

TRIPS, TRAPS, AND SNARES IN APPEALING A SUMMARY JUDGMENT IN  
TEXAS

David F. Johnson\*

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\*David F. Johnson is a shareholder with Winstead PC in Fort Worth, Texas.

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#### INTRODUCTION

Summary judgment motions are commonplace in almost any civil suit in Texas. Whether seeking dismissal of the entire case or seeking the dismissal of some (but not all) claims or defenses, parties routinely file motions for summary judgment. Therefore, almost all attorneys will eventually find themselves asking an appellate court to either affirm or reverse a summary judgment. When in that position, an attorney needs to be aware of a multitude of issues that can drastically affect the fate of the summary judgment. Over twenty years ago, Chief Justice William J. Cornelius and David F. Johnson published an article discussing the various issues and traps that can arise in

summary judgment appeals: William J. Cornelius & David F. Johnson, *Tricks, Traps, and Snares in Appealing a Summary Judgment in Texas*, 50 BAYLOR L. REV. 813 (1998). There has been a lot of precedent and growth in this area since that article was originally published. This article attempts to update and expand on issues that arise in summary judgment appellate practice.

## I. SUMMARY JUDGMENT GROUNDS

A summary judgment appeal will stand or fall on two main components: (1) the grounds asserted in the motion; and (2) whether the evidence was sufficient to create a fact issue in reference to the grounds.<sup>1</sup> Accordingly, whether the grounds were properly asserted and what grounds were asserted are very important factors in appealing a summary judgment.<sup>2</sup>

### A. *Traditional Motion For Summary Judgment*

The movant must expressly state the specific grounds for summary judgment in the motion.<sup>3</sup> “The term ‘grounds’ means the reasons that entitle the movant to summary judgment, in other words, ‘why’ the movant should be granted summary judgment.”<sup>4</sup> “The scope of a trial court’s power to render summary judgment is measured by the scope of the predicate motion for summary judgment and the specific grounds stated therein.”<sup>5</sup> The purpose of this requirement is to provide the nonmovant with adequate information to oppose the motion and to define the issues for the purpose of summary judgment.<sup>6</sup> The specificity requirement of Rule 166a(c) echoes the “fair notice” pleading requirements of Texas Rules of Civil Procedure 45(b) and

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<sup>1</sup> See *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997).

<sup>2</sup> See *id.*

<sup>3</sup> *Id.*; *Gustafson v. Complete Mfg. Servs.*, No. 09-18-00415-CV, 2020 Tex. App. LEXIS 5697, at \*14–15 (Tex. App.—Beaumont Oct. 8, 2019, no pet. h.) (not designated for publication); *McLendon v. Detoto*, No. 14-06-00658-CV, 2007 Tex. App. LEXIS 5173, at \*5 (Tex. App.—Houston [14th Dist.] July 3, 2007, pet. denied) (not designated for publication).

<sup>4</sup> *Hardaway v. Nixon*, 544 S.W.3d 402, 412 (Tex. App.—San Antonio 2017, pet. denied) (quoting *Stephens v. LNV Corp.*, 488 S.W.3d 366, 373 (Tex. App.—El Paso 2015, no pet.)).

<sup>5</sup> *Id.*

<sup>6</sup> *FDIC v. Lenk*, 361 S.W.3d 602, 609 n.7 (Tex. 2012); *Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978), *overruled on other grounds by City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

47(a).<sup>7</sup> If the motion contains a concise statement that provides fair notice of the claim involved to the nonmovant, the grounds for summary judgment are sufficiently specific.<sup>8</sup> Grounds may “be stated concisely, without detail and argument.”<sup>9</sup> “Summary judgments . . . may only be granted upon grounds expressly asserted in the summary judgment motion.”<sup>10</sup>

In *McConnell v. Southside Independent School District*, the Texas Supreme Court dealt with the issue of whether a party properly raised summary judgment grounds.<sup>11</sup> The defendant filed the summary judgment motion, which asserted only that “there were no genuine issues as to any material facts . . . .”<sup>12</sup> In a separate document, the defendant filed a twelve-page brief in support of the motion.<sup>13</sup> The plaintiff filed an exception to the form of the defendant’s motion and argued that the motion did not state the grounds for the summary judgment.<sup>14</sup> The trial court overruled the plaintiff’s exception and granted the summary judgment, which the plaintiff appealed.<sup>15</sup> The court of appeals affirmed the trial court.<sup>16</sup> The Texas Supreme Court, relying on Texas Rule of Civil Procedure 166a(c), reversed the judgments of both lower courts.<sup>17</sup> Rule 166a(c) states, “the motion for summary judgment shall state the specific grounds therefor.”<sup>18</sup>

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<sup>7</sup> *Westchester Fire Ins. Co.*, 576 S.W.2d at 772–73.

<sup>8</sup> *Hevey v. Hundley*, No. 05-12-00588-CV, 2013 Tex. App. LEXIS 13292, at \*4–5 (Tex. App.—Dallas Oct. 25, 2013, pet. denied) (not designated for publication) (“If the motion contains a concise statement that provides fair notice of the claim involved to the nonmovant, the grounds for summary judgment are sufficiently specific.”); *Tomlinson v. Estate of Theis*, No. 03-07-00123-CV, 2008 Tex. App. LEXIS 372, at \*15 (Tex. App.—Austin Jan. 18, 2008, no pet.) (not designated for publication); *Dear v. City of Irving*, 902 S.W.2d 731, 734 (Tex. App.—Austin 1995, writ denied).

<sup>9</sup> *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 340 (Tex. 1993) (quoting *Roberts v. Sw. Tex. Methodist Hosp.*, 811 S.W.2d 141, 146 (Tex. App.—San Antonio 1991, writ denied)); *Wallace v. Energen Res. Corp.*, No. 08-17-00248-CV, 2020 Tex. App. LEXIS 3490, at \*12 (Tex. App.—El Paso Apr. 24, 2020, pet. filed) (not designated for publication).

<sup>10</sup> *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam) (citing TEX. R. CIV. P. 166a(c)).

<sup>11</sup> 858 S.W.2d at 338.

<sup>12</sup> *Id.* at 338 n.1.

<sup>13</sup> *Id.* at 338–39.

<sup>14</sup> *Id.* at 344 (Hecht, J., dissenting).

<sup>15</sup> *Id.* at 339.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 343–44.

<sup>18</sup> TEX. R. CIV. P. 166a(c).

Taking a literal view of the rule, the Texas Supreme Court held that a “motion for summary judgment must itself expressly present the grounds upon which it is made.”<sup>19</sup> Further, the court held that a trial court may not rely on briefs or summary judgment evidence in determining whether grounds are expressly presented.<sup>20</sup> A court of appeals cannot review a ground that was not contained in the summary judgment motion to affirm that order.<sup>21</sup> A trial court can only grant summary judgment on the grounds addressed in the motion for summary judgment.<sup>22</sup> An appellate court cannot affirm a summary judgment on a ground raised for the first time at the hearing even where the nonmovant fails to object.<sup>23</sup>

The Texas Supreme Court issued an opinion affirming a trial court’s summary judgment where the issue on appeal was whether a ground was

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<sup>19</sup> *McConnell*, 858 S.W.2d at 341.

<sup>20</sup> *Id.*; *see also* *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997); *Raym v. Tupelo Mgmt., LLC*, No. 02-19-00477-CV, 2020 Tex. App. LEXIS 5092, at \*14 (Tex. App.—Fort Worth July 9, 2020, no pet. h.) (not designated for publication); *Pleasant Grove Indep. Sch. Dist. v. FieldTurf USA, Inc.*, No. 06-19-00022-CV, 2020 Tex. App. LEXIS 2778, at \*12 (Tex. App.—Texarkana Apr. 3, 2020, pet. filed) (not designated for publication) (stating grounds in a supplemental brief filed at request of trial court could not support summary judgment motion); *RR Publ’n & Prod. Co. v. Lewisville Indep. Sch. Dist.*, 917 S.W.2d 472, 473 (Tex. App.—Fort Worth 1996, no writ).

<sup>21</sup> *ExxonMobil Corp. v. Lazy R. Ranch, LP*, 511 S.W.3d 538, 545–46 (Tex. 2017); *see also* *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 888 n.9 (Tex. App.—Dallas 2007, no pet.).

<sup>22</sup> *Blancett v. Lagniappe Ventures, Inc.*, 177 S.W.3d 584, 592 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Positive Feed, Inc. v. Guthmann*, 4 S.W.3d 879, 881 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (“When, as here, a trial court grants more relief by summary judgment than requested, by disposing of issues never presented to it, the interests of judicial economy demand that we reverse and remand as to those issues, but address the merits of the properly presented claims.”); *Amboree v. Bonton*, No. 01-14-00846-CV, 2015 Tex. App. LEXIS 8772, at \*21 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, no pet.) (not designated for publication).

<sup>23</sup> *In re Estate of Mendoza*, No. 04-19-00129-CV, 2020 Tex. App. LEXIS 1845, at \*5 (Tex. App.—San Antonio Mar. 4, 2020, no pet.) (not designated for publication); *Protocol Techs., Inc. v. J.B. Grand Canyon Dairy, L.P.*, 406 S.W.3d 609, 613 (Tex. App.—Eastland 2013, no pet.) (“[T]he matters presented during the oral hearing on a motion for summary judgment have no bearing on appeal because the grounds for summary judgment and the issues defeating entitlement thereto must be presented in writing to the trial court before the hearing.”) (internal quotation marks omitted); *Nat’l City Bank of Ind. v. Ortiz*, 401 S.W.3d 867, 882 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (rejecting argument that nonmovant waived trial court’s erroneous consideration of grounds raised orally at a summary judgment hearing but not raised in the motion).

raised in the underlying motion.<sup>24</sup> In *Nall*, the plaintiff sued the defendants based on an accident that occurred after a third party left a party being hosted by the defendants.<sup>25</sup> The plaintiff raised a negligence claim based on the defendants' alleged failure to exercise due care in their undertaking.<sup>26</sup> The summary judgment motion stated the issue as: "Whether the defendants have any duty to plaintiff in the factual scenario pled by the plaintiff."<sup>27</sup> The defendants' "short answer" was that "Texas does not recognize social host liability, and defendants do not have any duty to the plaintiff in this case."<sup>28</sup> The court of appeals held that the trial court erred by granting summary judgment because the defendants failed to address the plaintiff's negligent-undertaking theory in their motion.<sup>29</sup> The Texas Supreme Court disagreed, holding that the summary judgment motion specifically addressed the negligent-undertaking claim by arguing that a prior opinion foreclosed the assumption of any duty (i.e., an undertaking) by a social host.<sup>30</sup> Therefore, the Court held that the court of appeals erred by reversing the trial court's judgment.<sup>31</sup> The Court reviewed the briefing and arguments in the motion to give flesh to the rather broad issue statement.

A party should not file an ambiguous or unclear motion for summary judgment. If it does, the nonmovant can file a special exception.<sup>32</sup> "The purpose of special exceptions focused upon a summary judgment motion is to ensure the parties and the trial court are focused on the same grounds."<sup>33</sup> A nonmovant should explain to the trial court and court of appeals how the

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<sup>24</sup> *Nall v. Plunkett*, 404 S.W.3d 552, 554 (Tex. 2013) (per curiam).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 556.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 554.

<sup>30</sup> *Id.* at 556.

<sup>31</sup> *See id.* at 556–57.

<sup>32</sup> *Bryant v. Progressive Cnty. Mut. Ins. Co.*, No. 05-17-01023-CV, 2018 Tex. App. LEXIS 10258, at \*5 (Tex. App.—Dallas Dec. 23, 2018, no pet.) (not designated for publication); *see also* *Martinez v. Wilson Plaza Assocs., L.P.*, No. 13-02-00697-CV, 2004 Tex. App. LEXIS 9804, at \*6–7 (Tex. App.—Corpus Christi–Edinburg Nov. 4, 2004, no pet.) (not designated for publication).

<sup>33</sup> *Stephens & Johnson Operating Co. v. Schroeder*, 04-14-00167-CV, 2015 Tex. App. LEXIS 8412, at \*4 (Tex. App.—San Antonio Aug. 12, 2015, pet. denied) (not designated for publication).

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motion is vague or ambiguous.<sup>34</sup> One court reversed a summary judgment where the trial court erred in denying a special exception and stated:

In doing so, we note that we take summary judgment practice very seriously. When a party files a motion that has the potential to dispose of a case in part or in its entirety, we expect that the pleading will be prepared with the utmost consideration as to clarity and professionalism so as to give the parties every opportunity to defend against the motion. Otherwise, the purpose of summary judgment practice may be thwarted by unfairly depriving a party of his right to trial by jury.<sup>35</sup>

The party who wants to complain of the form of the motion must “properly” except to it.<sup>36</sup> But what is a “proper exception”? Must the non-movant except to the trial court, or can he raise the defect for the first time in his appellate brief? The Texas Supreme Court set forth some guidelines for deciding this issue.<sup>37</sup> When the motion does not present any grounds in support of summary judgment, the non-movant is not required to except to it in the trial court.<sup>38</sup> The reasoning is that the motion must stand or fall on its own merits, and the non-movant’s failure to respond or except to the motion in the trial court should not result in a judgment by default.<sup>39</sup>

Where the summary judgment motion presents some grounds, but not all, once again the non-movant is not required to except to the trial court because to do so in this situation would require the non-movant to alert the movant to the additional grounds that he left out of his summary judgment motion.<sup>40</sup> The Court noted that “[a]n exception is required should a non-movant wish to complain on appeal that the grounds relied on by the movant were unclear

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<sup>34</sup> See *Bryant*, 2018 Tex. App. LEXIS 10258, at \*8.

<sup>35</sup> *Martinez*, 2004 Tex. App. LEXIS 9804, at \*12.

<sup>36</sup> See *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 344 (Tex. 1993).

<sup>37</sup> *Id.* at 342–43.

<sup>38</sup> *Id.* at 342; see also *Mercantile Ventures, Inc. v. Dunkin’ Donuts, Inc.*, 902 S.W.2d 49, 50 (Tex. App.—El Paso 1995, no writ).

<sup>39</sup> *McConnell*, 858 S.W.2d at 342.

<sup>40</sup> *Id.*; see also *DeWoody v. Rippley*, 951 S.W.2d 935, 944 n.7 (Tex. App.—Fort Worth 1997, writ dism’d by agr.).



or ambiguous.”<sup>41</sup> “However, even when a non-movant fails to except, the court of appeals cannot ‘read between the lines’ or infer from the pleadings any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court.”<sup>42</sup>

It is only when the grounds in the summary judgment motion are unclear or ambiguous that the non-movant must file an exception to the motion with the trial court, thus ensuring that the parties and the trial court are focused on the same grounds.<sup>43</sup> The *Toubaniaris* court stated the following:

We hold the language in *McConnell* inapplicable to this case because *McConnell* only addressed the issue whether a nonmovant should specially except to a motion for summary judgment when the grounds in the motion are unclear or ambiguous. This case involves a motion that is itself ambiguous whether it is a motion for summary judgment or a motion for forum non conveniens.<sup>44</sup>

Thus, the non-movant did not have to specially except to the trial court to preserve error.<sup>45</sup> If the non-movant fails to file an exception to a motion with this defect, the only harm the non-movant will incur is that, on appeal, he will lose the right to have the grounds narrowly focused.<sup>46</sup> Thus, the appellate court can affirm on any ground that was included in the ambiguous summary judgment motion.<sup>47</sup> Further, these rules apply to the non-movant’s response and supporting brief because he must also expressly present to the trial court any issues that defeat the movant’s “entitlement.”<sup>48</sup>

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<sup>41</sup> *McConnell*, 858 S.W.2d at 342; see also *D.R. Horton-Tex., Ltd. v. Markel Int’l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009) (“A non-movant must present its objections to a summary judgment motion expressly by written answer or other written response to the motion in the trial court or that objection is waived.”).

<sup>42</sup> *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013) (per curiam) (quoting *McConnell*, 858 S.W.2d at 343).

<sup>43</sup> *McConnell*, 858 S.W.2d at 342–43; see also *Porterfield v. Galen Hosp. Corp.*, 948 S.W.2d 916, 920 (Tex. App.—San Antonio 1997, writ denied); cf. *Toubaniaris v. Am. Bureau of Shipping*, 916 S.W.2d 21, 24 (Tex. App.—Houston [1st Dist.] 1995, no writ).

<sup>44</sup> *Toubaniaris*, 916 S.W.2d at 24 (emphasis omitted) (footnote omitted).

<sup>45</sup> See *id.*

<sup>46</sup> *McConnell*, 858 S.W.2d at 343.

<sup>47</sup> See *id.* at 342–43.

<sup>48</sup> *Id.* at 343; see also *Cornerstones Mun. Util. Dist. v. Monsanto Co.*, 889 S.W.2d 570, 574 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (“Any issue that a non-movant contends

There is one difference in the consequences that attach to a movant's failure to file his motion and supporting brief in the same document and those resulting from a non-movant's failure to file his response and supporting brief in the same document.<sup>49</sup> A non-movant's failure to answer or respond cannot, by itself, entitle the movant to a summary judgment because, even if the non-movant fails to respond, the movant still has the obligation to carry his initial burden.<sup>50</sup> However, this choice is not the most advantageous position for the non-movant because, on appeal, he may only argue the legal sufficiency of the summary judgment motion.<sup>51</sup> Even if the party who is required to file an exception to the motion or response with the trial court does so, that party is still required to present the issue to the appellate court in his appellate brief, or he waives the issue.<sup>52</sup> That the motion or response contains the grounds is not the only requirement.<sup>53</sup> The party need not completely brief each ground or issue; he must only notify the opposing party of what they are.<sup>54</sup> Furthermore, if the motion itself states legally sufficient grounds, the trial court does not err in considering a separately filed brief in deciding a summary judgment motion.<sup>55</sup>

#### B. *No-Evidence Motion for Summary Judgment*

Just as a traditional summary judgment movant must present its grounds in the motion, a no evidence movant must similarly raise any no-evidence grounds clearly in the motion.<sup>56</sup> The no evidence motion should be specific as to the challenged elements to give fair notice to the non-movant as to the

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avoids the movant's entitlement to summary judgment must be expressly presented by written answer to the motion, and not in a brief.").

<sup>49</sup> *McConnell*, 858 S.W.2d at 343.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See *Wilson v. Gen. Motors Acceptance Corp.*, 897 S.W.2d 818, 823 (Tex. App.—Houston [1st Dist.] 1994, no writ).

<sup>53</sup> *Golden Harvest Co. v. City of Dallas*, 942 S.W.2d 682, 691 (Tex. App.—Tyler 1997, writ denied).

<sup>54</sup> *Id.* ("The motion for summary judgment must state specific grounds on which it is made. The grounds in the motion are sufficiently specific if the motion gives 'fair notice' to the non-movant." (citation omitted) (emphasis omitted)); see also *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 175 (Tex. 1995).

<sup>55</sup> See *Golden Harvest Co.*, 942 S.W.2d at 692.

<sup>56</sup> *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

evidence it must present.<sup>57</sup> A party can contest every element of its opponent's case so long as each element is distinctly and explicitly challenged.<sup>58</sup> A party can assert both traditional and no-evidence grounds in the same motion.<sup>59</sup> And a no-evidence summary judgment motion that attaches evidence should not be disregarded or treated as a traditional summary judgment motion.<sup>60</sup>

If an appellate court determines that the motion did not adequately present the no-evidence ground to the trial court, the movant could waive that ground because of the lack of notice to the non-movant.<sup>61</sup> Even though parties can file hybrid or dual motions for summary judgment that assert both traditional and no-evidence grounds, there should be a clear distinction between which aspects of the motion are brought on traditional summary judgment grounds and which are brought on no-evidence grounds.<sup>62</sup> If a motion does not sufficiently segregate the claims, a court of appeals may review the motion under a traditional standard of review and ignore no-evidence grounds.<sup>63</sup>

The Corpus Christi Court of Appeals has been especially quick to find waiver of no-evidence grounds.<sup>64</sup> Further, issues not expressly presented to

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<sup>57</sup> *Id.* at 310–11; *Waller v. Waller*, No. 12-19-00226-CV, 2020 Tex. App. LEXIS 4239, at \*45 (Tex. App.—Tyler June 5, 2020, no pet.) (not designated for publication).

<sup>58</sup> *Martin v. McDonnold*, 247 S.W.3d 224, 233 (Tex. App.—El Paso 2006, no pet.).

<sup>59</sup> *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *Binur v. Jacobo*, 135 S.W.3d 646, 650 (Tex. 2004); *Torres v. City of Waco*, 51 S.W.3d 814, 822 n.7 (Tex. App.—Waco 2001, no pet.); *see also* *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 257 (Tex. 2020).

<sup>60</sup> *Binur*, 135 S.W.3d at 651; *Rankin v. Union Pac. R.R. Co.*, 319 S.W.3d 58, 63 (Tex. App.—San Antonio 2010, no pet.) (citing *Binur*, 135 S.W.3d at 651). *But see* *Michael v. Dyke*, 41 S.W.3d 746, 751–52 (Tex. App.—Corpus Christi–Edinburg 2001, no pet.); *Graham Land & Cattle Co. v. Indep. Bankers Bank*, 205 S.W.3d 21, 28–29 (Tex. App.—Corpus Christi–Edinburg 2006, no pet.).

<sup>61</sup> *See* *Bean v. Reynolds Realty Grp., Inc.*, 192 S.W.3d 856, 859 (Tex. App.—Texarkana 2006, no pet.) (holding motion that stated only that “there is no evidence to support the plaintiff’s causes of actions and allegations” was ineffective); *Thomas v. Clayton Williams Energy, Inc.*, 2 S.W.3d 734, 737 n.1 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

<sup>62</sup> *Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 782 (Tex. App.—Dallas 2013, no pet.).

<sup>63</sup> *Id.*; *Gross v. Methodist Hosps. of Dall.*, No. 05-00-02124-CV, 2002 Tex. App. LEXIS 4590, at \*2 (Tex. App.—Dallas June 27, 2002, no pet.) (not designated for publication).

<sup>64</sup> *Richard v. Reynolds Metal Co.*, 108 S.W.3d 908, 910 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.) (stating where a summary judgment motion does not unambiguously state that it is filed under Rule 166a(i) and does not strictly comply with the requirements of that Rule, then court will construe it as a traditional motion); *Michael*, 41 S.W.3d at 750.

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.<sup>65</sup>

If the no-evidence point is hidden, the appellate court may simply waive that ground and reverse the summary judgment unless one of the movant's traditional grounds can support the summary judgment.<sup>66</sup> For example, in *Tello v. Bank One, N.A.*, the court of appeals found that the movant waived its no-evidence grounds:

The Bank did not specify whether the part of its motion opposing Tello's counterclaims was a traditional motion or a "no-evidence" motion. At times, the Bank used language applicable to a traditional motion; but at other times, the Bank generally asserted that Tello has "no evidence" to support his various claims or factual allegations. However, the motion did not "state the elements as to which there is no evidence" as required by Rule 166a(i). Because the motion did not unambiguously state it was filed under Rule 166a(i) and did not strictly comply with that rule, we construe it as a traditional motion.<sup>67</sup>

However, some courts are more lenient and will look to the merits of the motion no matter what it is called.<sup>68</sup> In *Tomlinson*, the court found:

When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated. The

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<sup>65</sup> See generally TEX. R. CIV. P. 166a(c); *Stiles v. Resol. Tr. Corp.*, 867 S.W.2d 24, 26 (Tex. 1993); *W.R. Grace Co. v. Scotch Corp.*, 753 S.W.2d 743, 748 (Tex. App.—Austin 1988, writ denied); *Dickey v. Jansen*, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *McAllen Hosps., L.P. v. State Farm Cnty. Mut. Ins. Co. of Tex.*, 433 S.W.3d 535, 542 (Tex. 2014) (stating that briefly addressing issues in oral arguments was insufficient to preserve a ground for the court's review that was not raised in the summary judgment motion).

<sup>66</sup> *Shaw v. Maddox Metal Works, Inc.*, 73 S.W.3d 472, 476 n.2 (Tex. App.—Dallas 2002, no pet.); *Hunt v. Killeen Imps., Inc.*, No. 03-99-00093-CV, 1999 Tex. App. LEXIS 9278, at \*6 n.7 (Tex. App.—Austin Dec. 16, 1999, pet. denied) (not designated for publication); *Thomas*, 2 S.W.3d at 737 n.1.

<sup>67</sup> 218 S.W.3d 109, 113 n.5 (Tex. App.—Houston [14th Dist.] Jan. 9, 2007, no pet.) (citations omitted) (citing *Adams v. Reynolds Tile & Flooring, Inc.*, 120 S.W.3d 417, 420 (Tex. App.—Houston [14th Dist.] 2003, no pet.)).

<sup>68</sup> *Tomlinson v. Estate of Theis*, No. 03-07-00123-CV, 2008 Tex. App. LEXIS 372, at \*16-17 (Tex. App.—Austin Jan. 18, 2008, no pet.) (not designated for publication).

supreme court has noted that although it is good practice to use headings “to clearly delineate the basis for summary judgment under subsection (a) or (b) from the basis for summary judgment under subsection (i),” the rule does not require it. We will therefore treat the Albins’ motion as a hybrid motion where, on the issue of testamentary capacity, they met the higher summary-judgment burden under 166a by conclusively establishing that there existed no genuine issue of material fact.<sup>69</sup>

Courts have held that when a party files a dual motion but only argues on appeal “matter of law” points, it waives its “no-evidence” points on appeal.<sup>70</sup> For example, in *Salazar v. Collins*, the court stated:

Although Appellees’ motion refers to both subsections (c) and (i) of Rule of Civil Procedure 166a, which govern traditional and no-evidence summary-judgment motions respectively, their motion does not delineate in any manner between traditional and no-evidence claims. *Salazar* cites the standard of review applicable to traditional summary-judgment motions in his brief, and *Collins* and *Garner* do not dispute that this is the applicable standard. Therefore, we construe their motion as one for a traditional summary judgment.<sup>71</sup>

If the movant fails to file a specific no-evidence motion, i.e., does not state the elements that he challenges, then the non-movant should raise an objection, or more properly a special exception, to the motion. If the non-movant fails to raise this special exception or objection, some courts have held that the non-movant will waive the complaint on appeal.<sup>72</sup> Other courts

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<sup>69</sup> *Id.* (internal citations omitted).

<sup>70</sup> *Brown v. Blum*, 9 S.W.3d 840, 844 (Tex. App.—Houston [14th Dist.] 1999, pet. dismissed w.o.j.). *But see* *Young Refin. Corp. v. Pennzoil Co.*, 46 S.W.3d 380, 385 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (addressing drafting of no-evidence grounds in a more forgiving way).

<sup>71</sup> 255 S.W.3d 191, 194 n.4 (Tex. App.—Waco, 2008, no pet.) (citation omitted).

<sup>72</sup> *Quesada v. Am. Garment Finishers Corp.*, No. 08-02-00092-CV, 2003 Tex. App. LEXIS 3338, at \*5 (Tex. App.—El Paso Apr. 17, 2003, no pet.) (not designated for publication); *Zwank v. Kemper*, No. 07-01-0400-CV, 2002 Tex. App. LEXIS 6508, at \*8 n.4 (Tex. App.—Amarillo Aug. 29, 2002, no pet.) (not designated for publication); *Barnes v. Sulack*, No. 03-01-00159-CV, 2002 Tex. App. LEXIS 5727, at \*15–16 (Tex. App.—Austin Aug. 8, 2002, pet. denied)

have held that a no-evidence motion that does not properly challenge an element of the non-movant's claim or defense is legally insufficient and that complaint can be raised for the first time on appeal.<sup>73</sup> For example, in *Rodriguez v. Gulf Coast & Builders Supply Inc.*, the court held that if a no-evidence motion does not state an element, the complaint about that failure can be raised for the first time on appeal; however, the court noted that other complaints about the motion, e.g., vague, ambiguous, etc., require a special exception to preserve error.<sup>74</sup>

A party relying on an affirmative defense may not file a no-evidence motion on that defense as it would have the burden to prove that matter.<sup>75</sup> If a movant files a no-evidence motion based on an affirmative defense, the non-movant should object or specially except to that impermissible ground.<sup>76</sup> Therefore, it is important for a non-movant to point out to the trial court any improper burden-shifting by an objection or special exception.

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(not designated for publication); *Miller v. Elliott*, 94 S.W.3d 38, 43 n.4 (Tex. App.—Tyler July 24, 2002, pet. denied); *Walton v. Phillips Petroleum, Co.*, 65 S.W.3d 262, 268 (Tex. App.—El Paso 2000, pet. denied); *Williams v. Bank One Tex., N.A.*, 15 S.W.3d 110, 117 (Tex. App.—Waco 1999, no pet.); *Roth v. FFP Operating Partners, L.P.*, 994 S.W.2d 190, 194–95 (Tex. App.—Amarillo 1999, pet. denied); *see also Leifester v. Dodge Country, Ltd.*, No. 03-06-00044-CV, 2008 Tex. App. LEXIS 790, at \*18 n.6 (Tex. App.—Austin Feb. 1, 2008, no pet.) (not designated for publication).

<sup>73</sup> *In re Estate of Swanson*, 130 S.W.3d 144, 147 (Tex. App.—El Paso 2003, no pet.); *Keszler v. Mem'l Med. Ctr. of E. Tex.*, 105 S.W.3d 122, 129–30 (Tex. App.—Corpus Christi—Edinburg 2003, no pet.); *Dentler v. Helm-Perry*, No. 04-02-00034-CV, 2002 Tex. App. LEXIS 8167, at \*13 (Tex. App.—San Antonio Nov. 20, 2002, no pet.) (not designated for publication); *Crocker v. Paulyne's Nursing Home, Inc.*, 95 S.W.3d 416, 419 (Tex. App.—Dallas 2002, no pet.); *Gross v. Methodist Hosps. of Dall.*, No. 05-00-02124-CV, 2002 Tex. App. LEXIS 4590, at \*8–9 (Tex. App.—Dallas June 27, 2002, no pet.) (not designated for publication); *Laparade v. Rivera*, No. 01-99-0723-CV, 2002 Tex. App. LEXIS 3487, at \*33–34 (Tex. App.—Houston [1st Dist.] May 16, 2002, no pet.) (not designated for publication); *Cuyler v. Minns*, 60 S.W.3d 209, 213 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex. App.—San Antonio 2000, pet. denied).

<sup>74</sup> No. 14-05-00930-CV, 2006 Tex. App. LEXIS 11073, at \*6–9 (Tex. App.—Houston [14th Dist.] Dec. 28, 2006, no pet.) (not designated for publication).

<sup>75</sup> *Forney 921 Lot Dev. Partners I, L.P. v. Paul Taylor Homes, Ltd.*, 349 S.W.3d 258, 268 (Tex. App.—Dallas 2011, no pet.).

<sup>76</sup> *Herrmann v. Lindsey*, 136 S.W.3d 286, 290 (Tex. App.—San Antonio 2004, no pet.) (finding that when movant filed no-evidence ground on its own counterclaim, non-movant waived error by not filing a special exception but reviewed motion under a traditional summary judgment standard of review); *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 836 (Tex. App.—Houston [1st Dist.] 1999, no pet.). *But see Keszler*, 105 S.W.3d at 128.

*C. Pleadings To Support Grounds For Summary Judgment*

A party cannot rely upon unpled claims or defenses as a ground for summary judgment.<sup>77</sup> A trial court may not grant a summary judgment on an unpled cause of action.<sup>78</sup> Texas Rule of Civil Procedure 63 provides: “[A]ny pleadings, responses or pleas offered for filing within seven days of the date of trial or thereafter, or after such time as may be ordered by the judge under Rule 166, shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such filing will operate as a surprise to the opposite party.”<sup>79</sup> So, a party may amend its pleadings without leave of court up to seven days before a summary judgment hearing.<sup>80</sup> For pleadings filed within the seven-day period, leave of court may be presumed if the summary judgment order “states that all pleadings were considered, and when . . . the record does not indicate that an amended pleading was not considered, and the opposing party does not show surprise.”<sup>81</sup> No presumption applies, however, when a party files an amended pleading after the summary judgment hearing occurred, but before the judgment is signed, unless the record affirmatively shows that the trial court

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<sup>77</sup> *FDIC v. Lenk*, 361 S.W.3d 602, 609 (Tex. 2012) (finding a party must plead an affirmative defense to be able to rely on it in a summary judgment proceeding); *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991); *DeBord v. Muller*, 446 S.W.2d 299, 301 (Tex. 1969) (stating an unpled affirmative defense may not serve as the basis for a summary judgment); *Suite 900, LLC v. Vega*, No. 02-19-00271-CV, 2020 Tex. App. LEXIS 4008, at \*25–26 (Tex. App.—Fort Worth May 21, 2020, no pet.) (mem. op., not designated for publication); *Gillis v. MBNA Am. Bank, N.A.*, No. 2-08-058-CV, 2009 WL 51027, at \*1 (Tex. App.—Fort Worth Jan. 8, 2009, no pet.) (mem. op., not designated for publication) (“[A] motion for summary judgment must be supported by the pleadings on file, and the final judgment of the court must conform to those pleadings.”).

<sup>78</sup> *Baker v. John Peter Smith Hosp., Inc.*, 803 S.W.2d 454, 456 (Tex. App.—Fort Worth 1991, writ denied) (“Summary judgments must be supported by the pleadings on file . . .”).

<sup>79</sup> TEX. R. CIV. P. 63.

<sup>80</sup> *Id.*; *Goswami v. Metro. Sav. & Loan Ass’n*, 751 S.W.2d 487, 490 (Tex. 1988) (holding that “[a] summary judgment proceeding is a trial within the meaning of Rule 63.”); *see also Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (applying Rule 63 to amendment filed before summary judgment hearing).

<sup>81</sup> *Cont’l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276 (Tex. 1996).

granted leave.<sup>82</sup> “Failure to obtain leave waives the newly pleaded issues.”<sup>83</sup> However, such a claim or defense may be raised in a summary judgment motion where the opposing party does not object to a lack of pleading.<sup>84</sup> This is based on the waiver theory of trial by consent.<sup>85</sup> However, a nonmovant is not required to anticipate and respond to grounds that were not raised in the motion.<sup>86</sup>

## II. NEWLY PLEADED CLAIMS

After a party files a motion for summary judgment, it is not uncommon for the responding party to file an amended petition that raises new claims.<sup>87</sup> A party may not be granted judgment as a matter of law on a cause of action not addressed in a summary judgment proceeding.<sup>88</sup> In order to get a final appealable summary judgment, the movant will have to amend its motion for

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<sup>82</sup> TEX. R. CIV. P. 166a(c) (instructing that pleadings will be considered if filed after summary judgment hearing but before judgment “with permission of the court”); *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 261 (Tex. 2020) (per curiam) (“This has long been our approach when considering late-filed amended pleadings in advance of a summary-judgment hearing. Our rules provide that a party may not amend its pleadings within seven days of a summary-judgment hearing without leave of court. In this context, we have held that ‘leave of court is presumed when a summary judgment states that all pleadings were considered, and when, as here, the record does not indicate that an amended pleading was not considered, and the opposing party does not show surprise.’” (footnote omitted)); 9029 Gateway S. Joint Venture v. Eller Media Co., 159 S.W.3d 183, 187 (Tex. App.—El Paso 2004, no pet.) (“In this circumstance, we assume leave has been denied unless the record affirmatively reflects that the court granted leave.”); *see also* *DMC Valley Ranch, L.L.C. v. HPSC, Inc.*, 315 S.W.3d 898, 902–03 (Tex. App.—Dallas 2010, no pet.); *Mensa-Wilmot v. Smith Int’l, Inc.*, 312 S.W.3d 771, 778–79 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

<sup>83</sup> *DMC Valley Ranch*, 315 S.W.3d at 903; *see also* *Mensa-Wilmot*, 312 S.W.3d at 778–79.

<sup>84</sup> *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991); *PAS, Inc. v. Engel*, 350 S.W.3d 602, 609 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

<sup>85</sup> *Engel*, 350 S.W.3d at 610–11.

<sup>86</sup> *Id.* at 611.

<sup>87</sup> *See, e.g.,* *Blancett v. Lagniappe Ventures, Inc.*, 177 S.W.3d 584, 592 (Tex. App.—Houston [1st Dist.] 2005, no pet.).

<sup>88</sup> *Id.* (reversing summary judgment where it failed to address claim added in supplemental petition); *Espeche v. Ritzell*, 123 S.W.3d 657, 664 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) (citing *Chessher v. Sw. Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983)).



summary judgment to address this new cause of action.<sup>89</sup> “In order to be a final, appealable summary judgment, the order granting the motion must dispose of all the parties and all the issues before the court.”<sup>90</sup> If a summary judgment order grants more relief than was requested in the motion, it must be reversed and remanded.<sup>91</sup>

But if a motion for summary judgment is sufficiently broad to encompass later-filed claims or defenses, the movant need not amend its motion.<sup>92</sup> If the amended petition only sets forth new facts or new grounds that are totally encompassed by the prior cause of action, i.e., different ways that the movant was negligent, then the original motion for summary judgment will be sufficiently broad to cover the added grounds, and an amended motion for summary judgment will not be necessary.<sup>93</sup>

In *Lampasas v. Spring Center, Inc.*, the movant filed a no-evidence motion for summary judgment against the non-movant’s negligence claim.<sup>94</sup> The non-movant filed an amended petition alleging new facts and new ways that the movant was negligent.<sup>95</sup> The trial court granted the movant a final summary judgment, and the non-movant appealed this judgment arguing that

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<sup>89</sup> *Avary v. Bank of Am., N.A.*, 72 S.W.3d 779, 791 (Tex. App.—Dallas 2002, pet. denied).

<sup>90</sup> *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 435 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (quoting *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993)).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 435–36.

<sup>93</sup> *Logsdon v. Logsdon*, No. 02-16-00063-CV, 2017 Tex. App. LEXIS 1370, at \*14 (Tex. App.—Fort Worth Feb. 16, 2017, no pet.) (not designated for publication); *Am. Zurich Ins. Co. v. Barker Roofing, L.P.*, 387 S.W.3d 54, 67 (Tex. App.—Amarillo 2012, no pet.) (holding summary judgment could be granted as to new claims added before the motion was decided); *Ritter v. Las Colonitas Condo. Ass’n*, 319 S.W.3d 884, 891 (Tex. App.—Dallas 2010, no pet.) (upholding summary judgment on claims added after the motion was filed but before the motion was disposed); *O’Kane v. Coleman*, No. 14-06-00657-CV, 2008 Tex. App. LEXIS 4908, at \*11 (Tex. App.—Houston [14th Dist.] July 1, 2008, no pet.) (not designated for publication); *Dubose v. Worker’s Med., P.A.*, 117 S.W.3d 916, 922 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Gulf Coast Radiology Assocs. v. Malek*, No. 14-02-01126-CV, 2003 Tex. App. LEXIS 3750, at \*2 (Tex. App.—Houston [14th Dist.] May 1, 2003, no pet.) (not designated for publication); *Garza v. Minyard Food Stores, Inc.*, No. 05-98-02134-CV, 2001 Tex. App. LEXIS 4123, at \*3 (Tex. App.—Dallas June 22, 2001, no pet.) (not designated for publication); *Lampasas*, 988 S.W.2d at 436; *see also Hoskins v. Hoskins*, 497 S.W.3d 490, 497 (Tex. 2016); *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011).

