 8, at 14-54 to -96.

1412. FED. R. CIV. P. 56(a). Among the 2010 amendments to Rule 56 was the explicit clarification that a party may request summary judgment as to part of a claim or defense. *See id.* ("A party may move for summary judgment, identifying each claim or defense—or the *part* of each claim or defense—on which summary judgment is sought." (emphasis added)).

1413. *Id.*; *Celotex*, 477 U.S. at 322–23; *see also* Ruby Robinson Co. v. Kalil Fresh Mktg., Inc., No. H-08-199, 2010 WL 3701579, at *3–4 (S.D. Tex. Sept. 16, 2010) (granting summary judgment to an intervenor in an action under the Perishable Agricultural Commodities Act upon the finding by the court that, based on the submitted evidence, two individual defendants were shareholders, directors, and officers of a company in default and exercised sufficient control over the company to justify individual liability for failure to maintain trust assets).

1414. *See Celotex*, 477 U.S. at 322–23.

1415. *See id.*

B. When the Movant Does Not Bear the Burden of Proof

1. Movant's Initial Burden

When a movant seeks summary judgment on a claim upon which it does not bear the burden of proof, it bears an initial burden under Rule 56(a) to demonstrate the absence of a genuine dispute as to any material fact on the adverse party's claim.[1416] The moving party cannot rely on conclusory statements that the nonmovant has not presented evidence on an essential element of its claim.[1417] Rather, the moving party must point out to the court specifically the absence of evidence showing a genuine dispute.[1418]

When making this showing, the movant must identify the specific issue or issues on which it claims the nonmovant has no supporting evidence and demonstrate the absence of such evidence.[1419] In so doing, the movant may:

1416. *See* FED. R. CIV. P. 56(a); *see also In re* Crawfish Producers, 852 F.3d 456, 463 (5th Cir. 2017) (recognizing nonmovant-plaintiff has burden of producing evidence creating genuine dispute of material fact to defeat summary judgment); Chambers v. Sears Roebuck & Co., 428 F. App'x 400, 407 (5th Cir. 2011) (per curiam) ("The moving party . . . need not negate the elements of the non-movant's case. The moving party may meet its burden by pointing out the absence of evidence supporting the nonmoving party's case." (citation omitted) (internal quotation marks omitted)); Boudreaux v. Swift Transp. Co., 402 F.3d 536, 544 (5th Cir. 2005) ("On summary judgment, the moving party is not required to present evidence proving the absence of a material fact issue; rather, the moving party may meet its burden by simply 'pointing to an absence of evidence to support the nonmoving party's case.'" (quoting Armstrong v. Am. Home Shield Corp., 333 F.3d 566, 568 (5th Cir. 2003))). This burden can be particularly difficult in certain kinds of cases. For example, "[s]ummary judgment is rarely appropriate in negligence and products liability cases, even if the material facts are not in dispute." Little v. Liquid Air Corp., 952 F.2d 841, 847 (5th Cir. 1992). "An inherently normative issue, such as whether a manufacturer has adequately warned a user that its product is hazardous, is not generally susceptible to summary judgment. . . ." *Id.* "[T]he evidence requires that a jury balance the breadth and force of the warning that the manufacturer provided—if it even did so—against the nature and extent of the risk." *Id.* at 847–48. The Fifth Circuit has recognized two situations in which summary judgment might be proper in negligence or products liability cases: "(1) the resolution of the summary judgment motion turns upon legal issues, and not factual issues, and (2) the evidence was insufficient to create a genuine issue of material fact concerning the defendant's alleged failure to comply with a normative standard." *Id.* at 848 (citation omitted).

1417. St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440 (5th Cir. 2000); *see also* Melton Truck Lines, Inc., 706 F. App'x 824, 827–29 (5th Cir. 2017) (finding the moving party, although not bearing the burden of proof at trial, did not carry his summary judgment burden by stating only that "Defendants respectfully request summary judgment on Plaintiff's causes of action because Plaintiff has no evidence to support these allegations"); James v. State Farm Mut. Auto. Ins. Co., 719 F.3d 447, 466 (5th Cir. 2013) *withdrawn, substituted by* 743 F.3d 65 (5th Cir. 2014).

1418. *Celotex*, 477 U.S. at 322–25; Cont'l Cas. Co. v. Consol. Graphics, Inc. 646 F.3d 210, 218 (5th Cir. 2011); Duffie v. United States, 600 F.3d 362, 371 (5th Cir. 2010). "[T]he nonmoving party's burden is not affected by the type of case; summary judgment is appropriate in *any* case 'where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant.'" Little v. Liquid Air Corp, 37 F.3d 1069, 1075–76 (5th Cir. 1994) (per curiam) (quoting Armstrong v. City of Dallas, 997 F.2d 62, 67 (5th Cir. 1993)).

1419. Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp., 673 F.3d 399, 407 (5th Cir. 2012); Bradley v. Allstate Ins. Co., 620 F.3d 509, 516 (5th Cir. 2010). An interesting twist

- Demonstrate the absence of evidence on a crucial element of the opposing party's case (e.g., plaintiff was asked to identify all companies who manufactured the product and did not list the defendant);[1420]
- Present evidence that disproves some essential element of the opposing party's case (e.g., admissions);[1421] or
- Rely on the complete absence of proof of an essential element of the nonmovant's case.[1422]

The Fifth Circuit discussed this burden in *St. Paul Mercury Insurance Co. v. Williamson*.[1423] In *Williamson*, a plaintiff asserting a RICO claim argued that the defendants did not meet their initial burden of pointing out the absence of a triable issue.[1424] The Fifth Circuit disagreed, stating that the defendants "did proffer evidence in support of their motion for summary judgment. In addition to pointing out the lack of evidence supporting [plaintiff's] claims, they offered affidavits, depositions, and other relevant documentary evidence."[1425] Although the defendants' evidence admittedly related to the "pattern of racketeering" issue, rather than the pertinent

occurs when a party does not raise an issue until its reply brief. For example, in *Vais Arms, Inc. v. Vais*, the movant raised an issue for the first time in his reply brief. Vais Arms, Inc. v. Vais, 383 F.3d 287, 292 (5th Cir. 2004). When objecting on appeal, the Fifth Circuit stated, as long as the nonmovant had an adequate opportunity to respond prior to the trial court's ruling on summary judgment, it cannot complain on appeal that the issue was not timely raised. *Id.* But it appears, in the Fifth Circuit at least, there must be some indication in the record that the nonmovant requested an opportunity to respond or that the court invited or allowed the nonmovant to respond or the granting of summary judgment will be reversible. *See* United States v. $92,203.00 in U.S. Currency, 537 F.3d 504, 507 n.1 (5th Cir. 2008) (refusing to consider evidence submitted post-briefing where the nonmovant was not provided an opportunity to respond). As the Fifth Circuit stated in *Gillaspy v. Dallas Independent School District*:

> [T]here is no indication that [nonmovant] requested an opportunity to respond [to evidence proffered in a reply brief], nor any indication that the district court invited or allowed [nonmovant] an opportunity to file supplemental briefing. Because our jurisprudence is less than clear, we think it prudent to reverse the summary judgment . . . and remand the case to the district court to allow [nonmovant] to respond and offer additional argument and evidence if she has any.

Gillaspy v. Dall. Indep. Sch. Dist., 278 F. App'x 307, 315 (5th Cir. 2008) (per curiam). Other courts appear to have adopted this approach. *See, e.g.*, Hughes v. Astrue, 277 F. App'x 646, 646–47 (8th Cir. 2008) (per curiam) (allowing the district court to consider evidence submitted in a reply brief as long as the opposing party has an opportunity to respond); Int'l Ctr. for Tech. Assessment v. Johanns, 473 F. Supp. 2d 9, 21 (D.D.C. 2007) (considering evidence submitted post-briefing on the ground that the opposing party had an opportunity to and did respond).

1420. *Celotex*, 477 U.S. at 319–20.
1421. *Id.* at 322–23.
1422. *Id.* at 325.
1423. St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440 (5th Cir. 2000).
1424. *Id.*
1425. *Id.*

"investment in a RICO enterprise" inquiry, the Fifth Circuit found that the plaintiffs satisfied Rule 56(c).[1426]

2. Nonmovant's Burden

If the movant satisfies its initial burden, the burden then shifts, and the nonmovant must go beyond the pleadings and come forward with specific facts demonstrating that there is a genuine dispute for trial.[1427] If the nonmovant fails to meet this burden, summary judgment in the movant's favor is appropriate.[1428] The burden to show that there is a genuine dispute of material fact is on the party who seeks to avoid summary judgment.[1429] Rule 56(e) no longer explicitly provides, in the same way that it did prior to the 2010 amendments, that if no response is filed, the court should, if appropriate, grant summary judgment.[1430] However, under the Rule, "[i]f a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact . . . the court may . . . consider the fact undisputed for purposes of the motion [or] grant summary judgment."[1431] Many jurisdictions likewise have local rules providing that a nonmovant's failure to respond will be considered a representation of no opposition.[1432] The Fifth Circuit has held, however, that a district court may not grant a summary

1426. *Id.*

1427. Firman v. Life Ins. Co. of N. Am., 684 F.3d 533, 538 (5th Cir. 2012) ("Once the movant carries [its] burden, the burden shifts to the nonmovant to show that summary judgment should not be granted."); Wesley v. Gen. Drivers, Warehousemen & Helpers Local 745, 660 F.3d 211, 213 (5th Cir. 2011) ("Satisfying [the] initial burden shifts the burden to the non-moving party to produce evidence of the existence of a material issue of fact requiring a trial." (citing *Celotex*, 477 U.S. at 325)); Bayle v. Allstate Ins. Co., 615 F.3d 350, 355 (5th Cir. 2010) ("Once a party meets the initial burden of demonstrating that there exists no genuine issue of material fact for trial, the burden shifts to the non-movant to produce evidence of the existence of such an issue for trial." (citing *Celotex*, 477 U.S. at 324)); Versai Mgmt. Corp. v. Clarendon Am. Ins. Co., 597 F.3d 729, 735 (5th Cir. 2010) (per curiam) ("[O]nce the moving party meets its initial burden of pointing out the absence of a genuine issue for trial, the burden is on the nonmoving party to come forward with competent summary judgment evidence establishing the existence of a material factual dispute.").

1428. FED. R. CIV. P. 56(e); *Celotex*, 477 U.S. at 322–23; Tran Enters., LLC v. DHL Express (USA), Inc., 627 F.3d 1004, 1010 (5th Cir. 2011).

1429. *See* Newman v. Guedry, 703 F.3d 757, 766 (5th Cir. 2012).

1430. *Compare* FED. R. CIV. P. 56(e) (2009) ("Opposing Party's Obligation to Respond. . . . If the opposing party does not . . . respond, summary judgment should, if appropriate, be entered against that party."), *with* FED. R. CIV. P. 56(e) (2013) (providing for the entry of summary judgment if "a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact").

1431. FED. R. CIV. P. 56(e)(2), (3).

1432. *See, e.g.*, S.D. TEX. CIV. R. 7.4; Flores v. United States, 719 F. App'x 312, 314 (5th Cir. 2018).

judgment motion simply because the opposing party failed to respond, even if the failure to oppose the motion does not comply with a local rule.[1433]

III. RESPONDING TO THE MOTION FOR SUMMARY JUDGMENT

A. Supreme Court Precedent

The seminal case on summary judgments in federal court is *Celotex Corp. v. Catrett*.[1434] *Celotex* involved a wrongful death action by a widow who brought suit against an asbestos manufacturer for the death of her husband.[1435] The defendant moved for summary judgment based on the widow's failure to produce evidence that her husband had been exposed to its products.[1436] The defendant argued the widow's response consisted of inadmissible hearsay.[1437] The U.S. Supreme Court found that summary judgment would be mandated if the plaintiff failed, after adequate time for discovery, to present evidence of matters on which she had the burden of proof.[1438] The Supreme Court remanded the case to the court of appeals to determine whether the evidence submitted by the plaintiff was sufficient to defeat the defendant's motion for summary judgment.[1439] The Court's ruling illustrates that it was not the defendant's burden to negate such issues.[1440]

1433. Bustos v. Martini Club, Inc., 599 F.3d 458, 468 (5th Cir. 2010); *see also* Davis-Lynch, Inc. v. Moreno, 667 F.3d 539, 550 (5th Cir. 2012) ("The moving party has the burden of establishing that there is no genuine dispute of material fact; and, unless that party does so, a court may not grant the motion, regardless whether any response is filed."); Watson v. United States *ex rel.* Lerma, 285 F. App'x 140, 143 (5th Cir. 2008) (per curiam) ("We have previously recognized the power of district courts to adopt local rules requiring parties who oppose motions to file statements of opposition. However, we have not approved the automatic grant, upon failure to comply with such rules, of motions that are dispositive of the litigation." (citations omitted) (internal quotation marks omitted)); Petri v. Kestrel Oil & Gas Props., L.P., 878 F. Supp. 2d 744, 750–51 (S.D. Tex. 2012) ("A motion for summary judgment cannot be granted merely because no opposition has been filed, even though a failure to respond violates a local rule. . . . A decision to grant summary judgment based only on default is reversible error. Even if a plaintiff fails to file a response to a dispositive motion despite a local rule's mandate that a failure to respond is a representation of nonopposition, the Fifth Circuit has rejected the automatic granting of dispositive motions without responses without the court's considering the substance of the motion." (citation omitted)).

