AN OVERVIEW OF SUMMARY JUDGMENT PRACTICE IN TEXAS STATE COURT

KURT H. KUHN
Brown McCarroll, L.L.P.
111 Congress Avenue
Suite 1400
Austin, Texas 78701
(512) 472-5456
(512) 479-1101 (fax)

State Bar of Texas
APPELLATE BOOT CAMP
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Austin

CHAPTER 6

KURT HOWARD KUHN

Brown McCarroll, L.L.P.
111 Congress, Suite 1400
Austin, Texas 78701
512-479-9746
kkuhn@mailbmc.com

Mr. Kuhn is a partner in the appellate, commercial, and general civil litigation sections of Brown McCarroll, L.L.P. He has extensive litigation experience at both the trial and appellate level. Mr. Kuhn has handled a wide array of appellate matters, and is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization. He has successfully won reversals in numerous cases before the United States Fifth Circuit Court of Appeals, the Texas Supreme Court, and other Texas appellate courts.

In his trial practice, Mr. Kuhn has served as attorney-in-charge for a variety of civil disputes, and has worked on cases in each of the federal districts in Texas, as well as numerous Texas district and county courts. Mr. Kuhn's clients have included manufacturers, medical providers and hospitals, governmental entities and officers, media organizations, and a variety of other businesses and individuals.

Education

- Doctor of Jurisprudence, Yale Law School, 1996, *Yale Law & Policy Review*, Exec. Editor in Charge of Prod.
- Bachelor of Arts in Speech and Theater with English minor, *summa cum laude*, Arkansas Tech University, 1993

Prior Professional Experience

- Office of the Solicitor General, Attorney General of Texas, Assistant Solicitor General, 1999-2000
- Gibson, Dunn & Crutcher, LLP, Associate, 1997-1999
- Chief Judge H. Franklin Waters, United States District Court, Western District of Arkansas, Law Clerk, 1996-1997

Professional Licenses

- Attorney at Law, Texas, 1997
- Board Certified, Civil Appellate Law, Texas Board of Legal Specialization

Selected Appeals:

- *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598 (Tex. 2004). Appealed reversal of summary judgment in products-liability lawsuit arising out of vehicle fire. Won reversal by establishing that there was no evidence to support any finding of a manufacturing defect under Texas law.
- *Texas Dept. of Criminal Justice v. Miller*, 51 S.W.3d 583 (Tex. 2001). Appealed denial of plea to the jurisdiction in wrongful death (medical malpractice) case. Won reversal by establishing that administering pain medication was not a "use of property" that waived governmental immunity under the Tort Claims Act when medication was not the cause of the patient's death.
- *Texas Dept. of Transp. v. Jones*, 8 S.W.3d 143 (Tex. 1999) (per curiam). Appealed denial of plea to the jurisdiction in property damage case on procedural question regarding the nature of governmental immunity. Won reversal by establishing that a governmental entity may raise immunity from suit in a plea to the jurisdiction.
- *Brown v. Tull*, No. 99-50442 (5th Cir. May 30, 2000). Appealed denial of motion to dismiss in suit against numerous government and private defendants alleging constitutional and state law claims arising from seizure of animals from alleged "puppy mill." Won reversal and dismissal for government client by establishing that client's actions were objectively reasonable under Texas law.

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AN OVERVIEW OF SUMMARY JUDGMENT PRACTICE IN TEXAS STATE COURT

I. WHAT IS SUMMARY JUDGMENT?

Summary judgment is a procedural mechanism designed to allow for the efficient resolution of legal disputes which can be decided as a matter of law. To some degree, a summary judgment proceeding can be thought of as a trial. *Goswami v. Metropolitan 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"). However, a summary judgment proceeding does not place the trial judge in the position of the trier of fact.

Texas law is sensitive to the notion that summary judgment should not allow a trial judge to infringe on the jury's role as fact-finder. *Huckabee v. Time Warner Entm't Co.*, 19 S.W.3d 413, 422 (Tex. 2000). Summary judgment does not allow for a litigant to be deprived of its right to trial by jury. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n.5 (Tex. 1979). Thus, during a summary judgment proceeding, the trial judge should not be asked to weigh evidence. *Huckabee*, 19 S.W.3d at 422.