<sup>94</sup> 988 S.W.2d at 431–32.

<sup>95</sup> *Id.* at 432.

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the movant's motion did not cover his newly pleaded grounds.<sup>96</sup> The appellate court affirmed the summary judgment and stated:

The new no evidence summary judgment shifts the focus of the summary judgment from the pleadings to the actual evidence. . . . The thrust of the new rule is to require evidence. A no evidence summary judgment prevents the nonmovant from standing solely on his pleadings, but instead requires him to bring forward sufficient evidence to withstand a motion for instructed verdict. . . . Here, the no evidence motion for summary judgment stated that there was no evidence of any duty, breach, or causation. . . . Instead of bringing forward evidence on these challenged elements, [appellant] amended his petition to include variations of other negligence claims. However, all these new variations in his second amended petition sound in negligence and are composed of the same essential elements, duty, breach, and causation, which were already challenged in appellees' motion. . . . Therefore, [the trial court] correctly granted the no evidence summary judgment. We do not hold that newly filed pleadings may not ever raise entirely new distinct elements of a cause of action not addressed in a no evidence motion for summary judgment. However, based on the facts before us, the amended petition merely reiterates the same essential elements in another fashion, and the motion for summary judgment adequately covers these new variations.<sup>97</sup>

The Texas Supreme Court has endorsed this exception. The Court held:

The harmless error rule states that before reversing a judgment because of an error of law, the reviewing court must find that the error amounted to such a denial of the appellant's rights as was reasonably calculated to cause and probably did cause "the rendition of an improper judgment," or that the error "probably prevented the appellant from

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 436–37.

properly presenting the case [on appeal].”<sup>98</sup> The rule applies to all errors.<sup>99</sup> Although a trial court errs in granting a summary judgment on a cause of action not expressly presented by written motion, we agree that the error is harmless when the omitted cause of action is precluded as a matter of law by other grounds raised in the case.<sup>100</sup>

Therefore, a non-movant will have to plead a totally new cause of action with new and different elements to be an effective delay to a movant’s motion for summary judgment.<sup>101</sup>

### III. SUMMARY JUDGMENT RESPONSE

After a non-movant receives a motion for summary judgment, the non-movant should file a response that raises any objections or special exceptions to the motion or the movant’s evidence, attaches evidence, makes arguments why the law or facts does not support the movant’s motion, and otherwise raise any and all other reasons that the trial court should deny the motion. “The mere filing of an amended petition after a motion for summary judgment is filed does not constitute a response to the motion.”<sup>102</sup>

“The nonmovant must expressly present to the trial court, by written answer or response, any issues defeating the movant’s entitlement to

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<sup>98</sup> TEX. R. APP. P. 44.1(a).

<sup>99</sup> *Lorusso v. Members Mut. Ins. Co.*, 603 S.W.2d 818, 819–20 (Tex. 1980).

<sup>100</sup> *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297–98 (Tex. 2011); *see also Endeavor Energy Res., L.P. v. Cuevas*, 593 S.W.3d 307, 312 (Tex. 2019).

<sup>101</sup> *Lampasas*, 988 S.W.2d at 437.

<sup>102</sup> *Hussong v. Schwan’s Sales Enters., Inc.*, 896 S.W.2d 320, 323 (Tex. App.—Houston [1st Dist.] 1995, no writ); *see also City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1997) (“The new rule requires that contentions be expressly presented in a written motion or in a written answer or response to the motion, and pleadings are not to be considered . . .”); *Baker v. John Peter Smith Hosp., Inc.*, 803 S.W.2d 454, 457 (Tex. App.—Fort Worth 1991, writ denied) (“It is not a sufficient response to a motion for summary judgment to file an amended petition after the motion for summary judgment has been filed.”); *Hitchcock v. Garvin*, 738 S.W.2d 34, 36 (Tex. App.—Dallas 1987, no writ) (“It is clear that pleadings filed after a summary judgment motion is filed do not constitute a response to the motion for summary judgment.”); *see also 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.) (“Although Meineke filed its first amended answer subsequent to the filing of the motion for summary judgment, the amended answer does not constitute a response to the motion for summary judgment.”).

summary judgment.”<sup>103</sup> “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.”<sup>104</sup> To “expressly” present issues pursuant to Rule 166a(c), “[t]he written answer or response to the motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion.”<sup>105</sup> The term “issues” in Rule 166a(c) means “legal theories (i.e. grounds of recovery and defenses) and factual theories.”<sup>106</sup>

Issues are not expressly presented by mere reference to summary judgment evidence.<sup>107</sup> In addition, the requirement that issues be expressly presented by written answer or response refers to an answer or response to the motion for summary judgment, not to the pleadings.<sup>108</sup> However, where a traditional summary judgment movant fails to show that there is no genuine issue of material fact, the nonmovant can argue that failure on appeal even without a response on file in the trial court.<sup>109</sup> As one court stated: “A motion for summary judgment must stand on its own merits, and the nonmovant may

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<sup>103</sup> *Harris v. Pioneer Nat. Res. USA, Inc.*, No. 11-18-00114-CV, 2020 Tex. App. LEXIS 3468, at \*5 (Tex. App.—Eastland Apr. 23, 2020, no pet.) (not designated for publication); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 (Tex. 1993) (citing *Clear Creek Basin*, 589 S.W.2d at 678); *Brown v. Bank of Am., N.A.*, No. 01-14-00725-CV, 2015 WL 4760201, at \*5 (Tex. App.—Houston [1st Dist.] Aug. 13, 2015, no pet.) (not designated for publication); *Dubose v. Worker’s Med., P.A.*, 117 S.W.3d 916, 920 (Tex. App.—Houston [14th Dist.] 2003, no pet.); TEX. R. CIV. P. 166a(c).

<sup>104</sup> TEX. R. CIV. P. 166a(c); see *McConnell*, 858 S.W.2d at 343; *Harris*, 2020 Tex. App. LEXIS 3468, at \*6; *Dubose*, 117 S.W.3d at 920; *Querner Truck Lines, Inc. v. Alta Verde Indus., Inc.*, 747 S.W.2d 464, 469 (Tex. App.—San Antonio 1988, no writ) (finding non-movant waived argument on appeal that it was entitled to additional offset against movant’s damages than offset allowed by trial court because non-movant did not raise issue of additional offset in its summary judgment response).

<sup>105</sup> *Clear Creek Basin*, 589 S.W.2d at 678; see *Engel v. Pettit*, 713 S.W.2d 770, 772 (Tex. App.—Houston [14th Dist.] 1986, no pet.).

<sup>106</sup> *Atl. Richfield Co. v. Exxon Corp.*, 663 S.W.2d 858, 863 (Tex. App.—Houston [14th Dist.] 1983), *rev’d on other grounds*, 678 S.W.2d 944 (Tex. 1984); see also *Lee v. Rogers Agency*, 517 S.W.3d 137, 164 (Tex. App.—Texarkana Feb. 8, 2017, pet. denied).

<sup>107</sup> *McConnell*, 858 S.W.2d at 341; *Dubose*, 117 S.W.3d at 920; *D.M. Diamond Corp. v. Dunbar Armored, Inc.*, 124 S.W.3d 655, 659–60 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

<sup>108</sup> *Wheeler v. Sec. State Bank, N.A.*, 159 S.W.3d 754, 756 n.2 (Tex. App.—Texarkana 2005, no pet.) (citing *Clear Creek Basin*, 589 S.W.2d at 673).

<sup>109</sup> *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000); *Brown v. Bank of Am., N.A.*, No. 01-14-00725-CV, 2015 WL 4760201, at \*5 (Tex. App.—Houston [1st Dist.] Aug. 13, 2015, no pet.) (not designated for publication).

argue on appeal that the movant's summary judgment proof is insufficient as a matter of law, even if the nonmovant filed no response to the motion."<sup>110</sup>

When a movant files a proper no-evidence motion for summary judgment, the burden shifts to the respondent and unless the respondent produces summary-judgment evidence raising a genuine issue of material fact, the trial court must grant the motion for summary judgment.<sup>111</sup> To defeat a no-evidence motion for summary judgment, the non-movant need not marshal her evidence but must point out in her response evidence raising a genuine issue of fact as to the challenged elements.<sup>112</sup> Further, if a respondent desires to rely on an affirmative defense, the party should plead such to be able to rely on that defense in its response. "A party relying on an affirmative defense must specifically plead the defense and, when the defense is based on a claim enumerated in Rule 93, must verify the pleading by affidavit."<sup>113</sup> However, a movant can waive any complaint about the failure to plead.<sup>114</sup> In *Godoy v. Wells Fargo Bank, N.A.*, the Texas Supreme Court held that a plaintiff waived any complaint about a defendant's failure to plead an

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<sup>110</sup> *Circle Ridge Prod. v. Kittrell Fam. Mins., LLC*, No. 06-13-00009-CV, 2013 Tex. App. LEXIS 8790, at \*8 (Tex. App.—Texarkana July 17, 2013, pet. denied) (not designated for publication).

<sup>111</sup> TEX. R. CIV. P. 166a(i).

<sup>112</sup> See TEX. R. CIV. P. 166a(i) cmt.; *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex. 2002); see also *Transcon. Ins. Co. v. Briggs Equip. Tr.*, 321 S.W.3d 685, 692 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding non-movant's failure to respond to no-evidence motion was "fatal" to ability to successfully attack summary judgment on appeal); *Dyer v. Accredited Home Lenders, Inc.*, No. 02-11-00046-CV, 2012 WL 335858, at \*2–5 (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied) (not designated for publication) (holding that trial court is not required to review evidence presented by movant to support traditional portion of a combined motion for summary judgment to determine whether that evidence raises a fact issue on the no-evidence ground, absent a timely response by non-movant); *Modelist v. Deutsche Bank Nat'l Tr. Co.*, No. 14-10-00249-CV, 2011 WL 3717010, at \*1, \*3 (Tex. App.—Houston [14th Dist.] Aug. 25, 2011, no pet.) (not designated for publication) (summarily affirming summary judgment on no-evidence grounds when movant filed combined motion but non-movant failed to respond); *Burns v. Canales*, No. 14-04-00786-CV, 2006 WL 461518, at \*3–6 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, pet. denied) (not designated for publication) (affirming no-evidence summary judgment when non-movant filed one-half-inch-thick stack of evidence but page-and-a-half response which generally stated the attached evidence raised a fact issue but failed to cite argument or specific evidence supporting challenged causes of action; "[T]he trial court is not required, sua sponte, to assume the role of [non-movant's] advocate and supply his arguments for him.").

<sup>113</sup> *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991); TEX. R. CIV. P. 93, 94.

<sup>114</sup> *Roark*, 813 S.W.2d at 495.

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affirmative defense by raising that argument solely in a motion for new trial.<sup>115</sup>

#### IV. SUMMARY JUDGMENT REPLY

A summary judgment movant can file a reply brief and argue why the non-movant did not raise a genuine issue of material fact and why the trial court should grant summary judgment for the movant based on the law or facts.<sup>116</sup> The movant can also file objections to the nonmovant's summary judgment evidence.<sup>117</sup> The movant, however, cannot raise new summary judgment grounds in the reply brief.<sup>118</sup> A trial court should ignore any new grounds asserted in a reply brief.<sup>119</sup> Further, an appellate court cannot affirm a summary judgment on a new ground asserted in a reply brief.<sup>120</sup> The basis for this rule is that a motion for summary judgment must "stand or fall on the grounds expressly presented in the motion."<sup>121</sup> A reply is not a motion for summary judgment, and a movant "is not entitled to use its reply to amend its motion for summary judgment or to raise new and independent summary-judgment grounds."<sup>122</sup> One court concluded that to permit new grounds to be asserted in a reply would undercut the requirements of Texas Rule of Civil Procedure 166a(c):

The purpose of the time requirements in rule 166a(c), to give the nonmovant notice of all claims that may be summarily

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<sup>115</sup> *Id.*; *Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 537 (Tex. 2019).

<sup>116</sup> TEX. R. CIV. P. 166a.

<sup>117</sup> *Id.* 166a(f).

<sup>118</sup> *Gustafson v. Complete Mfg. Servs.*, No. 09-18-00415-CV, 2020 Tex. App. LEXIS 5697, at \*15 (Tex. App.—Beaumont Oct. 8, 2019, no pet.) (not designated for publication); *Reliance Ins. Co. v. Hibdon*, 333 S.W.3d 364, 378 (Tex. App.—Houston [14th Dist.] 2011, pet. denied) (citing *Guest v. Cochran*, 993 S.W.2d 397, 403 (Tex. App.—Houston [14th Dist.] 1999, no pet.)); *Ashton v. KoonsFuller, P.C.*, No. 05-16-00130-CV, 2017 Tex. App. LEXIS 4293, at \*3 (Tex. App.—Dallas May 10, 2017, no pet.) (not designated for publication).

<sup>119</sup> *Gustafson*, 2020 Tex. App. LEXIS 5697, at \*15.

<sup>120</sup> *Id.* at \*16.

<sup>121</sup> *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993).

<sup>122</sup> *Reliance*, 333 S.W. at 378; *Garcia v. Garza*, 311 S.W.3d 28, 36 (Tex. App.—San Antonio 2010, pet. denied); *1001 McKinney Ltd. v. Credit Suisse First Bos. Mortg. Cap.*, 192 S.W.3d 20, 25 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) ("In the absence of the nonmovant's consent, a movant may not raise a new ground for summary judgment in a reply to the nonmovant's response.").

disposed of and the specific grounds on which the movant relies, would be severely undercut if a movant's "reply" in which new independent grounds were presented could be treated as an amended motion for summary judgment . . . We believe . . . that allowing arguments made in the movant's reply to be considered, after the fact, as independent grounds for summary judgment would subvert the orderly process contemplated by rule 166a and put the nonmovant to an unfair burden.<sup>123</sup>

A movant can assert new grounds in a reply brief where the nonmovant consents to same.<sup>124</sup>

A movant cannot rely on evidence attached to a summary judgment reply unless it was filed more than twenty-one days before the summary judgment hearing or if the trial court grants leave to consider the late-filed evidence.<sup>125</sup>

#### V. MOTION FOR NEW TRIAL/RECONSIDERATION

A party may file a motion for new trial or reconsideration regarding a trial court's ruling on a summary judgment.<sup>126</sup> Of course, if the trial court originally denies the motion, such a ruling is interlocutory and the movant

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<sup>123</sup> *Sanders v. Cap. Area Council*, 930 S.W.2d 905, 911 (Tex. App.—Austin 1996, no writ) (finding in absence of nonmovant's consent, movant may not raise a new ground for summary judgment in a reply to nonmovant's response).

<sup>124</sup> *Id.*

<sup>125</sup> *See, e.g., Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996); *Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 491 n.1 (Tex. 1988); *INA of Tex. v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985); *Tex. Windstorm Ins. Ass'n v. Dickinson Indep. Sch. Dist.*, 561 S.W.3d 263, 271–72 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *Env't Procs., Inc., v. Guidry*, 282 S.W.3d 602, 612 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Conte v. Ditta*, No. 14-02-00482-CV, 2003 WL 21191296, at \*4 n.5 (Tex. App.—Houston [14th Dist.] May 22, 2003, no pet.) (mem. op., not designated for publication) (presuming that trial court did not consider a late-filed affidavit where the record showed only that the trial court considered the response). *But see Durbin v. Culberson Cnty.*, 132 S.W.3d 650, 656 (Tex. App.—El Paso 2004, no pet.) (holding that the seven-day limit before submission in which a nonmovant may submit summary-judgment evidence does not apply to the movant's reply); *Alaniz v. Hoyt*, 105 S.W.3d 330, 339–40 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.) (holding that affidavit filed separately from the reply was untimely because it was offered in support of the motion for summary judgment, but evidence attached to the reply was properly part of the summary-judgment evidence because the evidence was offered in reply to nonmovant's response).

<sup>126</sup> TEX. R. CIV. P. 320.

can re-urge its motion again at a later date.<sup>127</sup> In that case, the trial court can change its mind and later grant the motion.<sup>128</sup> If the trial court grants the motion, then the nonmovant can request that the court change its mind and deny the motion in part or in whole.<sup>129</sup> If the original ruling was a final judgment, then the nonmovant should be careful to comply with the appellate deadlines and seek such relief while the trial court has plenary power.<sup>130</sup> Otherwise, the trial court will lose its power to rescind its earlier ruling.<sup>131</sup>

One issue that arises is whether a party can raise new arguments in a motion for reconsideration or motion for new trial. The Texas Supreme Court held that raising an argument or objection in a motion for new trial or reconsideration for the first time is not sufficient because all issues must be raised in the response.<sup>132</sup> For example, in *Godoy v. Wells Fargo Bank, N.A.*, the Texas Supreme Court held that a plaintiff waived any complaint about a defendant's failure to plead an affirmative defense by raising that argument solely in a motion for new trial.<sup>133</sup>

Texas law also does not allow parties to create fact issues in a motion for new trial or reconsideration that should have been raised in response to a motion for summary judgment.<sup>134</sup> It should be noted that a motion for new trial after a summary judgment is really just a motion for reconsideration. Indeed, the party never had a trial to begin with and could not be awarded a "new trial."

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<sup>127</sup> *Id.* 329b.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 467 (Tex. 1998) (finding party waived argument by asserting it in a motion for new trial after summary judgment); *Tesoro Petroleum Corp. v. Nabors Drilling USA, Inc.*, 106 S.W.3d 118, 128 n.6 (Tex. App.—Houston [1st Dist.] 2002, pet. denied) (finding arguments first raised in a motion for reconsideration are waived).

<sup>133</sup> *Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 537 (Tex. 2019).

<sup>134</sup> *Denman v. Citgo Pipeline Co.*, 123 S.W.3d 728, 734 (Tex. App.—Texarkana 2003, no pet.) (finding appellate court could not consider evidence that was attached to motion for reconsideration of summary judgment order, which had not been previously filed, because there was no indication in record that trial court had considered it); *Risner v. McDonald's Corp.*, 18 S.W.3d 903, 909 (Tex. App.—Beaumont 2000, pet. denied) (finding party may not present additional evidence in a motion for new trial unless such evidence is newly discovered); *Priesmeyer v. Pac. Sw. Bank, F.S.B.*, 917 S.W.2d 937, 939 (Tex. App.—Austin 1996, no writ) (finding evidence attached for first time to motion for new trial was not proper summary judgment evidence).



## VI. TRIAL COURT'S STANDARD OF REVIEW

The parties must consider the trial court's standard of review in ruling on the motion and response.

A. *Traditional Summary Judgment*

The traditional summary judgment movant moves for summary judgment as a matter of law under Texas Rule of Civil Procedure 166a(a) and (b). A party moving for traditional summary judgment meets its burden by proving that there is no genuine issue of material fact and it is entitled to judgment as a matter of law.<sup>135</sup> It has the burden of production and persuasion in a summary judgment proceeding, and the court must resolve against the movant all doubts as to the existence of a genuine issue of fact so that all evidence favorable to the nonmovant will be taken as true.<sup>136</sup> Further, the court must indulge every reasonable inference in favor of the nonmovant and resolve doubts in his favor.<sup>137</sup>

The nonmovant is not required to respond to the movant's motion if the movant fails to carry his or her burden.<sup>138</sup> This is because "summary judgments must stand or fall on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right" to judgment.<sup>139</sup> Thus, a nonmovant who fails to raise any issues in response to a summary judgment motion may still challenge, on appeal, "the legal sufficiency of the grounds presented by the movant."<sup>140</sup> A trial court may not grant a traditional

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<sup>135</sup> *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 181 (Tex. 2019); *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017).

<sup>136</sup> *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995); *see also Kassen v. Hatley*, 887 S.W.2d 4, 8 n.2 (Tex. 1994).

<sup>137</sup> *KMS Retail Rowlett*, 593 S.W.3d at 181; *Park Place Hosp.*, 909 S.W.2d at 510.

<sup>138</sup> *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511–12 (Tex. 2014) ("[I]f the movant does not satisfy its initial burden, the burden does not shift and the nonmovant need not respond or present any evidence."); *State v. Ninety Thousand Two Hundred Thirty-Five Dollars and No Cents in U.S. Currency (\$90,235)*, 390 S.W.3d 289, 292 (Tex. 2013); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

<sup>139</sup> *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993).

<sup>140</sup> *Id.* at 343; *Newman v. Sivam*, No. 10-19-00192-CV, 2020 Tex. App. LEXIS 98, at \*9 (Tex. App.—Waco Jan. 8, 2020, no pet.) (not designated for publication); *Grace v. Titanium Electrode Prods., Inc.*, 227 S.W.3d 293, 297 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (stating

summary judgment by default against the nonmovant for failing to respond to the motion if the movant's summary judgment proof is legally insufficient to support the summary judgment; the movant must still establish his entitlement to judgment by conclusive summary judgment proof.<sup>141</sup>

If the movant does not meet his burden of proof, there is no burden on the nonmovant.<sup>142</sup> However, if the movant has established a right to a summary judgment, the burden shifts to the nonmovant.<sup>143</sup> The nonmovant must then respond to the summary judgment motion and present to the trial court summary judgment evidence raising a fact issue that would preclude summary judgment.<sup>144</sup> If the nonmovant does so, summary judgment is precluded.<sup>145</sup> If he does not do so, then the trial court should grant summary judgment.<sup>146</sup> “[A] party who fails to expressly present to the trial court any written response in opposition to a motion for summary judgment waives the right to raise any arguments or issues post-judgment.”<sup>147</sup>

In *Yancy v. United Surgical Partners International, Inc.*, the Texas Supreme Court stated that once the nonmovant files evidence, the reviewing court must consider all of the evidence to determine if a reasonable juror could find a fact issue: “[w]hen reviewing a summary judgment, we ‘must examine the *entire record* in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.’”<sup>148</sup>

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that a nonmovant may complain about the insufficiency of the movant's summary-judgment evidence on appeal even if the nonmovant did not file a response to the motion); *Rizkallah v. Conner*, 952 S.W.2d 580, 582–83 (Tex. App.—Houston [1st Dist.] 1997, no writ) (same).

<sup>141</sup> *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Ellert v. Lutz*, 930 S.W.2d 152, 155 (Tex. App.—Dallas 1996, no writ).

<sup>142</sup> *Clear Creek Basin*, 589 S.W.2d at 678.

<sup>143</sup> *Katy Venture, Ltd. v. Cremona Bistro Corp.*, 469 S.W.3d 160, 163 (Tex. 2015) (quoting *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014)); *Clarendon Nat'l Ins. Co. v. Thompson*, 199 S.W.3d 482, 486 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

<sup>144</sup> *Katy Venture*, 469 S.W.3d at 163.

<sup>145</sup> *See Clarendon Nat'l Ins.*, 199 S.W.3d at 486–87.

<sup>146</sup> *Amedisys*, 437 S.W.3d at 517.

<sup>147</sup> *Unifund CCR Partners v. Weaver*, 262 S.W.3d 796, 797 (Tex. 2008).

<sup>148</sup> 236 S.W.3d 778, 782 (Tex. 2007) (quoting *City of Keller v. Wilson*, 168 S.W.3d 802, 824–25 (Tex. 2005)).

When both parties move for summary judgment, each party must carry its own burden as the movant.<sup>149</sup> Also, to win, each party must bear the burden of establishing that it is entitled to judgment as a matter of law.<sup>150</sup> Each party must also carry its own burden as the nonmovant in response to the other party's motion.<sup>151</sup> If neither party carries their burdens, then a trial court should not grant the motion for either party.<sup>152</sup>

Further, when both parties file motions for summary judgment, the court may consider all of the summary judgment evidence filed by either party.<sup>153</sup> When both motions are before it, the trial court may consider all of the evidence in deciding whether to grant either motion and may rely upon one party's evidence to supply missing proof in the other party's motion.<sup>154</sup> "When both parties move for summary judgment and the trial court grants one motion and denies the other, as in this case, we determine all issues presented and render the judgment the trial court should have rendered."<sup>155</sup>

When the plaintiff moves for summary judgment on his own cause of action, he must present competent summary judgment evidence proving each element of his cause of action as a matter of law.<sup>156</sup> If the plaintiff meets his burden, the trial court may grant a final summary judgment or may grant a partial summary judgment on liability alone, and hold a hearing on damages when they are unliquidated.<sup>157</sup>

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<sup>149</sup> *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806, 811 (Tex. 2019); *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 278 (Tex. 2018); *Moayedhi v. Interstate 35/Chisam Rd., L.P.*, 438 S.W.3d 1, 3–4 (Tex. 2014); *Dall. Cnty. Cmty. Coll. Dist. v. Bolton*, 185 S.W.3d 868, 871–72 (Tex. 2005); *Mead v. RLMC, Inc.*, 225 S.W.3d 710, 713 (Tex. App.—Fort Worth 2007, pet. denied); *James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701, 703 (Tex. App.—Houston [1st Dist.] 1987, writ denied).

<sup>150</sup> *Perryman v. Spartan Tex. Six Cap. Partners, Ltd.*, 546 S.W.3d 110, 116 (Tex. 2018); *Guynes v. Galveston Cnty.*, 861 S.W.2d 861, 862 (Tex. 1993).

<sup>151</sup> *James*, 742 S.W.2d at 703.

<sup>152</sup> See *Barbara Techs.*, 589 S.W.3d at 828.

<sup>153</sup> *Tarr*, 556 S.W.3d at 278; *Comm'rs Ct. of Titus Cnty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997); see also *Rose v. Baker & Botts*, 816 S.W.2d 805, 810 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

<sup>154</sup> *DeBord v. Muller*, 446 S.W.2d 299, 301 (Tex. 1969); *Russell v. Panhandle Producing Co.*, 975 S.W.2d 702, 708 (Tex. App.—Amarillo 1998, no pet.).

<sup>155</sup> *Colorado Cnty. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017).

<sup>156</sup> *MMP Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986); *Geiselman v. Cramer Fin. Grp., Inc.*, 965 S.W.2d 532, 534–35 (Tex. App.—Houston [14th Dist.] 1997, no writ).

<sup>157</sup> TEX. R. CIV. P. 166a(a).

If the defendant asserts a counterclaim, the trial court can grant a final summary judgment for the plaintiff only if the plaintiff disproves at least one of the elements of the defendant's counterclaim in addition to conclusively proving every element of his own cause of action.<sup>158</sup> Alternatively, the plaintiff may move for a partial summary judgment solely on the defendant's counterclaims.<sup>159</sup> If the plaintiff carries his burden with respect to his motion for summary judgment, the defendant, in order to defeat a summary judgment for the plaintiff, must either raise a fact issue about one of the elements of the plaintiff's cause of action, create a fact question about each element of his affirmative defense, or agree to the facts and show that the law does not allow the plaintiff a recovery.<sup>160</sup>

When the defendant moves for summary judgment, he must either disprove at least one essential element of each theory of recovery pleaded by the plaintiff, or he must plead and conclusively prove each essential element of an affirmative defense.<sup>161</sup> One court has stated: "A defendant's summary judgment is a judgment on 'a claim [the plaintiff has] asserted.'"<sup>162</sup> A defendant moving for summary judgment must therefore "meet the plaintiff's causes of action as pleaded."<sup>163</sup> When a defendant's summary judgment ground "fail[s] to meet [the plaintiff's] claim as pleaded, [the] ground cannot support the summary judgment."<sup>164</sup> In *Roark v. Stallworth Oil & Gas, Inc.*,

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<sup>158</sup> *Schafer v. Fed. Servs. Corp.*, 875 S.W.2d 455, 456 (Tex. App.—Houston [1st Dist.] 1994, no writ) (citing *Taylor v. GWR Operation Co.*, 820 S.W.2d 908, 910 (Tex. App.—Houston [1st Dist.] 1991, writ denied); see also *Adams v. Tri-Cont'l Leasing Corp.*, 713 S.W.2d 152, 153 (Tex. App.—Dallas 1986, no writ).

<sup>159</sup> See *Adams*, 713 S.W.2d at 153.

<sup>160</sup> *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Dillard v. NCNB Tex. Nat'l Bank*, 815 S.W.2d 356, 358–59, 361 (Tex. App.—Austin 1991, no writ); see *Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 90–91 (Tex. App.—Dallas 1996, writ denied); *Estate of Devitt*, 758 S.W.2d 601, 603 (Tex. App.—Amarillo 1988, writ denied).

<sup>161</sup> *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015); *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015); *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996); *Doe v. Boys Club of Greater Dall., Inc.*, 907 S.W.2d 472, 476–77 (Tex. 1995).

<sup>162</sup> *Kenyon v. Elephant Ins. Co.*, No. 04-18-00131-CV, 2020 WL 1540392, at \*3 (Tex. App.—San Antonio Apr. 1, 2020, no pet.).

<sup>163</sup> *Dall. Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 231–32 (Tex. App.—Dallas 2000, pet. denied).

<sup>164</sup> *Kenyon*, 2020 WL 1540392, at \*3 (alteration in original) (citing *Overnite Transp. Co. v. Int'l Bhd. of Teamsters*, No. 03-00-00390-CV, 2001 WL 300247, at \*2 (Tex. App.—Austin Mar. 29, 2011, pet. denied)).

the Texas Supreme Court held that a plaintiff must except to the defendant's summary judgment motion to the trial court if he wants to complain on appeal that the defendant's pleading did not support the affirmative defense upon which the summary judgment was based.<sup>165</sup> The Court stated, "[i]f the non-movant does not object to a variance between the motion for summary judgment and the movant's pleadings, it would advance no compelling interest of the parties or of our legal system to reverse a summary judgment simply because of a pleading defect."<sup>166</sup>

If the plaintiff does except to the defendant's answer to the trial court, then the defendant must only amend his answer and add the affirmative defense.<sup>167</sup> If the defendant moves for summary judgment on his own counterclaim rather than on a defensive claim, then he has the same burden as a plaintiff moving for a summary judgment on his cause of action.<sup>168</sup> Accordingly, a plaintiff can thwart a defendant's summary judgment by either presenting summary judgment evidence creating a fact question on those elements of the plaintiff's case under attack by the defendant, creating a fact question on at least one element of each affirmative defense advanced by the defendant, or conceding the material facts and showing that the defendant's legal position is unsound.<sup>169</sup>

### B. *No-Evidence Motion*

The trial court's review of a no-evidence summary judgment filed under Texas Rule of Civil Procedure 166a(i) differs from that of a traditional summary judgment.

#### 1. Historical Standard

Under the no-evidence motion, the movant does not have the burden to produce evidence; the burden is on the nonmovant.<sup>170</sup> The no-evidence nonmovant has the initial burden to present sufficient evidence to warrant a

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<sup>165</sup> *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991).

<sup>166</sup> *Id.* at 495.

<sup>167</sup> 30 Dustin M. Howell, *TXCLE Advanced Civil Appellate Practice* § 22.V (2016 ed.).

<sup>168</sup> *Id.* (citing *Daniell v. Citizens Bank*, 754 S.W.2d 407, 409 (Tex. App.—Corpus Christi—Edinburg 1988, no writ)).

<sup>169</sup> *Torres v. W. Cas. & Sur. Co.*, 457 S.W.2d 50, 52 (Tex. 1970); *Maranatha Temple, Inc. v. Enter. Prods. Co.*, 893 S.W.2d 92, 97 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

<sup>170</sup> *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004).

trial.<sup>171</sup> When a sufficient no-evidence motion is filed and served, the various burdens are split—the burden of production (burden to produce evidence) is placed on the nonmovant.<sup>172</sup> Under this standard, as the Supreme Court stated:

A motion for summary judgment must be granted if, after adequate time for discovery, the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial and the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements.<sup>173</sup>

A court must review the summary judgment evidence in the light most favorable to the nonmovant, disregarding all contrary evidence and inferences.<sup>174</sup> The inferences that are in favor of the nonmovant trump all other inferences that may exist.<sup>175</sup>

A no-evidence motion for summary judgment must be granted if the respondent fails to bring forth evidence to raise a genuine issue of material fact on the challenged element.<sup>176</sup> If the nonmovant presents more than a scintilla of evidence to support the challenged ground, the court should deny the motion.<sup>177</sup> A genuine issue of material fact exists if the nonmovant

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<sup>171</sup> *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 181 (Tex. 2019); *Reese*, 148 S.W.3d at 99; *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002); *Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407, 410 (Tex. App.—Waco 1999, no pet.); *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

<sup>172</sup> David F. Johnson, *Can a Party File a No-Evidence Motion for Summary Judgment Based Upon an Inferential Rebuttal Defense?*, 53 BAYLOR L. REV. 763, 767–68 (2001).

<sup>173</sup> *LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 688 (Tex. 2006); *Sudan v. Sudan*, 199 S.W.3d 291, 293 (Tex. 2006).

<sup>174</sup> *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *Rodriguez*, 92 S.W.3d at 506; *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000).

<sup>175</sup> *Orangefield Indep. Sch. Dist. v. Callahan & Assocs.*, 93 S.W.3d 124, 127 (Tex. App.—Beaumont 2001), *aff'd in part and rev'd in part on other grounds*, 92 S.W.3d 841, 844 (Tex. 2002); *Tuco Inc. v. Burlington N. R.R. Co.*, 912 S.W.2d 311, 315 (Tex. App.—Amarillo 1995), *aff'd as modified*, 960 S.W.2d 629 (Tex. 1997).

<sup>176</sup> *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017); *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 79 (Tex. 2015); *Reese*, 148 S.W.3d at 99.

<sup>177</sup> *Forbes, Inc. v. Granada Biosciences*, 124 S.W.3d 167, 172 (Tex. 2003); *King Ranch v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003); *Rodriguez*, 92 S.W.3d at 506.

produces more than a scintilla of evidence establishing the existence of the challenged element.<sup>178</sup> Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of fact.<sup>179</sup>

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.<sup>180</sup> On the other hand, if “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, the evidence is no more than a scintilla and, in legal effect, is no evidence.”<sup>181</sup>

For clarification of the terms “genuine” and “material fact,” as they are used in Rule 166a(i), Texas courts have turned to federal law.<sup>182</sup> Materiality is a criterion for categorizing factual disputes in relation to the legal elements of the claim.<sup>183</sup> The materiality determination rests on the substantive law and those facts that are identified by the substantive law as critical are considered material.<sup>184</sup> Stated differently, “[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.”<sup>185</sup> A material fact issue is genuine if the evidence is such that a reasonable jury could find the fact in favor of the nonmoving party.<sup>186</sup> If the evidence simply shows that some metaphysical doubt exists as to a challenged fact, or if the evidence is not significantly probative, the material fact issue is not genuine.<sup>187</sup>

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<sup>178</sup> *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004); *Morgan*, 27 S.W.3d at 929.

<sup>179</sup> *KMS Retail Rowlett v. City of Rowlett*, 593 S.W.3d 175, 181 (Tex. 2019); *Special Car Servs. v. AAA Tex., Inc.*, No. 14-98-00628-CV, 1999 Tex. App. LEXIS 4200, at \*1 (Tex. App.—Houston [14th Dist.] June 3, 1999, no pet.) (not designated for publication); *Medrano v. City of Pearsall*, 989 S.W.2d 141, 143 (Tex. App.—San Antonio 1999, no pet.).

<sup>180</sup> *Ridgway*, 135 S.W.3d at 601.

<sup>181</sup> *Id.*

<sup>182</sup> *Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

<sup>183</sup> *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 248.

<sup>187</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Both direct and circumstantial evidence may be used to establish a material fact.<sup>188</sup> To raise a genuine issue of material fact, however, the evidence must transcend mere suspicion.<sup>189</sup> Evidence that is so slight as to make any inference a guess is in legal effect no evidence.<sup>190</sup>

## 2. *City of Keller's* Reasonable Juror Standard

In 2005, the Texas Supreme Court revisited the no-evidence standard of review.<sup>191</sup> In *City of Keller v. Wilson*, the Court engaged in an extensive analysis of legal sufficiency principles.<sup>192</sup> The Court found that the standard should remain the same and does not change depending on the motion in which it is asserted.<sup>193</sup> “Accordingly, the test for legal sufficiency review should be the same for summary judgments, directed verdicts, judgments notwithstanding the verdict, and appellate no-evidence review.”<sup>194</sup> That test is:

The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.<sup>195</sup>

The evidence does not create an issue of material fact if it is “so weak as to do no more than create a mere surmise or suspicion that the fact exists.”<sup>196</sup>

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<sup>188</sup> *Lozano v. Lozano*, 52 S.W.3d 141, 149 (Tex. 2001); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004).

<sup>189</sup> *Ridgway*, 135 S.W.3d at 601.

<sup>190</sup> *Id.*

<sup>191</sup> *City of Keller v. Wilson*, 168 S.W.3d 802, 821–22 (Tex. 2005).

<sup>192</sup> *Id.* at 809–10.

<sup>193</sup> *Id.* at 823.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 827; *see also* *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017) (“A genuine issue of material fact exists if the evidence ‘rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.’”).

<sup>196</sup> *Kia Motors Corp. v. Ruiz*, 432 S.W.3d 865, 875 (Tex. 2014).



This standard shifts the review from a traditional legal sufficiency review to a “reasonable juror” standard.<sup>197</sup> For example, in *Wal-Mart Stores, Inc. v. Spates*, the court set forth the standard of review as: “We review a summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions.”<sup>198</sup> For example, in *Hamilton v. Wilson*, the Texas Supreme Court reversed a no-evidence motion for summary judgment in a health care liability case where an expert’s opinion raised a material issue of genuine fact as to causation.<sup>199</sup> The Court held that the evidence could allow reasonable and impartial jurors to differ in their conclusions as to what caused the plaintiff’s injury.<sup>200</sup>

Under *City of Keller*, some of the exceptions to the general rule, which requires that evidence contrary to the nonmovant’s position be disregarded, are:

(1) contextual evidence – “The lack of supporting evidence may not appear until all the evidence is reviewed in context;”<sup>201</sup>

(2) competency evidence – “Evidence that might be ‘some evidence’ when considered in isolation is nevertheless rendered ‘no evidence’ when contrary evidence shows it to be incompetent;”<sup>202</sup>

(3) circumstantial equal evidence – “When the circumstances are equally consistent with either of two facts, neither fact may be inferred.’ In such cases, we must ‘view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances;”<sup>203</sup> and

(4) consciousness evidence – when reviewing “consciousness evidence,” a no evidence review must

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<sup>197</sup> William V. Dorsaneo III, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225, 233–34 (2005).

<sup>198</sup> 186 S.W.3d 566, 568 (Tex. 2006); *see also* Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 248 (Tex. 2013); *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009).

<sup>199</sup> 249 S.W.3d 425, 427–28 (Tex. 2008).

<sup>200</sup> *Id.*

<sup>201</sup> 168 S.W.3d 802, 811 (Tex. 2005).

<sup>202</sup> *Id.* at 813.

<sup>203</sup> *Id.* at 813–14.

encompass “all of the surrounding facts, circumstances, and conditions, not just individual elements or facts.”<sup>204</sup>

Accordingly, a court may not disregard certain types of evidence when a reasonable juror could not do so—the scope of review has been enlarged in the context of legal sufficiency of the evidence after a jury trial.