1434. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). *See generally* Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 86–88 (2006) (discussing the impact of *Celotex* by providing empirical analysis).

1435. *Celotex*, 477 U.S. at 319.

1436. *Id.* at 319–20.

1437. *Id.* at 320.

1438. *Id.* at 322–23.

1439. *Id.* at 327–28.

1440. *Id.* at 323.

Rather, the plaintiff was required to demonstrate a genuine issue of material fact to be heard at trial.[1441]

In addition to *Celotex*, practitioners should be familiar with the other two cases of the summary judgment trilogy, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[1442] and *Anderson v. Liberty Lobby, Inc.*[1443] In *Matsushita* and *Liberty Lobby*, the Supreme Court elaborated on the meaning of the "genuine issue of material fact" summary judgment standard. *Liberty Lobby* is instructive on what evidence raises a "genuine issue" sufficient to preclude entry of summary judgment.[1444] *Liberty Lobby* involved a libel suit against a magazine brought by the founder and treasurer of a not-for-profit corporation.[1445] Given the nature of the case, the lower court applied the actual malice requirement enunciated by the Supreme Court in *New York Times Co. v. Sullivan*.[1446] The issue before the Supreme Court was whether the heightened evidentiary requirements applicable to proof of actual malice (i.e., the standard of clear and convincing evidence) must be considered in ruling on a summary judgment motion.[1447] Answering in the affirmative, the Court ruled that the trial judge "must bear in mind the actual quantum and quality of proof necessary to support liability."[1448] When evaluating the evidence presented by the nonmovant, "the judge must view the evidence presented through the prism of the substantive evidentiary burden."[1449] There is no genuine dispute for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmovant.[1450]

Liberty Lobby also discussed the "materiality" element, stating that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[1451] The materiality determination rests upon the substantive law governing the case, and the substantive law identifies which facts are critical versus which facts are

1441. *Id.* at 324.
1442. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).
1443. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).
1444. *Id.* at 249–50.
1445. *Id.* at 244–45.
1446. *Id.* at 244. In *Sullivan*, the Supreme Court held that in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that the defendant acted with actual malice in publishing the alleged defamatory statement. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).
1447. *Liberty Lobby*, 477 U.S. at 247.
1448. *Id.* at 254.
1449. *Id.*
1450. *See id.* ("[T]here is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence."); Kariuki v. Tarango, 709 F.3d 495, 501 (5th Cir. 2013).
1451. *Liberty Lobby*, 477 U.S. at 248.

irrelevant.[1452] Materiality is only a criterion for categorizing factual disputes in relation to the legal elements of the claim.[1453]

In *Matsushita*, the Supreme Court considered what evidence was required to preclude entry of summary judgment in an antitrust conspiracy case.[1454] Under Section 1 of the Sherman Antitrust Act, to survive a properly supported summary judgment motion by the defendants, the plaintiffs had to present evidence that excluded the possibility that the alleged conspirators acted independently.[1455] The Supreme Court thus turned to the applicable substantive law to analyze what facts would be material and, hence, crucial to the plaintiffs to withstand summary judgment.[1456] Commenting on the requirement that an issue of fact must be "genuine," the Court explained that a genuine issue of material fact does not exist if the nonmovant's evidence merely shows that "there is some metaphysical doubt as to the material facts."[1457] Rather, a genuine dispute as to a material fact exists only "[w]here the record taken as a whole could . . . lead a rational trier of fact to find for the non-moving party."[1458] As stated in *Liberty Lobby*, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[1459] Moreover, there is an inverse relationship between the quality of the evidence the nonmovant must present and the overall plausibility of the nonmovant's claims.[1460] If the claims of the party bearing the burden

1452. *Id.*

1453. *Id.*

1454. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585–86 (1986).

1455. *Id.* at 588.

1456. *Id.* at 588–91 (discussing which facts would be necessary to prove a predatory pricing scheme).

1457. *Id.* at 586. For application of *Matsushita*'s summary judgment rules in the employment discrimination context, see Evans v. City of Houston, 246 F.3d 344, 355 (5th Cir. 2001). In *Evans*, the plaintiff sued the City of Houston for race and age discrimination and retaliation. *Id.* at 347. The Fifth Circuit stated, "[m]erely disputing [an employer's] assessment of [a plaintiff's] work performance will not necessarily support an inference of pretext." *Id.* at 355 (alterations in original) (quoting Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 408 (5th Cir. 1999)). A plaintiff in an employment discrimination suit (utilizing the burden-shifting scheme under *McDonnell Douglas*) cannot survive summary judgment merely because she disagrees with the employer's characterization of her work history. *Id.* Rather, the issue is whether the employer's perception of the employee's performance, accurate or not, was the true reason for the adverse employment action. *Id.* "[T]he only question on summary judgment is whether the evidence of retaliation, in its totality, supports an inference of retaliation." *Id.* (quoting *Shackelford*, 190 F.3d at 407). Notably, in *University of Texas Southwestern Medical Center v. Nassar*, the Supreme Court held that Title VII retaliation claims must be proved according to traditional principles of but-for causation. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

1458. *Matsushita*, 475 U.S. at 587.

1459. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); Haverda v. Hays County, 723 F.3d 586, 591 (5th Cir. 2013); R & L Inv. Prop., L.L.C. v. Hamm, 715 F.3d 145, 149 (5th Cir. 2013).

1460. *Matsushita*, 475 U.S. at 587.

of proof appear "implausible," that party must respond to the motion for summary judgment with more persuasive evidence to support its claim than would otherwise be required.[1461]

B. Items in Response

The nonmovant cannot establish a genuine dispute as to any material fact by reference to the allegations contained in its pleadings.[1462] To meet its burden and avoid summary judgment, the nonmovant must respond with specific evidence showing that there is a genuine dispute of material fact in the form of depositions, documents, electronically stored information, affidavits, declarations, admissions on file, or answers to interrogatories.[1463] The response may include:

1. admissible summary judgment evidence;[1464]
2. a memorandum of points and authorities;[1465]

1461. *Id.*

1462. Duffie v. United States, 600 F.3d 362, 371 (5th Cir. 2010); Stahl v. Novartis Pharm. Corp., 283 F.3d 254, 264–65 (5th Cir. 2002).

1463. FED. R. CIV. P. 56(c)(1)(A); Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); James v. State Farm Mut. Auto. Ins. Co., 719 F.3d 447, 466 (5th Cir. 2013) *withdrawn, substituted by* 743F.3d 65 (5th Cir. 2014); *see also* Jackson v. Watkins, 619 F.3d 463, 466 (5th Cir. 2010) (per curiam) (acknowledging a Title VII plaintiff's ability to rely on either direct or circumstantial evidence in response to a summary judgment motion).

1464. FED. R. CIV. P. 56(c)(2); *see also* Harris *ex rel.* Harris v. Pontotoc Cty. Sch. Dist., 635 F.3d 685, 692 (5th Cir. 2011) (stating that hearsay evidence inadmissible at trial cannot create a genuine dispute of material fact to avoid summary judgment). *But see* Crostley v. Lamar County, 717 F.3d 410, 423–24 (5th Cir. 2013) (providing that hearsay statements can be considered by a court when ruling on qualified immunity-based summary judgment motions grounded in whether probable cause existed). Importantly, although summary judgment evidence must be admissible at trial, summary judgment evidence need not be presented in admissible form. *See* FED. R. CIV. P. 56(c)(2); *see also* 3 JAMES M. WAGSTAFF, THE WAGSTAFF GROUP PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 43-VI(b)(3)(a) (2017). Summary judgment evidence may be either admissible as presented *or* "capable of being presented in a form that would be admissible in evidence." Maurer v. Indep. Town, 870 F.3d 380, 384 (5th Cir. 2017) (citing LSR Consulting, LLC v. Wells Fargo Bank, N.A., 835 F.3d 530, 534 (5th Cir. 2016)). "This flexibility allows the court to consider the evidence that would likely be admitted at trial . . . without imposing on parties the time and expense it takes to authenticate everything in record." *Id.* (citing FED. R. CIV. P. 56(c)(1)(A)); *see also* Lee v. Offshore Logistical and Transport, L.L.C., 859 F.3d 353, 355–56 (5th Cir. 2017) (vacating and remanding a summary judgment because the district court failed to consider an unsworn report "solely because it was not sworn without considering [the nonmovant's] argument that [the witness] would testify to those opinions at trial and without determining whether such opinions, as testified to at trial, would be admissible"). As a practical matter, a party submitting summary judgment evidence that is not admissible as presented should be prepared to, upon objection, demonstrate how such evidence will be presented in admissible form at trial. *See* Smith v. Palafox, 728 F. App'x 270, 274 (5th Cir. 2018) (affirming district court's exclusion of unsworn expert reports because they "were not sworn or made under penalty of perjury and the [nonmovant] has not explained how the reports could be reduced to admissible evidence at trial").

1465. *See, e.g.*, S.D. TEX. CIV. R. 7.1(B) (requiring opposed motions to be accompanied by authority).

3. any objections to the movant's evidence;[1466] and
4. a request for more time for discovery, when appropriate.[1467]

In addition, local rules of various jurisdictions might contain specific content or formatting requirements.[1468] When evaluating the motion, response, and all submissions, the court views all evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in favor of the nonmoving party.[1469] The nonmovant need not necessarily present his own summary judgment evidence. Instead, if the nonmovant believes evidence already submitted by the movant indicates the existence of a genuine issue of material fact, the nonmovant may direct the court's attention to that evidence and rely on it without submitting additional evidence.[1470] In any event, the nonmovant must set forth specific facts showing there is a genuine issue for trial.[1471] It is not

1466. FED. R. CIV. P. 56(c)(2); *see also* Cutting Underwater Techs. USA, Inc. v. ENI U.S. Operating Co., 671 F.3d 512, 515 (5th Cir. 2012) (observing that objections under Rule 56(c)(2) have replaced the necessity of filing independent motions to strike).

1467. FED. R. CIV. P. 56(d); *see also supra* Part 2.I.D (elaborating on Rule 56(d)).

1468. *See, e.g.*, S.D. TEX. CIV. R. 7.4(D) (requiring responses to be accompanied by a proposed order); S.D. & E.D. N.Y. CIV. R. 56.1(b) (requiring a response to include a correspondingly numbered paragraph responding to each numbered paragraph).

1469. Homoki v. Conversion Servs., Inc., 717 F.3d 388, 395 (5th Cir. 2013). However, "[a] court is not required to draw legal inferences in the non-movant's favor on summary judgment review." Crowell v. Shell Oil Co., 541 F.3d 295, 309 (5th Cir. 2008). The factual controversy will be resolved in the nonmovant's favor only "when both parties have submitted evidence of contradictory facts." Antoine v. First Student, Inc., 713 F.3d 824, 830 (5th Cir. 2013). Further, "courts are not required to view evidence presented at summary judgment in the light most favorable to the nonmoving party *on the question of admissibility*; rather, 'the content of summary judgment evidence must be generally admissible.'" Garcia v. U Pull It Auto & Truck Salvage, Inc., 657 F. App'x 293, 297 (5th Cir. 2016) (emphasis added) (quoting Bryant v. Farmers Ins. Exch., 432 F.3d 1114, 1122 (10th Cir. 2005)). When a case is to be tried before a court rather than a jury "[t]he decision-making process is tweaked slightly." Manson Gulf, L.L.C. v. Modern Am. Recycling Serv., Inc., 878 F.3d 130, 134 (5th Cir. 2017) (citing Nunez v. Superior Oil Co., 572 F.2d 1119, 1123–24 (5th Cir. 1978)). In such cases, "the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though the decision may depend on inferences to be drawn from what has been incontrovertibly proved." *Nunez*, 572 F.2d at 1123–24; *see also* Lyles v. Medtronic Sofamor Danek, USA, Inc., 871 F.3d 305, 311 (5th Cir. 2017). A court may not, however, exercise this "inference-drawing function" when the evidentiary facts are in dispute or there are issues of witness credibility. *Manson*, 878 F.3d at 134 (quoting *Nunez*, 572 F.2d at 1123–24).

1470. Smith *ex rel.* Estate of Smith v. United States, 391 F.3d 621, 625 (5th Cir. 2004) (directing the nonmovant to point out "the precise manner in which the submitted or identified evidence supports his or her claim"); Isquith *ex rel.* Isquith v. Middle S. Utils., Inc., 847 F.2d 186, 199–200 (5th Cir. 1988).