Instead, summary judgment allows for the resolution of disputes that do not present fact issues. *New Jersey Bank (N.A.) v. Knuckley*, 637 S.W.920, 921 (Tex. 1982). If no genuine issues of material fact are present, a summary judgment proceeding can be used to resolve the entire lawsuit. *Rhone-Poulenc, Inc. v. Steel,* 997 S.W.2d 217, 222 (Tex. 1999). It is also proper to use summary judgment to resolve separate issues within a single cause of action. *Chase Manhattan Bank, N.A. v. Lindsay*, 787 S.W.2d 51, 53 (Tex. 1990) (orig. proceeding).

Texas has not always had summary judgment practice. The procedure was first adopted in 1940 with the promulgation of the first rules of civil procedure. *Clear Creek Basin Auth.*, 589 S.W.2d at 675. The intent behind adopting a summary judgment proceeding was to increase judicial efficiency. *Id.* Historically, any benefit of the procedure was squandered due to misunderstandings and skepticism from bench and bar alike. *Id.* As a result, attempts have been made to clarify the procedure. *Id.*

Summary judgment is now a much more widely used procedural mechanism. However, current practitioners know that the receptiveness to summary judgment motions varies around the state and from one courtroom to the next. This is unfortunate, and need not be the case. Used properly, summary judgment practice can provide multiple benefits to the litigation process, including: (1) saving time and resources by resolving disputes before trial; (2) familiarizing the trial court with the issues in dispute prior to trial; (3) providing the parties with pretrial legal rulings to prevent surprise at trial; (4) allowing a simpler and more focused case to be presented to the jury; and (5) forcing the parties to more realistically value the dispute for settlement purposes.

This article is meant to provide an overview of summary judgment practice in Texas state courts. Clearly it does not address every issue that might arise in a summary judgment proceeding. Instead, it is meant to provide the practitioner with the basics necessary to argue for, or defend against, summary judgment. Hopefully, a better understanding of the procedural tool of summary judgment will help to maximize its potential benefits.

Practice Note

Practitioners should carefully review the evidence in the case and the applicable law before deciding whether a motion for summary judgment is proper. A motion for summary judgment may give rise to Rule 13 sanctions if it is both: (1) groundless; and (2) brought in bad faith or for purpose of harassment. *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993). The rules also specifically allow for sanctions if affidavits filed as part of the summary judgment process were presented in bad faith or solely for the purpose of delay. TEX. R. CIV. P. 166a(h).

However, a motion for summary judgment asserting that there is no genuine issue of material fact is not proven groundless or in bad faith merely by the filing of a response which raises an issue of fact, even if the response was or could have been anticipated by the movant. *Tanner*, 856 S.W.2d at 731. Denial of a motion for summary judgment alone is not grounds for sanctions. *Id.*

Even if not sanctionable, counsel should give careful consideration before filing a motion that he or she believes to be of questionable merit. First, it is a waste of time and resources of the parties and the court. Second, it simply provides the non-movant a chance to demonstrate to the trial court that opposing counsel does not understand the law and/or the facts of the case.

II. WHAT ARE THE STANDARDS FOR SUMMARY JUDGMENT AND WHO HAS THE BURDEN?

Texas rules provide for two distinct types of summary judgments: a "traditional" motion for summary judgment and a "no-evidence" motion for summary judgment. TEX. R. CIV. P. 166a(a), -(b), -(i).

The standards and burdens applied vary between the two types.

*****Practice Note*****

A party may decide that it has grounds to file both a traditional and a no-evidence summary judgment motion. Some Texas courts have expressed a preference that this be accomplished in two separate motions. If filed in one joint motion, it is certainly helpful to the courts, though not required, that the motion separate out the basis for each type of motion into separate sections delineated by clear headings. *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004).

A. Traditional motions for summary judgment

Prior to 1997, Texas law did not allow for a "no-evidence" summary judgment motion similar to that found in federal practice. After the rules were changed to allow for such a motion, the older procedure became known as a "traditional" motion for summary judgment. The standards and burdens for a traditional motion for summary judgment have been clearly defined.

1. A traditional motion for summary judgment is reviewed under well-established standards.

The basic standards for a traditional motion for summary judgment proceeding have been repeatedly articulated in Texas case law. Under a traditional motion for summary judgment:

(a) the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law;
(b) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true; and
(c) every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548-49 (Tex. 1985).