### C. Use of Presumptions in Summary Judgment Procedure

The issue is whether a summary judgment movant or nonmovant can use a presumption to shift the burden of production to the opposing party.<sup>205</sup> Historically, Texas courts did not go to great lengths to analyze the appropriateness of a summary judgment movant using a presumption in a summary judgment proceeding to shift the burden of production to the nonmovant.<sup>206</sup> Several Texas cases allowed the use of presumptions in summary judgment proceedings.<sup>207</sup>

In 1981, however, the Texas Supreme Court did an about-face in *Missouri-Kansas-Texas Railroad Co. v. City of Dallas*, and held that a movant in a traditional summary judgment proceeding could not rely upon a presumption to shift the burden of production to the opposing party.<sup>208</sup> Though not cited by the Texas Supreme Court, *Brown v. Parrata Sales, Inc.* arguably supports the Court’s finding that a movant in a traditional summary judgment proceeding cannot rely upon a presumption to shift the burden of production.<sup>209</sup> The holding in *Missouri-Kansas-Texas Railroad* followed the concept that the movant always has the burden of proof in summary judgment

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<sup>204</sup> *Id.* at 817.

<sup>205</sup> For a more detailed discussion of this issue, please refer to an earlier article by the author: David F. Johnson, *The Use of Presumptions in Summary Judgment Procedure in Texas State and Federal Courts*, 54 BAYLOR L. REV 605 (2002).

<sup>206</sup> *Id.* at 615.

<sup>207</sup> See, e.g., *Pachter v. Woodman*, 547 S.W.2d 954, 957 (Tex. 1977); *Sudduth v. Commonwealth Cnty. Mut. Ins. Co.*, 454 S.W.2d 196, 197–98 (Tex. 1970); *Estate of Galland v. Rosenberg*, 630 S.W.2d 294, 297 (Tex. App.—Houston [14th Dist.] 1981, writ ref’d n.r.e.); *Williams v. Hill*, 396 S.W.2d 911, 912–13 (Tex. Civ. App.—Dallas 1965, no writ).

<sup>208</sup> 623 S.W.2d 296, 297–98 (Tex. 1981).

<sup>209</sup> 521 S.W.2d 359, 361–63 (Tex. Civ. App.—Dallas 1975, no writ).

hearings.<sup>210</sup> Therefore, it would be inconsistent for a movant to shift the burden of proof to the nonmovant.<sup>211</sup>

In the context of no-evidence summary judgment proceedings, a movant does not need to use a presumption to shift the burden of production because the burden is already on the non-movant.<sup>212</sup> Before the case was eventually settled, the Fort Worth Court of Appeals addressed a presumption shifting the burden of proof back to the movant for a no-evidence summary judgment.<sup>213</sup> The movant filed a no-evidence motion, alleging that there was no evidence to support a nonmovant's undue influence claim.<sup>214</sup> The court held that because the movant owed a fiduciary duty, he had the burden to overcome a presumption of unfairness and had the burden to prove that there was no undue influence.<sup>215</sup> Because the presumption shifted the burden of proof to the movant, the court of appeals held that the trial court erred in granting his no-evidence motion.<sup>216</sup>

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<sup>210</sup> See 623 S.W.2d at 297–98.

<sup>211</sup> The author questions whether the rationale of the Court considers the difference between the burden of production and burden of persuasion, both referred to as the “burden of proof.” The use of a presumption by a movant would not shift the burden of persuasion to the non-movant; that burden would remain at all times on the movant. The use of a presumption only shifts the burden of production. If a party has the burden of production to come forward with evidence at trial, but cannot, then there is no reason to make both parties incur the expense of trial when the case can be resolved by a summary judgment motion. Accordingly, a party should be allowed to use a presumption to shift the burden of production in a summary judgment proceeding, just as he or she would be allowed to do at trial. See, e.g., David F. Johnson, *The Use of Presumptions in Summary Judgment Procedure in Texas State and Federal Courts*, 54 BAYLOR L. REV. 605 (2002).

<sup>212</sup> See TEX. R. CIV. P. 166a(i).

<sup>213</sup> Estate of Klutts, No. 02-18-00356-CV, 2019 WL 6904550, at \*3 (Tex. App.—Fort Worth Dec. 19, 2019) (mem. op., not designated for publication), *withdrawn pursuant to settlement*, No. 02-18-00356-CV, 2020 WL 1646581 (Tex. App.—Fort Worth Apr. 2, 2020, no pet.).

<sup>214</sup> *Id.* at \*2.

<sup>215</sup> *Id.* at \*6.

<sup>216</sup> *Id.*

#### D. Scope of Review for Summary Judgment Motions

##### 1. Scope of Review for Traditional Motions for Summary Judgment

The scope of review refers to what evidence a court can examine in determining the merits of a motion for summary judgment.<sup>217</sup> In other words, can the trial court, and on appeal the court of appeals, review evidence submitted by the movant, the non-movant, or both?

Regarding a traditional motion filed under Texas Rules of Civil Procedure 166a(b), the court should first review the evidence submitted by the movant to determine if the movant proved its entitlement to summary judgment as a matter of law.<sup>218</sup> Therefore, at that stage, the court can review the movant's evidence. If the movant meets its burden, the burden then shifts to the nonmovant to produce evidence to create a fact issue.<sup>219</sup> At this stage, the Texas Supreme Court stated that the reviewing court must consider all of the evidence to determine if a reasonable juror could find a fact issue: "When reviewing a summary judgment, we 'must examine *the entire record* in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.'"<sup>220</sup>

Further, a court can review the nonmovant's evidence attached to its response against the nonmovant:

Pasko also complains that the trial court improperly considered Pasko's own summary judgment evidence against him. Pasko argues that Schlumberger was not entitled to rely on his summary judgment evidence because Schlumberger did not serve it on Pasko at least twenty-one days prior to the hearing on Schlumberger's motion.<sup>221</sup> According to Pasko, Schlumberger was required to seek leave of court to submit new evidence less than twenty-one days before the hearing, and to reset the hearing to no sooner

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<sup>217</sup> See *Hardaway v. Nixon*, 544 S.W.3d 402, 412 (Tex. App.—San Antonio 2017, pet. denied).

<sup>218</sup> *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

<sup>219</sup> *Id.*

<sup>220</sup> *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 782 (Tex. 2007).

<sup>221</sup> See TEX. R. CIV. P.166a(c) (requiring affidavits supporting a summary judgment motion to be filed and served at least twenty-one days before the hearing on the motion).

than twenty-one days after it filed its reply relying on Pasko's evidence. We disagree. Rule 166a(c) plainly provides for the court to consider evidence in the record that is attached either to the motion or a response.<sup>222</sup> Schlumberger was allowed to rely on, and the trial court could consider, the evidence and pleadings Pasko filed.<sup>223</sup>

The scope of review becomes broader once the parties file cross-motions for summary judgment.<sup>224</sup> When competing summary-judgment motions are filed, "each party bears the burden of establishing that it is entitled to judgment as a matter of law."<sup>225</sup> In that instance, if "the trial court grants one motion and denies the other, the reviewing court should determine all questions presented" and "render the judgment that the trial court should have rendered."<sup>226</sup> When both motions are before it, the trial court may consider all of the evidence in deciding whether to grant either motion, and may rely upon one party's evidence to supply missing proof in the other party's motion.<sup>227</sup>

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<sup>222</sup> *Wilson v. Burford*, 904 S.W.2d 628, 629 (Tex. 1995).

<sup>223</sup> *Schlumberger Tech. Corp. v. Pasko*, 544 S.W.3d 830, 835 (Tex. 2018).

<sup>224</sup> *See Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274, 278 (Tex. 2018).

<sup>225</sup> *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 356 (Tex. 2000).

<sup>226</sup> *Id.*; *see also Comm'rs Ct. of Titus Cnty. v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997) (requiring appellate courts to "review the summary judgment evidence presented by both sides" when making this inquiry); *Guynes v. Galveston Cnty.*, 861 S.W.2d 861, 862 (Tex. 1993) (reviewing cross-motions for summary judgment where the facts were undisputed by "determining all legal questions presented"). When both parties file motions for summary judgment, the court may consider all of the summary judgment evidence filed by either party. *Agan*, 940 S.W.2d at 81; *Rose v. Baker & Botts*, 816 S.W.2d 805, 810 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

<sup>227</sup> *DeBord v. Muller*, 446 S.W.2d 299, 301 (Tex. 1969); *United Food & Com. Workers Int'l Union v. Wal-Mart Stores, Inc.*, No. 02-15-00374-CV, 2016 WL 6277370, at \*6 (Tex. App.—Fort Worth Oct. 27, 2016, pet. denied) (not designated for publication) ("Here, the parties filed cross-motions for summary judgment; therefore, we consider the entire record and determine whether there is more than a scintilla of probative evidence raising genuine issues of material fact on each element of the challenged claims and on all questions presented by the parties."); *Estate of Huffhines*, No. 02-15-00293-CV, 2016 WL 1714171, at \*5 (Tex. App.—Fort Worth Apr. 28, 2016, pet. denied) (not designated for publication) (same); *Martin v. Harris Cnty. Appraisal Dist.*, 44 S.W.3d 190, 193 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (citing *City of Houston v. McDonald*, 946 S.W.2d 419, 420 (Tex. App.—Houston [14th Dist.] 1997, writ denied)); *Russell v. Panhandle Producing Co.*, 975 S.W.2d 702, 708 (Tex. App.—Amarillo 1998, no pet.); *see also Embrey v. Royal Ins. Co. of Am.*, 22 S.W.3d 414, 415–16 (Tex. 2000) ("When both sides move for

For example, in *Farmers Texas County Mutual Insurance Company v. Griffin*, the court held: “On appeal, this Court considers all evidence accompanying both motions in determining whether to grant either party’s motion.”<sup>228</sup> So, by that plain wording, an appellate court can review evidence attached to a response to a cross motion to support a ground contained in a motion. For example, in *Dallas National Insurance Company v. Calitex Corp.*, the court reversed the denial of summary judgment on grounds that evidence submitted with the movant’s response to a cross-motion for summary judgment supported the judgment sought in the movant’s motion.<sup>229</sup>

## 2. Scope of Review for No-Evidence Motion for Summary Judgment

A party filing a no-evidence motion for summary judgment does not have to file any evidence with its motion.<sup>230</sup> Is the scope of review the same as a traditional motion? Texas Rule of Civil Procedure 166a(i) provides that “a party *without presenting summary judgment evidence* may move for summary judgment on the ground that there is no evidence . . . .”<sup>231</sup> One view is that a court can only look to the summary judgment evidence offered by the nonmovant, and that any evidence offered by the movant should be disregarded for all purposes.<sup>232</sup> These cases dealt with a movant arguing that its evidence proves that the nonmovant does not have any evidence to support a challenged element. The court found that the movant could not do so.<sup>233</sup>

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summary judgment and the trial court grants one motion and denies the other, the reviewing court considers both sides’ summary judgment evidence and determines all questions presented.”).

<sup>228</sup> 868 S.W.2d 861, 863 (Tex. App.—Dallas 1993, writ denied); *see also* Durst v. Travelers Prop. Cas., No. 08-01-00028-CV, 2002 WL 1038804, at \*2 (Tex. App.—El Paso May 23, 2002, no pet.) (not designated for publication); *Edinburg Consol. Indep. Sch. Dist. v. St. Paul Ins. Co.*, 783 S.W.2d 610, 612 (Tex. App.—Corpus Christi—Edinburg 1989, no writ); *Villarreal v. Laredo Nat’l Bank*, 677 S.W.2d 600, 605 (Tex. App.—San Antonio 1984, writ ref’d n.r.e.).

<sup>229</sup> 458 S.W.3d 210, 224 (Tex. App.—Dallas 2015, no pet.).

<sup>230</sup> TEX. R. CIV. P. 166a(i).

<sup>231</sup> *Id.* (emphasis added).

<sup>232</sup> *Padron v. L&M Props.*, No. 11-02-00151-CV, 2003 Tex. App. LEXIS 1229, at \*5 (Tex. App.—Eastland Feb. 6, 2003, no pet.) (not designated for publication); *Herod v. Baptist Found. of Tex.*, 89 S.W.3d 689, 692 (Tex. App.—Eastland 2002, no pet.); *Kelly v. LIN Television of Tex.*, 27 S.W.3d 564, 569 (Tex. App.—Eastland 2000, pet. denied); *Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614, 618–19 (Tex. App.—Eastland 2000, pet. denied).

<sup>233</sup> *E.g., Hight*, 22 S.W.3d at 618–19.

Another view is that a court may consider all summary judgment evidence in determining whether a fact issue exists—even the movant’s evidence.<sup>234</sup> This view provides that the movant’s evidence is nonetheless before the court and, if applicable, can be used to support the nonmovant’s position.<sup>235</sup> However, those courts would not review the movant’s evidence to support the movant’s position that no evidence existed to support the nonmovant’s element.<sup>236</sup> The movant’s evidence could only be used against it. The Texas Supreme Court has previously implied that this view is correct.<sup>237</sup> In *Binur v. Jacobo*, the Court stated: “Similarly, if a motion brought solely under subsection (i) attaches evidence, that evidence should not be considered unless it creates a fact question . . . .”<sup>238</sup> This language would support the position that if a movant files evidence with a no-evidence motion, the evidence should be disregarded unless it helps the non-movant and creates a fact issue.

Following *Jacobo*, several courts of appeals similarly stated that they would ignore evidence that a movant attached or referred to in its no-evidence motion for summary judgment unless the evidence created a fact issue.<sup>239</sup> One court stated thusly:

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<sup>234</sup> See *Saenz v. S. Union Gas. Co.*, 999 S.W.2d 490, 493 (Tex. App.—El Paso 1999, pet. denied); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.); *Louck v. Olshan Found. Repair Co.*, No. 14-99-00076-CV, 2000 Tex. App. LEXIS 5337, at \*12 (Tex. App.—Houston [14th Dist.] Aug. 10, 2000, pet. denied) (not designated for publication).

<sup>235</sup> E.g., *Jackson*, 979 S.W.2d at 70.

<sup>236</sup> See, e.g., *id.*

<sup>237</sup> See *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004).

<sup>238</sup> *Id.*

<sup>239</sup> See, e.g., *Hernandez v. Select Med. Corp.*, No. 11-11-00182-CV, 2013 Tex. App. LEXIS 8930, at \*3 (Tex. App.—Eastland July 18, 2013, no pet.) (not designated for publication); *Davis v. Dillard’s Dep’t Store, Inc.*, No. 11-06-00027-CV, 2008 Tex. App. LEXIS 3201, at \*3 (Tex. App.—Eastland May 1, 2008, no pet.) (not designated for publication); *Poteet v. Kaiser*, No. 2-06-397-CV, 2007 Tex. App. LEXIS 9749, at \*18 n.6 (Tex. App.—Fort Worth Dec. 13, 2007, pet. denied) (not designated for publication); *Southtex 66 Pipeline Co. v. Spoor*, 238 S.W.3d 538, 542 n.1 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Dunlap-Tarrant v. Ass’n Cas. Ins. Co.*, 213 S.W.3d 452, 453 (Tex. App.—Eastland 2006, no pet.); *Green v. Lowe’s Home Ctrs., Inc.*, 199 S.W.3d 514, 518 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *DeLeon v. DSD Devel., Inc.*, No. 01-03-00806-CV, 2006 Tex. App. LEXIS 7799, at \*15 n.7 (Tex. App.—Houston [1st Dist.] Aug. 31, 2006, pet. denied) (not designated for publication); *Seaway Prods. Pipeline Co. v. Hanley*, 153 S.W.3d 643, 650 n.7 (Tex. App.—Fort Worth 2004, no pet.).

In a no-evidence motion for summary judgment, the non-movant bears the burden of producing competent summary judgment evidence; therefore in this case, Space Place bore the burden of producing proper summary judgment evidence, not Midtown. Pursuant to this rule, we have not considered the evidence attached by Midtown in conjunction with its motion. As a result, Space Place's objections to Midtown's evidence were irrelevant; therefore, we need not address Space Place's second issue on the merits.<sup>240</sup>

A case from the Fourteenth Court of Appeals frames this exact issue.<sup>241</sup> The movant filed a dual traditional and no-evidence motion that had evidence attached.<sup>242</sup> The majority affirmed the no-evidence summary judgment because the nonmovant did not file a response, and the court refused to review the evidence attached to the motion.<sup>243</sup> A concurring justice disagreed with this approach and argued that the court should have reviewed the evidence attached to the motion to see if it created a fact issue.<sup>244</sup>

Another case posits that a nonmovant can rely on the movant's evidence to create a fact issue only where the nonmovant files a response and directs the trial court to the evidence.<sup>245</sup> It held that a nonmovant cannot rely on a movant's evidence to create a fact issue where it did not file a response.<sup>246</sup>

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<sup>240</sup> *SP Midtown, Ltd v. Urb. Storage, L.P.*, No. 14-07-00717-CV, 2008 Tex. App. LEXIS 3364, at \*39–40 (Tex. App.—Houston [14th Dist.] May 8, 2008, pet. denied) (not designated for publication) (citations omitted).

<sup>241</sup> *Gallien v. Goose Creek Consol. Indep. Sch. Dist.*, No. 14-11-00938-CV, 2013 Tex. App. LEXIS 2790, at \*9–10 (Tex. App.—Houston [14th Dist.] Mar. 19, 2013, pet. dismissed) (not designated for publication).

<sup>242</sup> *Id.* at \*10.

<sup>243</sup> *Id.* at \*9.

<sup>244</sup> *Id.* at \*12.

<sup>245</sup> *See Dyer v. Accredited Home Lenders, Inc.*, No. 02-11-0046-CV, 2012 WL 335858, at \*3 (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied) (mem. op., not designated for publication).

<sup>246</sup> *Id.* at \*4 (“Although it appears to be a triumph of procedure over substance, we cannot create a rule that the trial court disposing of a combined motion has a duty to look at the traditional summary judgment evidence to see if it defeats the movant's right to no-evidence summary judgment when the rules of procedure place the burden on the nonmovant to produce evidence.”).



After the *City of Keller* opinion, one commentator has argued that the scope of review for a no-evidence motion has been expanded.<sup>247</sup> In *City of Keller*, as shown above, the Texas Supreme Court included a lengthy discussion of the “contrary evidence that cannot be disregarded” by the jury when rendering verdict or by the appellate court when reviewing that verdict on no-evidence grounds.<sup>248</sup> Accordingly, the court’s categories concern not only evidence that jurors must consider but also evidence a reviewing court should not disregard in conducting a legal sufficiency review.<sup>249</sup> The issue is whether a trial court can review evidence filed by a no-evidence movant in determining that the non-movant has no evidence to support a challenged element of its claim or defense.

In discussing the standards for a no-evidence motion for summary judgment, one court cited *City of Keller* and stated: “We view the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences, *unless there is no favorable evidence or contrary evidence renders supporting evidence incompetent or conclusively establishes the opposite.*”<sup>250</sup> This language would support the position that a court could look to “contrary evidence” to determine that the non-movant’s evidence was incompetent.<sup>251</sup>

In *City of Keller*, however, the Texas Supreme Court acknowledged that a party moving for summary judgment may not be able to take advantage of the expanded scope of review.<sup>252</sup> In a section of the opinion discussing how the no-evidence standard is the same no matter how it is raised, the court specifically excepted summary judgment motions:

In practice, however, a different scope of review applies when a summary judgment motion is filed without supporting evidence. In such cases, evidence supporting the motion is effectively disregarded because there is none;

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<sup>247</sup> See TIM PATTON, STANDARD AND SCOPE OF REVIEW SPOTLIGHT: “NO-EVIDENCE” SUMMARY JUDGMENT, 17th Ann. Conf. on State & Fed. Appeals, Univ. of Tex. Sch. of L., (June 1, 2007).

<sup>248</sup> *City of Keller v. Wilson*, 168 S.W.3d 802, 810–18 (Tex. 2005).

<sup>249</sup> *Id.* at 810, 818.

<sup>250</sup> *Brent v. Daneshjou*, No. 03-04-00225-CV, 2005 Tex. App. LEXIS 9249, at \*27 (Tex. App.—Austin Nov. 4, 2005, no pet.) (not designated for publication) (emphasis added).

<sup>251</sup> *Id.*

<sup>252</sup> 168 S.W.3d at 825.

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under the rule, it is not allowed. Thus, 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.<sup>253</sup>

Courts of appeals have found that the *City of Keller* opinion stands for the proposition that a party may not attach evidence to a no-evidence motion, and that if attached, it should not be considered.<sup>254</sup> For example, in *AIG Life Insurance v. Federated Mutual Insurance Co.*, the court of appeals addressed whether a vague motion was a traditional motion or a no-evidence motion—or both.<sup>255</sup> The court stated:

The motions do not include a standard of review and do not clearly delineate whether they are traditional motions for summary judgment under Texas Rule of Civil Procedure 166a(c) or no-evidence motions for summary judgment under Texas Rule of Civil Procedure 166a(i). Attached to each motion was a substantial amount of summary judgment evidence, indicating the motions sought a traditional summary judgment.<sup>256</sup>

The court concluded that the motion solely sought traditional grounds.<sup>257</sup>

Similarly, in *Mathis v. Restoration Builders, Inc.*, the Fourteenth Court of Appeals found that a reviewing court should only review the evidence attached to the non-movant's response:

However, per *City of Keller*, although we “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.” Thus, in this case, our review is limited to the evidence favoring Mathis that was attached to the Response to the Motions for Summary Judgment, even though the body of Restoration's Motion for Summary

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<sup>253</sup> *Id.* (emphasis added) (footnote omitted).

<sup>254</sup> *AIG Life Ins. Co. v. Federated Mut. Ins. Co.*, 200 S.W.3d 280, 283 (Tex. App.—Dallas 2006, pet. denied).

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* (“See *City of Keller v. Wilson*, 168 S.W.3d 802, 825 (Tex. 2005) (evidence supporting motion not allowed under rule 166a(i)).”).

<sup>257</sup> *Id.* at 284.

Judgment, which was both a traditional and no-evidence motion, contained testimony on which Restoration relied.<sup>258</sup>

However, the Texas Supreme Court indicated that the enlarged scope of review may apply to no-evidence summary judgment proceedings.<sup>259</sup> In *Mack Trucks, Inc. v. Tamez*, the Texas Supreme Court held that the plaintiff's expert testimony had been properly excluded, and therefore, a no-evidence motion for summary judgment was correctly granted on causation grounds.<sup>260</sup> The court stated:

A summary judgment motion pursuant to Tex. R. Civ. P. 166a(i) is essentially a motion for a pretrial directed verdict. Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion. We 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.<sup>261</sup>

In a *per curiam* opinion, the Texas Supreme Court has reaffirmed that: “An appellate court reviewing a summary judgment must consider *all* the evidence . . . .”<sup>262</sup> In *Goodyear*, the court reversed a court of appeals that disregarded uncontroverted evidence in reversing a traditional and no-evidence motion for summary judgment.<sup>263</sup> “*We review the evidence presented by a no-evidence motion for summary judgment 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*

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<sup>258</sup> 231 S.W.3d 47, 50 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citation omitted).

<sup>259</sup> See *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 581–82 (Tex. 2006).

<sup>260</sup> *Id.* at 581.

<sup>261</sup> *Id.* at 581–82 (emphasis added) (citations omitted).

<sup>262</sup> *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754–56 (Tex. 2007) (emphasis added).

<sup>263</sup> *Id.* at 758; see also *Gonzales v. Ramirez*, 463 S.W.3d 499, 505–06 (Tex. 2015).

could, and disregarding contrary evidence unless reasonable jurors could not.”<sup>264</sup>

Generally, courts of appeals have cited to *Mack Trucks* and found that under the review of a no-evidence motion that the court of appeals must review the evidence attached to the motion and response in the light most favorable to the non-movant.<sup>265</sup> These opinions, however, merely state the rule as described in *Mack Trucks*, and do not discuss the issue in any depth. One exception is the Dallas Court of Appeals, which stated that with regards to a no-evidence motion the “scope of our review includes both the evidence presented by the movant and the evidence presented by the respondent.”<sup>266</sup> Therefore, that court is using the expanded *City of Keller* standard with regards to a no-evidence motion review.

Once again, in *Mack Trucks, Inc. v. Tamez*, the Texas Supreme Court stated “We 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.*”<sup>267</sup> Therefore, it is clear under this standard that if the non-movant attaches evidence that hurts its position to the point that a reasonable juror could not disregard it, a reviewing court can use that evidence to show that there is no evidence. The issue is whether the reviewing court can also look

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<sup>264</sup> *Gonzalez*, 463 S.W.3d at 504 (citing *Mack Trucks*, 206 S.W.3d at 582) (emphasis added); *Boerjan v. Rodriguez*, 436 S.W.3d 307, 311–12 (Tex. 2014).

<sup>265</sup> *See, e.g.*, *Anderson v. Limestone Cnty.*, No. 10-07-00174-CV, 2008 Tex. App. LEXIS 5041, at \*8 (Tex. App.—Waco July 2, 2008, pet. denied) (not designated for publication); *Acad. of Skills & Knowledge, Inc. v. Charter Sch., USA, Inc.*, 260 S.W.3d 529, 534 (Tex. App.—Tyler 2008, pet. denied); *Abendschein v. GE Cap. Mortg. Servs.*, No. 10-06-00247-CV, 2007 Tex. App. LEXIS 9761, at \*1 (Tex. App.—Waco Dec. 12, 2007, no pet.) (not designated for publication); *Packwood v. Touchstone Cmty.*, No. 06-07-00020-CV, 2007 Tex. App. LEXIS 7935, at \*3 (Tex. App.—Texarkana Oct. 5, 2007, no pet.) (not designated for publication); *State v. Beeson*, 232 S.W.3d 265, 272 (Tex. App.—Eastland 2007, pet. abated); *Paragon Gen. Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 881 (Tex. App.—Dallas 2007, no pet.).

<sup>266</sup> *Highland Crusader Offshore Partners., L.P. v. Andrews & Kurth, L.L.P.*, 248 S.W.3d 887, 889 (Tex. App.—Dallas 2008, no pet.); *Guillaume v. City of Greenville*, 247 S.W.3d 457, 461 (Tex. App.—Dallas 2008, no pet.); *Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, 805 (Tex. App.—Dallas 2008, pet. denied); *Paragon Gen. Contractors, Inc.*, 227 S.W.3d at 881; *Graham v. Federated Dep’t. Stores, Inc.*, No. 05-09-01310-CV, 2011 Tex. App. LEXIS 6170, at \*7 (Tex. App.—Dallas Aug. 8, 2011, no pet.) (mem. op. not designated for publication).

<sup>267</sup> 206 S.W.3d 572, 582 (Tex. 2006) (emphasis added).

to evidence filed by the movant and use the same standard. One commentator has noted that to enlarge the scope of review to include both the movant's evidence and the nonmovant's evidence would be consistent with the practice in the federal court system.<sup>268</sup>

The Texas Supreme Court has never really discussed this issue in depth. Accordingly, the issue of whether a court may review evidence attached to a no-evidence motion in determining whether the non-movant's evidence raises a fact question for a reasonable juror is still unresolved. In *City of Dish v. Atmos Energy*, the court did not expressly discuss the scope of review issue but seemingly used evidence attached to a dual motion to show that the plaintiff had no evidence.<sup>269</sup> In this case, the plaintiffs asserted nuisance and trespass claims against the defendants due to a grouping of compressor stations.<sup>270</sup> One defendant did not have a compressor station; it had a metering station.<sup>271</sup> That defendant filed a dual motion, asserting both traditional and no-evidence grounds, on the issue that it was not the same as the other defendants and did not contribute to any of the complained-of activities.<sup>272</sup> The court referred to evidence filed by the defendant showing that it solely had a metering station, it was a closed-in system, and that it did not have any emissions or noise, and showed that the plaintiffs did not present any evidence to establish that the pipeline company (as opposed to the other defendants) did anything wrong.<sup>273</sup> Though there was no express discussion by the court regarding the use of evidence filed by the movant to support a no-evidence motion, the court did just that.<sup>274</sup>

Another potential basis for a court to review evidence attached to a no-evidence motion is where the parties file cross-motions of summary judgment.<sup>275</sup> In *Trial v. Dragon*, the Texas Supreme Court discussed the

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<sup>268</sup> PATTON, *supra* note 247(citing Celotex Corp. TIM PATTON, STANDARD AND SCOPE OF REVIEW SPOTLIGHT: "NO-EVIDENCE" SUMMARY JUDGMENT, 17th Ann. Conf. on State & Fed. Appeals, Univ. of Tex. Sch. of L., (June 1, 2007) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); BRUNER & REDISH, SUMMARY JUDGMENT: FEDERAL LAW & PRACTICE, § 5:7 (3d ed. 2006)).

<sup>269</sup> 519 S.W.3d 605, 608 (Tex. 2017).

<sup>270</sup> *Id.* at 607.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 607–08.

<sup>274</sup> *See id.*

<sup>275</sup> *See Trial v. Dragon*, 593 S.W.3d 313, 316–17 (Tex. 2019).

standards of review for cross-motions for summary judgment and stated: “Because the parties presented the case through competing summary judgment motions, *both traditional and no-evidence*, and the trial court granted the Trials’ motions while denying the Dragons’, *we review the summary judgment evidence presented by both sides and render judgment that the trial court should have rendered.*”<sup>276</sup> This quote would indicate that a reviewing court can consider any evidence submitted by either party (including the no-evidence movant) and render judgment.

#### VII. TIMING ISSUES REGARDING MOTION, RESPONSE, REPLY AND HEARING

Timing issues are very important to consider in appealing a summary judgment. A party moving for a traditional motion for summary judgment can file such a motion at any time after the responding party has filed an answer or appeared.<sup>277</sup> If a nonmovant wants to complain about a movant filing a traditional motion too early, it has the obligation to object to the timing of the motion in the trial court.<sup>278</sup> A party moving for a no-evidence motion for summary judgment should not file such a motion until there has been an adequate time for discovery.<sup>279</sup>

Parties to a summary judgment are not entitled to a hearing.<sup>280</sup> The summary judgment motion must be served on the opposing party at least twenty-one days before the hearing if a hearing is granted.<sup>281</sup> The notice must include the fact that the hearing has been set, the date, and the time for the hearing.<sup>282</sup> Furthermore, one court has held that if the movant provides notice

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<sup>276</sup> *Id.* (emphasis added).

<sup>277</sup> TEX. R. CIV. P. 166a(a).

<sup>278</sup> *See* Tex. Cent. R.R. & Infrastructure v. Miles, No. 13-19-00297-CV, 2020 Tex. App. LEXIS 3841, at \*23 (Tex. App.—Corpus Christi—Edinburg May 7, 2020, pet. filed) (not designated for publication).

<sup>279</sup> TEX. R. CIV. P. 166a(i).

<sup>280</sup> *In re Am. Media Consol.*, 121 S.W.3d 70, 74 (Tex. App.—San Antonio 2003, no pet.); *see also* *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998).

<sup>281</sup> TEX. R. CIV. P. 166a(c); *see also* *Lewis v. Blake*, 876 S.W.2d 314, 315–16 (Tex. 1994).

<sup>282</sup> *Hummel v. Hummel*, No. 04-10-00554-CV, 2011 WL 3849477, at \*2 (Tex. App.—San Antonio Aug. 31, 2011, no pet.) (not designated for publication); *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 11 (Tex. App.—Dallas 1994, no writ).

in a document other than the motion itself, that the notice must contain a certificate of service.<sup>283</sup>

The day of service is not included in the twenty-one day period, but the day of the hearing is included.<sup>284</sup> Therefore, the movant starts counting on the day after he files his no-evidence motion, and the hearing can be on the twenty-first day thereafter. Further, if service is completed by mail pursuant to Texas Rule of Civil Procedure 21a, the movant will have to add three additional days to the twenty-one day period, which makes it a twenty-four day period.<sup>285</sup> Therefore, if the movant serves the motion by use of the mail, the day after it is mailed is day one, and the hearing can be held on day twenty-four or later.

The movant may want to file evidence after it files its motion and within the twenty-one-day notice period. If that is the case, the movant should file a motion for leave and obtain an order on same. Summary judgment evidence, either supporting or opposing the motion, may be filed late only with leave of court.<sup>286</sup> Leave to file summary judgment evidence late may be shown by “a separate order, a recital in the summary judgment [order], or an oral ruling contained in the reporter’s record of the summary judgment hearing.”<sup>287</sup> An appellate court presumes the trial court did not consider late-filed evidence when nothing in the record indicates the trial court granted leave.<sup>288</sup>

There is no requirement that the non-movant object to the late-filed evidence. Requiring a party to object that summary-judgment evidence was late filed would be inconsistent with (1) Rule 166a(c), which places the onus on the party filing the evidence to obtain leave of court, and (2) the dictate of the Texas Supreme Court, cited above, that we presume the trial court did not

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<sup>283</sup> *Tanksley v. CitiCapital Com. Corp.*, 145 S.W.3d 760, 763 (Tex. App.—Dallas 2004, pet. denied).

<sup>284</sup> *Lewis*, 876 S.W.2d at 315–16; *Lee v. Palo Pinto Cnty.*, 966 S.W.2d 83, 85 (Tex. App.—Eastland 1998, pet. denied).

<sup>285</sup> *Lewis*, 876 S.W.2d at 315.

<sup>286</sup> *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996); *Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 154 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing TEX. R. CIV. P. 166a(c)); *see also Lopez v. Exxon Mobil Dev. Co.*, No. 14-16-00826-CV, 2017 WL 4018359, at \*5 (Tex. App.—Houston [14th Dist.] Sept. 12, 2017, pet. denied) (mem. op., not designated for publication).

<sup>287</sup> *Alphaville Ventures*, 429 S.W.3d at 154 (citing *Pipkin v. Kroger Tex., L.P.*, 383 S.W.3d 655, 663 (Tex. App.—Houston [14th Dist.] 2012, pet. denied)).

<sup>288</sup> *Id.*; *see also Lopez*, 2017 WL 4018359, at \*5.

consider late-filed evidence unless the record affirmatively indicates it granted leave.<sup>289</sup>

The record need only contain some affirmative indication that the court considered the late-filed evidence for a party to meet the leave requirement.<sup>290</sup> An opposing party may file a motion to strike late-filed evidence.<sup>291</sup> However, some courts have held that denying a motion to strike late-filed evidence is not the same as granting leave to file late-filed evidence and does not indicate that the trial court considered the late-filed evidence.<sup>292</sup> The Texas Supreme Court has recently held that an order stating that the trial court considered the “evidence” meant that the trial court considered a late-filed

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<sup>289</sup> See *Dixon v. E.D. Bullard Co.*, 138 S.W.3d 373, 376 n.1 (Tex. App.—Houston [14th Dist.] 2004, pet. granted, judgment vacated w.r.m.) (stating trial court’s denial of non-movant’s request to strike movant’s late-filed summary-judgment evidence did not constitute implied ruling granting leave for late filing because such a conclusion would contradict burden on movant to timely file evidence or obtain leave of court); see also *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 582 (Tex. App.—Austin 1995, no writ) (“If the movant files late summary judgment evidence and no order appears in the record granting leave to file, we presume the trial court did not consider the evidence regardless of whether the nonmovant failed to object to the evidence.”) (emphasis omitted). *But see* *City of Coppell v. Gen. Homes Corp.*, 763 S.W.2d 448, 451–52 (Tex. App.—Dallas 1988, writ denied) (holding appellate court could consider summary-judgment response even if late filed because opposing party did not move to strike and trial court did not strike sua sponte); see *Alaniz v. Hoyt*, 105 S.W.3d 330, 339–40 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.) (holding that evidence attached to the reply was properly part of the summary-judgment evidence where nonmovant did not object to the late filing).

<sup>290</sup> See *Corniello v. State Bank & Tr.*, 344 S.W.3d 601, 608–09 (Tex. App.—Dallas, 2011, no pet.) (trial court could consider late-filed affidavit where record indicated that the trial court did review late-filed response); see also *Partin v. Superior Energy Servs.*, No. 01-17-00629-CV, 2018 Tex. App. LEXIS 6334, \*15–16 (Tex. App.—Houston [1st Dist.] Aug. 14, 2018, pet. denied) (not designated for publication); see also *Lesikar v. Moon*, No. 14-16-00299-CV, 2017 Tex. App. LEXIS 10172, \*24–25 (Tex. App.—Houston [14th Dist.] Oct. 31, 2017, no pet.) (not designated for publication).

<sup>291</sup> TEX. R. CIV. P. 166a(c).

<sup>292</sup> See, e.g., *Tex. Windstorm Ins. Ass’n v. Dickinson Indep. Sch. Dist.*, 561 S.W.3d 263, 280–81 (Tex. App.—Houston [14th Dist.] 2018, pet. denied); *Env’tl. Procs., Inc. v. Guidry*, 282 S.W.3d 602, 619 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (trial court’s denial of motion to strike is not equivalent of leave to file contested evidence) (citing *Dixon*, 138 S.W.3d at 376 n.2); see also *Alphaville Ventures*, 429 S.W.3d at 154 (leave of court to file untimely evidence may be shown by separate order, recital in summary judgment order, or oral ruling contained in the reporter’s record).



summary judgment response.<sup>293</sup> The same precedent should apply to late-filed evidence by a movant.

The non-movant must file and serve the response, accompanying evidence or special exceptions or objections to the movant's no-evidence motion not later than seven days before the hearing.<sup>294</sup> The non-movant can file the response on the seventh day before the hearing – there does not have to be seven full days.<sup>295</sup> The non-movant can file the response on the seventh day before the hearing—there does not have to be seven full days.<sup>296</sup> Pursuant to Texas Rule of Civil Procedure 5, the non-movant can also use the mail to file his response, and if he does, it is considered timely filed on the day it is deposited in the mail so long as it reaches the clerk no more than ten days after it is due.<sup>297</sup> The party relying on the mailbox rule has the burden to establish its application.<sup>298</sup> The non-movant who uses the mail to file and serve his response does not have to add three days to the seven day period pursuant to Texas Rule of Civil Procedure 21a.<sup>299</sup> In essence, the timing sequence implemented by Rule 166a is designed to provide the non-movant with fourteen days to review the summary judgment motion and to serve a response.<sup>300</sup>

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<sup>293</sup> *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 259 (Tex. 2020) (per curiam).

<sup>294</sup> *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993); *Crews v. Plainsman Trading Co.*, 827 S.W.2d 455, 457 (Tex. App.—San Antonio 1992, writ denied).

<sup>295</sup> *Thomas v. Med. Arts Hosp.*, 920 S.W.2d 815, 817–18 (Tex. App.—Texarkana 1996, writ denied); *Wright v. Lewis*, 777 S.W.2d 520, 521 (Tex. App.—Corpus Christi—Christi—Edinburg 1989, no writ); *Benger Builders, Inc. v. Bus. Credit Leasing, Inc.*, 764 S.W.2d 336, 338 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

<sup>296</sup> *Thomas v. Med. Arts Hosp.*, 920 S.W.2d 815, 817–18 (Tex. App.—Texarkana 1996, writ denied); *Wright v. Lewis*, 777 S.W.2d 520, 521 (Tex. App.—Corpus Christi—Christi—Edinburg 1989, no writ); *Benger Builders, Inc. v. Bus. Credit Leasing, Inc.*, 764 S.W.2d 336, 338 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

<sup>297</sup> *Geiselman v. Cramer Fin. Grp., Inc.*, 965 S.W.2d 532, 535 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Clendennen v. Williams*, 896 S.W.2d 257, 259 (Tex. App.—Texarkana 1995, no writ).