1471. Bridgmon v. Array Sys. Corp., 325 F.3d 572, 576 (5th Cir. 2003); *see also* Rizzo v. Children's World Learning Ctrs., Inc., 84 F.3d 758, 762 (5th Cir. 1996) (discussing the evidentiary requirements of nonmovants); C.F. Dahlberg & Co. v. Chevron U.S.A., Inc., 836 F.2d 915, 920 (5th Cir. 1988) (stating "[a]ppellant had the opportunity to raise [an] issue by way of affidavit or other evidence in response" to the motion for summary judgment but elected to rely solely on legal argument).

enough simply to rely on evidence in the record to avoid summary judgment without specifically referring to the precise evidence that supports the nonmovant's claim.[1472] The nonmovant must "articulate the precise manner in which the submitted or identified evidence supports his or her claim."[1473] Moreover, even when evidence exists in the record that would tend to support the nonmovant's claim, if the nonmovant fails to refer to it, that evidence is not properly before the court.[1474] It is not the function of the court to search the record on the nonmovant's behalf for evidence that may raise a fact issue.[1475]

IV. SUMMARY JUDGMENT EVIDENCE

Rule 56(c)(1)(a) provides that a party moving for or opposing a summary judgment motion may support its assertions by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers or other materials."[1476]

A. Declarations and Affidavits

Declaration or affidavits submitted in connection with summary judgment proceedings must:

1. be based on personal knowledge;[1477]
2. state facts as would be admissible in evidence (i.e., evidentiary facts, not conclusions);[1478] and

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1472. CQ, Inc. v. TXU Mining Co., 565 F.3d 268, 273 (5th Cir. 2009).

1473. *Id.* (quoting *Smith*, 391 F.3d at 625).

1474. *Id.* In *CQ, Inc.*, the Fifth Circuit found that the respondent sufficiently referred to evidence in the record by cross-citing its own motion for summary judgment. *Id.* at 274.

1475. Huffman v. Union Pac. R.R., 683 F.3d 619, 626 (5th Cir. 2012); Wease v. Ocwen Loan Servicing, No. 17-10574, 2019 WL 97372, at *6 (5th Cir. Jan. 4, 2019).

1476. FED. R. CIV. P. 56(c)(1)(A). "As indicated by the ending reference to 'other materials,' the particular forms of evidence mentioned in the rule are not the exclusive means of presenting evidence on a Rule 56 motion." 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2723 (4th ed. 2018).

1477. FED. R. CIV. P. 56(c)(4); Campbell Harrison & Dagley, L.L.P. v. PBL Multi-Strategy Fund, L.P., 744 F. App'x 192, 195 (5th Cir. 2018); DIRECTV, Inc. v. Budden, 420 F.3d 521, 529–30 (5th Cir. 2005) (explaining that a summary judgment affidavit need not explicitly state that it is based on personal knowledge and stating "there is no requirement for a set of magic words"); *see also* De la O v. Hous. Auth. of El Paso, 417 F.3d 495, 501–02 (5th Cir. 2005) (rejecting affidavit as based on speculation rather than personal knowledge); FDIC v. Selaiden Builders, Inc., 973 F.2d 1249, 1254 n.12 (5th Cir. 1992); Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 80–81 (5th Cir. 1987).

1478. FED. R. CIV. P. 56(c)(2); First Colony Life Ins. Co. v. Sanford, 555 F.3d 177, 181 (5th Cir. 2009) ("[A] summary assertion made in an affidavit is simply not enough proof to raise a

3. affirmatively demonstrate that the affiant is competent to testify to the matters stated in the affidavit.

"[U]nsupported affidavits setting forth 'ultimate or conclusory facts and conclusions of law' are insufficient to either support or defeat a motion for summary judgment."[1479] Similarly, "a parties' uncorroborated self-serving testimony cannot prevent summary judgment, particularly if the overwhelming documentary evidence supports the opposite scenario."[1480] Nor can a party create an issue of fact merely by presenting testimony through a declaration that contradicts previous sworn testimony, such as deposition testimony.[1481] From a practical standpoint, failure to produce opposing affidavits frequently will doom an otherwise meritorious response.

Formal affidavits are no longer required under the Federal Rules.[1482] Rather, for summary judgment purposes, pursuant to 28 U.S.C. § 1746, written unsworn declarations, certificates, verifications, or statements are allowed to substitute for affidavits as long as they are subscribed in proper

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genuine issue of material fact."); *De la O*, 417 F.3d at 502 ("Statements made on information and belief do not constitute proper summary judgment evidence under rule 56(e)."); Crescent Towing & Salvage Co. v. M/V Anax, 40 F.3d 741, 745 (5th Cir. 1994) (holding mere conclusions and statements that a document exists are insufficient for summary judgment); Salas v. Carpenter, 980 F.2d 299, 305 (5th Cir. 1992) (explaining that conclusory assertions are not admissible as summary judgment evidence); Walker v. SBC Servs., Inc., 375 F. Supp. 2d 524, 535 (N.D. Tex. 2005) ("Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence."); *see also* Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 515 (5th Cir. 2001) (noting the employee's statement in a Title VII discrimination suit was unsworn and, therefore, was not competent summary judgment evidence); Wismer Distrib. Co. v. Brink's Inc., No. Civ.A.H-03-5897, 2005 WL 1840149, at *6 (S.D. Tex. Aug. 2, 2005) ("Affidavits supporting or opposing summary judgment must 'set forth facts that would be admissible in evidence.'" (quoting FED. R. CIV. P. 56(e))).

1479. Shaboon v. Duncan, 252 F.3d 722, 736 (5th Cir. 2001) (alteration in original); *see also* Perkins v. Bank of Am., No. 14-20284, 2015 WL 64870, at *3 (5th Cir. Jan. 6, 2015) (per curiam); Corley v. Prator, 290 F. App'x 749, 754 (5th Cir. 2008) (per curiam).

1480. Vinewood Capital, LLC v. Dar Al-Maal Al-Islami Trust, 541 F. App'x 443, 447–48 (5th Cir. 2013). However, the Fifth Circuit has indicated that, when faced with conflicting affidavits, a district court should not discredit a nonmovant's affidavit solely because it appears self-serving. *See* LegacyRG, Inc. v. Harter, 705 F. App'x 223, 230–31 (5th Cir. 2017) (citing Heinsohn v. Carabin & Shaw, P.C., 832 F.3d 224, 245 (5th Cir. 2016)) (holding district court erred in crediting movant's affidavit but rejecting nonmovant's affidavit as self-serving).

1481. *See First Colony Life Ins. Co.*, 555 F.3d at 181 ("[A] summary assertion made in an affidavit is simply not enough proof to raise a genuine issue of material fact."); *see also In re* Deepwater Horizon, 857 F.3d 246, 250 (5th Cir. 2017) ("It is . . . well-established that a non-movant 'cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous statement without explaining the contradiction or attempting to resolve the disparity.'"). *Compare* Thurman v. Sears, Roebuck & Co., 952 F.2d 128, 136 n.23 (5th Cir. 1992) (rejecting the use of an affidavit to contradict the affiant's previous sworn deposition testimony), *with* Randall v. Dall. Power & Light Co., 752 S.W.2d 4, 5 (Tex. 1988) (per curiam) ("[I]f conflicting inferences may be drawn from a deposition and from an affidavit filed by the same party . . . , a fact issue is presented.").

1482. FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments.

form as true under penalty of perjury.[1483] Affidavits or declarations submitted in bad faith or solely for the purpose of delay may result in sanctions including costs, attorney's fees, and contempt of court.[1484]

B. Documents and Discovery Products

Rule 56(e)'s former requirement that sworn or certified copies of all documents or parts of documents referred to in a declaration must be attached to the declaration or served concurrently was omitted as part of the 2010 amendments.[1485] However, as a practical matter, litigants should always attach such documents to their motions. Moreover, practitioners (particularly those filing voluminous documents) citing to affidavits or declarations that themselves cite to documents in the record should clearly indicate in the body of the motion or response specifically where the fact in question can be found in the record.[1486]

Summary judgment evidence may also consist of deposition testimony, interrogatory answers, stipulations, or admissions.[1487] As with other documentary evidence, these discovery documents must be either properly authenticated (for example, by affidavit or declaration establishing the accuracy of the attached copy) or capable of otherwise being presented in admissible form.[1488] Only those portions of deposition testimony otherwise admissible at trial are proper summary judgment proof.[1489]

The party submitting deposition testimony transcripts as summary judgment evidence should identify the precise sections of the testimony that support the party's position.[1490] "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a

1483. 28 U.S.C. § 1746 (2018); Ion v. Chevron USA, Inc., 731 F.3d 379, 382 n.2 (5th Cir. 2013); Mutuba v. Halliburton Co., 949 F. Supp. 2d 677, 684 (S.D. Tex. 2013).

1484. FED. R. CIV. P. 56(h); *see also* Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 349 (5th Cir. 2007) (declining to award sanctions on the finding that an inconsistency between a declaration and prior deposition testimony did not constitute a bad faith submission).

1485. FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments. The former requirement was "omitted as unnecessary given the requirement in subdivision (c)(1)(A) that a statement or dispute of fact be supported by materials in the record." *Id.*

1486. *See* FED. R. CIV. P. 56(c)(1).

1487. FED. R. CIV. P. 56(c)(1)(A).

1488. FED. R. CIV. P. 56(c)(2) ("A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."); *see also supra* note 1464 and accompanying text (discussing the admissibility of summary judgment evidence).

1489. *See, e.g.*, Bellard v. Gautreaux, 675 F.3d 454, 460 (5th Cir. 2012) (stating that on a motion for summary judgment, the evidence proffered by the plaintiff to satisfy his burden of proof must be competent and admissible at trial); Paz v. Brush Engineered Materials, Inc., 555 F.3d 383, 387–88 (5th Cir. 2009) ("The admissibility of evidence 'is governed by the same rules, whether at trial or on summary judgment.'" (quoting First United Fin. Corp. v. U.S. Fid. & Guar. Co., 96 F.3d 135, 136–37 (5th Cir. 1996))).

1490. *See* FED. R. CIV. P. 56(c)(3) ("The court need consider only the cited materials . . . .").

party's opposition to summary judgment."[1491] Consequently, the district court likely will not search through voluminous transcripts to find the testimony that allegedly raises a genuine dispute as to any material fact.[1492]

Admissions made pursuant to Federal Rule of Civil Procedure 36 are conclusive as to the matters admitted.[1493] These admissions "cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record."[1494] Rather, if a party seeks to avoid the consequences of failing to timely respond to Rule 36 requests for admissions, it should move the court to amend, quash, or withdraw the admissions in accordance with Rule 36(b).[1495]

C. Pleadings

In federal court, verified pleadings may be treated as affidavits if they conform to the requirements of admissibility set forth by Federal Rule of Civil Procedure 56(c)(4), which requires the facts asserted to be within the pleader's personal knowledge and otherwise admissible evidence.[1496] Admissions by respondents in their pleadings, even if unverified, are competent summary judgment evidence.[1497]

As a practical matter, the use of cross-references to pleadings should be kept to a minimum in summary judgment practice. Although Federal Rule of Civil Procedure 10(c) provides that "statement[s] in a pleading may be

1491. Am. Family Life Assurance Co. of Columbus v. Biles, 714 F.3d 887, 896 (5th Cir. 2013) (per curiam); Ragas v. Tenn. Gas Pipeline Co., 136 F.3d 455, 458 (5th Cir. 1998) (quoting Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 915 n.7 (5th Cir. 1992)); *see also* R.P. *ex rel.* R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 811 (5th Cir. 2012) ("It is not the Court's 'duty to sift through the record in search of evidence to support a party's opposition to summary judgment.'" (quoting Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir. 1994))).

1492. Chambers v. Sears Roebuck & Co., 428 F. App'x 400, 408 (5th Cir. 2011) (per curiam) (first citing De La O v. Hous. Auth. of El Paso 417 F.3d 495, 501 (5th Cir. 2005); then citing United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991)).

1493. FED. R. CIV. P. 36(b); Armour v. Knowles, 512 F.3d 147, 154 n.13 (5th Cir. 2007); *In re* Carney, 258 F.3d 415, 420 (5th Cir. 2001).

1494. *In re Carney*, 258 F.3d at 420.

1495. FED. R. CIV. P. 36(b); *In re Carney*, 258 F.3d at 420.

1496. FED. R. CIV. P. 56(c)(4); s*ee* Smith v. Bank of Am., No. 2:11CV120–MPM–JMV, 2012 WL 3289080, at *2 (N.D. Miss. Aug. 10, 2012) ("In order for verified pleadings to constitute proper summary judgment proof, they must conform to the requirements of affidavits, that is, they must establish that the person making the affidavit is competent to testify to the matters in question, they must show that the facts stated in the affidavit are based upon his personal knowledge, and they must contain a clear description of factual information that would be admissible at trial, not mere unsupported conclusions."). *Compare* Isquith *ex rel.* Isquith v. Middle S. Utils., Inc., 847 F.2d 186, 194 (5th Cir. 1988) (recognizing the use of verified pleadings if the requirements of Rule 56(e) are met), *with* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979) (stating that, in Texas practice, pleadings themselves do not constitute summary judgment proof).