2. The movant retains the burden to prove its motion, but the non-movant can then be required to come forward with evidence sufficient to create a fact question.

The general standards cited above can be used to navigate the burden in any traditional motion for summary judgment. However, in trying to understand how summary judgment practice actually works, it can be helpful to consider its various permutations.

In any traditional motion for summary judgment, the movant must always conclusively prove all essential elements of his cause of action or defense as a matter of law. *Clear Creek Basin Auth.*, 589 S.W.2d at 678. If a plaintiff meets this burden by proving the essential elements of its affirmative claim, it is entitled to summary judgment unless the defendant comes forward with summary judgment proof sufficient to raise a fact issue as to an affirmative defense. *Nichols v. Smith*, 507 S.W.2d 518, 520 (Tex. 1974).

Merely pleading an affirmative defense does not defeat a motion for summary judgment where the plaintiff has conclusively established its own claim. *Id.* To avoid summary judgment by relying on an affirmative defense, the defendant must come forward with sufficient evidence to raise a fact issue on each element of its defense. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

A defendant is entitled to summary judgment if it either: (1) conclusively negates at least one of the essential elements of a cause of action; or (2) conclusively establishes each element of an affirmative defense. *Randall's Food Mkts., Inc. v. Davis*, 891 S.W.2d 640, 644 (Tex. 1995). If the defendant presents sufficient summary judgment evidence to negate one element of a plaintiff's claim, the plaintiff must bring forth evidence sufficient to prove the existence of a genuine issue of material fact with regard to the element challenged by the defendant. *Centeq Realty v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995).

If a defendant brings forth sufficient summary judgment evidence to prove each element of an affirmative defense, the burden is then on the plaintiff to submit evidence raising a fact issue concerning the defense. *"Moore" Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936-37 (Tex. 1972). The defendant has the burden of proving any of its affirmative defenses. *McIntyre v. Ramirez*, 109 S.W.3d 741, 748 (Tex. 2003). But a properly pleaded affirmative defense, supported by uncontroverted summary judgment evidence, can serve as the basis for summary judgment. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991).

3. The non-movant is not required to file a response, but failing to do so limits what can be argued.

As noted above, the movant retains the burden of establishing that there is no genuine issue of any material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). Unless the movant offers evidence sufficient to conclusively establish its claim or defense, the non-movant has no burden to file a response. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222-23 (Tex. 1999).

Summary judgment cannot be granted by default based on the non-movant's failure to file a response. *Id*. at 223. Even without a response, in a traditional motion for summary judgment, the non-movant can argue at the hearing or on appeal that the summary judgment proof is insufficient as a matter of law to support summary judgment. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000).

While not required, filing a response would seem to be helpful and prudent. *Clear Creek Basin Auth.*, 589 S.W.2d at 678. In the absence of a response, even on appeal, the non-movant can continue to argue the legal sufficiency of the summary judgment, but the non-movant loses the right to argue any other grounds for reversal that are subject to waiver, including any affirmative defense. *Id.* Even if legal sufficiency is the only argument the non-movant has to make, a prudent attorney would still file a response outlining its argument for the trial judge.

B. No-evidence motions for summary judgment

In 1997, Texas modified its summary judgment rules to include a "no-evidence" motion for summary judgment. The no-evidence summary judgment motion is a streamlined procedure in that the movant is merely required to point to specific elements of an opponent's claim or defense to which the non-moving party cannot produce sufficient summary judgment proof to raise a fact issue. TEX. R. CIV. P. 166a(i).

1. <u>The no-evidence summary judgment procedure is set out in the text of the rule and accompanying comment.</u>

The text of the rule allowing for no-evidence summary judgment motions is somewhat self-explanatory. It reads:

> After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

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

Unlike other notes and comments in the rules of civil procedure, the comment to Rule 166(a)(i) was specifically meant to provide guidance on the construction and application of the rule. TEX. R. CIV. P. 166a(i) cmt.; *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist] 2000, pet. denied]. Accordingly, understanding the rule requires reviewing the comment; which reads:

> This comment is intended to inform the construction and application of the rule. Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case.
>
> Paragraph (i) does not apply to ordinary motions for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law.
>
> To defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice. A motion under paragraph (i) is subject to sanctions provided by existing law (Tex. Civ. Prac. & Rem. Code §§ 9.001- 10.006) and rules (Tex. R. Civ. P. 13). The denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c).