<sup>298</sup> *See Landers v. State Farm Lloyds*, 257 S.W.3d 740, 745 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (summary judgment was affirmed where response was filed via the mail and did not establish the application of the mailbox rule).

<sup>299</sup> *See Lee v. Palo Pinto Cnty.*, 966 S.W.2d 83, 86 (Tex. App.—Eastland 1998, no pet.).

<sup>300</sup> *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 3 (Tex. App.—Corpus Christi—Edinburg 1991, no writ); *Robey v. Gillespie Motor Co.*, No. 04-98-00308-CV., 1999 WL 238958, at \*6 (Tex. App.—San Antonio Apr. 21, 1999, pet. denied) (not designated for publication).

If the non-movant files its response late (within seven days of the hearing), it must receive written permission from the trial court or else the response will not be before the court.<sup>301</sup> If the record does not contain some indication that the trial court granted leave to file the late response, the appellate court will assume that it was not before the trial court, and the non-movant will waive all of his issues.<sup>302</sup> The court may grant leave through an “affirmative indication” that the trial court permitted the non-movant’s late response.<sup>303</sup> In early 2020, the Texas Supreme Court held that a mere recital stating the court considered the “evidence and arguments of counsel,” without any limitation constitutes such an “affirmative indication.”<sup>304</sup>

Similarly, the non-movant must get the court’s leave to file evidence within seven days of the hearing, and if no written order appears in the record, the late-filed evidence will not be considered as being before the court.<sup>305</sup> The best practice is for a non-movant to file a motion requesting leave to file late-filed evidence with the evidence itself. Further, the non-movant should be careful to have the trial court either sign a separate order allowing the requested leave, or have the order granting or denying the no-evidence motion state that the trial court allowed leave to file the evidence.<sup>306</sup>

If one of the parties desires to rely upon the mailbox rule, it should be very careful to make sure the record indicates how it served and filed the motion or response, and when it did so. For example, in *Derouen v. Wal-Mart Stores, Inc.*, the record showed that the response was filed six days before the summary judgment hearing and there was no indication of any leave being granted for late filing.<sup>307</sup> The court of appeals presumed that the non-movant filed the response late due to the file date stamp on the response and there

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<sup>301</sup> *INA of Tex. v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985); *Envntl. Procs., Inc. v. Guidry*, 282 S.W.3d 602, 620 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *Lazaro v. Univ. of Tex. Health Sci. Ctr.*, 830 S.W.2d 330, 331–32 (Tex. App.—Houston [14th Dist.] 1992, writ denied).

<sup>302</sup> *Goswami v. Metro. S.&L. Ass’n*, 751 S.W.2d 487, 490 n.1 (Tex. 1988); *Waddy v. City of Houston*, 834 S.W.2d 97, 101 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

<sup>303</sup> *B.C. v. Steak N Shake Operations, Inc.*, 598 S.W.3d 256, 260 (Tex. 2020) (per curiam).

<sup>304</sup> *Id.* at 261.

<sup>305</sup> *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996).

<sup>306</sup> *See Daniell v. Citizens Bank*, 754 S.W.2d 407, 409 (Tex. App.—Corpus Christi—Edinburg 1988, no writ).

<sup>307</sup> No. 06-06-00087-CV, 2007 Tex. App. LEXIS 569, at \*3 (Tex. App.—Texarkana Jan. 26, 2007, no pet.) (mem. op., not designated for publication).

being no other evidence in the record indicating otherwise.<sup>308</sup> The court affirmed the summary judgment after not finding any indication that the trial court granted the non-movant leave to late-file its response.<sup>309</sup> Accordingly, the author suggests that parties to a summary judgment proceeding include a “Certificate of Filing and Service” and indicate in that certificate all facts necessary to establish the applicability of the mailbox rule for the purposes of filing.

Lastly, the movant is entitled to file a reply to the non-movant’s response. However, Rule 166a does not set forth any time requirements for filing a movant’s reply based solely upon legal arguments.<sup>310</sup> Houston’s Fourteenth Court of Appeals has held the movant could file this reply the very day of the hearing on his motion.<sup>311</sup> Again in 2004, the El Paso Court of Appeals asserted the seven-day limit before submission in which a nonmovant may submit summary-judgment evidence does not apply to the movant’s reply.<sup>312</sup> Yet in 2009, the Fourteenth Court of Appeals disapproved of the interpretation in *Durbin* and *Knapp* after an amendment to Tex. R. Civ. P. 166a(d).<sup>313</sup> The amendment “permitted unfiled discovery to be used in support of a motion for summary judgment if filed and served on all parties, together with a statement of intent to use the specified discovery, at least [twenty-one] days before the hearing.”<sup>314</sup>

Additionally, parties should be careful to review local rules as some counties have local rules that requires any briefing or authority has to be filed at least three days before any hearing.<sup>315</sup> A local rule may require a movant to file a summary judgment reply before the hearing.

If the movant raises any special exceptions to the non-movant’s response, it must file and serve those special exceptions not less than three days before

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<sup>308</sup> *Id.* at \*3–4.

<sup>309</sup> *Id.* at \*4.

<sup>310</sup> TEX. R. CIV. P. 166a; *Knapp v. Eppright*, 783 S.W.2d 293, 296 (Tex. App.—Houston [14th Dist.] 1989, no writ).

<sup>311</sup> *Knapp*, 783 S.W.2d at 296; *Wright v. Lewis*, 777 S.W.2d 520, 522 (Tex. App.—Corpus Christi–Edinburg 1980, writ denied).

<sup>312</sup> *Durbin v. Culberson Cnty.*, 132 S.W.3d 650, 656 (Tex. App.—El Paso 2004, no pet.).

<sup>313</sup> *Envtl. Procs., Inc. v. Guidry*, 282 S.W.3d 602, 612 n.9 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

<sup>314</sup> *Id.*

<sup>315</sup> *See Grotjohn Precise Connexiones Int’l v. JEM Fin. Inc.*, 12 S.W.3d 859, 866 n. 3 (Tex. App.—Texarkana 1999, no pet.).

the hearing on his motion for summary judgment.<sup>316</sup> Some courts have extended this three-day rule to objections to summary judgment evidence.<sup>317</sup> However, other courts have not done so.<sup>318</sup> For example, in *Grotjohn Precise Connexiones Int'l v. JEM Fin. Inc.*, the court held that objections made for the first time at a hearing were timely and that the trial court erred in striking those objections due to timeliness: “Because Grotjohn et al. filed their objections to the affidavits before the trial court rendered the partial summary judgment, the objections were timely and the trial court erred in overruling them on the basis that they were not timely.”<sup>319</sup>

Courts have held that an order granting summary judgment objections after the summary judgment order was signed did not preserve error.<sup>320</sup> However, other courts have held that an order on objections can be signed after a summary judgment order is signed.<sup>321</sup> In *Crocker v. Paulyne's Nursing Home, Inc.*, the party appealing a summary judgment argued that the movant waived its evidence objections by failing to obtain an express ruling until eighty-nine days after the court granted the summary judgment.<sup>322</sup> The court of appeals stated:

In doing so, appellants confuse a party's duty to preserve error with a trial court's authority to rule on objections. The issue in this case is not whether the Rembrandt Center (which obtained a favorable ruling in the trial court) preserved its complaint for appellate review. Rather, the issue is whether the trial court's order, which was reduced to

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<sup>316</sup> *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 n.7 (Tex. 1993).

<sup>317</sup> See *Herrington v. Cote*, No. 01-04-00212-CV, 2007 WL 926622, at \*2 (Tex. App.—Houston [1st Dist.] Mar. 29, 2007, no pet.) (mem. op., not designated for publication) (holding that Rule 21's three-day notice requirement applies to objections to summary judgment evidence).

<sup>318</sup> E.g., *Grotjohn*, 12 S.W.3d at 866.

<sup>319</sup> *Id.* at 866; see also *Reynolds v. Murphy*, 188 S.W.3d 252, 259 (Tex. App.—Fort Worth 2005, pet. denied).

<sup>320</sup> E.g., *Choctaw Props. L.L.C. v. Aledo Ind. Sch. Dist.*, 127 S.W.3d 235, 241 (Tex. App.—Waco 2003, no pet.).

<sup>321</sup> E.g., *Crocker v. Paulyne's Nursing Home, Inc.*, 95 S.W.3d 416, 421 (Tex. App.—Dallas 2002, no pet.); *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Hill v. Crowson*, No. 10-09-00006-CV, 2009 WL 3858065, at \*1–2 (Tex. App.—Waco Nov. 18, 2009, no pet.) (mem. op., not designated for publication).

<sup>322</sup> 95 S.W.3d at 420–21.

writing eighty-nine days after the summary judgment was signed, was effective.<sup>323</sup>

The court held that so long as the ruling was made within the trial court's plenary period, the ruling was effective.<sup>324</sup> Further, the court in *Dolcefino v. Randolph*, held that there is a presumption that a trial court rules on timely filed summary judgment objections before ruling on the motion, and that a party only has to have these rulings expressed "near the time" that the trial court grants the motion or risk waiver.<sup>325</sup>

A court can grant a motion for summary judgment after initially denying it without allowing the non-movant the further opportunity to argue or present evidence.<sup>326</sup> The general rule is "[a] trial court may, in the exercise of discretion, properly grant summary judgment after having previously denied summary judgment without a motion by or prior notice to the parties, as long as the court retains jurisdiction over the case."<sup>327</sup> Citing this rule, one court stated: "a trial court's action when it considers a party's motion to reconsider the court's prior ruling on a motion for summary judgment is within the court's discretion."<sup>328</sup>

For example, in *Lindale Auto Supply v. Ford Motor Co.*, the court of appeals affirmed a trial court that granted a partial summary judgment (by a visiting judge), but then later (without notice) withdrew that order and entered the same summary judgment (by the active judge).<sup>329</sup> The nonmovant complained that he did not have a chance to respond, and the court of appeals found that it was not entitled to new notice and affirmed.<sup>330</sup> So, if a court

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<sup>323</sup> *Id.* at 421.

<sup>324</sup> *Id.*

<sup>325</sup> 19 S.W.3d 906, 926 n.15.

<sup>326</sup> *H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 877 (Tex. App.—Corpus Christi—Edinburg 1996, writ denied).

<sup>327</sup> *Id.*; see also *Roberts v. E. Lawn Mem. Park Cemetery*, No. 2-05-289-CV, 2006 Tex. App. LEXIS 3183, at \*1 n.2 (Tex. App.—Fort Worth Apr. 20, 2006, no pet.) (mem. op., not designated for publication).

<sup>328</sup> *Mendez v. San Benito/Cameron Cnty. Drainage Dist. No. 3*, 45 S.W.3d 746, 755 (Tex. App.—Corpus Christi—Edinburg 2001, no pet.) (affirmed trial court's granting of second summary judgment on reconsideration).

<sup>329</sup> No. 14-96-00536-CV, 1998 Tex. App. LEXIS 1564, at \*37–38 (Tex. App.—Houston [14th Dist.] Mar. 12, 1998, no pet.) (not designated for publication).

<sup>330</sup> *Id.* at \*37.

denies summary judgment, then later sua sponte grants it without any notice, that is fine.

Finally, after the hearing, trial courts are widely recognized to have “considerable discretion” in the time they take to issue a summary judgment decision.<sup>331</sup> However, one court of appeals issued mandamus relief and ordered a trial court to rule on a motion where a no-evidence motion had been on file for eight months with no response and trial court refused to rule.<sup>332</sup>

### VIII. DISCOVERY AFTER INTERLOCUTORY SUMMARY JUDGMENT

At least one court has held that a party is not entitled to conduct any discovery on issues that have been resolved by an interlocutory summary judgment.<sup>333</sup>

### IX. PRESERVATION OF ERROR

A party can win or lose an appeal depending on whether an issue has been preserved for appellate review.<sup>334</sup> Whether the party is appealing an objection to summary judgment evidence, motion for continuance, or motion for leave to file new evidence, the issue must be preserved.

#### A. *Preserving Error On Grounds Asserted In Denied Summary Judgment Motion*

The denial of a motion for summary judgment does not preserve any points raised in that motion, thus the movant must re-urge those issues at a latter point in the proceedings, i.e., objections to the charge, motion for a directed verdict, or a motion for judgment notwithstanding the verdict.<sup>335</sup>

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<sup>331</sup> Bayou City Fish Co. v. S. Tex. Shrimp Processors, Inc., No. 13-06-438-CV, 2007 Tex. App. LEXIS 9148, at \*17 (Tex. App.—Corpus Christi—Edinburg Nov. 20, 2007, no pet.) (mem. op., not designated for publication); Zalta v. Tennant, 789 S.W.2d 432, 433 (Tex. App.—Houston [1st Dist.] 1990, no writ) (refusing to grant mandamus relief to relator because the trial court’s over one-year-long wait to decide on a motion for summary judgment was not an abuse of discretion).

<sup>332</sup> In re Mission Consol. Indep. Sch. Dist., 990 S.W.2d 459, 461 (Tex. App.—Corpus Christi—Edinburg 1999, no pet.).

<sup>333</sup> Krenek v. Texstar N. Am., 787 S.W.2d 566, 568–69 (Tex. App.—Corpus Christi—Edinburg 1990, writ denied).

<sup>334</sup> See Iglesias v. State, 564 S.W.3d 461, 467 (Tex. App.—El Paso 2018, no pet.).

<sup>335</sup> See Wackenhut Corp. v. Gutierrez, 453 S.W.3d 917, 920 n.3 (Tex. 2015) (denied no-evidence motion for summary judgment did not preserve no-evidence objection to charge at trial);

### *B. Preserving Error Regarding Objections to Summary Judgment Evidence*

In Texas state court, the standard for admissibility of evidence in a summary judgment proceeding is the same as at trial.<sup>336</sup> Historically, in order to preserve error as to a movant's objection to the non-movant's evidence, the movant must have obtained an express ruling on his objections in a written order.<sup>337</sup> Texas Rule of Appellate Procedure 33.1, however, now provides that a separate, signed order is no longer required to preserve an issue for appellate review.<sup>338</sup> Accordingly, a signed order should no longer be required to preserve an objection to a non-movant's evidence when the trial court orally ruled on the objection and the ruling appears in the record.<sup>339</sup> Therefore, a party should request that the reporter's record be prepared and sent to the court of appeals if the trial court made oral rulings on objections to summary judgment evidence that are in the party's favor. A careful practitioner, however, should still have the trial court reduce all rulings on summary judgment evidence objections to writing as some courts are still citing old authority and requiring written rulings.<sup>340</sup>

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*Fling v. Steed*, No. 07-99-0450-CV, 2001 Tex. App. LEXIS 1585, at \*11 (Tex. App.—Amarillo Mar. 12, 2001, pet. denied) (not designated for publication); *Hines v. Comm'n for Lawyer Discipline*, 28 S.W.3d 697, 700 (Tex. App.—Corpus Christi—Edinburg 2000, no pet.); *United Parcel Serv. Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 916 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see also Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966); *Motor 9, Inc., v. World Tire Corp.*, 651 S.W.2d 296, 299 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

<sup>336</sup> *Lewis v. Nolan*, No. 01-04-00865-CV, 2006 Tex. App. LEXIS 10668, at \*4 (Tex. App.—Houston [1st Dist.] Dec. 14, 2006, pet. denied) (not designated for publication); *Dupuy v. Am. Ecology Envtl. Servs. Corp.*, No. 12-01-0160-CV, 2002 Tex. App. LEXIS 3581, at \*6 (Tex. App.—Tyler May 14, 2002, no pet.) (not designated for publication); *Bayless v. U.C. Rentals, Inc.*, No. 14-98-00337-CV, 1999 Tex. App. LEXIS 3406, at \*7 (Tex. App.—Houston [14th Dist.] May 5, 1999, no pet.) (not designated for publication).

<sup>337</sup> *Utils. Pipeline Co. v. Am. Petrofina Mktg.*, 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ).

<sup>338</sup> TEX. R. APP. P. 33.1.

<sup>339</sup> *Allen v. Albin*, 97 S.W.3d 655, 662 (Tex. App.—Waco 2002, no pet.); *see also Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 387, 395–96 (Tex. App.—Corpus Christi—Edinburg 2000, no pet.) (error is preserved if the reporter's record of the summary judgment hearing shows that the trial court announced an oral ruling on the objection).

<sup>340</sup> *See Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 583 (Tex. 2017) (holding even objected-to evidence remains valid summary-judgment proof unless an order sustaining the objection is reduced to writing, signed, and entered of record); *see also Crocker v. Paulyne's Nursing Home, Inc.*, 95 S.W.3d 416, 420 (Tex. App.—Dallas 2002, no pet.).

Additionally, Rule 33.1(a) states that in order to preserve a complaint for appellate review, the record must show that the trial court either expressly or implicitly ruled on an objection that was sufficiently specific to make the trial court aware of the complaint.<sup>341</sup> There has been great debate in Texas's courts of appeals about whether a court of appeals can imply a ruling on an objection to summary judgment evidence due to the trial court's granting of the motion.<sup>342</sup> Some courts hold that under the facts of the case, an implied ruling can exist in a summary judgment context.<sup>343</sup> Under this standard, in granting a summary judgment motion, a trial court implicitly sustains the movant's objections to evidence that, if considered, would create a fact issue and implicitly denies the non-movant's objections to evidence that is necessary to support the summary judgment. Either way, the timely raised objections are simply preserved for appellate review. Otherwise, an appellate court infers that the trial court intentionally granted a summary judgment motion when it knew the "evidence" created a fact issue.

But most courts hold that a court of appeals cannot imply a ruling.<sup>344</sup> For example, the San Antonio Court of Appeals disagreed with implicit rulings and held:

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<sup>341</sup> See TEX. R. APP. P. 33.1(a)(1)–(2).

<sup>342</sup> See, e.g., Judge David Hittner & Lynee Liberato, *Summary Judgments in Texas*, 47 SOUTH TEX. L. REV. 409, 447–48 (2006) ("There is dispute among the courts of appeals concerning what constitutes an implicit holding, and even if an objection may be preserved under Texas Rule of Civil Procedure 33.1(a)(2)(a) by an implicit ruling.").

<sup>343</sup> See, e.g., *Praytor v. Ford Motor Co.*, 97 S.W.3d 237, 242 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (holding that movant/appellee is not required to preserve complaint as to non-movant/appellant's summary judgment evidence where trial court grants summary judgment motion); *Trusty v. Strayhorn*, 87 S.W.3d 756, 760 (Tex. App.—Texarkana 2002, no pet.); *Clement v. City of Plano*, 26 S.W.3d 544, 550 n.5 (Tex. App.—Dallas 2000, no pet.), *disapproved on other grounds by* *Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. 2002); *Dagley v. Haag Eng'g*, 18 S.W.3d 787, 795 n.9 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d at 395–96; *Williams v. Bank One, Tex., N.A.*, 15 S.W.3d 110, 114–15 (Tex. App.—Waco 1999, no pet.); *Frazier v. Yu*, 987 S.W.2d 607, 609–10 (Tex. App.—Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.).

<sup>344</sup> *Arellano v. Americanos USA, LLC*, 334 S.W.3d 326, 329 (Tex. App.—El Paso 2010, no pet.); *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92, 101 (Tex. App.—Dallas 2010, pet. denied); *Gellatly v. Unifund CCR Partners, No. 01-07-00552-CV*, 2008 Tex. App. LEXIS 5018, at \*10 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet. hist.) (mem. op., not designated for publication); *Anderson v. Limestone Cnty.*, No. 10-07-00174-CV, 2008 Tex. App. LEXIS 5041, at \*4 (Tex. App.—Waco July 2, 2008, no pet. hist.) (mem. op., not designated for publication); *Delfino v. Perry Homes*, 223 S.W.3d 32, 35 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Hixon v. Tyco*



[R]ulings on a motion for summary judgment and objections to summary judgment evidence are not alternative; nor are they concomitants. Neither implies a ruling-or any particular ruling-on the other. In short, a trial court's ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment.<sup>345</sup>

There was great confusion regarding when objections to summary judgment evidence were preserved for many years. Many commentators have noted the conflict among the courts of appeals on this important issue.<sup>346</sup>

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Int'l, Ltd., No. 01-04-01109-CV, 2006 Tex. App. LEXIS 9494, at \*9–10 (Tex. App.—Houston [1st Dist.] Oct. 31, 2006, no pet.) (mem. op., not designated for publication); Strunk v. Belt Line Rd. Realty Co., 225 S.W.3d 91, 99 (Tex. App.—El Paso 2005, no pet.); Palacio v. AON Proprs., Inc., 110 S.W.3d 493, 496 (Tex. App.—Waco 2003, no pet.); Mitchell v. Baylor Univ. Med. Ctr., 109 S.W.3d 838, 842–43 (Tex. App.—Dallas 2003, no pet.); Sunshine Mining & Ref. Co. v. Ernst & Young, L.L.P., 114 S.W.3d 48, 51 (Tex. App.—Eastland 2003, no pet.); Wilson v. Thomason Funeral Home, Inc., No. 03-02-00774-CV, 2003 Tex. App. LEXIS 6358, at \*12 (Tex. App.—Austin July 24, 2003, no. pet.); Allen v. Albin, 97 S.W.3d 655, 662–63 (Tex. App.—Waco 2002, no pet.); Jones v. Ray Ins. Agency, 59 S.W.3d 739, 752–53 (Tex. App.—Corpus Christi–Edinburg 2001, pet. denied); Rogers v. Cont'l Airlines, Inc., 41 S.W.3d 196, 200 (Tex. App.—Houston [14th Dist.] 2001, no pet.); Ball v. Youngblood, No. 05-00-00691-CV, 2001 Tex. App. LEXIS 5660, at \*5 (Tex. App.—Dallas Aug. 21, 2001, no pet.) (not designated for publication); Chapman Child.'s Trust v. Porter & Hedges, L.L.P., 32 S.W.2d 429, 435–36 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Well Sols., Inc. v. Stafford, 32 S.W.3d 313, 316–17 (Tex. App.—San Antonio 2000, pet. denied); Hou-Tex., Inc. v. Landmark Graphics, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.); Taylor Made Hose, Inc. v. Wilkerson, 21 S.W.3d 484, 487 (Tex. App.—San Antonio 2000, pet. denied).

<sup>345</sup> *Well Sols., Inc.*, 32 S.W.3d at 316–17.

<sup>346</sup> See, e.g., Hittner & Liberato, *supra* note 343, at 447–48 (“There is dispute among the courts of appeals concerning what constitutes an implicit holding, and even if an objection may be preserved under Texas Rule of Civil Procedure 33.1(a)(2)(a) by an implicit ruling.”); Judge David Hittner & Lynee Liberato, *Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, n. 194 (2006); Omar Kilany & Prescott Scot, *Implied Rulings on Summary Judgment Objections: Preservation of Error and Appellate Rule 33.1(a)(2)(A)*, 15 APP. ADVOC. ST. B. TEX. APP. SEC. REP. 4 (2002) (published online at [www.tex-app.org](http://www.tex-app.org)); David F. Johnson, *The No-Evidence Summary Judgment In Texas*, 52 BAYLOR L. REV. 929, 966 (2000); Charles Frazier, et. al., *Recent Development: Celotex Comes To Texas: No-Evidence Summary Judgments And Other Recent Developments In Summary Judgment Practice*, 32 TEX. TECH. L. REV. 111, 132 (2000); see also WILLIAM V. DORSANEO, TEXAS LITIGATION GUIDE: APPELLATE REVIEW, § 145.03[2][a] (2007); McDONALD & CARLSON, TEXAS CIVIL PRACTICE, § 18.20 (2<sup>nd</sup> Ed. Supp. 2007); MICHOLO’CONNOR, O’CONNOR’S TEXAS RULES, CIVIL TRIAL, 499–500 (2007) (five courts find that there can be implicit rulings, eight courts find that there cannot be implicit rulings – some of the courts from both groups are the same); Tim

Take the Fort Worth Court of Appeals for an example. In *Blum v. Julian*, the court held that when a trial court granted a motion for summary judgment, an inference was created that the trial court implicitly overruled the non-movant's objections to the movant's evidence.<sup>347</sup> Similarly, in *Frazier v. Yu*, the court held an order granting a summary judgment implicitly sustained the movant's objections to the non-movant's evidence.<sup>348</sup> But, later, the court reversed course. In *Wrenn v. GATX Logistics, Inc.*, the court limited *Frazier* to the facts of that case because the trial court stated that it reviewed the "competent" evidence in the order, and held that when the record does not indicate that the trial court expressly ruled on the objections, they are waived.<sup>349</sup> Most recently, in *Mead v. RLMC, Inc.*, the court completely retreated from *Frazier*, holding that even when the trial court's summary judgment order expressly states that it considered the "competent" evidence, the movant's objections are waived.<sup>350</sup>

It is judicially inefficient for an appellate court to reverse a trial court's summary judgment, which is otherwise correct, because the trial court failed to expressly rule on proper objections to otherwise incompetent evidence. A court of appeals should analyze whether the objection was meritorious and whether the evidence should be considered.

Notwithstanding, the Texas Supreme Court has finally clarified this confusion.<sup>351</sup> In *Seim v. Allstate Tex. Lloyds*, the Court held that an order granting a summary judgment order does not give an implicit ruling on evidence objections:

After the revisions to Rule 33.1(a) became effective, we concluded in *In re Z.L.T.* that "an implicit ruling may be sufficient to preserve an issue for appellate review."<sup>352</sup> In that case, we held a ruling was implied because the implication was "clear."<sup>353</sup> But nothing in this record serves

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Patton, *Selected Unsettled Aspects of Summary Judgment Practice and Procedure*, 2-5, ADVANCED CIVIL TRIAL COURSE, (State Bar of Texas 2003).

<sup>347</sup> 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.).

<sup>348</sup> 987 S.W.2d 607, 610–11 (Tex. App.—Fort Worth 1999, pet. denied).

<sup>349</sup> 73 S.W.3d 489, 498 (Tex. App.—Fort Worth 2002, no pet.).

<sup>350</sup> 225 S.W.3d 710, 714 (Tex. App.—Fort Worth 2007, pet. denied).

<sup>351</sup> See *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 165–66 (Tex. 2018).

<sup>352</sup> *Id.* at 165 (emphasis added).

<sup>353</sup> *Id.*

as a clearly implied ruling by the trial court on Allstate's objections. Indeed, even without the objections, the trial court could have granted summary judgment against the Seims if it found that their evidence did not generate a genuine issue of material fact. Allstate has argued this very point in its briefing to this Court. And if sustaining the objections was not necessary for the trial court to grant summary judgment, how can the summary-judgment ruling be an implication that the objections were sustained?<sup>354</sup>

A cautious party will request express rulings and submit proposed rulings on summary judgment evidence in either a separate order or the order granting a summary judgment. Further, if the trial court still refuses to rule, the party should object to the trial court's failure to rule.<sup>355</sup> Rule 33.1(a) provides that regarding the ruling requirement, "the trial court: (A) ruled on the request, objection, or motion, either expressly or implicitly; *or* (B) refused to rule on the request, objection, or motion, and the complaining party objected to the refusal."<sup>356</sup> So, a party objecting to summary judgment evidence should be able to preserve error on those objections by objecting to the trial court's failure to rule. Ideally, this objection would be made on the record at the hearing on the summary judgment motion. But that may be difficult to do where it is not clear that the trial court is refusing to rule on evidence objections. It is common for trial courts to take all matters under advisement and rule later.<sup>357</sup> If the trial court later grants summary judgment but fails to rule on evidence objections, when is a party supposed to object to the court's failure to rule? Before the hearing, the author typically files a separate document that raises objections to summary judgment evidence, and in that document at the end the author raises a contingent objection to the court failing to rule (if the court fails to rule on these objections, then the party objects to the court's failure to rule per Rule 33.1(a)).<sup>358</sup> Further, while the court has plenary jurisdiction, a party can file a motion that requests the

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<sup>354</sup> *Id.* at 165–66.

<sup>355</sup> TEX. R. APP. P. 33.1(a)(2)(B); *Allen v. Albin*, 97 S.W.3d 655, 661 (Tex. App.—Waco 2002, no pet.).

<sup>356</sup> TEX. R. APP. P. 33.1(a)(2)(B).

<sup>357</sup> *See, e.g.*, *U.S. v. King*, 44 U.S. 773, 784 (1845).

<sup>358</sup> *See, e.g.*, *Iglesias v. State*, 564 S.W.3d 461, 467 (Tex. App.—El Paso 2018, no pet.).

court rule on the objections and objects to the court's failure to rule.<sup>359</sup> The party should set that motion for hearing and obtain a ruling thereon while the trial court has jurisdiction and very near the time of the summary judgment ruling.<sup>360</sup> This may be difficult to do where a party successfully has a trial court grant summary judgment and does not want to risk the court changing its mind by complaining about rulings on evidence objections. Yet, the Texas Supreme Court may require this procedure as a necessary prerequisite to raising evidence objections on appeal.

### *C. Preserving Error Regarding Objections To The Non-Disclosure of Experts*

There was a split in the intermediate courts of appeals regarding whether an undesignated expert can provide evidence in a summary judgment proceeding.<sup>361</sup> Most of the appellate courts addressing whether the discovery rules apply in a summary judgment case have applied the revised discovery rules to summary judgments.<sup>362</sup> Other courts have found that the discovery rules do not apply to summary judgment proceedings and that a trial court cannot strike an undesignated or under-designated expert.<sup>363</sup>

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<sup>359</sup> See, e.g., *Wolfe v. Devon Energy Prod. Co., LP*, 382 S.W.3d 434, 447 (Tex. App.—Waco 2012, no pet.) (court's ruling on evidence objections a month after summary judgment ruling was effective).

<sup>360</sup> *Id.*; see also *Vecchio v. Jones*, No. 01-12-00442-CV, 2013 WL 3467195, at \*13 (Tex. App.—Houston [1st Dist.] July 9, 2013, no pet.) (party waived objection to a trial court's failure to rule by waiting a year after the summary judgment ruling to raise the objection).

<sup>361</sup> Compare *Thompson v. King*, No. 12-06-00059-CV, 2007 WL 1064078, at \*2 (Tex. App.—Tyler Apr. 11, 2007, pet. denied) (mem. op., not designated for publication); and *F.W. Indus., Inc. v. McKeehan*, 198 S.W.3d 217, 220 (Tex. App.—Eastland 2005, no pet.); and *Cunningham v. Columbia/St. David's Healthcare Sys., L.P.*, 185 S.W.3d 7, 10–11 (Tex. App.—Austin 2005, no pet.); and *Villegas v. Tex. Dep't of Transp.*, 120 S.W.3d 26, 35 (Tex. App.—San Antonio 2003, pet. denied); and *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 273 (Tex. App.—Austin 2002, pet. denied); with *Alaniz v. Hoyt*, 105 S.W.3d 330, 340 (Tex. App.—Corpus Christi–Edinburg 2003, no pet.); and *Johnson v. Fuselier*, 83 S.W.3d 892, 897 (Tex. App.—Texarkana 2002, no pet.).

<sup>362</sup> *Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 881–82 (Tex. 2009).

<sup>363</sup> See, e.g., *Alaniz*, 105 S.W.3d at 339–40; *Johnson*, 83 S.W.3d at 897.

In *Chau v. Riddle*, the court of appeals affirmed a trial court's striking of expert evidence.<sup>364</sup> Even though the Texas Supreme Court reversed the court of appeals on a different issue, it noted as follows: "In this Court, Chau challenges the court of appeals' holding that the trial court did not abuse its discretion in enforcing a docket control order or in striking part of Chau's expert testimony. We agree with the court of appeals' resolution of those issues."<sup>365</sup> More recently, in *Fort Brown Villas III Condominium Ass'n v. Gillenwater*, the court held that a trial court did not abuse its discretion in striking an expert where there was no good cause shown for his untimely designation.<sup>366</sup> Accordingly, if a party intends to rely on expert evidence in a summary judgment proceeding, the party should fully designate the expert according to the Texas Rules of Civil Procedure and according to any scheduling order.

#### D. Preserving Error Regarding Adequate Time for Discovery

Courts have placed a burden on the non-movant to file a verified motion for continuance or affidavit proving up relevant facts in order to argue that there was not an adequate time for discovery—this is true even though a presumption arose that there was not an adequate time for discovery.<sup>367</sup> When the non-movant files a motion for continuance in order to collect more evidence, the motion should meet the requirements for Texas Rules of Civil Procedure 166a(g) and 252.<sup>368</sup> This can be done with an affidavit that is specific—general allegations that the attorney has personal matters, other

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<sup>364</sup> 212 S.W.3d 699, 702 (Tex. App.—Houston [1st Dist.] 2006), *rev'd*, 254 S.W.3d 453 (Tex. 2008).

<sup>365</sup> *Chau v. Riddle*, 254 S.W.3d at 455.

<sup>366</sup> 285 S.W.3d 879, 882 (Tex. 2009).

<sup>367</sup> *Collinsworth v. Eller Media Co.*, No. 01-01-00749-CV, 2003 WL 21299954, at \*2 (Tex. App.—Houston [1st Dist.] June 5, 2003, no pet.) (mem. op., not designated for publication); *Sparks v. Butler Mfg. Co.*, No. 05-99-00115-CV, 1999 WL 1051654, at \*3 (Tex. App.—Dallas Nov. 22, 1999, no pet.) (not designated for publication); *Hopkins v. Kuehm*, No. 03-98-00514-CV, 1999 WL 603667, at \*2 (Tex. App.—Austin Aug. 12, 1999, pet. denied) (not designated for publication.); *Flores v. Snelling*, No. 06-98-00046-CV, 1999 WL 482198, at \*1 (Tex. App.—Texarkana July 9, 1999, no pet.) (not designated for publication); *Jaimes v. Fiesta Mart, Inc.*, 21 S.W.3d 301, 304 (Tex. App.—Houston [1st Dist.] 1999, pet. denied). *But see Keszler v. Mem'l Med. Ctr.*, 105 S.W.3d 122, 130 n.10 (Tex. App.—Corpus Christi—Edinburg 2003, no pet.).

<sup>368</sup> *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996).

cases, or insufficient time are not enough.<sup>369</sup> The affidavit should set out the identity of the specific type of discovery or other affidavit needed, the person from whom it is sought, and the information that will be obtained.<sup>370</sup>

The non-movant will need to show in detail how the needed discovery is material to the challenged element.<sup>371</sup> Further, the non-movant will need to show in detail how he has been diligent in attempting to secure the needed evidence and why he has been unable to secure the evidence in a timely fashion.<sup>372</sup>

The motion for continuance must have affidavits or sworn testimony to prove up all factual allegations.<sup>373</sup> The safest practice is to request a hearing and present sworn proof as to the need for a continuance following the above listed requirements.<sup>374</sup> Lastly, courts have ruled differently on whether a non-movant has to get an express ruling by the court on a motion in order to preserve error.<sup>375</sup> However, the safest course is to always get an express ruling or object to the court's failure to rule.

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<sup>369</sup> Cronen v. Nix, 611 S.W.2d 651, 653 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

<sup>370</sup> TEX. R. CIV. P. 252; Rocha v. Faltys, 69 S.W.3d 315, 319 (Tex. App.—Austin 2002, no. pet.); Gabaldon v. Gen. Motors Corp., 876 S.W.2d 367, 370 (Tex. App.—El Paso 1993, no writ).

<sup>371</sup> TEX. R. CIV. P. 252; J.E.M. v. Fid. & Cas. Co., 928 S.W.2d 668, 676 (Tex. App.—Houston [1st Dist.] 1996, no writ).

<sup>372</sup> TEX. R. CIV. P. 252; Gregg v. Cecil, 844 S.W.2d 851, 853 (Tex. App.—Beaumont 1992, no writ); Rhima v. White, 829 S.W.2d 909, 912 (Tex. App.—Fort Worth 1992, writ denied).

<sup>373</sup> TEX. R. CIV. P. 166a(g); Casey v. Interstate Bldg. Maint., Inc., No. 03-99-00524-CV, 2000 WL 422901, at \*2 (Tex. App.—Austin Apr. 20, 2000, no pet.) (not designated for publication); Crow v. Rockett Special Util. Dist., 17 S.W.3d 320, 328 (Tex. App.—Waco 2000, pet. denied).

<sup>374</sup> Roob v. Von Bereghshasy, 866 S.W.2d 765, 766 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

<sup>375</sup> Compare Williams v. Bank One, 15 S.W.3d 110, 114 (Tex. App.—Waco 1999, no pet.) (deciding under new Texas Rule of Appellate Procedure 33.1, a non-movant does not have to have an express ruling on the trial court's denial of his motion for continuance to preserve error, and the trial court's granting of the summary judgment and holding of hearing is an implicit overruling of the non-movant's motion); with Casey, 2000 WL 422901, at \*2 (party must object to the court's failure to rule or waive error); and Washington v. Tyler Indep. Sch. Dist., 932 S.W.2d 686, 690 (Tex. App.—Tyler 1996, no writ) (decided under the former Texas Rule of Appellate Procedure 52(a), which required an express ruling).

*E. Preserve Complaint Regarding Opponent's Failure to Produce Evidence in Discovery*

If a non-movant needs discovery from the movant in order to respond to the movant's motion for summary judgment, he should: (1) file a motion to compel, (2) set a hearing, and (3) get the trial court's ruling before the hearing on the no-evidence motion.<sup>376</sup> But the non-movant can still file a motion for continuance because a trial court will not err in granting a properly filed, valid motion despite outstanding discovery issues.<sup>377</sup> The filing of a motion to compel can also be a factor in a court of appeals determination of whether there was an adequate time for discovery.<sup>378</sup>

*F. Preserve Complaint Regarding Notice of Hearing*

If the movant did not provide the non-movant with twenty-one days' notice of the hearing, the non-movant should file an objection and a motion for continuance based on the untimely notice. The non-movant will waive any objection to the faulty notice if he fails to object to it in a timely fashion after he has knowledge of the improper notice.<sup>379</sup> This objection should be made before the hearing, but the latest the non-movant can raise it is in a motion for new trial.<sup>380</sup> All that is required is that the non-movant formally object and present proof that he did not receive proper notice.<sup>381</sup> Once again, the safest practice is to request a hearing and present sworn proof as to the lack of notice.<sup>382</sup>

Whether error is preserved depends on the circumstances of when notice was actually received. "[I]f a party receives notice that is untimely, but sufficient to enable the party to attend the summary judgment hearing, [a]

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<sup>376</sup> Anderson v. Tu Elec., No. 05-99-01255-CV, 2000 WL 567045, at \*3 (Tex. App.—Dallas May 3, 2000, no pet.) (not designated for publication); Casey, 2000 WL 422901, at \*3.

<sup>377</sup> Joe v. Two Thirty Nine Joint Venture, 145 S.W.3d 150, 162 (Tex. 2004).

<sup>378</sup> Hayes v. Woods, No. 05-00-01121-CV, 2001 WL 727347, at \*2 (Tex. App.—Dallas June 29, 2001, no pet.) (not designated for publication).

<sup>379</sup> Ajibade v. Edinburg Gen. Hosp., 22 S.W.3d 37, 40 (Tex. App.—Corpus Christi—Edinburg 2000, pet. struck); Veal v. Veterans Life Ins. Co., 767 S.W.2d 892, 895 (Tex. App.—Texarkana 1989, no writ).

<sup>380</sup> Johnson, *supra* note 346, at 962.