1497. *See Isquith*, 847 F.2d at 195 (allowing defendants to rely upon the factual allegations of the complaint as admissions or stipulations for the purpose of summary judgment).

adopted by reference elsewhere in the same pleading or in any other pleading or motion,"[1498] counsel's use of this tactic should be used sparingly—especially in cases with numerous pleadings. In *CQ, Inc. v. TXU Mining Co.*, the Fifth Circuit addressed the issue of whether a respondent to a summary judgment motion adequately referred to evidence in the record sufficient to demonstrate a genuine issue of material fact by simply cross-citing its own motion for summary judgment.[1499] In that case, although the court "decline[d] to endorse a bright-line rule," it found the respondent's "targeted cross-citation to [its] own motion" sufficiently referred to evidence in the record to support its notion that a genuine issue of material fact existed in the case.[1500] Nevertheless, to ensure one's arguments and supporting evidence are properly considered, the better approach for practitioners is to attach all pertinent exhibits to the motion currently pending before the court and "articulate the precise manner in which the submitted . . . evidence supports [the] claim."[1501] More importantly, local rules may require that summary judgment evidence be included in an appendix attached to the motion.[1502]

D. Expert Testimony

An expert's testimony must be relevant and reliable in order to be considered competent summary judgment evidence.[1503] The three U.S. Supreme Court cases on admissibility of expert testimony regarding "scientific, technical, or other specialized knowledge"[1504]—*Daubert v.*

1498. FED. R. CIV. P. 10(c).

1499. CQ, Inc. v. TXU Mining Co., 565 F.3d 268, 274 (5th Cir. 2009).

1500. *Id.*

1501. Smith *ex rel.* Estate of Smith v. United States, 391 F.3d 621, 625 (5th Cir. 2004); *TXU Mining Co.*, 565 F.3d at 274 n.3.

1502. *See, e.g.*, N.D. TEX. CIV. R. 7.1(i)(1) ("A party who relies on materials—including depositions, documents, electronically stored information, affidavits, declarations, stipulations, admissions, interrogatory answers, or other materials—to support or oppose a motion must include the materials in an appendix."); S.D. TEX. CIV. R. 7.7 ("If a motion or response requires consideration of facts not appearing of record, proof by affidavit or other documentary evidence must be filed with the motion or response.").

1503. *See* Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993). "The proponent of an expert's testimony need not prove the testimony is factually correct, but rather need only prove by a preponderance of the evidence the testimony is reliable." Paz v. Brush Engineered Materials, Inc., 555 F.3d 383, 388 (5th Cir. 2009). Nor is there a "requirement that an expert derive his opinion from 'firsthand knowledge or observation.'" Deshotel v. Wal-Mart La., 850 F.3d 742, 746–47 (5th Cir. 2017) (quoting Wellogix, Inc. v. Accenture, L.L.P., 716 F.3d 867, 876 (5th Cir. 2013)). In addition, a party should timely designate its experts in order to avoid a motion to strike by the opposition. *See, e.g.*, Hamburger v. State Farm Mut. Auto. Ins. Co., 361 F.3d 875, 882–84 (5th Cir. 2004) (holding that the trial court did not abuse its discretion by barring expert due to untimely designation per Rule 26(a)(2)(A)).

1504. FED. R. EVID. 702.

Merrell Dow Pharmaceuticals, Inc.,[1505] *General Electric Co. v. Joiner*,[1506] and *Kumho Tire Co. v. Carmichael*[1507]—set out the standards by which federal trial courts must evaluate expert testimony.[1508]

Daubert mandates that trial judges, in accordance with Federal Rules of Evidence 104(a) and 702, act as "gatekeepers" by excluding unreliable scientific evidence.[1509] In performing this function, the district court must determine whether the proffered scientific testimony is grounded in the methods and procedures of science by examining a nonexhaustive list of factors.[1510] Those factors include: (1) whether the theory or technique can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error; and (4) the degree of acceptance within the scientific community.[1511]

In *Joiner*, the Supreme Court considered the standard of review to apply in reviewing a district court's exclusion of expert testimony under *Daubert*.[1512] The district court in *Joiner* excluded the opinions of the plaintiff's expert under *Daubert* and granted the defendant's motion for summary judgment.[1513] The U.S. Court of Appeals for the Eleventh Circuit reversed, stating that the Federal Rules of Evidence displayed a preference for admissibility of expert testimony that warranted a particularly stringent standard of review.[1514] The Supreme Court granted certiorari to consider the appropriate standard of review for the appellate courts in reviewing a trial court's decision to admit or exclude evidence under *Daubert*.[1515] The Court held that the abuse of discretion standard was appropriate, rather than the more stringent standard suggested by the Eleventh Circuit.[1516]

In *Kumho Tire*, the Supreme Court granted certiorari to resolve confusion in the lower courts regarding whether *Daubert*'s standards related only to scientific evidence (often referred to as "hard science"), or whether the gatekeeping function also applied to "technical, or other specialized

1505. *Daubert*, 509 U.S. 579.
1506. Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).
1507. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
1508. For a comprehensive discussion of these three cases, see Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 9 (2d ed. 2000).
1509. *Daubert*, 509 U.S. at 592, 597.
1510. *Id.* at 592–93.
1511. *Id.* at 593–94.
1512. Gen. Elec. Co. v. Joiner, 522 U.S. 136, 138–39 (1997).
1513. Joiner v. Gen. Elec. Co., 864 F. Supp. 1310, 1326–27 (N.D. Ga. 1994).
1514. Joiner v. Gen. Elec. Co., 78 F.3d 524, 529, 534 (11th Cir. 1996).
1515. *Joiner*, 522 U.S. at 138–39.
1516. *Id.* at 141–43.

knowledge" categories of evidence (often referred to as "soft science").[1517] The Court held that trial courts should apply the *Daubert* analysis to all expert testimony, not just scientific testimony.[1518] The "trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability."[1519] The Court reiterated that the test of reliability is "flexible" and the *Daubert* factors will not necessarily apply to all experts in every case,[1520] a point often overlooked by practitioners who attempt to completely exclude all experts identified in their opponent's case.

1517. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 146–47 (1999) (internal quotation marks omitted). Federal Rule of Evidence 702 refers to "scientific, technical, or other specialized knowledge," FED. R. EVID. 702, but *Daubert*'s holding was limited by its facts to admissibility of scientific evidence. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589–90 (1993). Hard science is traditionally characterized as science that is "experimentally based, where the data [that is] collected is based on procedures [and] protocols that have been designed to have groups . . . that act as controls." Joseph Sanders, Milward v. Acuity Specialty Products Group*: Constructing and Deconstructing Science and Law in Judicial Opinions*, 3 WAKE FOREST J.L. & POL'Y 141, 148 (2013). Soft science, on the contrary, is often defined by its inability to directly measure and test the subject being studied. Tim Newton, *Has Evolution Disproved God?: The Fallacies in the Apparent Triumph of Soft Science*, 4 LIBERTY U. L. REV. 1, 18–19 (2009). Traditional examples of hard science include biology, physics, and chemistry, while soft science is normally associated with such disciplines as economics, anthropology, and sociology. Brian R. Gallini, *Police "Science" in the Interrogation Room: Seventy Years of Pseudo-Psychological Interrogation Methods to Obtain Inadmissible Confessions*, 61 HASTINGS L.J. 529, 576 (2010). Courts and academics disagree on the classification of medicine. *Compare, e.g.*, Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 HOFSTRA L. REV. 217, 227 (2006) (characterizing "hard" sciences separately from medicine), *with* Walter R. Schumm, *Empirical and Theoretical Perspectives from Social Science on Gay Marriage and Child Custody Issues*, 18 ST. THOMAS L. REV. 425, 435–36 (2005) (labeling medicine as a "hard" science), *and* Neal C. Stout & Peter A. Valberg, *Bayes' Law, Sequential Uncertainties, and Evidence of Causation in Toxic Tort Cases*, 38 U. MICH. J.L. REFORM 781, 874 n.302 (2005) (criticizing "courts [that] have stated that clinical medicine is not a 'hard' science"). In *Moore v. Ashland Chemical, Inc.*, a panel of the Fifth Circuit held that *Daubert* was inapplicable to a physician's testimony because clinical medicine is not considered a "hard science." Moore v. Ashland Chem., Inc., 126 F.3d 679, 688 (5th Cir. 1997) ("Because the objectives, functions, subject matter and methodology of hard science vary significantly from those of the discipline of clinical medicine, as distinguished from research or laboratory medicine, the hard science techniques or methods that became the "*Daubert* factors" generally are not appropriate for assessing the evidentiary reliability of a proffer of expert clinical medical testimony."), *rev'd*, 151 F.3d 269 (5th Cir. 1998) (en banc). On rehearing en banc, the Fifth Circuit rejected the panel's conclusion that the testifying doctor's opinion was not predicated on hard science and held that application of *Daubert* to cases where expert testimony is based exclusively on experience or training is permissible, under the correct circumstances. *Moore*, 151 F.3d at 275 n.6. In *Kumho Tire* itself, the expert testimony at issue was proffered by a "tire failure analys[t]." *Kumho Tire Co.*, 526 U.S. at 142.

1518. *Kumho Tire Co.*, 526 U.S. at 141.

1519. *Id.*

1520. *Id.* at 141–42.

Federal Rule of Evidence 702, which governs expert testimony, was amended in 2000 in response to *Daubert* and its progeny.[1521] Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.[1522]

In federal court, the party seeking to proffer expert testimony must establish the relevancy and reliability of its expert's testimony—or risk the trial court's exclusion of the testimony pursuant to *Daubert*.[1523] These rules also may implicate state summary judgment practice. For example, pursuant to Texas Rule of Civil Procedure 166a(i),[1524] the respondent to a "no-evidence" motion must be able to overcome a challenge pursuant to *E.I. du Pont de Nemours & Co. v. Robinson*[1525] and *Gammill v. Jack Williams Chevrolet, Inc.*[1526]—the corollaries to *Daubert* and *Kumho* in Texas state court—when relying upon expert testimony to defeat a no-evidence summary judgment motion.[1527] Accordingly, neither the movant nor the nonmovant in state or federal court should wait until trial to develop an expert's qualifications, given the potentially serious ramifications of exclusion of the expert's testimony at the dispositive motion stage.[1528]

As a practice point, counsel should consider contemporaneously filing a motion to exclude an expert together with its motion for summary judgment. If the nonmovant's case is dependent upon the admissibility of the expert's testimony, the district court may immediately grant summary

1521. FED. R. EVID. 702; Matosky v. Manning, 428 F. App'x 293, 297 (5th Cir. 2011) (per curiam).

1522. FED. R. EVID. 702.

1523. Moore v. Ashland Chem. Inc., 151 F.3d 269, 276 (5th Cir. 1998).

1524. TEX. R. CIV. P. 166a(i) ("After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.").

1525. E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 555–58 (Tex. 1995).

1526. Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 718–26 (Tex. 1998).

1527. *See supra* Part 1.II.H.1. Further, in *United Blood Services v. Longoria*, the Texas Supreme Court required summary judgment proof of an expert's qualifications in support of the response to a summary judgment motion. United Blood Servs. v. Longoria, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam). The court, using an abuse of discretion standard (similar to the U.S. Supreme Court in *Joiner*), upheld the trial court's exclusion of expert testimony. *Id.* at 31.

1528. *See, e.g.*, *id.* at 30–31.

judgment with or shortly after excluding the expert's testimony. For example, in *Barrett v. Atlantic Richfield Co.*, the district court excluded expert testimony because it was inadmissible under *Daubert*.[1529] After striking the experts, the court granted summary judgment in the defendants' favor.[1530] On appeal, the Fifth Circuit affirmed the exclusion of the expert's testimony under *Daubert* because the proposed testimony consisted of "unsupported speculation" and thus was unreliable.[1531] The Fifth Circuit further affirmed the district court's contemporaneous entry of summary judgment, reasoning, after striking the expert testimony, that the plaintiffs failed to provide any further summary judgment evidence in support of their claims.[1532]

Additionally, in *Michaels v. Avitech, Inc.*, a negligence action arising from the crash of a private plane, the Fifth Circuit indirectly considered the impact of *Daubert* expert testimony in the context of a summary judgment motion.[1533] The district court struck the expert's reports for violations of discovery disclosure requirements.[1534] The Fifth Circuit held that the district court erred in striking the reports, yet stated, "It remains to determine whether the plaintiff can withstand summary judgment, even considering all of his experts and reports."[1535] The court noted that the theory of the plaintiff's expert "would likely have been inadmissible at trial under *Daubert*," and it was "perhaps remiss to attempt a *Daubert* inquiry at the appellate level when the district court did not perform one."[1536] Nevertheless, to determine whether the plaintiff provided sufficient and competent summary judgment evidence in his response, "it would be equally remiss for [the court] to ignore the fact that a plaintiff's expert evidence lacks any rational probative value."[1537] On summary judgment, if the evidence gives rise to numerous inferences that are equally plausible, yet only one inference is consistent with the plaintiff's theory, the plaintiff does not satisfy his summary judgment burden, "absent at least some evidence that excludes the other potential [proximate] causes."[1538] Because the plaintiff's expert made no attempt to rule out other sources of proximate cause, the court held that his testimony was not "significantly probative" as to the issue of negligence and, thus, was insufficient to preclude summary judgment.[1539]

1529. Barrett v. Atl. Richfield Co., 95 F.3d 375, 382 (5th Cir. 1996).
1530. *Id.* at 383.
1531. *Id.* at 382 (quoting Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590 (1993)).
1532. *Id.* at 383.
1533. Michaels v. Avitech, Inc., 202 F.3d 746, 750–53 (5th Cir. 2000).
1534. *Id.* at 750.
1535. *Id.* at 750–51 (citing *In re* TMI Litig., 193 F.3d 613, 716 (3d Cir. 1999)).
1536. *Id.* at 753.
1537. *Id.*
1538. *Id.*
1539. *Id.* at 754.