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

2. <u>The standard applied to no-evidence summary judgment is the same as that of a pre-trial directed verdict.</u>

The courts have recognized that a no-evidence summary judgment is essentially a pre-trial directed verdict. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003). As such, a no-evidence

summary judgment motion is reviewed under a legal sufficiency standard. *Id.* at 750-51.

In considering a no-evidence motion for summary judgment, the evidence is reviewed in a light most favorable to the non-movant, disregarding all contrary evidence and inferences. *Id.* at 751. A no-evidence summary judgment is appropriate when:

(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.

Id. As the party with the burden at trial, the non-movant has the burden of providing evidence sufficient to create a material fact on issue challenged by the motion. *Marsaglia v. University of Texas, El Paso*, 22 S.W.3d 1, (Tex. App.—El Paso 1999, pet. denied). A no-evidence summary judgment motion should not be granted if the non-movant submits more than a scintilla of probative evidence to raise a genuine issue of material fact as to the element challenged. *King Ranch, Inc.*, 118 S.W.3d at 751.

The non-movant satisfies its burden if it submits probative evidence that rises to a level that would allow reasonable and fair-minded people to differ in their conclusion. *Id.* The burden is not met if the evidence is so weak that it creates no more than "mere surmise or suspicion" of a fact. *Id.*

3. A no-evidence motion for summary judgment cannot be brought based on a party's own claims.

On its face, the no-evidence rule applies only to a motion attacking "a claim or defense on which an adverse party would have the burden of proof at trial." TEX. R. CIV. P. 166a(i). The comment reiterates that the rule allows for a motion addressing "specified elements of an adverse party's claim or defense," and goes on to specifically indicate that the rule "does not apply to ordinary motions for summary judgment . . . in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense." TEX. R. CIV. P. 166a(i) cmt.

Accordingly, it should come as no surprise that a party cannot file a no-evidence motion for summary judgment based on a claim or defense on which the moving party has the burden at trial. *Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 679-81 (Tex. App.—Houston [14th Dist] 2003, no pet.); *Kesler v. Memorial Med. Ctr.*, 105 S.W.3d 122, 128 (Tex. App.—Corpus Christi 2003, no pet.).

Nowak was a suit for default on a promissory note for the sale of a house, and the defendant asserted an affirmative defense of statute of limitations. 110 S.W.3d at 679-80. The defendant filed a no-evidence motion for summary judgment, not on any of the elements of the claim on the note, but instead arguing that the plaintiff could not show sufficient evidence to avoid the limitations defense. *Id.* at 680.

This is an improper use of the no-evidence procedure. Not only is it contrary to the specific language of Rule 166a(i) and the comment, it also would allow the movant to avoid its burden of conclusively proving each element of its defense. *Id.* at 680-681. The no-evidence motion does not fundamentally alter the burden of proof.

Split of Authority

More than a decade ago, the Texas Supreme Court ruled that a non-movant is not required to object to the legal sufficiency of a traditional motion for summary judgment to raise that issue on appeal. *McConnell v. Southside Indep. Schl. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993). However, there is currently a split between the courts of appeals as to whether this same rule applies to a no-evidence motion.

At least five of the courts have indicated that it does and that the legal sufficiency of a no-evidence motion may be raised for the first time on appeal. These courts include: Dallas, Corpus Christi, El Paso, Houston [14th Dist.], and San Antonio. *See In re Swanson*, 130 S.W.3d 144, 147 (Tex. App.—El Paso 2003, no pet.); *Crocker v. Paulne's Nursing Home, Inc.*, 95 S.W.3d 416, 419 (Tex. App.—Dallas 2002, no pet.); *Michael v. Dyke*, 41 S.W.3d 746, 750-51 n.3 (Tex. App.—Corpus Christi 2001, pet. denied); *Cuyler v. Minns*, 60 S.W.3d 209, 213-14 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex. App.—San Antonio 2000, pet. denied).