<sup>381</sup> Guinn v. Zarsky, 893 S.W.2d 13, 17 (Tex. App.—Corpus Christi—Edinburg 1994, no writ).

<sup>382</sup> Roob v. Von Bereghshay, 866 S.W.2d 765, 766 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

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party must file a motion for continuance and/or raise the complaint of late notice in writing, supported by affidavit evidence . . . .”<sup>383</sup> However, if a party receives no notice of the summary judgment hearing or “is deprived of its right to seek leave to file additional affidavits or other written response[s],” the error may be preserved in a post-trial motion.<sup>384</sup>

*G. Preserving Right To Correct Defects In Evidence*

A trial court should give the non-movant an opportunity to correct any defects that the movant has pointed out in the non-movant’s response or evidence.<sup>385</sup> “Defects in the form of an affidavit must be objected to, and the opposing party must have the opportunity to amend the affidavit.”<sup>386</sup> As the Fort Worth Court of Appeals stated:

Rule 166a(f) indicates that a party offering an affidavit that is defective in form, as pointed out by the opposing party, should have the “opportunity” to amend. . . . A defect is substantive if the summary judgment proof is incompetent; it is formal if the summary judgment proof is competent, but inadmissible.<sup>387</sup>

For example, in *Keeton v. Carrasco*, the defendant objected to the summary judgment use of an expert affidavit on the day of the summary judgment hearing.<sup>388</sup> At the summary judgment hearing, the plaintiffs tendered an amended expert affidavit to the trial court, but the trial court denied them leave to file the amended report.<sup>389</sup> The appellate court reversed,

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<sup>383</sup> *Fertic v. Spencer*, 247 S.W.3d 242, 247 (Tex. App.—El Paso 2007, pet. denied).

<sup>384</sup> *Id.* at 248 n.4.

<sup>385</sup> *Rollins v. Uribe*, No. 12-19-00262-CV, 2020 WL 1283904, at \*2 (Tex. App.—Tyler Mar. 18, 2020, no pet.) (mem. op., not designated for publication); *Webster v. Allstate Ins. Co.*, 833 S.W.2d 747, 749 (Tex. App.—Houston [1st Dist.] 1992, no writ).

<sup>386</sup> *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied).

<sup>387</sup> *Tri-Steel Structures, Inc. v. Baptist Found.*, 166 S.W.3d 443, 448 (Tex. App.—Fort Worth 2005, pet. denied).

<sup>388</sup> 53 S.W.3d 13, 22 (Tex. App.—San Antonio 2001, pet. denied).

<sup>389</sup> *Id.* at 24.



holding that the trial court should have given the plaintiffs the opportunity to amend their expert's affidavit.<sup>390</sup>

The non-movant will need to ask for a continuance to get additional time to correct errors in his response or evidence.<sup>391</sup> If the non-movant does not or cannot correct a defect in its evidence, then a court may strike the evidence and grant the movant's motion by default.<sup>392</sup> Moreover, a court does not need to allow a party the chance to amend evidence to correct an error of substance.<sup>393</sup>

## X. FINALITY OF SUMMARY JUDGMENT ORDERS

The first step in appealing a summary judgment is determining whether the order is a final judgment that can be appealed. Generally, Texas appellate courts may review only final judgments, and there can be only one final judgment in any case.<sup>394</sup> Further, an appellate court must determine if it has jurisdiction to review an appeal, even if it must be done *sua sponte*.<sup>395</sup> If an

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<sup>390</sup> *Id.*; see also *Garcia v. Willman*, 4 S.W.3d 307, 311 (Tex. App.—Corpus Christi—Edinburg 1999, no pet.); *Wyatt v. McGregor*, 855 S.W.2d 5, 17 (Tex. App.—Corpus Christi—Edinburg 1993, writ denied).

<sup>391</sup> *Marty's Food & Wine, Inc. v. Starbucks Corp.*, No. 05-01-00008-CV, 2002 WL 31410923, at \*5 (Tex. App.—Dallas Oct. 28, 2002, no pet.) (not designated for publication); *Brown v. Wong*, No. 05-99-00706-CV, 2000 WL 433973, at \*3 (Tex. App.—Dallas Apr. 24, 2000, pet. denied) (not designated for publication); *Eckmann v. Des Rosiers*, 940 S.W.2d 394, 400 (Tex. App.—Austin 1997, no writ); *Peerenboom v. HSP Foods, Inc.*, 910 S.W.2d 156, 160 (Tex. App.—Waco 1995, no writ); *Webster v. Allstate Ins. Co.*, 833 S.W.2d 747, 750 (Tex. App.—Houston [1st Dist.] 1992, no writ).

<sup>392</sup> See *Sparks v. Butler Mfg. Co.*, No. 05-99-00115-CV, 1999 WL 1051654, at \*3 (Tex. App.—Dallas Nov. 22, 1999, no pet.) (not designated for publication.); *Tex. Smac, LLC v. EMJ Corp.*, No. 04-18-00391-CV, 2019 WL 1923048, at \*3 (Tex. App.—San Antonio May 1, 2019, pet. denied) (mem. op., not designated for publication).

<sup>393</sup> *Williams v. G&E REIT II Ennis MOB, LLC*, No. 10-16-00325-CV, 2017 WL 1749798, at \*4 (Tex. App.—Waco May 3, 2017, no pet.) (mem. op., not designated for publication); *Olsen v. Comm'n for Lawyer Discipline*, 347 S.W.3d 876, 886 (Tex. App.—Dallas 2011, pet. denied).

<sup>394</sup> *Colquitt v. Brazoria Cnty.*, 324 S.W.3d 539, 542 (Tex. 2010); *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985).

<sup>395</sup> *N.Y. Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 678 (Tex. 1990) (per curiam); see also *Di Ferrante v. Georgiades*, No. 14-96-01199-CV, 1997 WL 213844, at \*2 (Tex. App.—Houston [14th Dist.] May 1, 1997, writ denied) (per curiam) (not designated for publication); *Welch v. McDougal*, 876 S.W.2d 218, 220 (Tex. App.—Amarillo 1994, writ denied).

appellate court rules without jurisdiction to do so, then any judgment entered by the appellate court is void and of no effect.<sup>396</sup>

A judgment rendered after a trial on the merits is presumed final and appealable, even absent clear language so stating.<sup>397</sup> But “when there has been no traditional trial on the merits, no presumption arises regarding the finality of a judgment.”<sup>398</sup> For example, summary judgments are not afforded the finality presumption; rather, they are presumed to be interlocutory and not appealable.<sup>399</sup> Ordinarily, the order granting summary judgment must expressly dispose of all parties and all issues in the case in order for it to be a final, appealable judgment.<sup>400</sup> If the order does not dispose of all issues and all parties, it normally will be considered interlocutory and not appealable.<sup>401</sup>

#### A. *Mafrige v. Ross*

A problem arises when a trial court’s order does not expressly dispose of all issues and parties but includes a Mother Hubbard clause. “A Mother Hubbard clause generally recites that all relief not expressly granted is denied.”<sup>402</sup> Is the order final and appealable, which starts the appellate timetable running, or is the order interlocutory?

In *Mafrige v. Ross*, the trial court granted several of the defendant’s summary judgment motions.<sup>403</sup> In each of the orders, the trial court used essentially the following language: “It is . . . therefore, ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of Defendant . . . should in all things be granted and that Plaintiff . . . take nothing against Defendant.”<sup>404</sup> The plaintiffs appealed the summary

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<sup>396</sup> *Di Ferrante*, 1997 WL 213844, at \*2 n.2; see also *Johnson v. State*, 747 S.W.2d 568, 569 (Tex. App.—Houston [14th Dist.] 1988, no writ).

<sup>397</sup> *Vaughn v. Drennon*, 324 S.W.3d 560, 562–63 (Tex. 2010); *John v. Marshall Health Serv., Inc.*, 58 S.W.3d 738, 740 (Tex. 2001); *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 312 (Tex. 1994).

<sup>398</sup> *Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009) (per curiam).

<sup>399</sup> *Hood v. Amarillo Nat’l Bank*, 815 S.W.2d 545, 547 (Tex. 1991).

<sup>400</sup> *Cont’l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276–77 (Tex. 1996); *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).

<sup>401</sup> *Mafrige*, 866 S.W.2d at 591.

<sup>402</sup> *Id.* at 592 n.1.

<sup>403</sup> *Id.* at 590–91.

<sup>404</sup> *Id.* at 590.

judgments and argued that they were final orders because of the Mother Hubbard language.<sup>405</sup> The court of appeals held that the summary judgment orders were interlocutory because they failed to address one or more of the causes of action asserted by the plaintiffs.<sup>406</sup> Therefore, the court of appeals dismissed the appeal for want of jurisdiction.<sup>407</sup> The Texas Supreme Court reversed the judgment of the court of appeals.<sup>408</sup> The court stated:

If a summary judgment order appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal. If the judgment grants more relief than requested, it should be reversed and remanded, but not dismissed. . . . [L]itigants should be able to recognize a judgment which on its face purports to be final, and courts should be able to treat such a judgment as final for purposes of appeal.<sup>409</sup>

The court reversed and remanded the case for further proceedings on the merits because the trial court's order was final and the plaintiffs correctly appealed it.<sup>410</sup> Further, the court held that if the Mother Hubbard language in a summary judgment order has the effect of granting more relief than was requested, the appellate court should reverse and remand the summary judgment, but not dismiss the appeal.<sup>411</sup> If the plaintiffs had failed to timely appeal the apparently interlocutory summary judgment order, they would have lost their appeal. The Mother Hubbard language turned what clearly appeared to be an interlocutory judgment into a final, appealable one.

The Texas Supreme Court reinforced *Mafrige* and its bright line rule in *English v. Union State Bank*.<sup>412</sup> The court ruled that a summary judgment was final because it included Mother Hubbard-type language which purported to be final.<sup>413</sup> The court stated:, “[t]o avoid waiver, [the plaintiff] was required

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<sup>405</sup> *Id.* at 590–91.

<sup>406</sup> *Id.* at 591.

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 592.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.*

<sup>411</sup> *Id.*

<sup>412</sup> 945 S.W.2d 810, 811 (Tex. 1997).

<sup>413</sup> *Id.* at 809.

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either to ask the trial court to correct the first summary judgment while the court retained plenary power or to perfect a timely appeal of that judgment.”<sup>414</sup> Since the plaintiff did neither, the court of appeals had no jurisdiction to decide the merits of the appeal. The court dismissed the plaintiff’s appeal, reversed the judgment of the court of appeals, and rendered judgment dismissing the appeal for want of jurisdiction.<sup>415</sup>

*B. Reversal of Mafrige*

In 2001, the Texas Supreme Court reversed *Mafrige* and held that Mother Hubbard language did not make an otherwise interlocutory judgment a final appealable judgment.<sup>416</sup> The court stated:

[I]n cases in which only one final and appealable judgment can be rendered, a judgment issued without a conventional trial is final for purposes of appeal if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties.<sup>417</sup>

Apparently, the court found that Mother Hubbard language, in general, did not state “with unmistakable clarity” that the judgment was final:

Much confusion can be dispelled by holding, as we now do, that the inclusion of a Mother Hubbard clause—by which we mean the statement, “all relief not granted is denied,” or essentially those words—does not indicate that a judgment without a conventional trial is final for purposes of appeal. We overrule *Mafrige* to the extent it states otherwise.<sup>418</sup>

Accordingly, Mother Hubbard language like “all relief not expressly granted is denied” no longer makes an otherwise interlocutory order final and

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<sup>414</sup> *Id.* at 811.

<sup>415</sup> *Id.*

<sup>416</sup> *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 203–04 (Tex. 2001).

<sup>417</sup> *Id.* at 192–93.

<sup>418</sup> *Id.* at 203–04.

appealable.<sup>419</sup> The court stated that language such as “this judgment finally disposes of all parties and all claims and is appealable” is unmistakably clear and does make an order final and appealable even if the order does not dispose of all parties and all claims.<sup>420</sup> The court stated that language such as “[t]his judgment finally disposes of all parties and all claims and is appealable” is unmistakably clear and does make an order final and appealable even if the order does not dispose of all parties and all claims.<sup>421</sup> But where the order does not contain finality language, state that it is a final order, or dispose of all claims and parties, then it is not final and appealable.<sup>422</sup>

Since *Lehmann*, the Texas Supreme Court has continued to discuss finality of summary judgment orders.<sup>423</sup> In *Farm Bureau County Mutual Insurance Co. v. Rogers*, the Texas Supreme Court held that a summary judgment was not final because it did not resolve a claim for attorney’s fees.<sup>424</sup> “[W]e agree with Rogers that the order at issue here did not dispose of all parties and claims, because neither the language taxing court costs nor the Mother Hubbard clause disposed of the parties’ claims for attorney’s fees.”<sup>425</sup> The court went on to state:

Mother Hubbard clauses do not, on their face, implicitly dispose of claims not expressly mentioned in the order, including claims for attorney’s fees. Instead, 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. To hold otherwise would simply resurrect the issues we put to rest in *Lehmann* and *McNally*, albeit in a slightly different form.<sup>426</sup>

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<sup>419</sup> *Id.*; see also *Parking Co. of Am. v. Wilson*, 58 S.W.3d 742, 742 (Tex. 2001); *Bobbitt v. Stran*, 52 S.W.3d 734, 735 (Tex. 2001); *Clark v. Pimienta*, 47 S.W.3d 485, 486 (Tex. 2001) (per curiam); *Guajardo v. Conwell*, 46 S.W.3d 862, 864 (Tex. 2001).

<sup>420</sup> *Lehmann*, 39 S.W.3d at 206.

<sup>421</sup> *Id.*

<sup>422</sup> *Bison Bldg. Materials, Ltd. v. Aldridge*, 422 S.W.3d 582, 585 (Tex. 2012).

<sup>423</sup> *Farm Bureau Cnty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 163–64 (Tex. 2015).

<sup>424</sup> *Id.* at 164.

<sup>425</sup> *Id.* at 163.

<sup>426</sup> *Id.* at 164 (citations omitted).

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In *In re Daredia*, a plaintiff obtained a default judgment against one defendant that contained a statement that it disposed of all parties and all claims and was final.<sup>427</sup> The judgment was not final, however, because there was another defendant in the suit.<sup>428</sup> More than fifteen months after the default, the plaintiff attempted to file a motion for judgment nunc pro tunc to correct “typographical errors” and clarify that it was interlocutory.<sup>429</sup> After the trial court granted the motion, the defendant filed a petition for writ of mandamus, arguing that the judgment was final and ended the litigation.<sup>430</sup> The Texas Supreme Court agreed with the defendant, stating:

But the lack of any basis for rendering judgment against Daredia did not preclude dismissing him from the case. Even if dismissal was inadvertent, as American Express insists, it was nonetheless unequivocal, and therefore effective. American Express complains that the trial court never made a substantive disposition of its claims against Daredia, but dismissal is not a ruling on the merits. We conclude that the judgment by its clear terms disposed of all claims and parties and was therefore final.

. . . .

American Express complains that the judgment, if not corrected, will give Daredia a windfall, but being given the relief an opponent requests can hardly be considered a windfall. Further, had American Express acted promptly in pursuing its claim against Daredia, before and after suit, counsel’s error in allowing the claim to be dismissed could have been rectified, either by timely moving to reinstate the case, or perhaps by refile the lawsuit. We conclude that the trial court clearly abused its discretion in setting aside a

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<sup>427</sup> 317 S.W.3d 247, 248 (Tex. 2009) (per curiam).

<sup>428</sup> *Id.* at 250.

<sup>429</sup> *Id.* at 248.

<sup>430</sup> *Id.*

judgment after its plenary power expired. Daredia has no adequate remedy at law.<sup>431</sup>

In *Ford v. Exxon Mobil Chemical Co.*, the court found that a summary judgment order was final even though it awarded a lump sum and did not itemize every element of damages:

ExxonMobil argues that the undisputed summary judgment evidence established attorney's fees of \$36,167 and expert fees of \$1,500, and that the trial court's award of precisely \$36,167 means it adjudicated only the former. But the award was a lump sum that did not specify what it was for; that it may have been incorrect if it did not include both fees does not mean it was interlocutory. We have never held that an order disposing of all claims can be final only if it itemizes each and every element of damages pleaded. Similarly, a summary judgment order clearly disposing of a suit is final even if it does not break down that ruling as to each element of duty, breach, and causation. Accordingly, we hold this order granting a lump sum for all Ford's claims is final.<sup>432</sup>

In *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, the court found that a default judgment was interlocutory because it did not address the plaintiff's claim for punitive damages.<sup>433</sup> Interestingly, the default judgment had statements about issuing writs and executing on the judgment that would indicate it was intended to be a final judgment.<sup>434</sup> But the court found that this was not sufficient to make it final: "We cannot conclude that language permitting execution 'unequivocally express[es]' finality in the absence of a judgment that actually disposes of all parties and all claims."<sup>435</sup>

In *M.O. Dental Lab v. Rape*, the court found that a summary judgment order was final where it stated only that "[n]o dangerous condition existed"

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<sup>431</sup> *Id.* at 249–50 (citations omitted). *See also* *Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009) (per curiam) (order from nonsuit was not final where no statement of finality and where sanctions claim was still pending).

<sup>432</sup> 235 S.W.3d 615, 617 (Tex. 2007) (emphasis omitted) (footnote omitted) (citations omitted).

<sup>433</sup> 167 S.W.3d 827, 829–30 (Tex. 2005).

<sup>434</sup> *Id.* at 830.

<sup>435</sup> *Id.* (alteration in original).

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and defendant “committed no acts of negligence.”<sup>436</sup> In *Ritzell v. Espeche*, the court concluded that the summary judgment order was final where it stated that the plaintiff take nothing and found that the order was incorrectly granted but final.<sup>437</sup>

The courts of appeals have taken heed of *Lehmann* and have held that Mother Hubbard language, alone, is not sufficient to make an order final and appealable.<sup>438</sup>

In *McNally*, the defendants filed a motion for summary judgment but failed to request summary judgment on their counterclaim for attorneys’ fees.<sup>439</sup> Although the trial court’s order granted the motion and taxed court costs against the plaintiff, the Texas Supreme Court concluded that “[n]othing in the trial court’s judgment, other than its award of costs to the defendants, suggests that it intended to deny the defendants’ claim for attorney [sic] fees. The award of costs, by itself, does not make the judgment final.”<sup>440</sup> The court held that the resolution of a claim for court costs did not dispose of a claim for attorneys’ fees and did not serve as an indicium of finality.<sup>441</sup>

The following provisions are sufficient to be unmistakably clear that the order is intended to be final and appealable:

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<sup>436</sup> 139 S.W.3d 671, 674–75 (Tex. 2004).

<sup>437</sup> 87 S.W.3d 536, 538 (Tex. 2002). *See also* *Jacobs v. Satterwhite*, 65 S.W.3d 653, 655 (Tex. 2001).

<sup>438</sup> *Sabre Oil & Gas Corp. v. Gibson*, 72 S.W.3d 812, 815 (Tex. App.—Eastland 2002, pet. denied); *Yazdchi v. Bennett L. Firm*, No. 14-01-00928-CV, 2002 WL 1163568, at \*1 (Tex. App.—Houston [14th Dist.] May 30, 2002, no pet.) (mem. op., not designated for publication); *Phillips v. Baker*, No. 14-02-01099-CV, 2002 WL 31718870, at \*2 (Tex. App.—Houston [14th Dist.] Dec. 5, 2002, no pet.) (mem. op., not designated for publication).

<sup>439</sup> *McNally v. Guevara*, 52 S.W.3d 195, 195 (Tex. 2001). *But see* *In re Certain Underwriters at Lloyd’s London*, No. 01-09-00851-CV, 2010 WL 184300, at \*3 (Tex. App.—Houston [1st Dist.] Jan. 15, 2010, no pet.) (mem. op., not designated for publication) (holding that when parties did present claims for attorney’s fees in a summary judgment motion, the summary judgment order was final and appealable).

<sup>440</sup> *McNally*, 52 S.W.3d at 196.

<sup>441</sup> *Id.*



(1) judgment stated, in part, “that [plaintiff] take nothing against [defendants] by its suit” and taxed costs against the parties;<sup>442</sup>

(2) judgment that stated that “This is the Final Judgment of the Court disposing of all parties and claims,” was final;<sup>443</sup>

(3) judgment disposes of “*all claims* between the only existing parties”;<sup>444</sup>

(4) judgment disposes of all of the plaintiff’s claims and the defendant’s “various counterclaims”;<sup>445</sup>

(5) judgment stated “all issues and matters between [the parties] have been decided, and that this Order constitutes a final judgment”;<sup>446</sup>

(6) judgment stated the court “is of the opinion that the Motions for Summary Judgment should be granted as to all claims asserted by Plaintiff”;<sup>447</sup>

(7) judgment stated that the “[j]udgment on all claims is entered in favor of Defendant”;<sup>448</sup> and

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<sup>442</sup> Tex. Integrated Conveyor Sys., Inc. v. Innovative Conveyor Concepts, Inc., 300 S.W.3d 348, 362 (Tex. App.—Dallas 2009, pet. denied).

<sup>443</sup> Rehab 2112, L.L.C. v. Audio Images Int’l Inc., 168 S.W.3d 308, 311 (Tex. App.—Dallas 2005, no pet.).

<sup>444</sup> Lopez v. Yates, No. 14-01-00649-CV, 2002 WL 31599472, at \*2 (Tex. App.—Houston [14th Dist.] Nov. 21, 2002, no pet.) (not designated for publication).

<sup>445</sup> Clark v. Bula, No. 05-01-00887-CV, 2002 WL 1371195, at \*2 (Tex. App.—Dallas June 26, 2002, no pet.) (quoting Lehmann v. Har-Con Corp., 39 S.W.3d 191, 200 (Tex. 2001)) (not designated for publication).

<sup>446</sup> Arredondo v. City of Dallas, 79 S.W.3d 657, 660 n.7 (Tex. App.—Dallas 2002, pet. denied) reh’g overruled by 415 S.W.3d 327 (Tex. App.—Dallas, Aug. 13, 2013).

<sup>447</sup> Alashmawi v. IBP, Inc., 65 S.W.3d 162, 167 (Tex. App.—Amarillo 2001, pet. denied).

<sup>448</sup> Murphy v. Gulf States Toyota, Inc., No. 01-00-00740-CV, 2001 WL 619557, at \*2 n.2 (Tex. App.—Houston [1st Dist.] June 7, 2001, no pet.) (not designated for publication).

(8) judgment stated that “[a]s a result of the other orders signed on this date, this is a final judgment.”<sup>449</sup>

But courts of appeals have also held that language that is very similar to, or is, Mother Hubbard language is also unmistakably clear under the facts and circumstances of those cases.<sup>450</sup>

In determining whether a judgment is final, an appellate court should look to the four corners of the judgment and also to the appellate record to determine the claims asserted, the claims addressed by the judgment, and the claims intended to be addressed.<sup>451</sup> But a trial court cannot make an order final by signing a subsequent order (a clarification order) that states that the prior order was final and appealable.<sup>452</sup> If the court of appeals is still uncertain as to the finality of the judgment, it can abate the appeal and remand the case to the trial court for clarification.<sup>453</sup>

Most importantly, if a judgment does not dispose of all claims or parties, but it erroneously states that it does, it starts the appellate deadlines anyway.<sup>454</sup> For example, if a defendant files a motion for summary judgment on one of four claims raised by the plaintiff, and the trial court grants the

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<sup>449</sup> Capstead Mortg. Corp. v. Sun Am. Mortg. Corp., 45 S.W.3d 233, 235 (Tex. App.—Amarillo 2001, no pet.) (quoting *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2001)) (alteration in original).

<sup>450</sup> *Morales v. Craig*, No. 03-99-00553-CV, 2001 WL 617187, at \*1 n.7 (Tex. App.—Austin June 7, 2001, no pet.) (not designated for publication) (stating that the take nothing language and Mother Hubbard language was sufficient to constitute final judgment); *Hodde v. Portanova*, No. 14-99-00656-CV, 2001 WL 224940, at \*1 (Tex. App.—Houston [14th Dist.] Mar. 8, 2001, no pet.) (not designated for publication) (“[plaintiffs] take nothing by their action”).

<sup>451</sup> *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205–06 (Tex. 2001).

<sup>452</sup> *Guajardo v. Conwell*, 46 S.W.3d 862, 864 (Tex. 2001). *But see Lehmann*, 39 S.W.3d at 205; *Lopez v. Sulak*, 76 S.W.3d 597, 603 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.) (stating that the fact that an order awards costs does not, in and of itself, make the order final and appealable); *City of Houston v. Hous. Firemen’s Relief & Ret. Fund*, No. 01-00-00739-CV, 2002 WL 437253, at \*4–5 (Tex. App.—Houston [1st Dist.] Mar. 21, 2002, no pet.) (not designated for publication).

<sup>453</sup> *Lehmann*, 39 S.W.3d at 206; *see, e.g., Vansteen Marine Supply, Inc. v. Twin City Fire Ins. Co.*, 93 S.W.3d 516, (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (court of appeals reviewed reporter’s record to determine finality); *Walker v. City of Georgetown*, 86 S.W.3d 249, 253–54 (Tex. App.—Austin 2002, pet. denied).

<sup>454</sup> *Lehmann*, 39 S.W.3d at 204; *see also Ritzell v. Espeche*, 87 S.W.3d 536, 538 (Tex. 2002); *Kleven v. Tex. Dept. of Crim. Just.*, 69 S.W.3d 341, 344 (Tex. App.—Texarkana 2002, no pet.); *Haas v. George*, 71 S.W.3d 904, 909–10 (Tex. App.—Texarkana 2002, no pet.).

motion and signs a judgment that states that it is final and that the plaintiff takes nothing, the judgment is erroneous but final and appealable.<sup>455</sup>

If the appellant does not file a notice of appeal from a judgment that purports to be final, though it is actually not, the judgment still becomes final and un-appealable. But if that purportedly final judgment is appealed, and after reviewing the record the appellate court determines that it is not a final judgment, then the appellate court will either dismiss the appeal or abate the appeal and remand the case to the trial court to determine whether to render a final judgment.<sup>456</sup> If a summary judgment is not final, a trial court may make it final by severing the claims or parties resolved by the order from other pending claims or parties.<sup>457</sup> It should be noted, however, that if the severance is contingent on some future event, it may not create a final order.<sup>458</sup>

### C. *Challenging Interlocutory Summary Judgments*

“The issues determined on a motion for partial summary judgment are final, even though the judgment is interlocutory.”<sup>459</sup> “After an interlocutory, partial summary judgment is granted, the issues it decides cannot be litigated further [in the trial court], unless the trial court sets the partial summary judgment aside or the summary judgment is reversed on appeal.”<sup>460</sup>

## XI. STANDARDS OF APPELLATE REVIEW

### A. *Order of Review*

When a party moves for both traditional and no-evidence summary judgments, an appellate court should first consider the no-evidence motion.<sup>461</sup>

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<sup>455</sup> *Lehmann*, 39 S.W.3d at 204.

<sup>456</sup> *See, e.g., Bobbitt v. Stran*, 52 S.W.3d 734, 735 (Tex. 2001) (affirmed dismissal of appeal); *McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001) (remanded to court of appeals to determine whether to abate appeal).

<sup>457</sup> *Doe I v. Pilgrim Rest Baptist Church*, 218 S.W.3d 81, 82 (Tex. 2007).

<sup>458</sup> *Id.*

<sup>459</sup> *Trevino & Assocs. Mech., L.P. v. Frost Nat. Bank*, 400 S.W.3d 139, 144 (Tex. App.—Dallas 2013, no pet.).

<sup>460</sup> *Id.*

<sup>461</sup> *KMS Retail Rowlett v. City of Rowlett*, 593 S.W.3d 175, 181 (Tex. 2018); *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017); *First United Pentecostal*

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The Texas Supreme Court stated as follows regarding review of a dual motion for summary judgment:

The non-movants, here the plaintiffs, must produce summary judgment evidence raising a genuine issue of material fact to defeat the summary judgment under that provision. A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced. If the plaintiffs fail to produce more than a scintilla of evidence under that burden, then there is no need to analyze whether Ford's proof satisfied the Rule 166a(c) burden.<sup>462</sup>

If the non-movant fails to meet its burden under the no-evidence motion, there is no need to address the challenge to the traditional motion as it necessarily fails.<sup>463</sup> "Any claims that survive the no-evidence review will then be reviewed under the traditional standard."<sup>464</sup>

### *B. Traditional Summary Judgment*

Appellate review of a trial court's summary judgment ruling is de novo.<sup>465</sup> "The scope of a trial court's power to render summary judgment is measured by the scope of the predicate motion for summary judgment and the specific grounds stated therein," and the court's de novo review is limited accordingly.<sup>466</sup>

The appellate court may look only to evidence that was presented to the trial court.<sup>467</sup> The *Totman* court stated:

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Church v. Parker, 514 S.W.3d 214, 219 (Tex. 2017); Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 600 (Tex. 2004).

<sup>462</sup> Ford Motor Co., 135 S.W.3d at 600 (citations omitted).

<sup>463</sup> Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 248 (Tex. 2013).

<sup>464</sup> Parker, 514 S.W.3d at 219–20.

<sup>465</sup> Ortiz v. State Farm Lloyds, 589 S.W.3d 127, 131 (Tex. 2019); Laverie v. Wetherbe, 517 S.W.3d 748, 752 (Tex. 2017); Cantey Hanger, LLP v. Byrd, 467 S.W.3d 477, 481 (Tex. 2015); Merriman, 407 S.W.3d at 248; Shivers v. Texaco Expl. & Prod., 965 S.W.2d 727, 730 (Tex. App.—Texarkana 1998, pet. denied).

<sup>466</sup> Hardaway v. Nixon, 544 S.W.3d 402, 412 (Tex. App.—San Antonio 2017, pet. denied).

<sup>467</sup> H.S.M. Acquisitions, Inc. v. West, 917 S.W.2d 872, 877–78 (Tex. App.—Corpus Christi–Edinburg 1996, writ denied); see also E.B. Smith Co. v. U.S. Fid. & Guar. Co., 850 S.W.2d

The question on appeal is not whether the summary judgment proof presented raises material fact issues with regard to the essential elements of a cause of action or defense, but whether the evidence presented to the trial court establishes, as a matter of law, no genuine material fact issue exists as to one or more of the essential elements of plaintiff's cause of action.<sup>468</sup>

The question on appeal, as well as in the trial court, is whether the movant has established that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.<sup>469</sup>

### C. *No-Evidence Summary Judgment*

There has been some confusion and disagreement about the appropriate standard of review over a no-evidence motion for summary judgment. Some appellate courts hold that a no-evidence motion should have a *de novo* standard of review just like a traditional motion for summary judgment.<sup>470</sup>

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621, 624 (Tex. App.—Corpus Christi—Edinburg 1993, writ denied); *Totman v. Control Data Corp.*, 707 S.W.2d 739, 742–43 (Tex. App.—Fort Worth 1986, no writ).

<sup>468</sup> 707 S.W.2d at 742.

<sup>469</sup> TEX. R. CIV. P. 166a(c); *see also* *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985).

<sup>470</sup> *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 156 (Tex. 2004); *DTND Sierra Invs., LLC v. Deutsche Bank Nat'l Tr. Co.*, No. 04-12-00817-CV, 2013 WL 4483436, at \*1 (Tex. App.—San Antonio Aug. 21, 2013, pet. denied) (mem. op., not designated for publication); *Simulis, L.L.C. v. Gen. Elec. Capital Corp.*, No. 14-06-00701-CV, 2008 WL 1747483, at \*2 (Tex. App.—Houston [14th Dist.] Apr. 17, 2008, no pet.) (mem. op., not designated for publication); *Baize v. Scott & White Clinic*, No. 03-05-00780-CV, 2007 WL 135956, at \*2 (Tex. App.—Austin Jan. 22, 2007, pet. denied) (mem. op., not designated for publication); *Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.3d 672, 675 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *In re Estate of Wallace*, No. 04-05-00567-CV, 2006 WL 3611277, at \*3 (Tex. App.—San Antonio Dec. 13, 2006, no pet.) (mem. op., not designated for publication); *Aiken v. Hancock*, 115 S.W.3d 26, 28 (Tex. App.—San Antonio 2003, pet. denied); *Leonard v. Coastal States Crude Gathering Co.*, No. 04-02-00238-CV, 2003 WL 21067090, at \*3 (Tex. App.—San Antonio May 14, 2003, pet. denied) (not designated for publication); *Jones v. City of Hitchcock*, No. 01-02-00676-CV, 2003 WL 1889444, at \*1 (Tex. App.—Houston [1st Dist.] Apr. 17, 2003, pet. denied) (mem. op., not designated for publication); *Keszler v. Menil Med. Ctr.*, 105 S.W.3d 122, 125 (Tex. App.—Corpus Christi—Edinburg 2003, no pet.); *Taub v. Aquila Sw. Pipeline Corp.*, 93 S.W.3d 451, 462 (Tex. App.—Houston [14th Dist.] 2002, no pet.); *United Plaza-Midland L.L.C. v. Chase Bank*, No. 14-01-00210-CV, 2002 WL 1315802, at \*2 (Tex. App.—Houston [14th

Other courts, however, have determined that a no-evidence motion should have a legal sufficiency standard of review—the same as the review over a directed verdict motion.<sup>471</sup> One court has even held in the same case that the standard of review over a no-evidence motion is the same as a directed verdict (legal insufficiency) and that the standard is de novo.<sup>472</sup> And at least one court has acknowledged the differing standards of review between a traditional and a no-evidence motion.<sup>473</sup>

The courts that favor the de novo standard hold that the better approach is to review no-evidence motions “in the same manner as any other 166a summary judgment is reviewed,” as there is “no reason to engage in analogies [to directed verdict practice] when we already have in place a standard of

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Dist.] June 6, 2002, no pet.) (not designated for publication); Delgado v. Jim Wells Cnty., 82 S.W.3d 640, 641 (Tex. App.—San Antonio 2002, no pet.); Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 618 (Tex. App.—Eastland 2000, pet. denied); Shull v. UPS, 4 S.W.3d 46, 49 (Tex. App.—San Antonio 1999, pet. denied); see also Sarah B. Duncan, *No-Evidence Motions for Summary Judgment: Harmonizing Rule 166a(i) and its Comment*, 41 S. TEX. L. REV. 873, 907 (2000).

<sup>471</sup> Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 248 (Tex. 2013); King Ranch v. Chapman, 118 S.W.3d 742, 750–51 (Tex. 2003); Tex. Integrated Conveyor Sys. Inc. v. Innovative Conveyor Concepts, Inc., 300 S.W.3d 348, 375 (Tex. App.—Dallas 2009, pet. denied); Butler v. McDonald’s Corp., No. 11-05-00323-CV, 2007 WL 38379, at \*1 (Tex. App.—Eastland Jan. 5, 2007, no pet.) (mem. op., not designated for publication); Ross v. Womack, No. 13-04-571-CV, 2006 WL 3628042, at \*3 (Tex. App.—Corpus Christi–Edinburg Dec. 14, 2006, no pet.) (mem. op., not designated for publication); Entravision Commc’ns Corp. v. Belalcazar, 99 S.W.3d 393, 399 (Tex. App.—Corpus Christi–Edinburg 2003, pet. denied); Diversified Fin. Sys. v. Hill, 99 S.W.3d 349, 353 (Tex. App.—Fort Worth 2003, no pet.); DRC Parts & Accessories, L.L.C. v. VM Mortori, S.P.A., 112 S.W.3d 854, 857 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); Trevino v. Goss, No. 03-01-00521-CV, 2002 WL 1343227, at \*1 (Tex. App.—Austin June 21, 2002, pet. denied) (not designated for publication); Lattrell v. Chrysler Corp., 79 S.W.3d 141, 147 (Tex. App.—Texarkana 2002, pet. denied); Morris v. JTM Materials, Inc., 78 S.W.3d 28, 37 (Tex. App.—Fort Worth 2002, no pet.); Two Thirty Nine Joint Venture v. Joe, 60 S.W.3d 896, 904 (Tex. App.—Dallas 2001), *rev’d on other grounds*, 145 S.W.3d 150 (Tex. 2004); Vargas v. K.K.B., Inc., 52 S.W.3d 250, 254 (Tex. App.—Corpus Christi–Edinburg 2001, pet. denied); Gen. Mills Rests., Inc. v. Tex. Wings, Inc., 12 S.W.3d 827, 832–33 (Tex. App.—Dallas 2000, no pet.); Gomez v. Tri City Cnty. Hosp., Ltd., 4 S.W.3d 281, 283 (Tex. App.—San Antonio 1999, no pet.); Zapata v. The Children’s Clinic, 997 S.W.2d 745, 747 (Tex. App.—Corpus Christi–Edinburg 1999, pet. denied); Roth v. FFP Operating Partners, 994 S.W.2d 190, 195 (Tex. App.—Amarillo 1999, pet. denied); Jackson v. Fiesta Mart, Inc., 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.); see also Mack Trucks v. Tamez, 206 S.W.3d 572, 581–82 (Tex. 2006).

<sup>472</sup> Allen v. Albin, 97 S.W.3d 655, 659 (Tex. App.—Waco 2002, no pet.); Dodd v. City of Beverly Hills, 78 S.W.3d 509, 512 (Tex. App.—Waco 2002, pet. denied).

<sup>473</sup> Logsdon v. Miller, No. 03-01-00575-CV, 2002 WL 437284, at \*2 (Tex. App.—Austin Mar. 21, 2002, pet. denied) (not designated for publication).

review by which to review [most] summary judgments.”<sup>474</sup> The Author agrees that the standard of review over a no-evidence motion should be the same as a traditional motion—*de novo*. The standard of review determines how much deference a court of appeals gives to the trial court’s determination. In the no-evidence summary judgment context, that deference is zero—the court of appeals looks at the motion, response, and evidence as if it were the first court reviewing them.

In exercising its *de novo* standard of review, the court of appeals sits in the same position as the trial court and reviews the evidence under a legal sufficiency standard:

Where a no-evidence motion for summary judgment is granted . . . a reviewing court will sustain the summary judgment if “(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.”<sup>475</sup>

Accordingly, the distinction between standards is really without a difference because both standards provide that a court should review the evidence in the light most favorable to the non-movant and that the motion should be granted only if no more than a scintilla of evidence is produced to support the claim or defense.<sup>476</sup> In the Author’s view, the courts that hold that the standard of review is legal sufficiency are basically just skipping a step.

#### *D. Harmless Error Standard*

Due to the requirement that a summary judgment motion contain express grounds, an appellate court cannot review other grounds to sustain a summary judgment.<sup>477</sup> The Texas Supreme Court stated:

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<sup>474</sup> *Hight*, 22 S.W.3d at 618.

<sup>475</sup> *Sw. Bell Tel., L.P. v. Emmett*, 459 S.W.3d 578, 589 (Tex. 2015) (quoting *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003)).

<sup>476</sup> *Ellis v. McKinney*, No. 01-00-01098-CV, 2001 WL 1445892, at \*1 n.2 (Tex. App.—Houston [1st Dist.] Nov. 15, 2001, pet. denied) (not designated for publication).

<sup>477</sup> *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 566 (Tex. 2016) (omission in original) (citations omitted).