E. Objections to Evidence

In federal practice, objections to summary judgment evidence must be raised either orally or in writing by submission before formal consideration of the motion; otherwise, objections are deemed waived.[1540] Under the revised Rule 56(c)(2), motions to strike are unnecessary; rather, a party may simply object that the material cited is not admissible into evidence.[1541] The party contesting the admissibility of an affidavit has the burden to object to its inadmissible portions.[1542] Failure to object allows the district court to consider the entire affidavit.[1543]

V. RULE 12(B)(6) MOTION TO DISMISS TREATED AS RULE 56 MOTION FOR SUMMARY JUDGMENT

Where matters outside the pleadings are considered on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), Rule 12(d) requires the court to treat the motion as one for summary judgment and to dispose of it as required by Rule 56.[1544] If a Rule 12(b)(6) motion to dismiss has been converted to a Rule 56 motion for summary judgment, the summary

1540. *See, e.g.*, Branton v. City of Moss Point, 261 F. App'x 659, 661 n.1 (5th Cir. 2008) (per curiam) (finding any argument regarding the untimely production of an affidavit was waived due to the objecting party's failure to raise the issue in the district court); Donaghey v. Ocean Drilling & Expl. Co., 974 F.2d 646, 650 n.3 (5th Cir. 1992) (citing McCloud River R.R. v. Sabine River Forest Prods., Inc., 735 F.2d 879, 882 (5th Cir. 1984)); *cf.* Manderson v. Chet Morrison Contractors, Inc., 666 F.3d 373, 381 (5th Cir. 2012) ("It is settled law that one waives his right to object to the admission of evidence if he later introduces evidence of the same or similar import himself." (quoting United States v. Truitt, 440 F.2d 1070, 1071 (5th Cir. 1971) (per curiam))).

1541. FED. R. CIV. P. 56(c)(2); FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments ("There is no need to make a separate motion to strike.").

1542. *McCloud River R.R.*, 735 F.2d at 882 ("Sabine neither moved to strike the affidavit nor raised an objection to consideration of the affidavit. Thus, it has waived its right to raise the untimeliness issue on appeal.").

1543. *See id.* at 882–83.

1544. FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); Causey v. Sewell Cadillac-Chevrolet, Inc., 394 F.3d 285, 288 (5th Cir. 2004); Burns v. Harris Cty. Bail Bond Bd., 139 F.3d 513, 517 (5th Cir. 1998); Washington v. Allstate Ins. Co., 901 F.2d 1281, 1283–84 (5th Cir. 1990); *see also* FED. R. CIV. P. 12(b)(6) (allowing a party, by motion, to assert as a defense that the opposing party has in its pleadings "fail[ed] to state a claim upon which relief can be granted"); FED. R. CIV. P. 12(c) (permitting a party, after the pleadings are closed and before trial, to move for judgment on the pleadings); *supra* note 1377 (discussing exceptions based on documents attached to a motion to dismiss and central to the plaintiff's complaint). *But see* Funk v. Stryker Corp., 631 F.3d 777, 783 (5th Cir. 2011) (holding that a district court evaluating a motion to dismiss may properly take judicial notice of public records without converting the motion into one for summary judgment).

judgment rules govern the standard of review.[1545] In this manner, the nonmovant is entitled to the procedural safeguards of summary judgment.[1546]

Under Rule 56, the district court is not required to provide parties notice beyond its decision to treat a Rule 12(b)(6) motion as one for summary judgment.[1547] The standard is whether the opposing party had notice after the court accepted for consideration matters outside the pleadings.[1548] The notice required is only that the district court may treat the motion as one for summary judgment, not that the court would in fact do so.[1549]

Washington v. Allstate Insurance Co. provides an example of this principle.[1550] In *Washington*, the defendant attached a copy of a statute to its motion to dismiss, and the plaintiff attached a copy of certain repair estimates at issue to his response.[1551] After twenty days passed, the court treated the defendant's motion to dismiss as a motion for summary judgment and granted the motion.[1552] The court determined the plaintiff was on notice that the trial court could treat the motion to dismiss as one for summary judgment because the parties attached documents to both the motion to dismiss and the response; therefore, the notice provisions of Rule 12(b) and Rule 56 were not violated.[1553]

When a 12(b)(6) motion is converted to a summary judgment motion, the disposition of the motion does not turn on whether the complaint states a claim.[1554] Rather, disposition depends on whether the plaintiff raised an issue of material fact which, if proved, would entitle him to relief as a matter of

1545. Nat'l Cas. Co. v. Kiva Const. & Eng'g, Inc., 496 F. App'x 446, 452 (5th Cir. 2012) ("[W]here a district court bases its 'disposition in part on the consideration of matters in addition to the complaint . . . even if a motion to dismiss has been filed, the court must convert it into a summary judgment proceeding and afford the plaintiff a reasonable opportunity to present all material made pertinent to a summary judgment motion by Fed. R. Civ. P. 56.'" (quoting Murphy v. Inexco Oil Co., 611 F.2d 570, 573 (5th Cir. 1980))); Songbyrd, Inc. v. Bearsville Records, Inc., 104 F.3d 773, 776 (5th Cir. 1997) (noting the review would be de novo, applying the same standards as the trial court); *Washington*, 901 F.2d at 1284 (explaining that the appeals court may apply a summary judgment standard of review despite the trial court's mislabeling it as a 12(b)(6) motion).

1546. *Washington*, 901 F.2d at 1284.

1547. *Id.* (quoting Clark v. Tarrant County, 798 F.2d 736, 746 (5th Cir. 1986)).

1548. Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993) (noting that even if summary judgment is granted sua sponte, the notice and response requirements of Rule 56 still govern).

1549. Guiles v. Tarrant Cty. Bail Bond Bd., 456 F. App'x 485, 487 (5th Cir. 2012); Isquith *ex rel.* Isquith v. Middle S. Utils., Inc., 847 F.2d 186, 195–96 (5th Cir. 1988).

1550. *Washington*, 901 F.2d at 1284.

1551. *Id.*

1552. *Id.*

1553. *Id.* (noting that district courts have the authority to enter summary judgment sua sponte as long as the nonmoving party was on notice to come forward with all evidence).

1554. Bossard v. Exxon Corp., 559 F.2d 1040, 1041 (5th Cir. 1977) (per curiam).

law.[1555] For example, in *Bossard v. Exxon Corp.*, the district court granted the defendant's 12(b)(6) motion to dismiss after considering information outside the pleadings.[1556] The plaintiff appealed, arguing it stated a claim upon which relief could be granted.[1557] The Fifth Circuit affirmed, noting that once a court considers evidence outside the pleadings, a 12(b)(6) motion is then treated as a motion for summary judgment, requiring the nonmovant to show a genuine issue of material fact.[1558]

VI. APPEALING SUMMARY JUDGMENTS

A. When Summary Judgments are Appealable

If the district court grants summary judgment and disposes of all claims, the judgment is appealable.[1559] A district court's denial of a motion for summary judgment is not ordinarily reviewable on appeal.[1560] In this situation, the court's decision constitutes an interlocutory order from which the right to appeal is unavailable until entry of judgment following a trial on the merits.[1561] Specific exceptions to this rule exist in situations such as the denial of qualified immunity or when both parties file motions for summary judgment, and one of the motions is granted while the other is denied.[1562]

1555. *Id.*
1556. *Id.*
1557. *Id.*
1558. *Id.*
1559. *See* Miller v. Gorski Wladyslaw Estate, 547 F.3d 273, 277 n.1 (5th Cir. 2008) (finding appellant's notice of appeal of partial summary judgment premature because the judgment "neither disposed of the claims against all the defendants nor was it certified as a final judgment pursuant to Federal Rule of Civil Procedure 54(b)"); Samaad v. City of Dallas, 940 F.2d 925, 940 (5th Cir. 1991) ("As a general rule, only a final judgment of the district court is appealable."); *cf.* Brown v. Offshore Specialty Fabricators, Inc., 663 F.3d 759, 764 (5th Cir. 2011) (reviewing on appeal the dual grant of the defendants' motion to dismiss and motion for summary judgment). Caution must be taken in determining what is a final judgment for purposes of appeal. The pendency of a motion for attorney's fees, for example, does not prevent the running of time for filing a notice of appeal on the merits. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199–203 (1988); *see also* Treuter v. Kaufman County, 864 F.2d 1139, 1142–43 (5th Cir. 1989).
1560. Hogan v. Cunningham, 722 F.3d 725, 730 (5th Cir. 2013); *see also* Skelton v. Camp, 234 F.3d 292, 295 (5th Cir. 2000) ("A denial of summary judgment is not a final order within the meaning of 28 U.S.C. § 1291.").
1561. *See* Ozee v. Am. Council on Gift Annuities, Inc., 110 F.3d 1082, 1090–93 (5th Cir. 1997), *vacated sub nom.* Am. Council on Gift Annuities v. Richie, 522 U.S. 1011 (1997) (mem.); *Samaad*, 940 F.2d at 940 (explaining the "collateral order doctrine" exception to the general rule that a court's denial of summary judgment is unappealable).
1562. *See, e.g.*, Green v. Life Ins. Co. of N. Am., 754 F.3d 324, 328 (5th Cir. 2014); Pasco *ex rel.* Pasco v. Knoblauch, 566 F.3d 572, 576 (5th Cir. 2009); Tarver v. City of Edna, 410 F.3d 745, 749 n.2 (5th Cir. 2005); *see also* Liberty Mut. Ins. Co. v. Linn Energy, L.L.C., 574 F. App'x 425, 426 (5th Cir. 2014) (per curiam) (construing an insurance contract as a matter of law in a declaratory judgment action). Interestingly, a denial of summary judgment based on qualified immunity is immediately appealable only when it is based on a conclusion of law, while the denial of summary

Further, upon certification by the trial judge, the district court's denial of a motion for summary judgment may be reviewed by permissive interlocutory appeal,[1563] but certification as a permissive appeal is relatively rare.[1564]

Similarly, the grant of summary judgment concerning fewer than all the claims or parties in an action is not a final, appealable judgment.[1565] Yet, the Fifth Circuit has stated that when a grant of summary judgment in favor of one defendant near the time of trial will prejudice the trial preparation of another defendant, the district court should continue the trial to allow an interlocutory appeal.[1566]

Moreover, the Fifth Circuit has repeatedly held—even following a full trial on the merits—that orders denying summary judgment are not generally appealable when final judgment adverse to the movant is rendered.[1567] In *Ortiz v. Jordan*, the Supreme Court resolved a circuit split on this issue by unanimously confirming the Fifth Circuit's rule of law, holding that a party may not "appeal an order denying summary judgment after a full trial on the merits."[1568] More recently, in *Feld Motor Sports, Inc. v. Traxxas, L.P.*, the Fifth Circuit clarified that "following a jury trial on the merits, this court has jurisdiction to hear an appeal of the district court's legal conclusions in denying summary judgment, but only if it is sufficiently preserved in a Rule 50 motion."[1569] The Fifth Circuit has likewise recognized that appellate courts

judgment based on qualified immunity is not immediately appealable if it is based on a factual dispute. Oporto v. Moreno, 445 F. App'x 763, 764 (5th Cir. 2011) (per curiam) (dismissing an appeal from the district court's denial of summary judgment in a qualified immunity case "because the order denying summary judgment was based on a dispute over material fact, not law, and is thus not a final, appealable order"); Thibodeaux v. Harris County, 215 F.3d 540, 541 (5th Cir. 2000) (per curiam).

1563. 28 U.S.C. § 1292(b) (2018); *see also* Doré Energy Corp. v. Prospective Inv. & Trading Co., 570 F.3d 219, 224 (5th Cir. 2009) (noting the district court certified for interlocutory review a partial summary judgment award pursuant to § 1292(b)); *cf.* FED. R. CIV. P. 54(b) (permitting appeal from certain district court orders before the resolution of every issue in a case).

1564. Shannon, *supra* note 1393, at 53.

1565. *See* Guillory v. Domtar Indus. Inc., 95 F.3d 1320, 1325–29 (5th Cir. 1996); *see also* FED. R. CIV. P. 54(b).

1566. *Id.* at 1328–29 (finding the timing of summary judgment did not warrant reversal and that prejudice had not occurred).

1567. *E.g.*, Gonzalez v. Fresenius Med. Care N. Am., 689 F.3d 470, 474 n.3 (5th Cir. 2012); Becker v. Tidewater, Inc., 586 F.3d 358, 365 n.4 (5th Cir. 2009) (quoting Black v. J.I. Case Co., 22 F.3d 568, 572 (5th Cir. 1994)).