At least four of the courts have indicated that the same rule does not apply and that the legal sufficiency of a no-evidence motion may not be raised for the first time on appeal. These courts include: Amarillo, Austin, Tyler, and Waco. *See Flory v. Daimler Chrysler Corp.*, No. 12-02-00270-CV, 2003 Tex. App. LEXIS 10235, at *3 n.2 (Tex. App.—Tyler Dec. 3, 2003, pet. denied) (Mem. Op.); *Barnes v. Sulak*, No. 03-01-00159-CV, 2002 Tex. App. LEXIS 5727, *25 n.4 (Tex. App.—Austin Aug. 8, 2002, pet. denied) (not designated for publication); *Williams v. Bank One, Texas*, 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).

Until this split of authority is resolved by the Texas Supreme Court, practitioners should continue to raise this issue, on either side, as a possible ground for granting a petition for review.

III. WHAT SHOULD A MOTION FOR SUMMARY JUDGMENT LOOK LIKE?

What a motion for summary judgment will look like varies depending on whether it is filed as a traditional motion or a no-evidence motion.

A. The traditional motion for summary judgment

As noted above, for a movant to be entitled to prevail on a traditional motion for summary judgment, it must prove that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Nixon*, 690 S.W.2d at 548-49.

A traditional summary judgment requires the presentation of evidence. Evidence favorable to the non-movant will be taken as true, and every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. *Id.* Thus, the format of a traditional summary judgment centers on how best to present to the trial court two things: (1) the undisputed facts; and (2) the law applicable to the case.

The starting point of every traditional motion for summary judgment should be to lay out sufficient proper summary judgment evidence. As far as evidence is concerned, a summary judgment hearing can be thought of as procedurally similar to an appeal in that the court's decision must be based on the written record before it.

Live testimony cannot be received at the summary judgment hearing. TEX. R. CIV. P. 166a(c). Instead, the trial court must decide a summary judgment based on the deposition transcripts, interrogatory answers, and other discovery responses referenced or set forth in the motion or response, as well as the pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records. TEX. R. CIV. P. 166a(c); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992) (orig. proceeding). Regardless of what type of evidence is used, it must be presented in a form that would be admissible in trial. *Hildago v. Surety Sav. & Loan Ass'n*, 462 S.W.2d 540, 545 (Tex. 1971).

It should be noted that the evidence considered to support each party's arguments is not limited to only the evidence attached to that party's motion or response, and a party is not required to set out its evidence in its motion. While the grounds for summary judgment must be set out in the motion, evidence does not. *Wilson v. Buford*, 904 S.W.2d 628, 629 (Tex. 1995). The trial court can look to any evidence attached to either the motion or response. *Id.*

*****Practice Note*****

In order to be considered timely, summary judgment evidence must be filed and served by the movant at least 21 days before the hearing and by the non-movant at least 7 days before the hearing. Tex. R. Civ. P. 166a(c). As with a late filed motion or response, late filed evidence can only be considered with leave of court. Tex. R. Civ. P. 166a(c).

A party who is late filing a motion, response, or any supporting evidence must obtain a signed written order from the trial judge showing leave to file the material. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996) (late filed affidavits not considered without written order); *INA of Texas v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985) (late filed response not considered).

1. Pleadings are not summary judgment evidence.

While the trial court considers the pleadings in reviewing a motion for summary judgment, the party should not confuse this with evidence. "Pleadings do not constitute summary judgment proof." *Clear Creek Basin Auth.,* 598 S.W.2d at 678. Likewise, neither the motion for summary judgment nor the response, even if sworn, is ever proper summary judgment proof. *Farmer v. Ben E. Keith Co*., 919 S.W.2d 171, 175 (Tex. App.—Fort Worth 1996, no writ).

However, summary judgment can be rendered, when authorized, "on the pleadings." *Hildago*, 462 S.W.2d at 543 n.1. That is to say, summary judgment can be entered based on the pleadings if, on its face, the opposing party's pleading demonstrates deficiencies that make judgment appropriate. *Id.* Examples of when summary judgment should be entered on the pleadings include a petition that fails to state a legal claim or cause of action or a case of a suit brought on a sworn account under Rule 185 when the defendant fails to deny the account under oath. *Id.* Used this way, a Texas state court summary judgment motion is analogous to the federal court practice of filing a Rule 12(b)(6) motion to dismiss or Rule 12(c) motion for judgment on the pleadings.