We decline the invitation to expand the harmless-error rule to summary-judgment appeals in the manner Pavlovsky requests. “Summary judgments . . . may only be granted upon grounds expressly asserted in the summary judgment motion.” Because Pavlovsky did not assert his no-duty argument as a ground for summary judgment, the trial court could not have erred by not granting summary judgment on that ground.<sup>478</sup>

However, an appellate court may review other grounds asserted that may resolve an unaddressed claim.<sup>479</sup> The Texas Supreme Court stated:

The harmless error rule states that before reversing a judgment because of an error of law, the reviewing court must find that the error amounted to such a denial of the appellant’s rights as was reasonably calculated to cause and probably did cause “the rendition of an improper judgment,” or that the error “probably prevented the appellant from properly presenting the case [on appeal].” The rule applies to all errors. Although a trial court errs in granting a summary judgment on a cause of action not expressly presented by written motion, we agree that the error is harmless when the omitted cause of action is precluded as a matter of law by other grounds raised in the case.<sup>480</sup>

*E. Standards of Review Over Adequate Time for Discovery, Evidence Objections, Special Exceptions, And Motions for Continuance*

A trial court’s determination on whether there has been an adequate time for discovery is reviewed under an abuse of discretion standard because that determination encompasses a balancing and weighing of factors that is best

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<sup>478</sup> *Id.*

<sup>479</sup> *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011).

<sup>480</sup> *Id.* at 297–98 (alteration in original) (citations omitted). *See also Zarzosa v. Flynn*, 266 S.W.3d 614, 621 (Tex. App.—El Paso 2008, no pet.) (holding reversal would be meaningless because questioned recovery precluded as a matter of law); *Withrow v. State Farm Lloyds*, 990 S.W.2d 432, 437–38 (Tex. App.—Texarkana 1999, pet. denied); *Vogel v. Travelers Indem. Co.*, 966 S.W.2d 748, 754–55 (Tex. App.—San Antonio 1998, no pet.); *Cissne v. Robertson*, 782 S.W.2d 912, 918 (Tex. App.—Dallas 1989, writ denied).



left in the discretion of the trial court.<sup>481</sup> Trial court rulings concerning the admission or exclusion of summary judgment evidence are reviewed under an abuse of discretion standard.<sup>482</sup> The Texas Supreme Court recently addressed the sham affidavit theory, which allows a trial court to ignore affidavits that contradict earlier sworn testimony where there is no explanation for the contradiction.<sup>483</sup> The court stated:

Although we generally review summary judgments de novo, a trial court's refusal to consider evidence under the sham affidavit rule should be reversed only if it was an abuse of discretion. This standard of review reflects the deference traditionally afforded a trial court's decision to exclude or admit summary judgment evidence.<sup>484</sup>

When a court does not rule specifically on special exceptions to a motion for summary judgment but does grant the summary judgment motion, the special exceptions are treated as having been effectively overruled.<sup>485</sup> The trial court has broad discretion in ruling on special exceptions, and its ruling

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<sup>481</sup> McLendon v. Detoto, No. 14-06-00658-CV, 2007 WL 1892312, at \*2 (Tex. App.—Houston [14th Dist.] July 3, 2007, pet. denied) (not designated for publication); First Select Corp. v. Grimes, No. 2-01-257-CV, 2003 WL 151940, at \*3 (Tex. App.—Fort Worth Jan. 23, 2003, no pet.) (mem. op., not designated for publication); Carter v. MacFadyen, 93 S.W.3d 307, 311 (Tex. App.—Houston [14th Dist.] 2002, pet. denied); Rest. Teams Int'l, Inc. v. MG Sec. Corp., 95 S.W.3d 336, 339 (Tex. App.—Dallas 2002, no pet.); Dickson Const. v. Fid. & Deposit Co., 5 S.W.3d 353, 356–57 (Tex. App.—Texarkana 1999, pet. denied).

<sup>482</sup> Lujan v. Navistar, Inc., 555 S.W.3d 79, 84 (Tex. 2018); Sanders v. Shelton, 970 S.W.2d 721, 727 (Tex. App.—Austin 1998, writ denied); Ho v. Univ. of Tex., 984 S.W.2d 672, 680 (Tex. App.—Amarillo 1998, writ denied); Leyva v. Soltero, 966 S.W.2d 765, 768 (Tex. App.—El Paso 1998, no writ).

<sup>483</sup> Lujan, 555 S.W.3d at 84–85 (citations omitted).

<sup>484</sup> *Id.*

<sup>485</sup> Martinez v. Wilson Plaza Assocs., L.P., No. 13-02-00697-CV, 2004 WL 2471785, at \*3 (Tex. App.—Corpus Christi–Edinburg Nov. 4, 2004, no pet.) (not designated for publication); Alejandro v. Bell, 84 S.W.3d 383, 389 (Tex. App.—Corpus Christi–Edinburg 2002, no pet.).

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will not be disturbed absent an abuse of discretion.<sup>486</sup> Absent a showing of injury, the trial court's ruling on special exceptions will not be disturbed.<sup>487</sup>

Further, a trial court's ruling on a motion for continuance is reviewed under an abuse of discretion standard.<sup>488</sup> In *Joe v. Two Thirty Nine Joint Venture*, the Texas Supreme Court provided the appellate standard of review for an order denying a motion for continuance from a summary judgment hearing:

The trial court may order a continuance of a summary judgment hearing if it appears “from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition.” When reviewing a trial court's order denying a motion for continuance, we consider whether the trial court committed a clear abuse of discretion on a case-by-case basis. A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. We have considered the following nonexclusive factors when deciding whether a trial court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery: 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.<sup>489</sup>

A party moving for a continuance from a summary judgment should keep this standard in mind.

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<sup>486</sup> *Alejandro*, 84 S.W.3d at 389; *Bryant v. Progressive Cnty. Mut. Ins. Co.*, No. 05-17-01023-CV, 2018 WL 6521853, at \*2 (Tex. App.—Dallas Dec. 23, 2018, no pet.) (mem. op., not designated for publication); *Shelton v. Kalbow*, 489 S.W.3d 32, 54 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

<sup>487</sup> *Bryant*, 2018 WL 6521853, at \*2 (citing *Gause v. Gause*, 496 S.W.3d 913, 919 (Tex. App.—Austin 2016, no pet.)).

<sup>488</sup> *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984).

<sup>489</sup> 145 S.W.3d 150, 161 (Tex. 2004) (citations omitted).

## XII. APPEAL OF DENIAL OF SUMMARY JUDGMENT MOTION

### A. *Generally, No Right to Appeal Denial of Summary Judgment*

Generally, a party cannot appeal a trial court's denial of a summary judgment motion because the order is interlocutory.<sup>490</sup>

### B. *Appeal of Denial of Cross-Motion for Summary Judgment*

If both parties file motions for summary judgment and the trial court grants one party's motion but denies the other's, the party whose motion the court denied may appeal both the granting of his opponent's motion and the denial of his motion.<sup>491</sup> When opposing parties file counter motions for summary judgment and the trial court grants one motion and denies the other, the appellate court has jurisdiction to determine all questions presented in the opposing motions and to render the judgment the trial court should have rendered.<sup>492</sup> It is important to note in this circumstance that if the party whose summary judgment motion was denied appeals only the trial court's granting of his opponent's motion, the appellate court can only reverse the summary judgment and remand the case to the trial court.<sup>493</sup> If the appellant wants the appellate court to reverse his opponent's summary judgment and at the same time render and grant appellant's summary judgment, he must appeal not only the trial court's granting of the opponent's summary judgment, but also the denial of his summary judgment motion.<sup>494</sup>

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<sup>490</sup> *Lancer Ins. Co. v. Garcia Holiday Tours*, 345 S.W.3d 50, 59 (Tex. 2011); *Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex. 1980); *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 364 (Tex. 1966); *United Parcel Serv., Inc. v. Tasdemiroglu*, 25 S.W.3d 914, 915 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Amerivest, Inc. v. Bluebonnet Sav. Bank*, 897 S.W.2d 513, 515 n.1 (Tex. App.—Fort Worth 1995, writ denied); *Motor 9, Inc. v. World Tire Corp.*, 651 S.W.2d 296, 299 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

<sup>491</sup> *Lancer Ins. Co.*, 345 S.W.3d at 59; *Tobin v. Garcia*, 316 S.W.2d 396, 400 (1958); see also *Amerivest, Inc.*, 897 S.W.2d at 515 n.1.

<sup>492</sup> *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *Progressive Cnty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 806 (Tex. 2009) (per curiam).

<sup>493</sup> *City of Denison v. Odle*, 808 S.W.2d 153, 156–57 (Tex. App.—Dallas 1991), *rev'd on other grounds*, 833 S.W.2d 935 (Tex. 1992).

<sup>494</sup> See *id.*; see also *Grainger v. W. Cas. Life Ins. Co.*, 930 S.W.2d 609, 614 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

### C. Appeal of Interlocutory Denial of Summary Judgment by Right

Historically, parties could not generally appeal an interlocutory order and had to wait until the end of the case. Generally, Texas appellate courts may review only final judgments, and there can be only one final judgment in any case.<sup>495</sup> “A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree.”<sup>496</sup>

“There are, of course, exceptions to the final judgment rule that allow an immediate appeal before final judgment when the issue is so important that an answer should not wait until the case concludes.”<sup>497</sup> The Texas Civil Practice and Remedies Code sets out thirteen different instances where a party can appeal an interlocutory order. “Colloquially, these instances are referred to as ‘interlocutory appeals as of right,’ because parties need not secure judicial permission before filing an interlocutory appeal. Intermediate appellate courts have no discretion to decline interlocutory appeals brought under section 51.014(a).”<sup>498</sup> These include orders on temporary injunctions, receiverships, certain jurisdictional challenges, class action rulings, etc.

There are two special statutes that allow a party to appeal the denial of a summary judgment motion. When a trial court denies a summary judgment motion based on an assertion of immunity by an officer or employee of the state, the movant may immediately appeal that decision.<sup>499</sup> When reviewing this denial, an appellate court uses the same standard of review as it does for an order granting a summary judgment motion.<sup>500</sup> Also, if a trial court denies a summary judgment motion based on a claim against or defense by a member of the media, or a person whose communication the media published under the freedom of speech or free press guarantees, the movant may immediately appeal that denial.<sup>501</sup> Further, under those limited circumstances

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<sup>495</sup> Colquitt v. Brazoria Cnty., 324 S.W.3d 539, 542 (Tex. 2010); Cherokee Water Co. v. Ross, 698 S.W.2d 363, 365 (Tex. 1985).

<sup>496</sup> Lehmann v. Har-Con Corp., 39 S.W.3d 191, 195 (Tex. 2001).

<sup>497</sup> Sabre Travel Int’l, Ltd. v. Deutsche Lufthansa AG, 567 S.W.3d 725, 730 (Tex. 2019).

<sup>498</sup> *Id.* (citations omitted).

<sup>499</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (West 2019).

<sup>500</sup> Bartlett v. Cinemark USA, Inc., 908 S.W.2d 229, 233 (Tex. App.—Dallas 1995, no writ).

<sup>501</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(6); *see also* Freedom Commc’ns, Inc. v. Brand, 907 S.W.2d 614, 617 (Tex. App.—Corpus Christi–Edinburg 1995, no writ); H&C

when a party can appeal the denial of a summary judgment, the standard of review over a denial of a summary judgment is the same as the granting of a summary judgment, *de novo*.<sup>502</sup>

More recently, the Texas Supreme Court held that parties do not waive the right to appeal interlocutory orders by failing to appeal them in an interlocutory manner and may wait until after judgment to appeal.<sup>503</sup> The Court held: “When a trial court renders a final judgment, the court’s interlocutory orders merge into the judgment and may be challenged by appealing that judgment.”<sup>504</sup>

#### *D. Permissive Appeal of Denial of Summary Judgment*

Now there is a provision that allows parties to appeal almost any order so long as it involves a controlling question of law. An interlocutory order may be appealable in a permissive appeal.<sup>505</sup> This device would allow a party to appeal a traditionally non-appealable interlocutory ruling when it involves a controlling issue of law as to which there is a substantial ground for difference of opinion and when an immediate appeal may materially advance the ultimate termination of the litigation.<sup>506</sup> If all conditions exist for its use, the permissive appeal is a method to appeal an otherwise unappealable interlocutory order, such as the denial of a motion for summary judgment or the granting of a partial motion.

Section 51.014 of the Texas Civil Practice and Remedies Code authorizes a court to accept a permissive appeal from a proper interlocutory order if (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.”<sup>507</sup> The Legislature modeled Section 51.014(d)

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*Commc’ns, Inc. v. Reed’s Food Int’l, Inc.*, 887 S.W.2d 475, 476 (Tex. App.—San Antonio 1994, no writ).

<sup>502</sup> *Dall. Morning News, Inc. v. Tatum*, 554 S.W.3d 614, 624 (Tex. 2018); *HBO v. Harrison*, 983 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

<sup>503</sup> *Bonsmara Nat. Beef Co. v. Hart Cattle Feeders, LLC*, 603 S.W.3d 385, 402 (Tex. 2020).

<sup>504</sup> *Id.* at 390; *see also Hernandez v. Ebrom*, 289 S.W.3d 316, 323 (Tex. 2009).

<sup>505</sup> TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (West 2019).

<sup>506</sup> *Id.*

<sup>507</sup> *Id.* § 51.014(d), (f).

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after the federal counterpart to permissive interlocutory appeals.<sup>508</sup> The statute further provides:

An appellate court may accept an appeal permitted by Subsection (d) if the appealing party, not later than the 15th day after the date the trial court signs the order to be appealed, files in the court of appeals having appellate jurisdiction over the action an application for interlocutory appeal explaining why an appeal is warranted under Subsection (d). If the court of appeals accepts the appeal, the appeal is governed by the procedures in the Texas Rules of Appellate Procedure for pursuing an accelerated appeal. The date the court of appeals enters the order accepting the appeal starts the time applicable to filing the notice of appeal.<sup>509</sup>

“By using the phrase ‘may accept’ in section 51.014(f), the Legislature conveyed a discretionary function in the court of appeals.”<sup>510</sup> “The same can be said for the trial court regarding the phrase “may . . . permit” in subsection (d).”<sup>511</sup>

The Texas Supreme Court has recently held that courts of appeals have wide discretion to grant or deny a request for permissive appeal.<sup>512</sup> The Court first stated that “The United States Supreme Court has interpreted section 1292(b) as providing federal circuit courts absolute discretion to accept or deny permissive appeals.”<sup>513</sup> The Court then held: “We agree that Texas courts of appeals have discretion to accept or deny permissive interlocutory appeals certified under section 51.014(d), just as federal circuit courts do.”<sup>514</sup> The Court then cautioned that courts of appeals should grant permissive appeals where appropriate:

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<sup>508</sup> *Sabre Travel Int’l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 731 (Tex. 2019); *Compare* 28 U.S.C. § 1292(b), *with* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d), (f) (West 2019).

<sup>509</sup> TEX. CIV. PRAC. & REM. CODE § 51.014(f) (West 2019).

<sup>510</sup> *Sabre Travel*, 567 S.W.3d at 731.

<sup>511</sup> *Id.*

<sup>512</sup> *See id.* at 731–33.

<sup>513</sup> *Id.* at 731–32.

<sup>514</sup> *Id.* at 732.

We do caution, however, that while courts of appeals have discretion to deny acceptance of permissive interlocutory appeals, the Legislature in its enactment of section 51.014(d) and (f) has recognized the benefit of appellate courts accepting such appeals when the threshold for an exception to the final judgment rule is met. When courts of appeals accept such permissive appeals, parties and the courts can be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation. Indeed, the Legislature enacted section 51.014 to provide “for the efficient resolution of certain civil matters in certain Texas courts” and to “make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers.” If all courts of appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted. Just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should; in fact, in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified.<sup>515</sup>

If a court of appeals denies a request to accept a permissive appeal, the appellant can seek relief from the Texas Supreme Court, which will review the request *de novo* under the relevant factors.<sup>516</sup> However, a party may not directly appeal to the Texas Supreme Court and must first seek relief from the court of appeals.<sup>517</sup>

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<sup>515</sup> *Id.* at 732–33 (citations omitted) (quoting Senate Comm. on State Affairs, Engrossed Bill Analysis, Tex. H.B. 274, 82d Leg., R.S. (2011)).

<sup>516</sup> *Id.* at 733–34.

<sup>517</sup> *Id.* at 735–36.

Pursuant to this statute, the Texas Supreme Court created rules to effectuate a permissive appeal procedure.<sup>518</sup> Texas Rule of Civil Procedure 168 states:

On a party's motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute. Permission must be stated in the order to be appealed. An order previously issued may be amended to include such permission. The permission 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.<sup>519</sup>

Under this rule, the order must identify the controlling question of law, and there should not be a discrepancy between the trial court's order and the arguments contained in the petition seeking permission to appeal the interlocutory order.<sup>520</sup> Further, the trial court should actually rule on the substantive issue; it cannot simply seek an advisory opinion.<sup>521</sup>

The Rule states that the order previously issued may be amended. This is important. If a party has an adverse ruling, it may not immediately have time to include the necessary language for a permissive appeal. This Rule allows the party to file a motion to request the trial court to certify the legal issues for appeal, and then if granted, the trial court can enter an amended order that includes the necessary language. The clock to appeal only starts to tick after the amended order is signed.

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<sup>518</sup> See TEX. R. CIV. P. 168 (“On a party’s motion or on its own initiative, a trial court may permit an appeal from an interlocutory order that is not otherwise appealable, as provided by statute.”); 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.”).

<sup>519</sup> TEX. R. CIV. P. 168.

<sup>520</sup> Long v. State, No. 03-12-00437-CV, 2012 Tex. App. LEXIS 6201, at \*5–6 (Tex. App.—Austin July 25, 2012, no pet.) (not designated for publication).

<sup>521</sup> Corp. of the President of the Church of Jesus Christ of Latter-Day Saints v. Doe, No. 13-13-00463-CV, 2013 Tex. App. LEXIS 12543, at \*8 (Tex. App.—Corpus Christi–Edinburg Oct. 10, 2013, no pet.) (not designated for publication); Double Diamond Del., Inc. v. Walkinshaw, No. 05-13-00893-CV, 2013 Tex. App. LEXIS 12447, at \*4 (Tex. App.—Dallas Oct. 7, 2013, no pet.) (not designated for publication).



Texas Rule of Appellate Procedure 28.3 provides:

(a) *Petition Required.* 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.

(b) *Where Filed.* The petition must be filed with the clerk of the court of appeals having appellate jurisdiction over the action in which the order to be appealed is issued. The First and Fourteenth Courts of Appeals must determine in which of those two courts a petition will be filed.

(c) *When Filed.* The petition must be filed within 15 days after the order to be appealed is signed. If the order is amended by the trial court, either on its own or in response to a party's motion, to include the court's permission to appeal, the time to petition the court of appeals runs from the date the amended order is signed.

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(e) *Contents.* The petition must: (1) contain the information required by Rule 25.1 (d) to be included in a notice of appeal; (2) attach a copy of the order from which appeal is sought; (3) contain a table of contents, index of authorities, issues presented, and a statement of facts; and (4) argue clearly and concisely why the order to be appealed involves a controlling question of law as to which there is a substantial ground for difference of opinion and how an immediate appeal from the order may materially advance the ultimate termination of the litigation.

(f) *Response; Reply; Cross-Petition; Time for Filing.* If any party timely files a petition, any other party may file a response or a cross-petition within 10 days. A party may file a response to a cross-petition within 10 days of the date the cross-petition is filed. A petitioner or cross-petitioner may reply to any matter in a response within 7 days of the date the response is filed. The court of appeals may extend the time to file a response, reply, and cross-petition.

. . .

(j) *Time for Determination.* Unless the court of appeals orders otherwise, a petition, and any cross-petition, response, and reply, will be determined without oral argument, no earlier than 10 days after the petition is filed.

(k) *When Petition Granted.* If the petition is granted, a notice of appeal is deemed to have been filed under Rule 26.1 (b) on that date, and the appeal is governed by the rules for accelerated appeals. A separate notice of appeal need not be filed. A copy of the order granting the petition must be filed with the trial court clerk.<sup>522</sup>

In the comments to Rule 28.3, the Court explained that amendments to Section 51.014 “eliminated the prior requirement that the parties agree to the appeal and reinstated a requirement that the court of appeals also permit the appeal.”<sup>523</sup> So, a party seeking a permissive appeal does not have to obtain the other party’s consent; the trial court can simply certify the relevant legal issues upon one party’s request. Further, the Court noted that “[t]he petition procedure in Rule 28.3 is intended to be similar to the Rule 53 procedure governing petitions for review in the [Texas] Supreme Court,” meaning the courts of appeals can similarly accept or deny a permissive interlocutory appeal as the Texas Supreme Court can a petition for review.<sup>524</sup>

“An appeal from an interlocutory order, when allowed, will be accelerated and the filing a motion for new trial will not extend the time to perfect the appeal.”<sup>525</sup>

Permissive appeals are intended in situations where the trial court has made a substantive ruling on a pivotal issue of law. One commentator has stated:

[A] controlling question of law is one that deeply affects the ongoing process of litigation. If resolution of the question will considerably shorten the time, effort, and expense of fully litigating the case, the question is controlling.

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<sup>522</sup> TEX. R. APP. P. 28.3 (a)–(c), (e)–(f), (j)–(k).

<sup>523</sup> TEX. R. APP. P. 28.3 cmt.

<sup>524</sup> *Id.*; see also TEX. R. APP. P. 28.3(k) (clarifying that if a petition seeking interlocutory appeal is granted, the appeal is thereby perfected in the court of appeals).

<sup>525</sup> *Smith v. Adair*, 96 S.W.3d 700, 703 (Tex. App.—Texarkana 2003, pet. ref’d).

Generally, if the viability of a claim rests upon the court's determination of a question of law, the question is controlling. . . . Substantial grounds for disagreement exist when the question presented to the court is novel or difficult, when controlling circuit law is doubtful, when controlling circuit law is in disagreement with other courts of appeals, and when there simply is little authority upon which the district court can rely. . . . Generally, a district court will make [a finding that the appeal will facilitate final resolution of the case] when resolution of the legal question dramatically affects recovery in a lawsuit.<sup>526</sup>

For example, due to the “controlling issue of law” requirement, many permissible appeals come from denials of summary judgment motions and other similar motions.<sup>527</sup> Courts have recently held that whether a duty exists

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<sup>526</sup> ADT Sec. Servs. v. Van Peterson Fine Jewelers, No. 05-15-00646-CV, 2015 Tex. App. LEXIS 7831, at \*3–4 (Tex. App.—Dallas July 29, 2015, no pet.) (not designated for publication) (citing Gulf Coast Asphalt Co. v. Lloyd, 457 S.W.3d 539, 543–44 (Tex. App.—Houston [14th Dist.] 2015, no pet.)).

<sup>527</sup> See, e.g., Orca Assets, G.P. v. Dorfman, 470 S.W.3d 153, 155–56 (Tex. App.—Fort Worth 2015, pet. denied) (permissive appeal from interlocutory summary judgment); State v. Ledrec, Inc., 366 S.W.3d 305, 306 (Tex. App.—Fort Worth 2012, no pet.) (granting interlocutory appeal from denial of partial summary judgment motion where there was a difference of expert opinion on measure of damages); Cole v. Anadarko Petroleum Corp., 331 S.W.3d 30, 33 (Tex. App.—Eastland 2010, pet. denied) (granting interlocutory appeal from rulings on multiple motions for partial summary judgment regarding surface use); Placette v. M.G.S.L., No. 09-09-00410-CV, 2010 Tex. App. LEXIS 2935, at \*1 (Tex. App.—Beaumont Apr. 22, 2010, no pet.) (not designated for publication) (granting interlocutory appeal from ruling denying motion for summary judgment regarding whether statute of limitations applied to bar plaintiff's claim); Kimbrell v. Molinet, 288 S.W.3d 464, 465–66 (Tex. App.—San Antonio 2008), *aff'd*, 356 S.W.3d 407, 410 (Tex. 2011) (addressing agreed interlocutory appeal from trial court's denial of a summary judgment motion asserting physician-defendant's joinder in medical malpractice case was barred by limitations, and determining the controlling question of law as to which statute of limitations applied); Northside Indep. Sch. Dist. v. Dubose, No. 04-06-00517-CV, 2007 Tex. App. LEXIS 3937, at \*1 (Tex. App.—San Antonio May 23, 2007, no pet.) (mem. op., not designated for publication) (on cross-motions for summary judgment the trial court held that school district had waived its right to contest compensability of employee's workers' compensation claim, and thereafter certified the issue of waiver as the controlling question on agreed interlocutory appeal); Stolte v. County of Guadalupe, No. 04-04-00083-CV, 2004 Tex. App. LEXIS 10236, at \*1 (Tex. App.—San Antonio Nov. 17, 2004, no pet.) (not designated for publication) (agreed interlocutory appeal from denial of summary judgment in which trial court concluded county had inherent authority to reject plat application in the interest of public health); Enter. Prods. Partners, L.P. v. Mitchell, 340 S.W.3d 476, 479, (Tex.

is a legal question that is appropriate for a permissive appeal.<sup>528</sup> Courts of appeals typically deny petitions for permissive appeal where they feel that the case involves a fact issue.<sup>529</sup> For example, in an undue influence case, an appellate court refused a permissive appeal after a partial no-evidence summary judgment motion was granted because it did not necessarily decide a controlling issue of law.<sup>530</sup>

If the trial court denies a petition to certify the denial of the summary judgment motion for appeal, then the party could potentially file a petition for writ of mandamus requesting the court of appeals to require the trial court to grant that petition. In *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, a party sought mandamus relief from the Texas Supreme Court to order a court of appeals to accept a petition for permission to appeal.<sup>531</sup> The Court denied that petition holding that courts of appeals have wide discretion to grant or deny a request for permissive appeal.<sup>532</sup> The Court first stated: “The United States Supreme Court has interpreted section 1292(b) as providing federal circuit courts absolute discretion to accept or deny permissive appeals.”<sup>533</sup> The Court then held: “We agree that Texas courts of appeals have discretion to accept or deny permissive interlocutory

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App.—Houston [1st Dist.] 2011, pet. dismissed) (trial court ruled Texas, not Mississippi, law applied to lawsuit and certified choice-of-law question as the controlling legal question for agreed interlocutory appeal); *Comcast Cable of Plano, Inc. v. City of Plano*, 315 S.W.3d 673, 675 (Tex. App.—Dallas 2010, no pet.) (on agreed interlocutory appeal, court of appeals addressed the controlling question of law as to whether the city’s claim for breach of a franchise agreement was preempted by federal law after trial court denied Comcast’s summary judgment motion based on preemption).

<sup>528</sup> See *Kenyon v. Elephant Ins. Co.*, No. 04-18-00131-CV, 2020 Tex. App. LEXIS 2686, at \*6 (Tex. App.—San Antonio Apr. 1, 2020, pet. filed) (not designated for publication) (court accepted permissive appeal where legal issue was whether a defendant had a duty to train); *Scott v. West*, 594 S.W.3d 397, 399 (Tex. App.—Fort Worth 2019, pet. denied) (granted permissive appeal to determine if defendant has a duty to support their own land); *OCI Beaumont LLC v. Barajas*, 520 S.W.3d 83, 85 (Tex. App.—Beaumont 2017, no pet.) (granted permissive appeal to determine if employer owed a duty).

<sup>529</sup> See, e.g., *King-A Corp. v. Wehling*, No. 13-13-00100-CV, 2013 Tex. App. LEXIS 2761, at \*8–9 (Tex. App.—Corpus Christi–Edinburg Mar. 14, 2013, no pet.) (not designated for publication)

<sup>530</sup> *In re Estate of Fisher*, 421 S.W.3d 682, 684–85 (Tex. App.—Texarkana 2014, no pet.).

<sup>531</sup> 567 S.W.3d 725, 731 (Tex. 2019).

<sup>532</sup> *Id.* at 731–32.

<sup>533</sup> *Id.*

appeals certified under section 51.014(d), just as federal circuit courts do.”<sup>534</sup> The Court then cautioned that courts of appeals should grant permissive appeals where appropriate:

We do caution, however, that while courts of appeals have discretion to deny acceptance of permissive interlocutory appeals, the Legislature in its enactment of section 51.014(d) and (f) has recognized the benefit of appellate courts accepting such appeals when the threshold for an exception to the final judgment rule is met. When courts of appeals accept such permissive appeals, parties and the courts can be spared the inevitable inefficiencies of the final judgment rule in favor of early, efficient resolution of controlling, uncertain issues of law that are important to the outcome of the litigation. Indeed, the Legislature enacted section 51.014 to provide “for the efficient resolution of certain civil matters in certain Texas courts” and to “make the civil justice system more accessible, more efficient, and less costly to all Texans while reducing the overall costs of the civil justice system to all taxpayers.” If all courts of appeals were to exercise their discretion to deny permissive interlocutory appeals certified under section 51.014(d), the legislative intent favoring early, efficient resolution of determinative legal issues in such cases would be thwarted. Just because courts of appeals can decline to accept permissive interlocutory appeals does not mean they should; in fact, in many instances, courts of appeals should do exactly what the Legislature has authorized them to do—accept permissive interlocutory appeals and address the merits of the legal issues certified.”<sup>535</sup>

The Court denied the mandamus request:

Here, the trial court certified an interlocutory appeal under section 51.014(d), but the court of appeals exercised its discretion—as it is entitled to do—to decline acceptance of the appeal, citing authority for strictly construing the

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<sup>534</sup> *Id.* at 732.

<sup>535</sup> *Id.* at 732–33 (internal citations omitted).

interlocutory appeals statute. Under the plain language of section 51.014(d) and (f), we cannot say that the court of appeals abused its discretion.<sup>536</sup>

It should be noted that there is a significant difference between filing a mandamus action to force a court of appeals to grant a permissive appeal versus a trial court. There is no other adequate remedy (other than appeal after final judgment) from trial court's decision whereas a party has the ability to seek review from the Texas Supreme Court if the trial court grants the petition but the court of appeals does not. Therefore, there is an intellectual distinction between the *Sabre* case and a trial court denying a petition.

The author has not found any case that granted a petition for writ of mandamus based on a trial court's denial of a petition for permission to appeal. A Houston court of appeals has denied mandamus petitions arising from denial of a summary judgment motions.<sup>537</sup> In light of the scant authority on whether a party can mandamus a trial court regarding a discretionary ruling on petition for permission to appeal, a party could file a non-frivolous mandamus action on that basis. However, it is unlikely that a court of appeals would be willing to grant such a mandamus petition.

### XIII. MANDAMUS OF RULINGS ON SUMMARY JUDGMENT MOTIONS

Historically, courts have not allowed mandamus relief to review the denial of a summary judgment motion.<sup>538</sup> Rather, courts historically limited its mandamus review to ordering a trial court to rule on a properly filed

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<sup>536</sup> *Id.* at 732 (citations omitted).

<sup>537</sup> *In re Gemini Ins. Co.*, No. 01-19-00675-CV, 2019 Tex. App. LEXIS 8655, at \*1 (Tex. App.—Houston [1st Dist.] Sept. 26, 2019, orig. proceeding); *In re Intermarine, LLC*, No. 01-16-00912-CV, 2017 Tex. App. LEXIS 455, at \*1 (Tex. App.—Houston [1st Dist.] Jan. 19, 2017, orig. proceeding). See also *In re Rodriguez*, No. 08-04-00171-CR, 2004 Tex. App. LEXIS 6310, at \*1 (Tex. App.—El Paso July 15, 2004, orig. proceeding) (not designated for publication) (denying mandamus regarding a trial court's decision to deny a permissive appeal, in a criminal case).

<sup>538</sup> *Crofts v. Ct. of Civ. App.*, 362 S.W.2d 101, 104–05 (Tex. 1962) (orig. proceeding) (appellate court “may not tell the district court what judgment to enter”); *In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d 459, 460 (Tex. App.—Corpus Christi–Edinburg 1999, orig. proceeding) (“[W]e do not have the authority by mandamus . . . to require the trial court to grant the present ‘no evidence’ motion for summary judgment.”); *In re Lee*, 995 S.W.2d 774, 777 (Tex. App.—San Antonio 1999, orig. proceeding) (denial of summary judgment is incidental ruling not subject to mandamus review).

motion.<sup>539</sup> When a motion is properly filed and pending before a trial court, the act of giving consideration to and ruling upon that motion is a ministerial act, and mandamus may issue to compel the trial judge to act.<sup>540</sup> To obtain mandamus relief for the trial court's refusal to rule on a motion, a relator must establish: (1) the motion was properly filed and has been pending for a reasonable time, (2) the relator requested a ruling on the motion, and (3) the trial court refused to rule.<sup>541</sup>

“The mere filing of a motion with a trial court clerk does not equate to a request that the trial court rule on the motion.”<sup>542</sup> A trial court is required to consider and rule upon a motion within a reasonable time.<sup>543</sup> No litigant is entitled to a hearing at whatever time he may choose.<sup>544</sup> “Whether a reasonable time for the trial court to act has lapsed is dependent upon the circumstances of each case and no bright line separates a reasonable time period from an unreasonable one.”<sup>545</sup> “Among the criteria included are the trial court's actual knowledge of the motion, its overt refusal to act, the state of the court's docket, and the existence of other judicial and administrative matters which must be addressed first.”<sup>546</sup>

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<sup>539</sup> *Mission*, 990 S.W.2d at 461 (where motion had been filed for eight months with no response and trial court refused to rule, the movant was entitled to a writ of mandamus ordering the trial court to rule on the motion).

<sup>540</sup> *Safety-Kleen Corp. v. Garcia*, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding).

<sup>541</sup> *In re Buholtz*, No. 05-16-01312-CV, 2017 Tex. App. LEXIS 862, at \*1 (Tex. App.—Dallas Jan. 31, 2017, orig. proceeding) (mem. op., not designated for publication); *In re Dong Sheng Huang*, 491 S.W.3d 383, 385 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding).

<sup>542</sup> *In re Sarkissian*, 243 S.W.3d 860, 861 (Tex. App.—Waco 2008, orig. proceeding) (mem. op.)

<sup>543</sup> *Safety-Kleen Corp.*, 945 S.W.2d at 269; *In re Craig*, 426 S.W.3d 106 (Tex. App.—Houston [1st Dist.] 2012, orig. proceeding) (per curiam).

<sup>544</sup> *In re Chavez*, 62 S.W.3d 225, 229 (Tex. App.—Amarillo 2001, orig. proceeding).

<sup>545</sup> *In re Shapira*, No. 05-16-00184-CV, 2016 Tex. App. LEXIS 4559, at \*1 (Tex. App.—Dallas Apr. 29, 2016, orig. proceeding) (mem. op., not designated for publication) (citing *In re Blakeney*, 254 S.W.3d 659, 661 (Tex. App.—Texarkana 2008, orig. proceeding)).

<sup>546</sup> *Id.*; *In re Wynne Motorcoaches, LLC*, No. 05-19-00409-CV, 2019 Tex. App. LEXIS 2986, at \*3 (Tex. App.—Dallas Apr. 11, 2019, orig. proceeding) (mem. op., not designated for publication) (party not entitled to mandamus relief where record did not indicate that the trial court refused to set a hearing or that the party filed a request for a ruling or hearing date); *In re First Mercury Ins. Co.*, No. 13-13-00469-CV, 2013 WL 6056665, at \*3 (Tex. App.—Corpus Christi—Edinburg Nov. 13, 2013, orig. proceeding) (mem. op., not designated for publication).

Recently, there has been some precedent that may allow a court of appeals to review a denial of summary judgment via mandamus review. Mandamus is an extraordinary writ, usually issued by a higher court to a lower court or to an individual, ordering the subject of the writ to perform a particular legal duty or correct an abuse of discretion.<sup>547</sup> Because mandamus is an “extraordinary remedy,” it historically has only been available in limited circumstances when necessary to “correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.”<sup>548</sup> Historically, Texas courts have not granted mandamus relief from a trial court’s denial of a summary judgment motion.<sup>549</sup>

However, in 2004, the Texas Supreme Court changed the way that mandamus relief is evaluated.<sup>550</sup> In that case, the court held that “adequate” is a “proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts.”<sup>551</sup> “These considerations implicate both public and private interests.”<sup>552</sup> The Court stated:

Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of

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<sup>547</sup> Walker v. Packer, 827 S.W.2d 833, 839 (Tex. 1992).

<sup>548</sup> CSR Ltd. v. Link, 925 S.W.2d 591, 596 (Tex. 1996).

<sup>549</sup> *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 465–66 (Tex. 2008); *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 497 (Tex. App.—Texarkana 1998, orig. proceeding). *But see* State Bar of Tex. v. Heard, 603 S.W.2d 829, 831 (Tex. 1980).

<sup>550</sup> *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135–38 (Tex. 2004) (orig. proceeding).

<sup>551</sup> *Id.* at 136.

<sup>552</sup> *Id.*



improperly conducted proceedings. An appellate remedy is “adequate” when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.<sup>553</sup>

In *In re McAllen Medical Center, Inc.*, the Texas Supreme Court discussed the use of mandamus relief in the context of summary judgment denials.<sup>554</sup> The Court stated:

Of course, mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion. But parties are not “entitled” to summary judgment in the same way they are entitled to arbitration, their chosen attorney, or an expert report like those here. Summary judgments were unknown at common law, and appeared in Texas cases only with adoption of the rule in 1949. Even if the merits could be decided only one way, jury trials may still be important both for justice and the appearance of doing justice. Moreover, trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice—as it will if the first trial is conducted in the wrong time, place, or manner. By contrast, insisting on a wasted trial simply so that it can be reversed and tried all over again creates the appearance not that the courts are doing justice, but that they don’t know what they are doing. Sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded.<sup>555</sup>

Previously, the Court held that mandamus was appropriate to order a trial court to enter summary judgment in *Tilton v. Marshall*.<sup>556</sup> The Court held that mandamus relief was appropriate in that case as “the trial itself, therefore,

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<sup>553</sup> *Id.*

<sup>554</sup> 275 S.W.3d at 465–66.

<sup>555</sup> *Id.* (footnote omitted).

<sup>556</sup> 925 S.W.2d 672, 675 (Tex. 1996).

and not merely the imposition of an adverse judgment, would violate relator's constitutional rights."<sup>557</sup>

After the *In re McAllen Medical Center, Inc.* opinion, the Court granted mandamus relief to order a trial court to grant summary judgment based on a statute of limitations defense.<sup>558</sup> The extraordinary circumstances in USAA that justified mandamus relief were: (1) a previous trial by a trial court without jurisdiction, (2) an appeal to an appellate court and then to the supreme court to get that error corrected, and (3) a proposed second trial on a claim barred by limitations.<sup>559</sup> In granting mandamus relief, the Court noted: "Two wasted trials are not '[t]he most efficient use of the state's judicial resources.'" The Court concluded:

Denying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years (as well as the tolling provision's inapplicability to suits filed with intentional disregard of proper jurisdiction), and we should not 'frustrate th[at] purpose[] by a too-strict application of our own procedural devices.' Because the extraordinary circumstances presented here merit extraordinary relief, we conditionally grant the writ and direct the trial court to grant USAA's motion for summary judgment.<sup>560</sup>

Since *In re USAA*, courts of appeals have not generally been receptive to mandamus petitions from summary judgment denials absent the showing of some extraordinary issue.<sup>561</sup>

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<sup>557</sup> *Id.* at 682.