1568. Ortiz v. Jordan, 562 U.S. 180, 183–84 (2011).

1569. Feld Motor Sports, Inc. v. Traxxas, L.P., 861 F.3d 591, 596 (5th Cir. 2017). A Rule 50 motion is a motion for judgment as a matter of law. FED. R. CIV. P. 50. In making a Rule 50 preservation a prerequisite to appealing a district court's legal conclusions in denying summary judgment, the Fifth Circuit joined the First, Fourth, and Eighth Circuits. *Feld*, 861 F.3d at 596 (first citing N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC, 761 F.3d 830, 838 (8th Cir. 2014); then citing Ji v. Bose Corp., 626 F.3d 116, 128 (1st Cir. 2010); and then citing Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp., 51 F.3d 1229, 1235 (4th Cir. 1995)). Other Circuits have recognized a so-called "pure legal issue" exception, permitting an appeal of a summary

have jurisdiction to review a district court's legal conclusions in denying summary judgment in bench trials.[1570]

B. Standard of Review on Appeal

A district court's grant of summary judgment is normally subject to de novo review on appeal.[1571] The appellate court applies the same legal standards as the district court.[1572] Accordingly, the appellate court will not affirm a summary judgment ruling unless, after de novo review, the record reflects "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[1573]

The Fifth Circuit has stated that "[w]hen a district court denies summary judgment on the basis that genuine issues of material fact exist, it has made two distinct legal conclusions: that there are 'genuine' issues of fact in dispute, and that these issues are 'material.'"[1574] The appellate court may review a district court's legal conclusion that issues are "material."[1575] However, it may not review a district court's conclusion that issues of fact are "genuine."[1576]

Following this standard, the appellate court must review the evidence and inferences to be drawn from the evidence in a light most favorable to the

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judgment denial following a full trial on the merits—even absent the filing a Rule 50 motion—when the denial involved a "pure question of law." James C. Martin et al., *There May Be Hope on the Horizon Rule 50 Waivers and Summary Judgment Denials*, 60 NO. 2 DRI FOR DEF. 12 (2018) (collecting cases).

1570. *Becker*, 586 F.3d at 365 n.4.

1571. Ballard v. Devon Energy Prod. Co., 678 F.3d 360, 365 (5th Cir. 2012). A notable exception is when a court sua sponte grants summary judgment, which is subject to harmless error review. Spring St. Partners-IV, L.P. v. Lam, 730 F.3d 427, 436 (5th Cir. 2013). Moreover, when reviewing district court decisions upholding or overturning a decision of an administrative agency, such as the Board of Immigration Appeals, agency action is subject to a heightened level of deference and is "reviewed solely to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or whether it is not supported by substantial evidence. Alaswad v. Johnson, 574 F. App'x 483, 485 (5th Cir. 2014) (per curiam).

1572. Duval v. N. Assurance Co. of Am., 722 F.3d 300, 303 (5th Cir. 2013); Meza v. Intelligent Mexican Mktg., Inc., 720 F.3d 577, 580 (5th Cir. 2013); Ass'n of Taxicab Operators USA v. City of Dallas, 720 F.3d 534, 537 (5th Cir. 2013). Moreover, this same standard applies to the appellate court's review of the district court's judgment on cross-motions for summary judgment. *In re* Kinkade, 707 F.3d 546, 548 (5th Cir. 2013) (applying de novo review of the district court's grant of a cross-motion for summary judgment). However, on cross-motions for summary judgment, the court reviews each party's motion independently, "viewing the evidence and inferences in the light most favorable to the nonmoving party." Rossi v. Precision Drilling Oilfield Servs. Corp. Emp. Benefits Plan, 704 F.3d 362, 365 (5th Cir. 2013).

1573. *Meza*, 720 F.3d at 580 (quoting FED. R. CIV. P. 56(a)).

1574. Estate of Davis *ex rel.* McCully v. City of North Richland Hills, 406 F.3d 375, 379 (5th Cir. 2005) (quoting Reyes v. City of Richmond, 287 F.3d 346, 350–51 (5th Cir. 2002)).

1575. *Id.* (quoting *Reyes*, 287 F.3d at 350–51).

1576. *Id.* (quoting Kinney v. Weaver, 367 F.3d 337, 347 (5th Cir. 2004) (en banc)).

nonmovant.[1577] The court only considers admissible materials in the pretrial record and generally "will not enlarge the record on appeal with evidence not before the district court."[1578] In contrast, the appellate court will decide questions of law in the same manner as it decides questions of law outside the summary judgment context—by applying de novo review.[1579] In diversity actions, the appellate court reviews de novo the district court's application of state substantive law.[1580] The appellate court may affirm a summary judgment on any ground supported by the record—even grounds other than those stated by the trial court and even if the district court granted summary judgment on incorrect grounds.[1581] The appellate court may affirm summary judgment on grounds not raised by the trial court "where the lack of notice to the nonmovant is harmless, such as where 'the [unraised] issues were implicit or included in those raised below or the evidence in support thereof, or . . . the record appears to be adequately developed in respect thereto.'"[1582] Nonetheless, as a general principle in the Fifth Circuit, if a party does not raise an issue before the district court on summary judgment, the party waives that issue on appeal.[1583]

1577. Clayton v. ConocoPhillips Co., 722 F.3d 279, 290 (5th Cir. 2013); *see also* Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 288, 302 (5th Cir. 2000) (reversing the grant of summary judgment when "reasonable and fair-minded persons" could conclude from the summary judgment evidence that the defendant was liable under ERISA for breach of fiduciary duty).

1578. Weathersby v. One Source Mfg. Tech., L.L.C., 378 F. App'x 463, 466 (5th Cir. 2010) (per curiam); Michaels v. Avitech, Inc., 202 F.3d 746, 751 (5th Cir. 2000). Moreover, the Fifth Circuit will not normally review summary judgment briefing that was not introduced at a subsequent trial. *Weathersby*, 378 F. App'x at 466 (granting the appellee's motion to strike the appellant's "improper references to his response to [appellee's] motion for summary judgment in the district court because the materials referred to therein were not introduced or admitted at trial" and reasoning that citation should have been to the trial record, rather than summary judgment materials).

1579. *Michaels*, 202 F.3d at 751.

1580. Mid-Continent Cas. Co. v. Eland Energy, Inc., 709 F.3d 515, 520 (5th Cir. 2013); Levy Gardens Partners 2007, L.P. v. Commonwealth Land Title Ins. Co., 706 F.3d 622, 628 (5th Cir. 2013).

1581. Bluebonnet Hotel Ventures, L.L.C. v. Wells Fargo Bank, N.A., 754 F.3d 272, 276 (5th Cir. 2014); Cambridge Integrated Servs. Grp., Inc. v. Concentra Integrated Servs., Inc., 697 F.3d 248, 255 (5th Cir. 2012).

1582. McIntosh v. Partridge, 540 F.3d 315, 326 (5th Cir. 2008) (alterations in original) (quoting FDIC v. Lee, 130 F.3d 1139, 1142 (5th Cir. 1997)).

1583. Mid-Continent Cas. Co. v. Bay Rock Operating Co., 614 F.3d 105, 113 (5th Cir. 2010); *see also* Cox v. DeSoto County, 564 F.3d 745, 749 n.4 (5th Cir. 2009) (precluding the plaintiff from relying upon a mixed-motive theory of discrimination when she did not raise it before the district court). *But see* Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston, 660 F.3d 235, 239 n.4 (5th Cir. 2011) (finding that appellant did not waive an argument because "the argument on the issue before the district court was sufficient to permit the district court to rule on it").

C. The District Court's Order on Summary Judgment

Rule 56(a) provides that "[t]he court should state on the record the reasons for granting or denying the motion."[1584] In practice, because, in most instances, there is no appellate review of summary judgment denials,[1585] district courts frequently issue denials without stating extensive reasons.[1586] In contrast, a prevailing movant should seek an order from the court with a specific finding that the movant carried his burden of proof and there is no genuine dispute as to any material fact. When a district court provides a detailed explanation supporting the grant of summary judgment, the appellate court need not "scour the entire record while it ponders the possible explanations" for the entry of summary judgment.[1587] As such, the Fifth Circuit has stated that a detailed discussion is of great importance.[1588] In all but the simplest cases, a statement of the reasons for granting summary judgment usually proves "not only helpful but essential."[1589] The movant should therefore submit a proposed order with reasons for granting the motion rather than a form order merely stating that the motion is granted.[1590]

1584. FED. R. CIV. P. 56(a).

1585. *Supra* text accompanying notes 1559–77.

1586. Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV 286, 311 n.92 (2013) ("[A] retired federal judge suggested that because summary judgment grants produce written district court and court of appeals opinions and denials generally do not, other judges may be influenced by the apparent frequency and broadened bases on which those grants are made."). Even when the court gives reasons for its denial, the "statement on denying summary judgment need not address every available reason." FED. R. CIV. P. 56 advisory committee's note to the 2010 amendments. "[I]dentification of central issues may help the parties to focus further proceedings." *Id.* District courts are more likely to write on denials when faced with pure questions of law, such as an insurance coverage dispute or a defendant asserting qualified immunity. *See* Hogan v. Cunningham, 722 F.3d 725, 730 (5th Cir. 2013) (explaining that a district court must make determinations of law when reviewing the denial of summary judgment on qualified immunity grounds); La. Generating L.L.C. v. Ill. Union Ins. Co., 719 F.3d 328, 333 (5th Cir. 2013) ("The district court's interpretation of an insurance contract is a question of law subject to de novo review.").

1587. Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404, 418 (5th Cir. 2008) (quoting Jot-Em-Down Store (JEDS), Inc. v. Cotter & Co., 651 F.2d 245, 247 (5th Cir. 1981)).

1588. McInrow v. Harris County, 878 F.2d 835, 835–36 (5th Cir. 1989).

1589. *Gates*, 537 F.3d at 418 (quoting Myers v. Gulf Oil Corp., 731 F.2d 281, 284 (5th Cir. 1984)).

1590. This is true for most motions, particularly dispositive ones, in federal court. In contrast, Texas state courts may, and typically do, issue orders granting summary judgment without expressing reasons.

PART 3: STATE AND FEDERAL SUMMARY JUDGMENT PRACTICE—A COMPARATIVE OVERVIEW

Thus far, this Article has discussed state and federal summary judgments separately. This section compares the two jurisdictions and highlights important aspects of summary judgment practice in each.

I. HISTORY

Although the Texas Supreme Court formally adopted Rule 166a[1591] in 1950, Texas state courts initially viewed summary judgments with hostility, and the rule was relatively ineffective for the next three decades.[1592] In 1978, in an attempt to encourage the use of summary judgment disposition, the Texas Supreme Court revised Rule 166a to assist trial courts in ruling on summary judgment motions and to better protect those rulings on appeal.[1593] As a result, courts began to recognize Rule 166a's utility.[1594] Yet, more than a decade later, practitioners and judges were still hesitant to use it.[1595]

In federal courts, summary judgment procedure developed much earlier. Congress enacted the federal summary judgment rule, Rule 56, in 1938.[1596] As occurred in state courts, federal courts initially viewed summary judgments with skepticism[1597]—an early Fifth Circuit opinion cautioned that "[s]ummary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial."[1598] With the U.S.

1591. Texas Rule of Civil Procedure 166a is the summary judgment rule.

1592. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 675 (Tex. 1979); Dorsaneo, *supra* note 1, at 781–82; *see e.g.*, Gaines v. Hamman, 358 S.W.2d 557, 562–63 (Tex. 1962); Gulbenkian v. Penn, 252 S.W.2d 929, 931 (Tex. 1952).

1593. *See Clear Creek*, 589 S.W.2d at 676; Dorsaneo, *supra* note 1, at 782. Specifically, revised Rule 166a required issues to be "expressly presented to the trial court by written motion, answer, or other response" or they would "not be considered on appeal as grounds for reversal." *Clear Creek*, 589 S.W.2d at 676. This change was meant "to prevent the non-movant from laying behind the log within his objections on appeal." *Id.* at 675 (internal quotations omitted).

1594. *Clear Creek*, 589 S.W.2d at 676; Dorsaneo, *supra* note 1, at 782.

1595. *See, e.g.*, Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989); Letter from Joe Jamail to Chief Justice Phillips (May 9, 1997), http://courtstuff.com/trap/JJ.HTM [https://perma.cc/33S2-42QR].

1596. Coleman, *supra* note 4, at 298.

1597. *See id.* at 299–300; *see also* Joe S. Cecil et al., *A Quarter-Century of Summary Judgment Practice in Six District Courts*, 4 J. OF EMPIRICAL LEGAL STUD. 861, 862 (2007) ("Prior to the Supreme Court's trilogy of decisions in 1986, summary judgment was viewed as an underused and somewhat awkward tool that invited judicial distrust."); Marcy J. Levine, *Summary Judgment: The Majority View Undergoes a Complete Reversal in the 1986 Supreme Court*, 37 EMORY L.J. 171, 173–84 (1988) (discussing early debate over the benefits of Rule 56).

1598. Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940). Indeed, the Fifth Circuit has "offered a number of the most often quoted restrictive standards for summary judgment." Cecil et al., *supra* note 1597, at 874 n.43.

Supreme Court's 1986 trilogy of summary judgment decisions, however, summary judgment practice began to play an influential role in federal courts.[1599] Eleven years later, in 1997, the Texas Supreme Court authorized the use of the no-evidence summary judgment motion, the advent of which cemented summary judgment practice in state courts as a pivotal part of modern civil litigation.[1600]

II. BURDEN OF PROOF

Although Rule 56 and Rule 166a contain different language, in federal court, when the movant bears the burden of proof at trial, its burden is that of the "traditional" summary judgment movant in state court: the movant must present competent evidence to prove its entitlement to summary judgment as a matter of law.[1601] If, however, the nonmovant in federal court bears the burden of proof at trial, it has the ultimate burden of presenting competent evidence to avoid summary judgment.[1602] Stated another way, a party moving for summary judgment under Rule 56 on a claim on which it does not bear the burden of proof at trial need only point out the absence of evidence supporting an essential element of the nonmovant's case.[1603] Once a proper motion for summary judgment is filed, the burden shifts to the nonmovant to come forward with evidence sufficient to establish a genuine issue of material fact on the disputed element.[1604]

Today, the practical effect of what is required to meet the burden of proof in state court is largely the same. But that has not always been true. Until the 1997 amendment to Rule 166a, a party moving for summary judgment in state court was limited to filing a traditional motion for summary judgment, which required the movant "by competent proof, to disprove, as a matter of law, at least one of the essential elements of the [nonmovant's] cause of action or establish one or more affirmative defenses as a matter of law."[1605] Under traditional motion for summary judgment practice, the

1599. Coleman, *supra* note 4, at 295; Cecil et al., *supra* note 1597, at 865; *supra* Part 2.III.A (discussing the trilogy). *But see* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 160 (1988) (arguing that prior to the trilogy "rule 56 had sufficient teeth to it that it was used frequently and often.").