When a petition is reviewed under this type of summary judgment motion, the court is looking, not at the legal theories asserted, but to determine whether the factually allegations pled could ever state a cause of action. *National Union Ins. Co. v. Merchants Fast Motor Lines, Inc*., 939 S.W.2d 139, 142 (Tex. 1997).

When a motion for summary judgment is brought for a failure to state a claim, it is being used in the same manner as special exceptions. Under the special exceptions practice, if the trial court sustains the exceptions, it cannot dismiss without allowing the party the opportunity to cure. *Texas Dep't of Corr. v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974). The same is

true in summary judgment practice. If the trial court determines that summary judgment is proper for failure to state a claim, it should allow the non-movant the opportunity to cure any pleading deficiency before entering judgment. *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658-59 (Tex. 1998).

2. Uncontroverted testimonial evidence from an interested witness can serve as the basis for summary judgment.

The summary judgment motion can be supported by uncontroverted testimony evidence of an interested witness or expert. The mere fact that an affidavit or deposition testimony is self-serving does not make the evidence an improper basis for summary judgment. *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997). The rules specifically allow for the use of such material if it "is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted." TEX. R. CIV. P. 166a(c).

Any affidavit must be made based on personal knowledge and must affirmatively show that the affiant is competent to testify to the matters stated in the affidavit. TEX. R. CIV. P. 166a(f). Conclusory affidavits are not enough to raise fact issues, because they are not credible or susceptible to being readily controverted. *The Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996). An affidavit which recites that the affiant "estimates," "believes," or "understands" certain facts to be true will not support summary judgment, because such language is not a positive and unqualified representation that the "facts" are true. *Id.*

The requirement that the testimony have been such that it "could have been readily controverted" is apparently unique to Texas law, and was added to the Texas rule in 1978, without any precise antecedent in Texas case law. *Casso v. Brand*, 776 S.W.2d 551, 558 n.5 (Tex. 1989). The requirement does not simply mean that the summary judgment proof could have been easily and conveniently rebutted.

Instead, the testimonial evidence can be readily controverted when it is of a nature that can be effectively countered by opposing evidence. *Id*. at 558. If the credibility of the movant's affiant or deponent is likely to be a dispositive factor in the resolution of the case, then summary judgment is inappropriate. *Id.* However, if the non-movant "must, in all likelihood, come forth with independent evidence to prevail, then summary judgment may well be proper in the absence of such controverting proof." *Id.*

It is clear that this rule applies equally to the testimony of an expert. If the question to the trier of fact is such that the decision "must be guided solely by the opinion testimony of experts," then a summary judgment can be proved solely on the uncontroverted opinion testimony of an expert witness, if the testimony is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted. *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991).

It is not sufficient for the party relying on expert testimony to simply file that testimony alone. Instead, the testimonial evidence must demonstrate, on its face or through further affidavit, that the witness is competent to testify to the matters stated in the proof and that the testimony would be admissible. TEX. R. CIV. P. 166a(f). In the context of an expert's affidavit, this requires that the movant affirmatively prove the expert's qualifications. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30-31 (Tex. 1997).

However, proving up the expert's qualifications and bare opinions alone is not sufficient to sustain a summary judgment. Instead, the party must also prove up the reasoning and basis of the expert's opinion. *Burrow v. Arce*, 997 S.W.2d 229, 235-36 (Tex. 1999). The expert's affidavit should attach copies of the documents relied on to form the basis of any opinion given. TEX. R. CIV. P. 166a(f).

If an expert witness presents legally sufficient evidence in support of a motion for summary judgment, the opposing party must produce other expert testimony to controvert the claims. *Longoria*, 938 S.W.2d at 30-31. However, no such evidence is required from the non-movant if the movant's expert testimony is legally insufficient. Testimony that is comprised merely of legal or factual conclusions is legally insufficient to support summary judgment. *Id.*

Split of Authority

The Texas Supreme Court has held that when conflicting inferences can be drawn from a party's deposition testimony and an affidavit filed in response to a motion for summary judgment, a fact issue is presented that precludes summary judgment. *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988).