<sup>558</sup> *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 314 (Tex. 2010) (hereinafter "In re USAA") (alteration in original) (citations omitted) (quoting *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d 458, 466 (Tex. 2008)).

<sup>559</sup> *Id.*

<sup>560</sup> *Id.* (alteration in original) (citations omitted) (quoting *In re McAllen Med. Ctr., Inc.*, 275 S.W.3d at 467).

<sup>561</sup> *In re Altecort*, No. 13-20-00076-CV, 2020 Tex. App. LEXIS 1100, at \*3 (Tex. App.—Corpus Christi—Edinburg Feb. 7, 2020, orig. proceeding) (mem. op., not designated for publication); *McBride v. Tex. Bd. of Pardons & Paroles*, No. 03-19-00329-CV, 2019 Tex. App. LEXIS 7433, at \*6 (Tex. App.—Austin Aug. 22, 2019, orig. proceeding) (mem. op., not designated for publication); *In re Elizabeth Benavidez Elite Aviation, Inc.*, No. 04-19-00283-CV, 2019 Tex. App. LEXIS 3892, at \*1–2 (Tex. App.—San Antonio May 15, 2019, orig. proceeding) (per curiam) (mem. op., not designated for publication) (appellate court cannot order trial court to grant no-evidence motion for

However, some courts have found exceptional circumstances and have granted mandamus relief to compel a trial court to grant summary

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summary judgment); *In re Ocwen Loan Servicing, LLC*, No. 13-19-00189-CV, 2019 Tex. App. LEXIS 3092, at \*3 (Tex. App.—Corpus Christi—Edinburg Apr. 17, 2019, orig. proceeding) (mem. op., not designated for publication); *In re Double Diamond, Inc.*, 582 S.W.3d 535, 538 (Tex. App.—Eastland 2018, orig. proceeding); *In re McAllen Hosps., L.P.*, No. 13-18-00529-CV, 2018 Tex. App. LEXIS 10231, at \*4 (Tex. App.—Corpus Christi—Edinburg Dec. 12, 2018) (mem. op., not designated for publication); *In re Spiritas*, No. 05-16-00791-CV, 2017 Tex. App. LEXIS 3066, at \*7–8 (Tex. App.—Dallas Apr. 6, 2017, orig. proceeding) (mem. op., not designated for publication); *In re Exxon Mobil Corp.*, No. 14-17-00133-CV, 2017 Tex. App. LEXIS 1778, at \*1 (Tex. App.—Houston [14th Dist.] Mar. 2, 2017, orig. proceeding) (mem. op., not designated for publication); *In re Psychemedics Corp.*, No. 14-16-00744-CV, 2016 Tex. App. LEXIS 10751, at \*1 (Tex. App.—Houston [14th Dist.] Oct. 4, 2016, orig. proceeding) (mem. op., not designated for publication); *In re State Farm Lloyds*, No. 13-16-00049-CV, 2016 Tex. App. LEXIS 2526, at \*10–11 (Tex. App.—Corpus Christi—Edinburg Mar. 9, 2016, orig. proceeding) (mem. op., not designated for publication); *In re Ming Chu Chang*, No. 13-15-00352-CV, 2015 Tex. App. LEXIS 10382, at \*10 (Tex. App.—Corpus Christi—Edinburg Oct. 8, 2015, orig. proceeding) (mem. op., not designated for publication) (“Relators have not shown that extraordinary circumstances justify granting mandamus relief on grounds that the trial court erroneously denied their motion for summary judgment.”); *In re OOIDA Risk Retention Grp., Inc.*, 475 S.W.3d 905, 914 (Tex. App.—Fort Worth 2015, orig. proceeding) (“Relators have made no comparable showing of extraordinary circumstances. Expressing no opinion on the merits of the trial court’s order denying Relators’ motion for summary judgment, we hold that mandamus does not lie to review such an order.”); *In re TCPSP Corp.*, No. 12-14-00159-CV, 2014 Tex. App. LEXIS 3006, at \*3 (Tex. App.—Corpus Christi—Edinburg Mar. 18, 2014, orig. proceeding) (per curiam) (mem. op., not designated for publication) (“The Court, having examined and fully considered the petition for writ of mandamus, is of the opinion that relator has not met its burden to show itself entitled to the relief sought.”); *In re Crawford & Co.*, 453 S.W.3d 450, 451 (Tex. App.—Amarillo 2014, orig. proceeding); *In re Thuesen*, No. 14-13-00243-CV, 2013 Tex. App. LEXIS 4622, at \*4 (Tex. App.—Houston [14th Dist.] Apr. 11, 2013, orig. proceeding) (mem. op., not designated for publication) (“Relator has not presented such extraordinary circumstances. Relator argues only that because an interlocutory order denying a motion for summary judgment may not be immediately appealed, he lacks an adequate appellate remedy. As the Texas Supreme Court has repeatedly held, the cost or delay incident to pursuing an appeal does not make the remedy inadequate.”); *In re Piper Aircraft Inc.*, No. 13-12-00329-CV, 2012 Tex. App. LEXIS 4232, at \*2–6 (Tex. App.—Corpus Christi—Edinburg May 23, 2012, orig. proceeding) (mem. op., not designated for publication); *In re Johnson*, No. 04-12-00220-CV, 2012 Tex. App. LEXIS 3208, at \*2–3 (Tex. App.—San Antonio Apr. 25, 2012, orig. proceeding) (mem. op., not designated for publication); *In re AMF, Inc.*, No. 14-11-01011-CV, 2012 Tex. App. LEXIS 668, at \*3–4 (Tex. App.—Houston [14th Dist.] Jan. 26, 2012, orig. proceeding) (per curiam) (mem. op., not designated for publication); *In re Conoco Phillips Co.*, 405 S.W.3d 93, 95–96 (Tex. App.—Houston [14th Dist.] 2012, orig. proceeding) (mem. op.); *In re Kalathil*, No. 14-10-00933-CV, 2010 Tex. App. LEXIS 8051, at \*5 (Tex. App.—Houston [14th Dist.] Oct. 5, 2010, orig. proceeding) (per curiam) (mem. op., not designated for publication).

judgment.<sup>562</sup> For example, in *In re Hoskins*, the family had several different lawsuits and appeals.<sup>563</sup> The court held that mandamus was appropriate:

Reviewing the specific circumstances of this case, both legal and factual, we conclude that relator has shown that extraordinary circumstances justify granting mandamus relief in this case. The matters at issue here regarding Tilden Ranch have been repeatedly litigated and have been determined in an arbitration proceeding and relator should not be subject to defending against the same claims in a subsequent suit more than a decade after the transaction at issue and well past the expiration of the statute of limitations.<sup>564</sup>

Some courts have been willing to grant mandamus relief from a denial of a Rule 91a motion to dismiss.<sup>565</sup> As one court stated:

An order denying a Rule 91a motion to dismiss is an interlocutory order, for which there is no specific statute providing appellate jurisdiction for an interlocutory appeal. “In laying the groundwork for a rule mandating the early dismissal of baseless causes of action, the Legislature has

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<sup>562</sup> See, e.g., *In re Hoskins*, No. 13-18-00296-CV, 2018 Tex. App. LEXIS 10826, at \*25–26 (Tex. App.—Corpus Christi—Edinburg Dec. 27, 2018, orig. proceeding) (mem. op., not designated for publication); *In re S.T.*, 467 S.W.3d 720, 729 (Tex. App.—Fort Worth 2015, orig. proceeding) (granting mandamus relief ordering the granting of summary judgment where case involved child custody issues: “issues involving the rights of parents and children should be resolved expeditiously, and delay in such cases often renders appellate remedies inadequate.”); *In re Robison*, 335 S.W.3d 776, 783–84 (Tex. App.—Amarillo 2011, orig. proceeding) (granted mandamus relief ordering grant of summary judgment on breach of contract claim arising from unenforceable settlement agreement where doing so allowed a four-year old tort case to continue).

<sup>563</sup> 2018 Tex. App. LEXIS 10826, at \*25–26.

<sup>564</sup> *Id.* (citations omitted).

<sup>565</sup> See *In re Essex Ins. Co.*, 450 S.W.3d 524, 528 (Tex. 2014) (orig. proceeding) (per curiam) (reviewing denial of Rule 91a motion to dismiss and concluding mandamus relief appropriate to spare the parties and the public the time and money spent on fatally flawed proceedings); *In re Farmers Tex. Cnty. Mut. Ins. Co.*, No. 04-19-00180-CV, 2019 Tex. App. LEXIS 5309, at \*16 (Tex. App.—San Antonio June 26, 2019, orig. proceeding) (not designated for publication); *In re Wood Grp. PSN Inc.*, No. 04-18-00418-CV, 2018 Tex. App. LEXIS 8030, at \*6 (Tex. App.—San Antonio Oct. 3, 2018, orig. proceeding) (mem. op., not designated for publication) (reviewing denial of motion to dismiss filed by twenty defendants).

effectively already balanced most of the relevant costs and benefits of an appellate remedy, and mandamus review of orders denying Rule 91a motions comports with the Legislature's requirement for an early and speedy resolution of baseless claims." Thus, the denial of a Rule 91a motion to dismiss is subject to mandamus review.<sup>566</sup>

Accordingly, the courts of appeals have not seemed inclined to offer broad mandamus relief to parties who wish to challenge a trial court's denial of a summary judgment. But there is Texas Supreme Court precedent that would support such relief depending on the factual and procedural posture of the case. Further, a trial court can enter an order granting a motion for partial summary judgment that does not resolve all issues as to all parties. These orders would normally not be subject to a right of appeal. Parties have attempted to mandamus these types of orders, but courts of appeals have not been willing to grant mandamus relief in this circumstance.<sup>567</sup>

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<sup>566</sup> *Farmers*, 2019 Tex. App. LEXIS 5309, at \*14–15 (citations omitted).

<sup>567</sup> *In re Buena Vista Landscapes LLC*, No. 01-19-00526-CV, 2019 Tex. App. LEXIS 7262, at \*1 (Tex. App.—Houston [1st Dist.] Aug. 16, 2019, orig. proceeding) (mem. op., not designated for publication); *In re Spiritas*, No. 05-16-00791-CV, 2017 Tex. App. LEXIS 3066, at \*7–9 (Tex. App.—Dallas Apr. 6, 2017, orig. proceeding) (mem. op., not designated for publication); *In re Thompson*, No. 05-99-00251-CV, 1999 Tex. App. LEXIS 1316, at \*1 (Tex. App.—Dallas Feb. 22, 1999, orig. proceeding) (mem. op., not designated for publication) (denying petition seeking review of three partial summary judgment orders, noting that “Relator clearly has an adequate remedy at law”); *In re Dynamic Health*, 32 S.W.3d 876, 881 (Tex. App.—Texarkana 2000, orig. proceeding) (mandamus review unavailable as to non-final, unsevered order granting partial summary judgment because “[t]here is clearly an adequate remedy at law”); *In re Alvarez*, No. 01-19-00499-CV, 2019 Tex. App. LEXIS 6482, at \*2 (Tex. App.—Houston [1st Dist.] July 30, 2019, orig. proceeding) (per curiam) (not designated for publication) (citing *H.B. Zachry Co. v. Thibodeaux*, 364 S.W.2d 192, 193 (Tex. 1963) (holding that prior interlocutory orders merge into subsequent order disposing of remaining parties and issues, creating final and appealable judgment)) (noting that “[t]he interlocutory order granting the RPIs’ motions for partial summary judgment will merge into the final judgment, allowing relators to raise their claims from this petition on direct appeal”); *In re Lopez*, No. 14-12-00929-CV, 2012 Tex. App. LEXIS 8658, at \*1–2 (Tex. App.—Houston [14th Dist.] Oct. 16, 2012, orig. proceeding) (per curiam) (mem. op., not designated for publication) (denying mandamus because relator had adequate appellate remedy upon final judgment, which will incorporate partial summary judgment).

#### XIV. STANDARD FOR CHALLENGING A DEFAULT SUMMARY JUDGMENT

There has been some debate about whether a court of appeals should use the *Craddock*/equitable motion for new trial standard (not intentional, meritorious defense, and delay not harmful) to review the denial of a motion for new trial after a trial court grants a motion for summary judgment when the non-movant failed to file a response – essentially a default summary judgment. The Texas Supreme Court has answered this question and determined that the *Craddock*/equitable motion for new trial standard does not apply “when the movant had an opportunity to seek continuance or obtain permission to file a late response.”<sup>568</sup> In other words, if a non-movant had an opportunity to file a motion for leave to file a late response and/or a motion for continuance, then the court of appeals should not apply the *Craddock*/equitable motion for new trial standard. Interestingly, however, the Court found that a trial court should grant a motion for leave to file a late response or a motion for continuance when the non-movant “establishes good cause by showing that the failure to timely respond (1) was not intentional or the result of conscious indifference, but the result of an accident or mistake, and (2) that allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment.”<sup>569</sup> A court of appeals should affirm a default summary judgment if the party seeking to reverse it had notice of the hearing and did not file a motion for continuance or a motion for leave to file a late response, or if the party does file such a motion but does not prove up good cause as described above.

Several courts of appeals have concluded after *Carpenter*, that *Craddock* applies when a default summary judgment nonmovant does not receive notice until after the summary judgment hearing.<sup>570</sup> Several other courts have,

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<sup>568</sup> *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 686 (Tex. 2002).

<sup>569</sup> *Id.* at 688.

<sup>570</sup> *Harden v. E. Tex. Med. Ctr. Health Care Assocs.*, No. 14-08-00627-CV, 2009 Tex. App. LEXIS 3409, at \*4 (Tex. App.—Houston [14th Dist.] May 19, 2009, no pet.) (mem. op., not designated for publication) (“*Craddock* applies when a summary-judgment non-movant does not receive notice of the submission of the summary-judgment motion until after the submission date.”); *Cantu v. Valley Baptist Med. Ctr.*, No. 13-02-00321-CV, 2003 Tex. App. LEXIS 7379, at \*2–3 (Tex. App.—Corpus Christi–Edinburg Aug. 28, 2003, no pet.) (mem. op., not designated for publication) (distinguishing *Carpenter* and applying *Craddock* where defaulting party contended she did not receive notice and learned of the hearing only after judgment was entered); *Olien v. Univ. of Tex.*, No. 08-02-00300-CV, 2003 Tex. App. LEXIS 1549, at \*4 (Tex. App.—El Paso Feb.

instead, relied on language in *Carpenter* in determining whether the defaulting summary judgment nonmovant met its burden in its motion for new trial without deciding whether *Craddock* or *Carpenter* governs.<sup>571</sup> In subsequent cases, the Texas Supreme Court has held in other contexts that *Carpenter* does not apply when the nonmovant was unaware of its need to file a response or take other action but has not resolved the question of its application in the context of a default summary judgment.<sup>572</sup>

## XV. SUMMARY JUDGMENT RECORD

The record for a summary judgment appeal traditionally has only been the clerk's record because there was no testimony at the hearing and only written rulings would preserve error.<sup>573</sup> Accordingly, historically, nothing in the reporter's record could have an impact on the appeal. However, that is currently not the case. A signed order should no longer be required to preserve an objection to evidence when the trial court orally ruled on the objection and the ruling appears in the record.<sup>574</sup> Therefore, a party should

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20, 2003, no pet.) (mem. op., not designated for publication) (applying *Craddock* because fact pattern of *Carpenter* "not the case" where defaulting party did not become aware of hearing until after summary judgment granted); *Cf.* *Stanley v. CitiFinancial Mortg. Co.*, 121 S.W.3d 811, 815–16 (Tex. App.—Beaumont 2003, pet. denied) (observing that decision in *Carpenter* "called into question" whether *Craddock* applies when defaulting summary judgment nonmovant did not discover its mistake until after the hearing but deciding case on other grounds).

<sup>571</sup> *Kern v. Spencer*, No. 02-06-00199-CV, 2008 Tex. App. LEXIS 5582, at \*10–13 (Tex. App.—Fort Worth July 24, 2008, no pet.) (mem. op., not designated for publication); *Limestone Constr., Inc. v. Summit Commercial Indus. Props., Inc.*, 143 S.W.3d 538, 542–44 (Tex. App.—Austin 2004, no pet.).

<sup>572</sup> *DolgenCorp, Inc. v. Lerma*, 288 S.W.3d 922, 927 (Tex. 2009) (per curiam) (holding *Carpenter* does not apply to post-answer default judgment against defendant who was not aware of trial date); *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (declining to apply *Carpenter* to summary judgment nonmovant, acting pro se, who filed responses to requests for admission two days late and did not realize need to move to withdraw deemed admissions but attended summary judgment hearing).

<sup>573</sup> TEX. R. CIV. P. 166a(c); *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 n.7 (Tex. 1993); *Utils. Pipeline Co. v. Am. Petrofina Mktg.*, 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ) (only written rulings preserved error).

<sup>574</sup> *Allen v. Albin*, 97 S.W.3d 655, 661–62 (Tex. App.—Waco 2002, no pet.); *Aguilar v. LVDVD, L.C.*, 70 S.W.3d 915, 917–18 (Tex. App.—El Paso 2002, pet. ref'd); *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 387, 395–96 (Tex. App.—Corpus Christi—Edinburg 2000, no pet.) (error is preserved if the reporter's record of the summary judgment hearing shows that the trial court announced an oral ruling on the objection).

request that the reporter's record be prepared and sent to the court of appeals if the trial court made oral rulings on objections to summary judgment evidence that are in the party's favor. However, one court has held that a trial court does not err in refusing a written record during a summary judgment hearing as live testimony is not allowed.<sup>575</sup>

Moreover, there may be other collateral matters to the summary judgment proceeding that may require a reporter's record. For example, if there is an objection to expert testimony, there may be live testimony and evidence offered to support the expert: a *Daubert/Robinson* hearing. Further, there may be live testimony offered to support a motion for continuance of the summary judgment hearing or motion for leave to file evidence late. Accordingly, if a collateral issue impacts a trial court's summary judgment order, the appellant should request the preparation of a reporter's record.

#### XVI. ADVERSE EFFECTS FROM MOTIONS, RESPONSES, OR EVIDENCE MISSING FROM THE RECORD

One problem that has plagued many summary judgment appellants is an adverse presumption applied against them because of motions, responses, or evidence missing from the record. This presumption could act as a waiver by the appellant of entire points of error or the appeal itself. Because oral testimony argument at a summary judgment hearing is not summary judgment evidence, the record on appeal consists solely of the papers on file with the trial court, called the clerk's record.<sup>576</sup> An appellate court cannot review any evidence or summary judgment grounds not on file with the trial court at the time of the summary judgment hearing.<sup>577</sup> So, if a motion, response, or evidentiary document is not on file at the time of the summary judgment hearing, an appellate court cannot consider that document in its determination of the appeal.

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<sup>575</sup> Olsen v. Comm'n for Lawyer Discipline, 347 S.W.3d 876, 885–86 (Tex. App.—Dallas 2011, pet. denied).

<sup>576</sup> TEX. R. APP. P. 34.1; El Paso Assocs., Ltd. v. J.R. Thurman & Co., 786 S.W.2d 17, 19 (Tex. App.—El Paso 1990, no writ).

<sup>577</sup> Gandara v. Novasad, 752 S.W.2d 740, 743 (Tex. App.—Corpus Christi–Edinburg 1988, no writ).



### A. *Historically*

In the former rules of appellate procedure, Rule 50(d) stated: “The burden is on the appellant, or other party seeking review, to see that a sufficient record is presented to show error requiring reversal.”<sup>578</sup> The party who perfects an appeal has historically had the burden to produce a complete record.<sup>579</sup> Even when an appellant requested that items be included in the appellate record, “[he still had] the duty to be certain that all requested items are actually received by the appellate court.”<sup>580</sup> When the appellant failed to provide the appellate court with a complete record, the appellate court presumed that any missing material supported the trial court’s judgment.<sup>581</sup> Consequently, when the clerk’s record did not contain an affidavit or deposition filed in support of a summary judgment motion, the appellate court would presume that the omitted documents supported the trial court’s judgment.<sup>582</sup> If an appellant failed to include the appellee’s summary judgment motion in the transcript, the motion was presumed to support the trial court’s judgment and the appellate court would overrule the appellant’s points of error.<sup>583</sup> However, because a non-movant was not required to respond to a summary judgment motion at all, the appellant did not automatically waive the appeal by failing to include a response to the appellee’s summary judgment motion.<sup>584</sup> The only issue before the appellate court was whether the summary judgment motion is sufficient as a matter of law.<sup>585</sup> However, if the summary judgment could only be supported by a point of law, and not factually, the missing depositions or affidavits, although

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<sup>578</sup> TEX. R. APP. P. 50(d), 49 Tex. B.J. 572 (Tex. Crim. App. 1986, repealed 1997).

<sup>579</sup> *Id.*; *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 689 (Tex. 1990).

<sup>580</sup> *Worthy v. Collagen Corp.*, 921 S.W.2d 711, 717 (Tex. App.—Dallas 1995) (Devany, J., concurring), *aff’d*, 967 S.W.2d 360 (Tex. 1998).

<sup>581</sup> *DeSantis*, 793 S.W.2d at 689.

<sup>582</sup> *Crown Life Ins. Co. v. Estate of Gonzalez*, 820 S.W.2d 121, 122 (Tex. 1991). *See also DeSantis*, 793 S.W.2d at 689.

<sup>583</sup> *Atchison v. Weingarten Realty Mgmt. Co.*, 916 S.W.2d 74, 77 (Tex. App.—Houston [1st Dist.] 1996, no pet.).

<sup>584</sup> *See Knapp v. Eppright*, 783 S.W.2d 293, 295 (Tex. App.—Houston [14th Dist.] 1989, no writ).

<sup>585</sup> *Id.*

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presumed to support the summary judgment, would not result in the appellant waiving the appeal.<sup>586</sup>

*B. Currently*

In September of 1997, the Texas Rules of Appellate Procedure were amended. Current Rule 35.3(a) states:

The trial court clerk is responsible for preparing, certifying, and timely filing the clerk's record if:

- (1) a notice of appeal has been filed . . . ; and
- (2) the party responsible for paying for the preparation of the clerk's record has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee.<sup>587</sup>

Thus, an appellant is no longer obligated to make a specific request for the clerk's record to be filed in the appellate court.<sup>588</sup> Under the new rule, if the appellant files a notice of appeal and makes arrangements to pay the clerk's fee, the trial court clerk has the responsibility to file the clerk's record with the appellate court.<sup>589</sup> Further, Rule 34.5(a) defines what must appear in the clerk's record.<sup>590</sup> If a party's document does not fall into one of the categories that automatically will be sent to the appellate court, then the party only has to designate the document in compliance with the new appellate rules, and the burden to send the designated document is on the trial court clerk.<sup>591</sup> Under the new rule and new burden, appellate courts should no longer apply the presumption in favor of the judgment because of evidence or documents missing from the appellate record that the trial court clerk had the burden to produce. It would be unfair and unjust to presume that a missing pleading or properly designated evidentiary document favors the trial court's

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<sup>586</sup> See *Gupta v. Ritter Homes, Inc.*, 633 S.W.2d 626, 628 (Tex. App.—Houston [14th Dist.] 1982), *aff'd in part, rev'd in part on other grounds*, 646 S.W.2d 168 (Tex. 1983).

<sup>587</sup> TEX. R. APP. P. 35.3(a).

<sup>588</sup> See John Hill Cayce, Jr. et al., *Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L. REV. 867, 919–20 (1997).

<sup>589</sup> See *id.* at 928–29.

<sup>590</sup> TEX. R. APP. P. 34.5(a).

<sup>591</sup> *Id.* 34.5(b).

judgment when the burden to produce the pleading or document is on the trial court clerk and not the appellant.

An interesting issue is presented when a party appeals a trial court's ruling granting a summary judgment and evidence from the summary judgment motion or response or the motion or response itself is missing. Does the old presumption that the missing document favors the judgment still apply?

This question should be answered by determining who has the burden to produce the document. The only provision that may impose on the trial court clerk the responsibility to include a summary judgment motion, response, or reply, if the appellant has not made a designation, is the provision that the trial court clerk has the responsibility to include all pleadings in the record on which the trial was held.<sup>592</sup> Pleadings are alternating formulations of the parties' contentions. The pleadings consist of the original petition, the original answer, and each supplemental or amended petition or answer. A motion is not a pleading. Therefore, Rule 34.5 does not specifically list motions for summary judgment or supporting evidence as required contents of the clerk's record.<sup>593</sup> If the appellant fails to request any pertinent part of the summary judgment record, the court of appeals will presume that the omitted portion supported the judgment and affirm.<sup>594</sup>

For example, in *Enterprise Leasing Co. of Houston v. Barrios*, the Texas Supreme Court found that the appellant had the burden to designate summary judgment materials and applied the presumption for missing evidence:

Although Enterprise bears the burden to prove its summary judgment as a matter of law, on appeal Barrios bears the burden to bring forward the record of the summary judgment evidence to provide appellate courts with a basis to review his claim of harmful error. 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. Therefore, we presume that Barrios's answers

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<sup>592</sup> See *id.* 34.5(a)(1).

<sup>593</sup> See *id.* 34.5.

<sup>594</sup> *Sparkman v. ReliaStar Life Ins. Co.*, No. 13-03-500-CV, 2008 Tex. App. LEXIS 3517, at \*34-35 (Tex. App.—Corpus Christi—Edinburg May 15, 2008, pet. denied) (not designated for publication); *Mallios v. Standard Ins. Co.*, 237 S.W.3d 778, 782 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

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support the trial court's partial summary judgment in favor of Enterprise.<sup>595</sup>

Furthermore, in *Pierson v. SMS Financial II, L.L.C.*, the appellate court dealt with an appeal from a partial summary judgment when the appellant's summary judgment response was not in the appellate record.<sup>596</sup> Further, the appellant did not designate his response for inclusion in the clerk's record.<sup>597</sup> The appellate court concluded that, because a summary judgment response is not a pleading, and because there was no other category that would have placed a burden on the trial court clerk to include the response in the appellate record, the appellant had a duty to designate it.<sup>598</sup> Because the appellant did not designate the missing response, the appellate court used the traditional presumption case law to conclude that the missing summary judgment response would be presumed in favor of the trial court's judgment.<sup>599</sup> In doing so, the court stated that "we must review the summary judgment as if [the appellant] did not respond to the motion" and then proceeded to apply a legal sufficiency review of the partial summary judgment.<sup>600</sup> This case affirms that, although less likely, the traditional presumptions continue to apply to missing evidence, motions, and responses in some cases.<sup>601</sup> "This waiver [presumption] rule will still apply in certain instances, but the new rules will make it much less likely that parties will forfeit grounds of error due to the failure to file a complete record."<sup>602</sup>

The obvious remedy for missing motions, responses, and evidence is to supplement the record and include the missing document. The new rule for supplementing the record has greatly liberalized supplementation of the record.<sup>603</sup> Under the new rule, any party may supplement the record at any time, and the adverse presumptions that previously resulted from motions,

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<sup>595</sup> 156 S.W.3d 547, 549–50 (Tex. 2004) (per curiam) (citations omitted).

<sup>596</sup> 959 S.W.2d 343, 348 (Tex. App.—Texarkana 1998, no pet.).

<sup>597</sup> *Id.*

<sup>598</sup> *See id.*

<sup>599</sup> *See id.*

<sup>600</sup> *Id.*

<sup>601</sup> *See id.*

<sup>602</sup> Cayce, *supra* note 589, at 928.

<sup>603</sup> *See id.* at 935.

responses, and evidence omitted from the record may now be avoided simply by supplementing the record.<sup>604</sup>

However, at least one court has not taken such a liberal view of supplementation in *Zoya Enterprises, v. Sampri Investments, L.L.C.*, the court of appeals refused to consider a supplemental record filed after submission:

This is not a case of a simple oversight of tangential or insignificant information that could be easily overlooked. This is a case of continued neglect of information crucial to a proper appellate review. This neglect continued for over eleven months. The burden was on Zoya (1) to ensure that all the documents it needed for this Court to fully review the correctness of the summary judgment were in the record, and (2) to timely pay for the supplemental record once it realized necessary documents were excluded. Zoya did not carry its burden.

As a result, we refuse to consider the documents contained in the post-submission supplemental record. Instead, we will consider Zoya's issues on the record that was before us on the submission day.<sup>605</sup>

Moreover, although appellate courts strive to decide cases on the merits rather than on procedural technicalities, supplementing the record after a case is decided and reconsidering the prior decision does not serve judicial economy and does not violate this general policy.<sup>606</sup>

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<sup>604</sup> See *id.*; see also *id.* at 934 (for an excellent discussion of the former and current supplementation rules).

<sup>605</sup> No. 14-04-01158-CV, 2006 Tex. App. LEXIS 4406, at \*10–11 (Tex. App.—Houston [14th Dist.] May 23, 2006, no pet.) (footnote omitted) (citations omitted) (not designated for publication).

<sup>606</sup> *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 366 (Tex. 1998). See also *Tex. First Nat'l Bank v. Ng*, 167 S.W.3d 842, 866 (Tex. App.—Houston [14th Dist.] 2005, pet. granted, judgment vacated w.r.m.) (refusing to consider supplemental record filed more than a month after court's opinion and judgment).

XVII. ADVERSE EFFECTS DUE TO APPELLATE BRIEFING  
INADEQUACIES

*A. Duty To Appeal Claims*

A party has a duty to appeal a summary judgment and will waive any challenge to the judgment by failing to appeal.<sup>607</sup> Moreover, a party will waive a complaint about the dismissal of a claim where the party fails to seek review as to the claim.<sup>608</sup>

An argument should be raised in the issues presented section of a brief and also in the argument section, and the argument should be supported with factual arguments and citation to legal authority.<sup>609</sup> For example, in *Gunn v. McCoy*, the Court held that a party waived via a briefing deficiency an argument about the trial court granting summary judgment on a particular issue:

[W]hile the issue was raised in the “Issues Presented” section in both the petition for review and the brief on the merits, Dr. Gunn failed to support her contention with any argument or authority in either the petition or the brief. Every issue presented by a party must be supported by argument and authorities in the party’s brief on the merits, or it is waived.<sup>610</sup>

Moreover, before a party can assert an argument in the Texas Supreme Court, it should have first presented that argument in the trial court and the court of appeals. Texas Rule of Appellate Procedure 53.2(f) provides: “If the matter complained of originated in the trial court, it should have been preserved for appellate review in the trial court and assigned as error in the

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<sup>607</sup> *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555, 560 n.2 (Tex. 2016).

<sup>608</sup> *Id.*; *Guitar Holding Co., v. Hudspeth Cnty. Underground Water Conservation Dist. No. 1*, 263 S.W.3d 910, 918 (Tex. 2008) (citing TEX. R. APP. P. 53.2(f)) (holding that all issues not raised on appeal to the Texas Supreme Court are waived).

<sup>609</sup> TEX. R. APP. P. 38.1, 55.2.

<sup>610</sup> 554 S.W.3d 645, 677 (Tex. 2018) (citing *Trenholm v. Ratcliff*, 646 S.W.2d 927, 934 (Tex. 1983) and TEX. R. APP. P. 55.2(i)) (“The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.”).

court of appeals.”<sup>611</sup> The Texas Supreme Court has enforced this rule and its predecessors.<sup>612</sup>

*B. Appellate Court May Not Sua Sponte Raise Grounds To Reverse But Must Liberally Construe Briefs*

“Parties are restricted on appeal to the theory on which the case was tried.”<sup>613</sup> Appellate courts are similarly restricted and may not overlook the parties’ trial theories.<sup>614</sup> Likewise, in the summary judgment context, “[i]ssues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.”<sup>615</sup> “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.”<sup>616</sup> If a court of appeals were to reverse summary judgment based on such a general response, it “would improperly become an advocate” for a nonmovant who inadequately briefed his point.<sup>617</sup>

One court has balanced this rule with the concept that a court of appeals should liberally construe briefs:

At the same time, under the Rules of Appellate Procedure, appellate “[b]riefs are to be construed liberally,” and “[t]he statement of an issue or point [in an appellant’s brief] will be treated as covering every subsidiary question that is fairly included.” Moreover, “[t]he court of appeals must hand down a written opinion that is as brief as practicable but that addresses every issue raised and necessary to final disposition of the appeal.” Therefore, under Rule 166a(c) of

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<sup>611</sup> TEX. R. APP. P. 53.2(f).

<sup>612</sup> *In re K.A.F.*, 160 S.W.3d 923, 928 (Tex. 2005); *Johnson v. Lynaugh*, 796 S.W.2d 705, 707 (Tex. 1990) (per curiam).

<sup>613</sup> *Wells Fargo Bank, N.A. v. Murphy*, 458 S.W.3d 912, 916 (Tex. 2015) (quoting *Davis v. Campbell*, 572 S.W.2d 660, 662 (Tex. 1978)).

<sup>614</sup> *See Davis*, 572 S.W.2d at 662.

<sup>615</sup> TEX. R. CIV. P. 166a(c).

<sup>616</sup> *Murphy*, 458 S.W.3d at 916 (Tex. 2015); *see also San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209 (Tex. 1990) (per curiam).

<sup>617</sup> *Tello v. Bank One, N.A.*, 218 S.W.3d 109, 116 (Tex. App.—Houston [14th Dist.] 2007, no pet.); *see also Feagins v. Tyler Lincoln-Mercury, Inc.*, 277 S.W.3d 450, 455 (Tex. App.—Texarkana 2009, no pet.).

the Rules of Civil Procedure, an appellate court may not reverse a summary judgment on the basis of “legal theories (i.e., grounds of recovery and defenses) and factual theories” not presented to the trial court, and it may not resolve a case on an inadequately briefed point of error, but under Rules 38.1(f), 38.9, and 47.1 of the Rules of Appellate Procedure, it must address every “subsidiary question that is fairly included” within those legal and factual theories which were presented to the trial court, which are fully briefed on appeal, and which are “necessary to final disposition of the appeal.”<sup>618</sup>

### *C. Specific Judgments Versus General Judgments*

#### 1. General Definitions

If the order granting a summary judgment motion states the reasons why the trial court granted the summary judgment, it is a “specific judgment.”<sup>619</sup> If the trial court simply grants one party’s summary judgment motion but does not state any ground for doing so, then it is called a “general judgment.”<sup>620</sup>

#### 2. A Party Should Look to the Actual Order Granting Summary Judgment

There are occasions when the trial court may inform the parties on what grounds it is granting a summary judgment, but the actual order itself does not state the grounds. For example, the trial court sometimes informs the parties the grounds on which it is granting the summary judgment after oral

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<sup>618</sup> Lee v. Rogers Agency, 517 S.W.3d 137, 164 (Tex. App.—Texarkana 2017, pet. denied) (alteration in original) (citations omitted).

<sup>619</sup> State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374, 380 (Tex. 1993); *see also* B.C. v. Steak N Shake Operations, Inc., 512 S.W.3d 276, 281 n.3 (Tex. 2017); Weiner v. Wasson, 900 S.W.2d 316, 317 n.2 (Tex. 1995); Shivers v. Texaco Expl. & Prod., Inc., 965 S.W.2d 727, 732 (Tex. App.—Texarkana 1998, pet. denied).

<sup>620</sup> *See, e.g.*, Sumerlin v. Hous. Title Co., 808 S.W.2d 724, 726 (Tex. App.—Houston [14th Dist.] 1991, writ denied).



argument or in a letter sent to each party.<sup>621</sup> In these circumstances, where should the appealing party look to determine if the judgment is specific or general? Texas precedent requires that a party look only to the judgment to determine the grounds, if any, identified by the court as the basis of its judgment.<sup>622</sup> “It is the court’s order that counts, not the stated reason or oral qualifications.”<sup>623</sup> Even if the trial court sends a letter detailing the grounds on which the summary judgment was granted with the notice of judgment to each party, the letter is not a part of the judgment and cannot make a general judgment a specific one.<sup>624</sup> This rule can be harsh, but it has the prophylactic effect of ensuring that the plain meaning of a court’s formal order or judgment is not disputed.<sup>625</sup>

#### *D. Specific Judgments*

##### 1. If the Trial Court Grants the Summary Judgment Motion on a Ground that is Not in the Motion, the Appellant Should Object to the Trial Court Doing So.

Texas Rule of Civil Procedure 166a does not permit a trial court to grant a summary judgment based on a ground that was not presented to it in writing.<sup>626</sup> Indeed, the rule provides:

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<sup>621</sup> See, e.g., *Stevens v. State Farm Fire & Cas. Co.*, 929 S.W.2d 665, 669 (Tex. App.—Texarkana 1996, writ denied); *Richardson v. Johnson & Higgins, Inc.*, 905 S.W.2d 9, 11 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Martin v. Sw. Elec. Power Co.*, 860 S.W.2d 197, 199 (Tex. App.—Texarkana 1993, writ denied).

<sup>622</sup> *Morvant v. Dall. Airmotive, Inc.*, No. 02-19-00049-CV, 2020 WL 241424, at \*4 (Tex. App.—Fort Worth Jan. 16, 2020, pet. filed) (not designated for publication) (quoting *Hailey v. KTBS, Inc.*, 935 S.W.2d 857, 859 (Tex. App.—Texarkana 1996, no writ)); see also *Stevens*, 929 S.W.2d at 669; *Shannon v. Tex. Gen. Indem. Co.*, 889 S.W.2d 662, 664 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Martin*, 860 S.W.2d at 199; *Taylor v. Taylor*, 747 S.W.2d 940, 944 (Tex. App.—Amarillo 1988, writ denied); *Frank v. Kuhnreich*, 546 S.W.2d 844, 847 (Tex. Civ. App.—San Antonio 1977, writ ref’d n.r.e.); *Brazos River Auth. v. Gilliam*, 429 S.W.2d 949, 951 (Tex. Civ. App.—Fort Worth 1968, writ ref’d n.r.e.).

<sup>623</sup> *Richardson*, 905 S.W.2d at 11.

<sup>624</sup> *Shannon*, 889 S.W.2d at 664.

<sup>625</sup> *Richardson*, 905 S.W.2d at 12.

<sup>626</sup> *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996); see also *Toonen v. United Servs. Auto. Ass’n*, 935 S.W.2d 937, 942 (Tex. App.—San Antonio 1996, no writ).

The motion for summary judgment shall state the specific grounds therefor . . . . The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.<sup>627</sup>

The Texas Supreme Court has expressly stated that a trial court may not grant a summary judgment on a cause of action not addressed in a summary judgment proceeding.<sup>628</sup> A summary judgment motion must “stand or fall on the grounds specifically set forth in the motion(s).”<sup>629</sup> But this requirement can be waived.<sup>630</sup> The appellant will waive his objection if he fails to bring forward a point of error in his appellate brief complaining of the trial court’s error or arguing that excess relief was improperly granted.<sup>631</sup> Thus, if an appellant wants to complain that the trial court granted a summary judgment on a ground that was not presented in the motion for summary judgment, the appellant should raise this complaint to the appellate court in the brief by a point of error and argument with citation to authority.

## 2. Appellate Courts May Affirm On Any Ground In Motion

If the appellate court concludes that the trial court erred in granting summary judgment on one ground, may it look to other grounds to affirm the judgment even though the trial court may not have considered them? In *State Farm Fire & Casualty Co. v. S.S.*, the Texas Supreme Court addressed this issue in a plurality opinion.<sup>632</sup> The trial court granted summary judgment for the defendant insurance company on the specific basis that, as a matter of law, the homeowner’s policy provided no coverage for any of the plaintiff’s

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<sup>627</sup> TEX. R. CIV. P. 166a(c).