1600. *See* Clore, *supra* note 12, at 817–19; *see also supra* Part 1.III.B.2 (historical development).

1601. *See* Lindsey v. Sears Roebuck & Co., 16 F.3d 616, 618 (5th Cir. 1994) (per curiam); *see also supra* Part 1.III.A (traditional motions for summary judgment).

1602. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986).

1603. *Id.*; Tran Enters., LLC v. DHL Exp. (USA), Inc., 627 F.3d 1004, 1010 (5th Cir. 2011) (per curiam); *supra* Part 2.II.B.

1604. *Celotex*, 477 U.S. at 322; *Tran Enters., LLC*, 627 F.3d at 1010; *supra* Part 2.II.B.

1605. Dorsaneo, *supra* note 1, at 783.

burden of proof does not shift to the nonmovant unless and until the movant establishes its entitlement to summary judgment as a matter of law, even if the nonmovant bears the burden of proof at trial.[1606] Thus, the movant could not move for summary judgment on the basis that the nonmovant had no evidence to support its claim or affirmative defense.

In 1997, with the introduction of Rule 166a(i) (the no-evidence summary judgment), the Texas Supreme Court adopted the federal approach.[1607] However, practitioners in Texas state courts retain the option of filing a traditional summary judgment motion.

The determination of whether a genuine issue of fact exists is the same in state and federal courts. The reasonable juror standard applies, whereby courts "may remove an issue from the jury's consideration 'where the facts and the law will reasonably support only one conclusion.'"[1608]

III. SUBJECT MATTER

Certain types of cases are particularly amenable to summary judgment practice. For example, cases that turn on a court's interpretation of a written document, such as a contract, lease, or deed, attract summary judgment motions in both state and federal courts.[1609] Differences in subject matter between the two jurisdictions also make summary judgment practice in some cases more common in one or the other. In state court, summary judgments are often filed in insurance coverage disputes and oil and gas cases.[1610] In federal court, summary judgments are particularly common in civil rights and employment discrimination cases.[1611]

IV. DEADLINES

The deadlines for filing and responding to summary judgment motions in Texas state courts are keyed to the summary judgment hearing or submission date.[1612] In state courts, a motion for summary judgment "shall be filed and served at least twenty-one days before the time specified for

1606. *Id.*; *see also supra* Part 1.III.A (traditional motions for summary judgment).

1607. Clore, *supra* note 12, at 814.

1608. Helix Energy Sols. Grp., Inc. v. Gold, 522 S.W.3d 427, 436 (Tex. 2017) (quoting Chandris, Inc. v. Latsis, 515 U.S. 347, 373 (1995)); *see also* Stewart v. Dutra Constr. Co., 543 U.S. 481, 496 (2005); *see supra* Part 1.III.B.1 ("Reasonable Juror" Test Applied to No-Evidence Summary Judgments).

1609. *See supra* Part 1.VII; *see also* Cecil et al, *supra* note 1597, at 884.

1610. *See supra* Part 1.VII.

1611. Steven S. Gensler & Lee H. Rosenthal, *Managing Summary Judgment*, 43 LOY. U. CHI. L.J. 517, 526 (2012); *see also* Cecil et al., *supra* note 1597, at 905–06.

1612. *See* TEX. R. CIV. P. 166a(c).

hearing."[1613] Absent leave of court, a response to a motion for summary judgment should be filed and served "not later than seven days prior to the day of the hearing."[1614] "Unless a different deadline is established by local rule, [a] reply may be filed [in state court] at any time before the hearing."[1615] The date of hearing and a submission is important in state court practice because if a hearing or submission date has not been set, or the nonmovant has not received notice of such date, the nonmovant cannot calculate when its response is due.[1616]

In contrast, a motion for summary judgment in federal court may generally be filed at any time until thirty days after the close of discovery.[1617] The Federal Rules of Civil Procedure no longer specify a deadline for filing a response or reply.[1618] Rather, these deadlines are covered by local rules or scheduling orders.[1619] While state courts may also set summary judgment deadlines in a scheduling order, state court scheduling orders typically refer generally to the deadline by which dispositive motions must be filed and do not specify response and reply deadlines. Thus, the rule-set deadlines apply.

V. EVIDENCE

Presentation of summary judgment evidence is similar under Rule 166a and Rule 56.[1620] Yet, there are nuances between the two.

First, in state court, a movant need not submit evidence in support of a no-evidence summary judgment motion.[1621] Similarly, a federal movant need not submit evidence in support of a Rule 56 motion for summary judgment on claims on which the movant does not bear the burden of proof at trial.[1622] However, the burden of presenting evidence when filing a traditional summary judgment motion in state court is unique in that the movant must

1613. *Id.*

1614. *Id.*

1615. Kent Rutter, *Summary Judgment Motions and Responses: A Practical Checklist*, 72 ADVOC., Fall 2015, at 30, 32; *see* Reynolds v. Murphy, 188 S.W.3d 252, 259 (Tex. App.—Fort Worth 2006, pet. denied); *see also supra* Part 1.I.F.

1616. Martin v. Martin, Martin & Richards, Inc., 989 S.W.2d 357, 359 (Tex. 1998) (per curiam); Aguirre v. Phillips Props., Inc., 111 S.W.3d 328, 332 (Tex. App.—Corpus Christi 2003, pet. denied). A district court's granting of a summary judgment without notice to the nonmovant is harmless when the court subsequently considers the response and reaffirms its ruling. *Martin*, 989 S.W.2d at 359.

1617. FED. R. CIV. P. 56(b).

1618. *See* FED. R. CIV. P. 56(b) advisory committee's note to the 2010 amendments ("The timing provisions in former subdivisions (a) and (c) are superseded.").

1619. *See, e.g.*, S.D. TEX. LOCAL R. 7.4 (providing twenty-one day response deadline and seven-day reply deadline).

1620. *Compare* TEX. R. CIV. P. 166a(c), *with* FED. R. CIV. P. 56(c)(1).

1621. TEX. R. CIV. P. 166a(i).

1622. Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986).

submit sufficient evidence to prove its entitlement to summary judgment, even when the movant does not bear the burden of proof at trial.[1623] In contrast, in federal court, the movant who does not bear the burden of proof at trial "may merely point to an absence of evidence" and shift the burden of production to the nonmovant.[1624]

In state court, summary judgment evidence must be in admissible form as if presented at trial.[1625] In federal courts, however, "[a]t the summary judgment stage, materials cited to support or dispute a fact need only be *capable* of being 'presented in a form that would be admissible in evidence.'"[1626] An example of the distinction is that, in Texas state courts, unauthenticated documents are not competent summary judgment evidence (unless the documents are produced by the opposing party),[1627] while federal courts may "consider the evidence that would likely be admitted at trial . . . without imposing on parties the time and expense it takes to authenticate everything in the record."[1628]

A substantial difference between state and federal courts concerns the use of pleadings as summary judgment proof. In state courts, parties generally may not rely on pleadings, even if sworn to, as summary judgment evidence.[1629] On the other hand, in federal court, verified pleadings may be treated as affidavits if they conform to the requirements of admissibility found in Rule 56(c)(4).[1630]

Today, the sham affidavit doctrine applies equally in Texas state and federal courts. The sham affidavit doctrine provides that "the nonmovant cannot defeat a motion for summary judgment by submitting an affidavit

1623. Frost Nat'l Bank v. Fernandez, 315 S.W.3d 494, 508–09 (Tex. 2010) (citing Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995)); Brown v. Hearthwood II Owners Ass'n, 201 S.W.3d 153, 159 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) (plurality opinion).

1624. Lindsey v. Sears Roebuck & Co., 16 F.3d 616, 618 (5th Cir. 1994) (per curiam).

1625. Fort Brown Villas III Condo. Ass'n v. Gillenwater, 285 S.W.3d 879, 882 (Tex. 2009) (per curiam); Greeheyco, Inc. v. Brown, No. 11-16-00199-CV, 2018 WL 3192174, at *3 (Tex. App.—Eastland 2018, no pet.) (citing TEX. R. CIV. P. 166a(f)).

1626. LSR Consulting, LLC v. Wells Fargo Bank, 835 F.3d 530, 534 (5th Cir. 2016) (quoting FED. R. CIV. P. 56(c)(2)); *see also supra* note 1488 and accompanying text.

1627. *See* Huckaby v. Bragg, No. 12–05–00245–CV, 2006 WL 1791669, at *3 (Tex. App.—Tyler June 30, 2006, no pet.) (quoting Hittner & Liberato, *supra* note 975, at 69); *see also supra* Part 1.IV.C.

1628. Maurer v. Indep. Town, 870 F.3d 380, 384 (5th Cir. 2017) (citing FED. R. CIV. P. 56(c)(1)(A)); *see also* Clore, *supra* note 12, at 838–39.

1629. Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer, 904 S.W.2d 656, 660 (Tex. 1995) ("Generally, pleadings are not competent evidence, even if sworn or verified."); City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979); *see also supra* Part 2.II.B.

1630. *See* Hart v. Hairston, 343 F.3d 762, 765 (5th Cir. 2003) (per curiam) ("On summary judgment, factual allegations set forth in a verified complaint may be treated the same as when they are contained in an affidavit."). Rule 56(c)(4) sets out the requirements of an affidavit or declaration submitted as summary judgment evidence. FED. R. CIV. P. 56(c)(4).

which directly contradicts, without explanation, his previous testimony."[1631] Until 2018, state courts were split over whether to recognize the sham affidavit rule,[1632] which has long been recognized by federal courts.[1633] In *Lujan v. Navistar, Inc.*, the Texas Supreme Court resolved the split in the courts of appeals by adopting the sham affidavit rule as "a valid application of a trial court's authority to distinguish genuine fact issues from non-genuine fact issues under Rule 166a."[1634]

Finally, in either forum, the proponent of summary judgment evidence should always cite to the specific portions of evidence that support the proponent's position, but it is not strictly required in state court. Rule 166a does not expressly require a party to cite to the specific evidence supporting their summary judgment motion or response.[1635] Texas courts have occasionally found that a trial court cannot disregard a proponent's evidence despite the proponent's failure to bring the evidence to the court's attention.[1636] Rule 56, however, expressly states "[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of the record."[1637] Thus, the Fifth Circuit has held that Rule 56 does not impose upon the district court a "duty to sift through the record in search of evidence to support a party's opposition to summary judgment."[1638]

VI. HEARINGS

Hearings on motions for summary judgment are not required in Texas state and federal courts,[1639] although such hearings are more common in state

1631. Albertson v. T.J. Stevenson & Co., 749 F.2d 223, 228 (5th Cir. 1984).

1632. Lujan v. Navistar, Inc., 555 S.W.3d 79, 84 (Tex. 2018).

1633. *See id.* at 85–86 (discussing history of sham affidavit doctrine in federal courts).

1634. *Id.* at 86.

1635. *See generally* TEX. R. CIV. P. 166a.

1636. *See, e.g.*, Gallegos v. Johnson, No. 13-07-00603-CV, 2010 WL 672934, at *7 (Tex. App.—Corpus Christi 2010, no pet.) (holding proponent was not required to reference summary judgment evidence that was not voluminous); Hinojosa v. Columbia/St. David's Healthcare Sys., L.P., 106 S.W.3d 380, 387 (Tex. App.—Austin, 2003, no pet.) ("A non-movant need not set out the exact evidence on which it relies or explain with specificity how this evidence supports the issues it raises . . . ."); Barraza v. Eureka Co., 25 S.W.3d 225, 228–29 (Tex. App.—El Paso 2000, no pet.) (holding proponent is not required to identify the specific summary judgment evidence on which it relies). *But see* Guthrie v. Suiter, 934 S.W.2d 820, 826 (Tex. App.—Houston [1st Dist.] 1996, no pet.) ("The trial court should not be compelled to sift through a 500-page deposition to search for evidence supporting the contestant's contentions.").

1637. FED. R. CIV. P. 56(c)(1)(A).

1638. R.P. *ex rel.* R.P. v. Alamo Heights Indep. Sch. Dist., 703 F.3d 801, 811 (5th Cir. 2012) (quoting Forsyth v. Barr, 19 F.3d 1527, 1537 (5th Cir. 1994)).