Subsequently, some courts of appeals have held that, when the affidavit directly conflicts with the deposition testimony, without explanation, it is a "sham" affidavit made for the purposes of avoiding summary judgment, and it can be ignored in deciding the motion. *Elson Thermoplastics v. Dynamic Sys., Inc.*, 49 S.W.3d 891, 901 (Tex. App.—Austin 2001, no pet.); *Burkett v. Welborn*, 42 S.W.3d 282, 286 (Tex. App.—Texarkana 2001, no pet.); *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

Other courts have held that, while such a motion can subject the filing party to sanctions, it creates a fact

question that precludes summary judgment. *Thompson v. City of Corsicana Hous. Auth.*, 57 S.W.3d 547, 556-58 (Tex. App.—Waco 2001, no pet.); *see also Larson v. Family Violence & Sexual Assault Prevention Comm.*, 64 S.W.3d 506, 513 (Tex. App.—Corpus Christi 2001, pet. denied); *Grizzle v. Texas Commerce Bank*, 38 S.W.3d 265, 283 (Tex. App.—Dallas 2001), *rev'd in part on other grounds*, 96 S.W.3d 240 (Tex. 2002).

Still another court of appeals has held that the differences must be reviewed on a case-by-case basis, and the affidavit should not be ignored if the differences are minor variances in detail that would be proper impeachment, but can be disregarded if it is directly contradictory on major points without explanation. *Cantu v. Peacher*, 53 S.W.3d 5, 8-11 (Tex. App.—San Antonio 2001, pet. denied).

3. Deposition testimony, and discovery produced by the non-moviant, does not have to be authenticated to be relied on as summary judgment proof, but other documents should be.

It is common practice for a party to submit, with its summary judgment evidence, affidavits authenticating each and every document relied upon. There is nothing wrong with this practice, but it is more than is required under the rules.

The rules specifically allow for discovery products not on file with the clerk to be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are timely filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proof. TEX. R. CIV. P. 166a(d).

Because Rule 166a(d) contains no authentication requirement, the Texas Supreme Court has held that no authentication is required for depositions taken in the case. *McConathy v. McConathy*, 896 S.W.2d 341, 342 (Tex. 1994) (per curiam). The court reasoned that all parties had ready access to the depositions taken in a case, and they could easily be verified for authenticity. *Id.*

While the court did not reach the issue in *McConathy*, it seems logical to assume that this holding would extend to other forms of unfiled discovery that would be otherwise admissible under the rules. As the court recognized, "[a]uthentication is not necessary and is not required under the present rules." *Id.*

However, in a case dealing with a party relying on its own documents, the Dallas Court of Appeals has held that Rule 166a(d) does not do away with the need to authenticate documents used during summary judgment simply because they were produced during discovery. *Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 452 (Tex. App.—Dallas 2002, no pet.). While recognizing that *McConathy* did away with the authentication requirement for deposition excerpts, the Dallas court reasoned that the rationale behind that decision, that the transcripts were readily available to all parties, did not apply to documents obtained in discovery, the original of which remains only with the producing party. *Id*. Accordingly, the court declined to extend *McConathy* to discovery material other than deposition excerpts. *Id.*

The *Blanche* court did recognize, however, that no authentication is required when the document is being used against the party that produced it. *Id*. at 451. The rules specifically allow for self-authentication of documents for use against the party that produced them. TEX. R. CIV. P. 193.7.

A party can prevent the automatic authentication under Rule 193.7 by objecting to authenticity of a document it produced, if it does so orally on the record or in writing within 10 days, or during a time period ordered by the trial court, after receiving notice of the intent to use the document. The objection must state the grounds specifically, and must be made in good faith with a legal basis. TEX. R. CIV. P. 193.7. Non-movants should note that the time restrictions may mean that an objection under Rule 193.7 needs to be made even before a response is filed.

*****Practice Note*****

It should be noted that, generally, a party cannot rely on its own answer to an interrogatory as summary judgment evidence. *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000). However, the party's own interrogatory answer can become competent summary judgment evidence when it is made an exhibit to the party's deposition, the party affirms that it is correct, and the party is subject to cross-examination over the answer. *Id.*

Rule 166a(d) includes a requirement that the party serve the discovery together with a "statement of intent" to use it as summary judgment proof. TEX. R. CIV. P. 166a(d) This requirement is satisfied when the discovery is attached to a summary judgment motion or response, and the motion or response clearly relies on the attached discovery as support. *McConathy v. McConathy*, 896 S.W.2d at 342 n.2.