<sup>628</sup> *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993); *see also Chessher v. Sw. Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983).

<sup>629</sup> *Ortiz v. Spann*, 671 S.W.2d 909, 914 (Tex. App.—Corpus Christi—Edinburg 1984, writ ref’d n.r.e.).

<sup>630</sup> *Toonen*, 935 S.W.2d at 942.

<sup>631</sup> *See id.*; *see also Gilchrist v. Bandera Elec. Coop., Inc.*, 924 S.W.2d 388, 389 (Tex. App.—San Antonio 1996), *rev’d on other grounds*, 946 S.W.2d 336 (Tex. 1997); *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 342 (Tex. App.—San Antonio 1988, writ denied).

<sup>632</sup> *See generally* 858 S.W.2d 374 (Tex. 1993).

claims.<sup>633</sup> The plaintiff appealed, and the appellate court held that the trial court erred in granting the motion for summary judgment on the “no coverage” ground. The defendant appealed to the Texas Supreme Court and argued that the court of appeals erred in failing to affirm the summary judgment on a different and independent ground that was raised in the summary judgment motion.<sup>634</sup> The Texas Supreme Court held that when a trial court’s order expressly specifies the ground relied on for the summary judgment, the judgment can be affirmed only “if the theory relied on by the trial court is meritorious, otherwise the case must be remanded.”<sup>635</sup> The court based this result on two policy considerations. First, if appellate courts could affirm a summary judgment on grounds that were not relied on by the trial court, the appellant would be required on appeal to challenge every ground raised in the motion for summary judgment, even though many of the grounds were not considered or ruled on by the trial court.<sup>636</sup> Second, if an appellate court was to consider grounds that were never considered by the trial court, the appellate court would usurp the trial court’s authority to consider and rule on all issues before it.<sup>637</sup> The court stated:

Such a practice results in appellate courts rendering decisions on issues not considered by the trial court and voiding the trial court’s decision without allowing it to first consider the alternate grounds. Usurping the trial court’s authority does not promote judicial economy, but instead serves as an encouragement for summary judgment movants to obtain a specific ruling from the trial judge on a single issue and then try again with other alternate theories at the court of appeals, then assert the same or additional alternate theories before this Court.<sup>638</sup>

This issue, however, was not conclusively settled until three years later in *Cincinnati Life Insurance Co. v. Cates*.<sup>639</sup> In *Cincinnati Life Insurance*, the defendant insurance company filed a motion for summary judgment alleging

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<sup>633</sup> *Id.* at 376.

<sup>634</sup> *Id.* at 380.

<sup>635</sup> *Id.*

<sup>636</sup> *Id.* at 381.

<sup>637</sup> *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 381–82 (Tex. 1993).

<sup>638</sup> *Id.* (footnote omitted).

<sup>639</sup> 927 S.W.2d 623, 624 (Tex. 1996).

grounds A, B, C, and D. The trial court expressly granted the motion on grounds A and B, but expressly denied grounds C and D.<sup>640</sup> The court of appeals held that the trial court erred in granting the summary judgment on grounds A and B, but refused to consider grounds C and D and remanded the case to the trial court for further disposition.<sup>641</sup> In overruling *State Farm*, the Texas Supreme Court held that appellate courts should consider all of the summary judgment grounds that the appellee preserves for appellate review and that are necessary for final disposition of the appeal, whether or not the trial court actually ruled on those grounds.<sup>642</sup>

The Supreme Court has more recently stated the rule as follows: “In reviewing a summary judgment, we consider all grounds presented to the trial court and preserved on appeal in the interest of judicial economy.”<sup>643</sup> Notably, the Court did not articulate any different rule depending on the type of summary judgment order being appealed. In fact, in the appeal of a summary judgment, the appellate court may even review grounds in earlier summary judgment motions on which the trial court denied or did not rule.<sup>644</sup> In *Baker Hughes, Inc.*, the Court stated:

The court of appeals refused to consider whether Baker Hughes’s second motion for summary judgment should have been granted, citing the general rule that a denial of summary judgment is interlocutory and not appealable. But as we recognized in *Cincinnati Life Insurance Co. v. Cates*, the rule does not apply when a movant seeks summary judgment on multiple grounds and the trial court grants the motion on one or more grounds but denies it, or fails to rule, on one or more other grounds presented in the motion and urged on appeal. In *Cates* we held that the appellate court must review all of the summary judgment grounds on which the trial court actually ruled, whether granted or denied, and which are

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<sup>640</sup> *Id.*

<sup>641</sup> *Id.* at 624–625.

<sup>642</sup> *Id.* at 627; see also *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 5 (Tex. 1999); *Romo v. Tex. Dep’t of Transp.*, 48 S.W.3d 265, 269 (Tex. App.—San Antonio 2001, no pet.).

<sup>643</sup> *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005).

<sup>644</sup> *Baker Hughes, Inc.*, 12 S.W.3d at 5.

dispositive of the appeal, and may consider any grounds on which the trial court did not rule.<sup>645</sup>

Finally, it should be noted that when a trial court grants a summary judgment on a specific ground, a court of appeals should review other alternative grounds for affirmance where they are preserved for review: “To preserve these grounds, the party must raise them in the summary judgment proceeding and present them in an issue or cross-point on appeal.”<sup>646</sup> Two courts of appeals have dealt with whether an appellee preserved the ground for appellate review. In *Valores Corporativos, S.A. de C.V. v. McLane Co., Inc.*, the court noted that “courts of appeals should consider not only all those grounds the trial court rules on but also those grounds the trial court did not rule on but that are preserved for appellate review.”<sup>647</sup> The court found, however, that the appellee failed to preserve any of the unruléd upon grounds for appellate review by not seeking to affirm the summary judgment on those grounds in his brief.<sup>648</sup> In *Bennett v. Computer Associates International, Inc.*, the court held that the appellee had preserved for appeal a ground that was asserted in his summary judgment motion but was not considered by the trial court.<sup>649</sup> The appellee preserved error by developing the ground in its appellate brief after a general assertion that the trial court did not err in granting the summary judgment.<sup>650</sup> Without requiring the appellee to reargue all the grounds to the appellate court in support of the trial court’s granting of the summary judgment, an appellate court could affirm a summary judgment on a ground raised by the summary judgment motion but not considered by the trial court. This requirement serves as a form of notice to the appellant so that he will know which grounds he should brief to the appellate court. Of course, the appellant may need to file a reply brief to confront any grounds that the trial court did not consider but which were reasserted by the appellee in his appellate brief.

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<sup>645</sup> *Id.* (footnotes omitted) (citations omitted).

<sup>646</sup> *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172, 178 (Tex. App.—Fort Worth 2004, no pet.).

<sup>647</sup> 945 S.W.2d 160, 161 n.3 (Tex. App.—San Antonio 1997, writ denied) (citing *Cincinnati Life Ins.*, 927 S.W.2d at 625–26 (Tex. 1996)).

<sup>648</sup> *Id.*

<sup>649</sup> 932 S.W.2d 197, 205 (Tex. App.—Amarillo 1996, no writ).

<sup>650</sup> *See id.*

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Several courts of appeals have interpreted *Cincinnati Life Insurance* loosely and arguably have eliminated the requirement that the appellee preserve and raise the unruly ground for appellate review. The Fourteenth Court of Appeals has held that “a summary judgment may be affirmed on any ground asserted in the motion that has merit.”<sup>651</sup> The Tyler court has stated:

The Supreme Court has held that appellate courts, in the interest of judicial economy, may consider other grounds that the movant has reserved for review and the trial court did not rule on. We must be mindful, however, that a summary judgment cannot be affirmed on any grounds not presented in the motion for summary judgment.<sup>652</sup>

The Tyler court mentioned that the ground must be preserved but seemed to suggest that the appellee does so by solely raising the ground in his summary judgment motion.<sup>653</sup> Further, the Tyler court did not discuss whether the appellee reargued the alternative ground in its appellate brief.<sup>654</sup> These interpretations omit the important requirement that the appellee must preserve the ground for appellate argument by raising the ground in an appellate brief, thereby allowing appellate courts to review sua sponte the motion for summary judgment and affirm on any ground that was meritorious. Therefore, a party defending a specific summary judgment on appeal should argue both the grounds on which the trial court based its judgment, and all other grounds that were included in the summary judgment motion. This action will afford the best chance of the specific summary judgment being affirmed on appeal.

Likewise, the safest procedure for the party appealing the summary judgment is to brief every ground that was raised in the motion for summary judgment. This will provide the appellate court with both sides of the argument on any possible ground that the court could use to affirm and will reduce the chances that the summary judgment will be affirmed.

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<sup>651</sup> *City of Hous. Fire Fighters v. Morris*, 949 S.W.2d 474, 476 (Tex. App.—Houston [14th Dist.] 1997, pet. denied).

<sup>652</sup> *Robertson v. Church of God, Int’l*, 978 S.W.2d 120, 124 (Tex. App.—Tyler 1997, pet. denied) (citation omitted).

<sup>653</sup> *See id.*

<sup>654</sup> *See id.*

### *E. General Judgments*

When the trial court grants a general summary judgment and does not specify the ground on which it granted the judgment, the appellant must argue that every ground of the summary judgment motion is erroneous.<sup>655</sup> Further, the appellate court must affirm the summary judgment if any one of the movant's theories has merit.<sup>656</sup> Where the Texas Supreme Court reverses a court of appeals on one ground contained in a summary judgment, the Supreme Court can decide to remand the remainder of the summary judgment back to the court of appeals for review of the other grounds.<sup>657</sup>

#### 1. Specific Points of Error Versus General Points of Error

A party may use either specific points of error/issues or general points of error/issues to attack a summary judgment.<sup>658</sup> In *Malooly Brothers, Inc. v. Napier*, the Texas Supreme Court asserted that the best approach on appeal is to write a general point of error that states, "The Trial Court Erred In Granting The Motion For Summary Judgment."<sup>659</sup> This single point of error allows the party to challenge all of the grounds stated in the summary judgment motion. The court also stated, however, that it is possible to challenge the summary judgment by separate, specific points of error. An example of a specific point of error is "The Trial Court Erred In Granting The Summary Judgment Because The Movant Failed To Establish That There Is No Genuine Issue Of Material Fact As To When The Non-Movant Discovered His Injury So As To Toll The Statute Of Limitations."

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<sup>655</sup> See *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995); *Boone R. Enters., Inc. v. Fox Television Stations, Inc.*, 189 S.W.3d 795, 796 (Tex. App.—Dallas 2005, no pet.).

<sup>656</sup> *B.C. v. Steak N Shake Operations, Inc.*, 512 S.W.3d 276, 281 n.3 (Tex. 2017); *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001) (per curiam) (citing *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989)); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996).

<sup>657</sup> *Steak N Shake*, 512 S.W.3d at 281 n.3 ("Because we hold that the gravamen of B.C.'s claim is assault and therefore the TCHRA is not her exclusive remedy, *infra* at 284, and the court of appeals declined to address the other issues that may have constituted the basis of the trial court's summary judgment ruling, we remand the case to the court of appeals to address the issues in light of our disposition on TCHRA preemption.").

<sup>658</sup> *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970).

<sup>659</sup> *Id.*

## 2. Specific Points of Error

Where an appellant uses specific points of error to attack a general summary judgment and fails to attack one of the possible grounds on which the judgment was granted, the appellate court should affirm the judgment because the appellant has waived the error.<sup>660</sup> One court stated this waiver principle:

[T]he movant requesting judgment is free to assert as many grounds therefor as he chooses. Should he raise several and the court fail to state upon which it relied in granting relief, an additional obstacle confronts the non-movant. It falls upon the latter, on appeal, to address each ground asserted and establish why it was deficient to support judgment. Failing to do this entitles the reviewing court to affirm on any unaddressed ground.<sup>661</sup>

The rationale for waiver in this instance is that the summary judgment may have been based on a ground that was available to the trial court, that ground was not specifically challenged by the appellant, and there was no general assignment that the trial court erred in granting the summary judgment.<sup>662</sup> Thus, if the party challenging the summary judgment uses specific points of error, he should be careful to include every possible ground raised by the summary judgment motion. The following are further examples of an appellant waiving his appeal because he failed to assign a specific point of error to a ground raised in the summary judgment motion.<sup>663</sup> It is important

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<sup>660</sup> *See Id.*

<sup>661</sup> *Miller v. Galveston/Hous. Diocese*, 911 S.W.2d 897, 899 (Tex. App.—Amarillo 1995, no writ) (citation omitted).

<sup>662</sup> *See Malooly Bros.*, 461 S.W.2d at 121; *Lewis v. Skippy's Mistake Bar*, 944 S.W.2d 1, 3 (Tex. App.—Fort Worth 1996), *rev'd on other grounds*, 940 S.W.2d 83 (Tex. 1997) (per curiam).

<sup>663</sup> *Clark v. Compass Bank*, No. 2-07-050-CV, 2008 Tex. App. LEXIS 3783 at \*13–14 (Tex. App.—Fort Worth May 22, 2008, no pet.) (not designated for publication); *Pena v. Je Matadi Dress Co.*, 2008 Tex. App. LEXIS 678 at \*12 (Tex. App.—Houston [1st Dist.] Jan. 31, 2008, no pet.) (not designated for publication); *Fluid Concepts, Inc. v. DA Apartments Ltd. P'ship*, 159 S.W.3d 226, 231 (Tex. App.—Dallas 2005, no pet.); *Evans v. First Nat'l Bank*, 946 S.W.2d 367, 377 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Dubow v. Dragon*, 746 S.W.2d 857, 859 (Tex. App.—Dallas 1988, no writ); *King v. Tex. Employers' Ins. Ass'n.*, 716 S.W.2d 181, 182–83 (Tex. App.—Fort Worth 1986, no writ); *Langston v. Eagle Publ'g Co.*, 719 S.W.2d 612, 615 (Tex. App.—Waco 1986, writ ref'd n.r.e.); *Rodriguez v. Morgan*, 584 S.W.2d 558, 559 (Tex. App.—Austin 1979, writ ref'd n.r.e.).



that the rules discussed here are general and only apply when a defendant attacks a judgment for a plaintiff who asserts a single cause of action.<sup>664</sup>

Further, this discussion must be put in the context of the briefing rules of the 1997 version of the Texas Rules of Appellate Procedure. Those rules provide that an appellant's brief "must state concisely all issues or points presented for review," and the "statement of an issue or point will be treated as covering every subsidiary question that is fairly included."<sup>665</sup> Courts of appeals normally liberally construe "points of error in order to obtain a just, fair and equitable adjudication of the rights of the litigants."<sup>666</sup>

### 3. General Points of Error

A general point of error stating that the trial court erred in granting the motion for summary judgment will allow the non-movant to dispute on appeal all possible grounds for the judgment.<sup>667</sup> Thus, an appellant may challenge "not only arguments focusing on whether a genuine issue of material fact was raised by the summary judgment evidence, but also is able to contest non-evidentiary issues, such as the legal interpretation of a statute."<sup>668</sup>

In *Speck v. First Evangelical Lutheran Church of Houston*, the appellant raised one general issue: "The Trial Court Erred In Granting Appellees' Motion For Summary Judgment, As There Existed Evidence In The Court's File Supporting Appellant's Case."<sup>669</sup> The court of appeals construed this

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<sup>664</sup> See *Fetty v. Miller*, 905 S.W.2d 296, 299 (Tex. App.—San Antonio 1995, writ denied).

<sup>665</sup> TEX. R. APP. P. 38.1(f).

<sup>666</sup> *Lance v. Robinson*, 543 S.W.3d 723, 746 (Tex. 2018) (quoting *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989)); see also TEX. R. APP. P. 38.9; *Tex. Mexican Ry. Co. v. Bouchet*, 963 S.W.2d 52, 54 (Tex. 1998) ("Courts should liberally construe briefing rules."); *Anderson v. Gilbert*, 897 S.W.2d 783, 784 (Tex. 1995) ("Courts are to construe rules on briefing liberally.").

<sup>667</sup> See *Graham v. Federated Dept. Stores, Inc.*, 05-09-01310-CV, 2011 Tex. App. LEXIS 6170, 2011 WL 3435371, at \*3 (Tex. App.—Dallas Aug. 8, 2011, no pet.) (not designated for publication); *Cruikshank v. Consumer Direct Mortg., Inc.*, 138 S.W.3d 497, 502 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *Stevens v. State Farm Fire & Cas. Co.*, 929 S.W.2d 665, 669 (Tex. App.—Texarkana 1996, writ denied) (quoting *Plexchem Int'l, Inc. v. Harris Cnty. Appraisal Dist.*, 922 S.W.2d 930 (Tex. 1996)).

<sup>668</sup> *Moore v. Shoreline Ventures, Inc.*, 903 S.W.2d 900, 902 (Tex. App.—Beaumont 1995, no writ); see also *Shivers v. Texaco Exploration & Prod., Inc.*, 965 S.W.2d 727, 732; *Cassingham v. Lutheran Sunburst Health Serv.*, 748 S.W.2d 589, 590 (Tex. App.—San Antonio 1988, no writ).

<sup>669</sup> 235 S.W.3d 811, 818 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

issue broadly and found it was sufficient to challenge the trial court awarding relief that was not requested:

We hold that when a trial court grants summary judgment on a ground not contained in the motion for summary judgment, an assertion on appeal that fact issues remain on that ground is sufficient under the Texas Rules of Appellate Procedure to raise a challenge to the excess relief—without any request for summary judgment on a claim, nothing exists in the trial court record to controvert an appellant’s contention on appeal that facts exist to support it.<sup>670</sup>

In *Plexchem International Inc. v. Harris County Appraisal District*, the Texas Supreme Court noted that the appellant used a general point of error and presented three pages of argument and authority to support the allegedly waived ground, thus he preserved error as to that ground.<sup>671</sup> Certainly, when an appellant uses a general point of error and briefs every ground raised in the summary judgment motion, there is no waiver.

However, it is not clear whether an appellant who uses a general point of error but does not brief every ground raised in the summary judgment motion waives the unargued grounds on appeal.<sup>672</sup> There are two main situations when an appellant may face this issue. First, the appellant may have failed to challenge one of the movant’s grounds either in the trial court in the response or in the appellate court in the appellate brief. Second, the appellees could have challenged all of the movant’s grounds to the trial court in the response but failed to challenge every ground in the appellate brief.

As to the first situation, courts have held that the appellant waived the appeal.<sup>673</sup> In *San Jacinto River Authority v. Duke*, the Texas Supreme Court held that an appellate court may not reverse a summary judgment on issues

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<sup>670</sup> *Id.* at 819.

<sup>671</sup> 922 S.W.2d 930, 930–31 (Tex. 1996) (per curiam); *Shivers*, 965 S.W.2d at 733, n.2 (holding that the appellant did not waive his appeal when he used a general point of error and presented four pages of argument on the allegedly waived ground).

<sup>672</sup> See *Stevens*, 929 S.W.2d at 669–70.

<sup>673</sup> *Grainger v. Amerisourcebergen Specialty Grp.*, No. 05-13-00179-CV, 2013 Tex. App. LEXIS 12421 at \*6 (Tex. App.—Dallas Oct. 3, 2013, no pet.) (not designated for publication); *Graham v. Federated Dept. Stores, Inc.*, No. 05-09-01310-CV, 2011 WL 3435371, at \*3 (Tex. App.—Dallas Aug. 8, 2011, no pet.) (not designated for publication); *Cruikshank v. Consumer Direct Mortg., Inc.*, 138 S.W.3d 497, 502–03 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).

that were not briefed or assigned as error.<sup>674</sup> In doing so, the court cited to *Central Education Agency v. Burke*, which held that a court of appeals erred in reversing a summary judgment on grounds neither raised in opposition to the motion at the trial court level nor presented to the court of appeals in a brief.<sup>675</sup>

In *Morriss v. Enron Oil & Gas Co.*, the defendant based its motion for summary judgment on the failure of one of the elements of the plaintiff's contract claim and on the affirmative defense of the statute of limitations.<sup>676</sup> In his summary judgment response, the plaintiff only argued that the statute of limitations was tolled by the discovery rule.<sup>677</sup> The trial court signed an order granting the defendant's motion for summary judgment but failed to assign any particular basis for doing so.<sup>678</sup> On appeal, the plaintiff used a general point of error and alleged that the trial court erred in granting the summary judgment but only briefed and argued that the statute of limitations was tolled by the discovery rule.<sup>679</sup> The court stated that by using a general point of error, the plaintiff could "present argument on all grounds upon which he contends that summary judgment was inappropriate."<sup>680</sup> The court noted, however, that the plaintiff did not take advantage of this opportunity; rather, he focused his briefing on the issue of limitations.<sup>681</sup> Thus, the court ruled that "failure to take advantage of the opportunity to present argument on the alternative ground results in waiver."<sup>682</sup>

Other courts have similarly found that a broad issue only allows an appellant the opportunity to brief and argue all grounds; it does not relieve a party of the obligation to brief all grounds that the trial court could have used to support the order.<sup>683</sup>

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<sup>674</sup> 783 S.W.2d 209, 209–10 (Tex. 1990) (per curiam).

<sup>675</sup> 711 S.W.2d 7, 8–9 (Tex. 1986) (per curiam); *see also San Jacinto River Auth.*, 783 S.W.2d at 210.

<sup>676</sup> 948 S.W.2d 858, 863 (Tex. App.—San Antonio 1997, no writ).

<sup>677</sup> *Id.* at 871.

<sup>678</sup> *Id.* at 867.

<sup>679</sup> *Id.* at 871.

<sup>680</sup> *Id.*

<sup>681</sup> *Id.*

<sup>682</sup> *Id.*

<sup>683</sup> *See, e.g., McCoy v. Rogers*, 240 S.W.3d 267, 272 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Cruikshank v. Consumer Direct Mortg., Inc.*, 138 S.W.3d 497, 502–03 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 959

There is limited guidance from Texas courts as to the second situation. The Texas Supreme Court has authored a number of opinions that relate to this topic, but it has never directly addressed the situation when a non-movant attacks every ground in his response to the trial court and then only attacks a few of those grounds in his brief to the appellate court. In *Inpetco, Inc. v. Texas American Bank*, the non-movant appealed an adverse summary judgment to the appellate court using a general point of error.<sup>684</sup> The appellate court held that the non-movant had waived the appeal because the point of error was too broad, and there was insufficient argument and authorities under the point of error.<sup>685</sup> The supreme court reversed the appellate court, stating that it had erred in affirming the trial court's judgment on the basis of briefing inadequacies without first ordering the non-movant to rebrief.<sup>686</sup>

The Texas Supreme Court's ruling in this case was contrary to the historical development of waiver in the context of briefing.<sup>687</sup> *Inpetco* apparently required appellate courts to allow appellants to rebrief inadequately briefed points of error before the court could find waiver. This case produced a wave of confusion in the courts of appeals.<sup>688</sup> Some courts of appeals simply ignored *Inpetco*, some distinguished it, and others seemingly refused to follow it.<sup>689</sup> Much of the confusion in this area occurred because the courts of appeals were trying to apply *Inpetco*, which applied the waiver doctrine to a summary judgment appeal, to non-summary judgment

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(Tex. App.—Corpus Christi—Edinburgh 1998, no pet.) (concluding that *Malooly* allowed the non-movant to argue broadly on appeal under a general point of error, but it did not relieve an appellant of the burden to challenge the grounds for the summary judgment and to present argument for his case on appeal); see also *Judson 88 Partners v. Plunkett & Gibson, Inc.*, No. 14-99-00287-CV, 2000 WL 977402, at \*2 n.2 (Tex. App.—Houston [14th Dist.] May 18, 2000, no pet.) (noting that *Malooly* holds that “even a broad point of error must still be supported by argument challenging each independent summary judgment ground. Otherwise, the assertion of a broad point of error would shift the burden to the appellate court to search the record for grounds on which to reverse the summary judgment.” (citation omitted)) (not designated for publication).

<sup>684</sup> 729 S.W.2d 300 (Tex. 1987) (per curiam); see also *Inpetco, Inc. v. Tex. Am. Bank/Hous. N.A.*, 722 S.W.2d 721, 721–22 (Tex. App.—Houston [14th Dist.] 1986), *writ ref'd n.r.e.*, 729 S.W.2d 300 (Tex. 1987) (per curiam).

<sup>685</sup> *Inpetco*, 722 S.W.2d at 721–22.

<sup>686</sup> *Inpetco*, 729 S.W.2d at 300.

<sup>687</sup> See David M. Gunn, *Unsupported Points of Error on Appeal*, 32 S. TEX. L. REV. 105, 120–21 (1990).

<sup>688</sup> See *id.* at 121–33.

<sup>689</sup> See *id.*

appeals without taking into account the inherent differences in the two types of judgments. One court has attempted to limit *Inpetco* because of the change in the Texas Rules of Appellate Procedure.<sup>690</sup>

In *Fredonia State Bank v. General American Life Insurance Co.*, the Texas Supreme Court revisited *Inpetco* and held that it did not require the courts of appeals to order rebriefing.<sup>691</sup> Rather, the courts of appeals have discretion to determine whether to deem a point waived or to order rebriefing.<sup>692</sup> “Although *Fredonia* did not support its holding by distinguishing *Inpetco* on the basis that it was a summary judgment appeal, it seems to support [the proposition] that the appellate court has discretion to look to the appellant’s response to supply any missing argument under a general point of error.”<sup>693</sup>

In *Bonham State Bank v. Beadle*, the Texas Supreme Court held that when an appellant had raised an issue challenging the summary judgment on an independent ground with the trial court but failed to raise it in the appellate brief, he waived that issue.<sup>694</sup> *Beadle*, however, did not deal with a situation when the appellant lost the entire appeal due to the waiver. The appellate court simply chose not to consider the independent issue that the appellant raised to the trial court but failed to raise in the appellate court.<sup>695</sup>

In *Stevens v. State Farm Fire and Casualty Co.*, the Texarkana Court of Appeals ruled that when an appellant advances a general point of error in his appellate brief, but fails to argue all grounds that the movant advanced in support of his motion in the trial court, the appellate court may in its discretion refuse to consider the unargued bases for reversing the

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<sup>690</sup> *Svabic v. Svabic*, No. 01-99-00007-CV, 1999 Tex. App. LEXIS 7829 at \*4 (Tex. App.—Houston [1st Dist.] Oct. 21, 1999, no pet.) (“Rule 74, on which the court relied in *Inpetco*, has been repealed and replaced. Rule 38.9 does not require the court to allow rebriefing or supplementation as rule 74 did.”) (not designated for publication).

<sup>691</sup> 881 S.W.2d 279, 284–85 (Tex. 1994).

<sup>692</sup> *See id.* at 284 (“[T]he principle underlying the opinion in *Davis* is the settled rule that an appellate court has some discretion to choose between deeming a point waived and allowing amendment or rebriefing, and that whether that discretion has been properly exercised depends on the facts of the case.”).

<sup>693</sup> *Shivers v. Texaco Exploration & Prod.*, 965 S.W.2d 727, 733 (Tex. App.—Texarkana 1998, pet. denied).

<sup>694</sup> 907 S.W.2d 465, 470 (Tex. 1995).

<sup>695</sup> *See id.*; *see also* Gen. Servs. Comm’n v. Little-Tex. Insulation Co., 39 S.W.3d 591, 598 n.1 (Tex. 2001); *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62, 65 (Tex. 1998).

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judgment.<sup>696</sup> In *Stevens*, the court declined to use that discretion and instead considered that the appellant had simply limited his argument to his strongest point, and considered the other possible attacks against the judgment.<sup>697</sup> In so holding, the court stated:

As a practical matter, even if an appellant fails to argue all grounds after a general point of error, presumably it argued all those grounds in its summary judgment response at trial. If a general point of error simply is a request for the appellate court to conduct a *de novo* review of the trial court's judgment, the appellate court can, as a practical matter, step into the trial court's shoes and can, by reviewing the pleadings and evidence as raised in the motion and response, determine whether the trial court properly granted judgment. The appellee still must meet its appellate burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.<sup>698</sup>

“In essence, [the Texarkana court] ruled that because the appellant used a general point of error, he challenged all the grounds on which the summary judgment could have been based.”<sup>699</sup> Due to the *de novo* standard of review on appeal, the appellate court, like the trial court, may consider the clerk's record and the appellant's summary judgment response, “wherein he presumably briefed and challenged every argument that the appellee raised in his summary judgment motion.”<sup>700</sup> Further, there is no presumption of corrections in the summary judgment context. After a trial on the merits, a trial court's judgment is presumed correct. But in summary judgment cases, no presumption of correctness attaches to the trial court's judgment and the movant still must carry his burden at the appellate court level.<sup>701</sup> Because,

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<sup>696</sup> 929 S.W.2d 665, 670 (Tex. App.—Texarkana 1996, writ denied); *see also Shivers*, 965 S.W.2d at 732.

<sup>697</sup> *Stevens*, 929 S.W.2d at 670.

<sup>698</sup> *Id.*

<sup>699</sup> *Shivers*, 965 S.W.2d at 732.

<sup>700</sup> *Id.*

<sup>701</sup> *See Gillespie v. Fields*, 958 S.W.2d 228, 231 (Tex. App.—Tyler 1997, pet. denied) (“[T]he presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear.” (citing *Missouri-Kansas-Texas R.R. Co. v. City of Dall.*, 623 S.W.2d 296, 298 (Tex. 1981))).

unlike a judgment after a trial on the merits, there is no presumption applicable to a summary judgment. Thus, the briefing standards should also be different, with summary judgment appeals given more liberal treatment.<sup>702</sup>

Following the rule that the appellant waives appeal by not briefing every possible ground would require an appellate court to affirm a summary judgment even if the trial court erred in finding that the movant's summary judgment grounds were legally sufficient, and the non-movant challenged the summary judgment in its entirety by a general point of error.<sup>703</sup>

In *Sadler v. Bank of Am., N.A.*, the court of appeals held that it would not affirm a summary judgment based solely on briefing errors:

Sadler's failure to adequately brief the reasons he believed the trial court's ruling on the objections was erroneous would ordinarily result in a waiver of the issue. However, the waiver of this issue would require an affirmance of the trial court's judgment because Sadler would not have produced any summary judgment evidence in response to BOA's no-evidence motion. This court is not permitted to affirm a judgment on the basis of briefing inadequacies without first ordering the party to re-brief. Accordingly, we do not rest our decision on Sadler's briefing inadequacies.<sup>704</sup>

In *A.C. Collins Ford, Inc. v. Ford Motor Co.*, the court found that the party appealing a summary judgment waived appeal by not raising in the appellate brief the issue of conspiracy.<sup>705</sup> The court did not state whether the appellant had raised conspiracy in the summary judgment response in the trial court.

The best practice for a party appealing from a general summary judgment is to set out a general point of error and argue every ground raised in the summary judgment motion. If he/she does not do so, they will risk waiving

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<sup>702</sup> King v. Graham Holding Co., 762 S.W.2d 296, 298, 299 (Tex. App.—Houston [14th Dist.] 1988, no writ) (noting that *Inpetco* dealt with a summary judgment appeal where the more liberal *Malooly* briefing rules apply and that *Inpetco* did not create a general right to rebrief).

<sup>703</sup> *Shivers*, 965 S.W.2d at 732; see also *Bean v. Reynolds Realty Grp., Inc.*, 192 S.W.3d 856, 860 (Tex. App.—Texarkana 2006, no pet.) (citing *Stevens v. State Farm Fire & Cas. Co.*, 929 S.W.2d 665, 670 (Tex. App.—Texarkana 1996, writ denied)).

<sup>704</sup> No. 04-03-00706-CV, 2004 WL 1392325, at \*8–9 (Tex. App.—San Antonio June 23, 2004, no pet.) (citation omitted) (not designated for publication).

<sup>705</sup> 807 S.W.2d 755, 760 (Tex. App.—El Paso 1990, writ denied).

the entire appeal. If the party fails to challenge every possible ground raised in the summary judgment motion in either the response to that motion, or in his appellate brief, the appellate court will certainly affirm the judgment on the unchallenged grounds. On the other hand, if the party challenges every ground raised in the summary judgment motion in the response to that motion, the appellate court arguably may, like the court in *Stevens*, choose to review that response and not find a waiver of the appellant's appeal.<sup>706</sup> Most likely, however, the court will choose not to exercise that discretion because of docket concerns and, due to the supreme court's recent and apparent fondness of summary judgments, it will not likely reverse the decisions of the courts of appeals affirming summary judgments.

#### 4. Criticism of General Points of Error

One court of appeals has complained of the *Malooly* briefing rule, which allows argument as to all possible summary judgment grounds to be raised under a single point of error. In *A.C. Collins Ford Motor Co.*, the court urged the Texas Supreme Court to reconsider the *Malooly* briefing rules.<sup>707</sup> The court stated that “the time has come when attorneys should be able to direct an appellate court to the error of the trial court with such specificity that there is no question about the complaint on appeal.”<sup>708</sup> Further, the court pointed out that when the appellate record consists of volumes of material, “a single point of error saying the trial court erred is little help” to the appellate court.<sup>709</sup> To date, however, the Texas Supreme Court has refused to overrule *Malooly*. Indeed, it has reaffirmed *Malooly* in *Plexchem International, Inc. v. Harris County Appraisal District*.<sup>710</sup>

#### 5. How to Raise and Brief a Proper Point of Error

A party appealing an adverse summary judgment should brief the appeal as thoroughly as possible. First, the general point of error should state, “The Trial Court Erred In Granting The Motion For Summary Judgment.”<sup>711</sup> As

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<sup>706</sup> *Stevens*, 929 S.W.2d at 670.

<sup>707</sup> 807 S.W.2d at 760; *see also* *Natividad v. Alexis, Inc.*, 833 S.W.2d 545, 549 (Tex. App.—El Paso 1992), *rev'd on other grounds*, 875 S.W.2d 695 (Tex. 1994).

<sup>708</sup> *A.C. Collins Ford*, 807 S.W.2d at 760.

<sup>709</sup> *Id.*

<sup>710</sup> 922 S.W.2d 930, 931 (Tex. 1996) (per curiam).

<sup>711</sup> *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970).



discussed above, this allows the appellant to attack every ground relied on by the motion for summary judgment. Because the appellate courts and their staffs will find sub-points of error helpful, the appellant should also raise a sub-point of error stating, “The trial court erred in granting the summary judgment on ground X because of Y.” An example of such a brief is contained in *Davis v. Pletcher*, where the court states:

By a plethora of points, appellant . . . assails the action of the trial court in partially granting the summary judgment. In the first of the 59 points of error, [appellant] complains simply that the court erred in granting the motion. The following 41 points elaborate on this first point in a multitude of ways and are addressed by appellant in seven groups of from one to thirteen points.<sup>712</sup>

This language will act as a road map and ensure that the appellate court will not overlook any argument or authorities that may be dispositive. The appellant should brief and argue every ground raised in the summary judgment motion and should place these contentions in sub-points of error. This should be done whether the appeal is from a general or specific summary judgment order. If the order is specific, the appellate court can still affirm the summary judgment on grounds not considered by the trial court. It is wise for an appellant to clearly set out opposition to every possible ground on which the appellate court can affirm a summary judgment. If the summary judgment order is general, the appellant should assert as a sub-point of error and brief every possible ground to avoid waiving his appeal.

#### *F. Appellee’s Duty To File Brief*

Rule 38.8(a) of the Texas Rules of Appellate Procedure expressly guides courts as to what to do if an appellant fails to file a brief; however, there is no corresponding rule to guide courts when an appellee fails to file a brief.<sup>713</sup> A court has several options when an appellee fails to file a brief: it can accept the appellant’s arguments at face value and summarily reverse or advance

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<sup>712</sup> 727 S.W.2d 29, 32 (Tex. App.—San Antonio 1987, writ ref’d n.r.e.).

<sup>713</sup> TEX. R. APP. P. 38.8(a); *Dillard’s, Inc. v. Newman*, 299 S.W.3d 144, 147 (Tex. App.—Amarillo 2008, pet. denied).

arguments in order to affirm.<sup>714</sup> “Neither option is acceptable.”<sup>715</sup> Rather, “the appellate court should conduct an independent analysis of the merits of the appellant’s claim of error, limited to the arguments raised by the appellant, to determine if there was error.”<sup>716</sup>

So, appellees do not have to file an appellee’s brief; rather, whenever an appellee fails to file a brief, an appellate court should conduct an independent analysis of the merits of the appellant’s claim of error to determine if there was error.<sup>717</sup> Indeed, “An appellee’s failure to contradict issues presented does not lead to concession of error through some sort of appellate default judgment.”<sup>718</sup> Accordingly, even if an appellee fails to file an appellee’s brief, or its appellee’s brief does not expressly mention a particular argument, the court of appeals should undergo an independent review to determine if that issue would affirm the trial court’s judgment. This independent review should be constrained by what the appellee raised in the trial court. A court cannot advance new arguments. Note also that the appellee has no duty to raise any issue statements.<sup>719</sup> There is one negative consequence for not filing an appellee’s brief: a court of appeals may presume that factual statements made in the appellant’s brief are accurate if the appellee does not file a brief and contradict those statements.<sup>720</sup>

### XVIII. CONCLUSION

As we have seen, an attorney faces many issues in filing or responding to a summary judgment in Texas. Whether the issue is the appropriate standard and scope of review; the finality of the summary judgment order; the effect

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<sup>714</sup> *Dillard’s*, 299 S.W.3d at 147.

<sup>715</sup> *Id.*

<sup>716</sup> *Id.*

<sup>717</sup> See *Sarno v. Marsaw & Assocs. P.C.*, No. 05-10-01146-CV, 2012 Tex. App. LEXIS 2741, at \*3 n.2 (Tex. App.—Dallas Apr. 5, 2012, no pet.) (not designated for publication); *In re Bowman*, No. 03-07-0418-CR, 2007 Tex. App. LEXIS 9500, at \*2 (Tex. App.—Austin Dec. 5, 2007, no pet.) (mem. op., not designated for publication); *Burns v. Rochon*, 190 S.W.3d 263, 267 n.1 (Tex. App.—Houston [1st Dist.] 2006, no pet.); *San Antonio Villa Del Sol Homeowners Ass’n v. Miller*, 761 S.W.2d 460, 462 (Tex. App.—San Antonio 1988, no writ).

<sup>718</sup> *Spencer v. Gilbert*, No. 03-09-00207-CV, 2010 Tex. App. LEXIS 6353, at \*4 n.2 (Tex. App.—Austin Aug. 4, 2010, pet. dismissed w.o.j.) (mem. op., not designated for publication).

<sup>719</sup> TEX. R. APP. P. 38.2(a)(1)(B).

<sup>720</sup> TEX. R. APP. P. 38.1(g); see also *Nellis v. Haynie*, 596 S.W.3d 920, 922 n.2 (Tex. App.—Houston [1st Dist.] 2020, no pet.).

of motions, responses, and evidence missing from the record; or the exactitude of briefing to the appellate court, a party must be aware of recent precedent and rule changes in order to avoid the sometimes harsh consequence of waiver of an issue on appeal. Therefore, the author hopes that this article will help to inform attorneys who either need to appeal or respond to an appeal of a summary judgment.