1639. Martin v. Martin, Martin & Richards, Inc., 989 SW.2d 357, 359 (Tex. 1998) (per curiam); Allied Chem. Corp. v. Mackay, 695 F.2d 854, 856 (5th Cir. 1983) (per curiam).

courts.[1640] Resources available to federal judges that ease the burden of analyzing fully-briefed summary judgment motions, such as staff attorneys or law clerks, are generally unavailable to state district court judges.[1641] In either jurisdiction, oral hearings can be beneficial because they may allow lawyers to narrow and clarify issues.[1642]

In state court, there is a tradition of allowing oral arguments as a matter of right. Even so, summary judgment hearings are merely an opportunity for lawyers to advocate their positions to judges with limited time and resources.[1643] Lawyers are limited to presenting argument at summary judgment hearings; they may not offer or object to evidence or present additional grounds for summary judgment.[1644]

In federal court, summary judgment hearings are less common.[1645] In light of additional resources,[1646] federal courts may find hearings have less utility.[1647] Also, during oral hearings, federal courts are less restrained than state courts in that they may consider oral testimony at the hearing.[1648]

Importantly, whether in state or federal court, practitioners should not assume an oral hearing will be allowed and, even if it is, the motions and evidence should be complete and the motions correctly and persuasively

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1640. *See* ROY W. MCDONALD & ELAINE A. GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 18:24 (2d ed. 2017).

1641. *See* D. Brock Hornby, *Summary Judgment Without Illusions*, 13 GREEN BAG 2D 273, 277–78 (2010) (discussing law clerks' role in disposing of motions for summary judgment); *cf.* Jamail, *supra* note 1595.

1642. Gensler & Rosenthal, *supra* note 1611, at 557 ("At times, oral argument will clarify and confirm the parties' positions and the merits to a point that lets the court rule from the bench, saving the effort and time that otherwise would be needed to prepare a written opinion.").

1643. Adamo v. State Farm Lloyds Co., 853 S.W.2d 673, 677 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *supra* Part 1.I.I.

1644. TEX. R. CIV. P. 166a(c); *see supra* Part 1.I.I (discussing hearing/submission).

1645. *See* Gensler & Rosenthal, *supra* note 1611, at 555–56 ("As summary-judgment motions have seemingly increased in use and importance, the frequency of oral argument on those motions has seemingly declined."); *see also* Kravitz, *supra* note 1374, at 255 ("[A]t a recent hearing of the Judicial Conference's Civil Rules Advisory Committee on proposals to amend Rule 56, . . . a chief complaint of practitioners—plaintiffs' and defendants' lawyers alike—was that district court judges rarely, if ever, provide an opportunity for oral argument on summary judgment motions."); *supra* Part. 2.I.B.

1646. Hornby, *supra* note 1641, at 284.

1647. *See* Kravitz, *supra* note 1374, at 255 ("There appears to be a widespread belief among . . . [federal] district court judges that oral argument is inefficient and consumes too much court time, without attendant benefit."). Even so, multiple federal judges have expressed concern over the decline in summary judgment hearings in federal courts and have urged their use. *See, e.g.*, Gensler & Rosenthal, *supra* note 1611, at 555–56; Kravitz, *supra* note 1374, at 263–64; Michael A. McGlone, *The Silence of Oral Argument*, 58 FED. LAW 4, 4 (2011) (describing oral arguments in many federal district courts as "a distant, albeit fond, memory of the past").

1648. BATEMAN ET AL., 27A FEDERAL PROCEDURE, LAWYERS EDITION § 62:659 (2018) ("Although [Rule 56] manifests a preference for summary-judgment motions to be decided on the basis of the written record, . . . it does not preclude parties from introducing oral testimony at a hearing on the motion, and it is well established that trial judges may consider such evidence.").

drafted. The lawyers should prepare as if the motion will be decided on submission.[1649]

VII. ORDERS

In contrast to federal courts, Texas state courts seldom issue orders or opinions providing reasons for granting summary judgment.[1650] Some commentators have attributed this reluctance, in part, to a lack of resources.[1651] Also, for appellate purposes, it makes no difference whether the state trial court specifies the reasons for granting summary judgment—although, for strategic purposes, a movant may prefer a general order to keep the focus on the multiple grounds upon which the summary judgment could have been granted. Legally, an appellate court may affirm a district court's grant of summary judgment on any ground stated in the motion, regardless of whether the ground was considered by the district court.[1652] This ability to affirm on any ground may also form a disincentive for a state trial judge to draft a detailed summary judgment order.

Federal courts are more likely to issue orders with detailed reasons when granting summary judgment motions.[1653] For starters, Rule 56(a) directs that "[t]he court should state on the record the reasons for granting or denying the motion."[1654] The Fifth Circuit has repeatedly stressed the importance of a district court's detailed discussion of its reasoning[1655] and has even remanded summary judgments with instructions to the district court to explain itself.[1656] Moreover, law clerks and staff attorneys frequently aid federal district courts

1649. Local rules and court procedures should be referenced in determining the procedure for requesting a summary judgment hearing.

1650. Willy E. Rice, *Questionable Summary Judgments, Appearance of Judicial Bias, and Insurance Defense in Texas Declaratory-Judgment Trials: A Proposal and Arguments for Revising Texas Rules of Civil Procedure 166a(a), 166a(b), and 166a(i)*, 36 ST. MARY'S L.J. 535, 638 (2005) (recognizing that Texas trial judges regularly grant or deny summary-judgment motions without explaining their rulings); Jamail, *supra* note 1595 ("Unlike federal district courts, Texas trial courts rarely, if ever, issue detailed memorandum opinions in conjunction with orders to assist appellate courts."); *see also supra* Part 1.I.J.

1651. Jamail, *supra* note 1595 ("Texas trial dockets are simply too swamped, and trial judges simply under-assisted by court staff . . . to permit issuance of federal court-style opinions.").

1652. Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996); *see supra* Part 1.I.J (the judgment).

1653. *See generally supra* Part 2.VI.C.

1654. FED. R. CIV. P. 56(a).

1655. Wildbur v. ARCO Chem. Co., 974 F.2d 631, 644 (5th Cir. 1992); McIncrow v. Harris County, 878 F.2d 835, 835–36 (5th Cir. 1989).

1656. Myers v. Gulf Oil Corp., 731 F.2d 281, 284 (5th Cir. 1984) (per curiam) ("Because the District Court gives no indication from which we can accurately predict its basis for granting summary judgment . . . we cannot adequately review its decision. Thus, we vacate the Order and remand for findings and conclusions consistent with this opinion.").

in drafting detailed orders.[1657] Concerning preparation of denials of motions for summary judgments, federal courts typically do not provide detailed reasons. Among other reasons for not providing detailed orders, the denial of summary judgment is not generally appealable.[1658]

VIII. SUA SPONTE ACTION

Texas state courts may only grant summary judgment for a party upon a motion filed by that party and on a ground specifically argued in the motion.[1659] They cannot grant summary judgment sua sponte.[1660] Conversely, a federal district court has the power to enter summary judgment sua sponte upon sufficient notice to the parties.[1661]

IX. CONVERSION FROM MOTION TO DISMISS

Unlike its federal counterpart, a Texas Rule of Civil Procedure 91a motion to dismiss may not be converted by the trial court into a motion for summary judgment.[1662] Rule 91a, which became effective in 2013, "allows a party to move to dismiss a cause of action on the ground that it has no basis in law or in fact."[1663] In ruling on a Rule 91a motion to dismiss, "[t]he trial court may not consider evidence" and must generally decide the motion based solely on the pleading of a cause of action.[1664]

The older federal analogue to Texas's Rule 91a motion is a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6).[1665] As with Rule 91a motions, a district court ruling on a Rule 12(b)(6) motion generally cannot consider evidence, and the court must look

1657. *See* Hornby, *supra* note 1641, at 277; *see also* Todd C. Peppers et al., *Inside Judicial Chambers: How Federal District Court Judges Select and Use Their Law Clerks*, 71 ALB. L. REV. 623, 635–36 (2008).

1658. *See supra* note 1590.

1659. *See* Knutson v. Friess, No. 90-08-00181-CV, 2009 WL 1331100, at *4 (Tex. App.—Beaumont May 14, 2009, no pet.).

1660. *Id.*; Duncan v. First Am. Title Ins. Co., No. C14-93-00171-CV, 1994 WL 2010, at *5 (Tex. App.—Houston [14th Dist.] Jan. 6, 1994, no writ); Dillard v. NCNB Tex. Nat'l Bank, 815 S.W.2d 356, 358 (Tex. App.—Austin 1991), *overruled on other grounds*, 831 S.W.2d 793 (1992).

1661. FED. R. CIV. P. 56(f)(3); Jones v. Family Dollar Stores of La., Inc., 746 F. App'x 348, 351–52 (5th Cir. Aug. 16, 2018); *see also supra* Part 2.I.B. Prior to *Celotex*, however, courts in the Fifth Circuit could not enter summary judgment sua sponte on grounds not requested by the moving party. *Jones*, 746 F. App'x at 352 (citing John Deere Co. v. Am. Nat. Bank, 809 F.2d 1190, 1192 (5th Cir. 1987)).

1662. Timothy Patton, *Motions to Dismiss Under Texas Rule 91a: Practice, Procedure and Review*, 33 REV. LITIG. 469, 513 (2014).

1663. Wooley v. Schaffer, 447 S.W.3d 71, 74 (Tex. App.—Houston [14th Dist.] 2014, pet. denied) (citing TEX. R. CIV. P. 91a).

1664. *Id.*

1665. *See* Patton, *supra* note 1662, at 471; FED. R. CIV. P. 12(b)(6).

only to the allegations in the complaint.[1666] A federal court, however, has the option of converting a Rule 12(b)(6) motion to a motion for summary judgment if it considers matters extrinsic to the pleadings.[1667]

X. APPEALABILITY

In Texas state and federal courts, an order granting summary judgment and disposing of all claims is appealable, and an order denying summary judgment is interlocutory and generally cannot be appealed.[1668] There, however, are procedural and statutory exceptions in both forums. Some arise in the same circumstance; some do not. In both courts, when both sides file motions for summary judgment, an order denying one and granting the other is appealable.[1669] Likewise, state and federal court orders denying summary judgment are ordinarily appealable when (1) the denial is based on certain forms of governmental immunity;[1670] or (2) the district court certifies the appeal and the appellate court agrees to consider it.[1671]

By statute, state court orders denying summary judgment are also appealable when (1) the denial is of a media defendant's motion for summary judgment in a defamation case;[1672] or (2) the denial is of a summary judgment motion filed by an electric utility regarding liability in suit subject to Texas Civil Practice and Remedies Code Section 75.0022.[1673] In the Fifth Circuit, a denial of summary judgment is appealable following a trial on the merits when the denial is based on a ruling by the district court on an issue of law "but only if [the issue] is sufficiently preserved in a [motion for judgment as

1666. Colle v. Brazos County, 981 F.2d 237, 243 (5th Cir. 1993).

1667. Patton, *supra* note 1662, at 513. To convert a Rule 12(b)(6) motion to a summary judgment motion, a court must provide sufficient notice to the parties of the court's intent to do so. *Id*. For a detailed discussion of this procedure see *supra* Part 2.V.

1668. *See* Novak v. Stevens, 596 S.W.2d 848, 849 (Tex. 1980); *see also* Hogan v. Cunningham, 722 F.3d 725, 730 (5th Cir. 2013).

1669. Green v. Life Ins. Co. of N. Am., 754 F.3d 324, 329 (5th Cir. 2014); Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex., 253 S.W.3d 184, 192 (Tex. 2007).

1670. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5) (West 2017); Kinney v. Weaver, 367 F.3d 337, 346 (5th Cir. 2004) (citing Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)).

1671. 12 U.S.C. § 1292(b) (2018); TEX. CIV. PRAC. & REM. CODE § 51.014(d). To be appealable by certification in state and federal court, the order to be appealed must involve a "controlling question of law as to which there is a substantial ground for difference of opinion," and there must be a finding that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 18 U.S.C. § 1292(b); TEX. CIV. PRAC. & REM. CODE § 51.014(d).

1672. TEX. CIV. PRAC. & REM. CODE § 51.014(a)(6).

1673. *Id.* § 51.014 (a)(13). Section 75.0022 of the Texas Civil Practice and Remedies Code limits the liability of electric utility companies in certain situations. For a detailed discussion of summary judgment appeals in Texas state courts, see *supra* Part 1.V.

a matter of law]."[1674] A federal district court's legal conclusions in denying summary judgment are also appealable following a later bench trial.[1675] In state court, the denial of a summary judgment (that is not otherwise appealable) has no impact on the trial judgment or on appeals.[1676]

CONCLUSION

While following the summary judgment procedures detailed in this Article is fundamental, it does not ensure successful prosecution of, or defense against, a motion for summary judgment. In addition to technical considerations, the civil practitioner filing or opposing a summary judgment motion should also take advantage of strategic timing decisions, the development and use of evidence, written persuasion, and a familiarity with the particular judge and his or her procedures. These factors, combined with legal and technical correctness, ultimately determine success in summary judgment practice.

1674. Feld Motor Sports, Inc. v. Traxxas, L.P., 861 F.3d 591, 597 (5th Cir. 2017). For example, if properly preserved, a district court's denial of summary judgment based on the legal conclusion that a contract is ambiguous is appealable following a trial on the merits. *See id.*

1675. Becker v. Tidewater, Inc., 586 F.3d 358, 365–66 n.4 (5th Cir. 2009). For a detailed discussion of summary judgment appeals in federal court see *supra* Part 2.VI.

1676. *See* United Parcel Serv. Inc v. Tasdemiroglu, 25 S.W.3d 914, 916–17 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).