4. Admissions cannot be contradicted.

If a party has made admissions, or had admissions deemed admitted, the party cannot contradict those admissions, even with affidavits or live testimony.

See, e.g., Smith v. Home Indem. Co., 683 S.W.2d 559, 562 (Tex. App.—Fort Worth 1985, no writ).

5. Transcripts from prior proceedings can be used as summary judgment evidence.

While not expressly mentioned in the rules, a transcript from a prior proceeding can be used as summary judgment evidence. *Austin Bldg. Co. v. National Union Fire Ins. Co.*, 432 S.W.2d 697, 698-99 (Tex. 1968).

B. The response to a traditional motion for summary judgment

As discussed in section II.A.3 above, if a traditional motion for summary judgment is legally insufficient, no response is necessary to prevent summary judgment. *Rhone-Poulenc, Inc.*, 997 S.W.2d at 222-23. The movant must still conclusively prove all essential elements of his cause of action or defense as a matter of law. *Clear Creek Basin Auth.*, 589 S.W.2d at 678.

However, a prudent non-movant will file a response, using the same types of evidence available to the movant, sufficient to raise a genuine issue of material fact and prevent summary judgment. The non-movant can prevent summary judgment by bringing forth sufficient evidence to raise a fact question as to either: (1) the specific elements challenged by the movant, *Centeq Realty*, 899 S.W.2d at 197; or (2) each element of an affirmative defense, *Brownlee*, 665 S.W.2d at 112.

C. The no-evidence motion for summary judgment

In the case of a no-evidence summary judgment, the rule and supporting comment go a long way in telling us what a motion and response should look like. The no-evidence motion should do two things: (1) demonstrate that there has been adequate time for discovery; and (2) allege that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i).

The movant should be careful to craft a motion specifically tailored to the requirements of Rule 166a(i). Some courts have held that a summary judgment motion that does not unambiguously state that it is filed under Rule 166a(i) and does not strictly comply with the requirements of Rule 166(a)(i) will be construed as a traditional motion for summary judgment. *Keszler v. Memorial Med. Ctr. Of East Texas*, 105 S.W.3d 122, 125 (Tex. App.—Corpus Christi 2003, no pet.)

1. When has there been adequate time for discovery?

Rule 166a(i) only becomes available "[a]fter adequate time for discovery." TEX. R. CIV. P. 166a(i). The comment to the rule provides that a "discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before." TEX. R. CIV. P. 166a(i) cmt.

The courts, however, have held that there is no bright-line requirement that the discovery period end before a no-evidence motion may be granted. *Restaurant Teams Int'l, Inc. v. MG Sec. Corp.,* 95 S.W.3d 336, 339 (Tex. App.—Dallas 2002, no pet.). Instead, whether the non-movant has had "adequate time for discovery" is determined on a case specific basis. *Id.*

To determine whether an adequate time for discovery has passed, the court reviews such factors as: (1) the nature of the case; (2) the nature of the evidence necessary to controvert the no-evidence motion; (3) the length of time the case was active; (4) the amount of time the no-evidence motion was on file; (5) whether the movant had requested stricter deadlines for discovery; (6) the amount of discovery that has already taken place; and (7) whether the discovery deadlines in place were specific or vague. *Id.*; *Trostle v. Trostle*, 77 S.W.3d 908, 917 (Tex. App.—Amarillo 2002, no pet.).

The trial court's determination of whether adequate time for discovery has passed for a no-evidence motion is reviewed for abuse of discretion. *Restaurant Teams Int'l, Inc.,* 95 S.W.3d at 339; *Trostle*, 77 S.W.3d at 917.

2. How should the motion raise the evidentiary deficiency in the opponent's claim or defense?

The no-evidence summary judgment rule does not authorize conclusory motions or general no-evidence challenges to an opponent's case. TEX. R. CIV. P. 166a(i). In alleging that there is no evidence of one or more essential elements, the movant must specifically name the elements challenged. TEX. R. CIV. P. 166a(i); *Howell v. Hilton Hotels Corp*., 84 S.W.3d 708, 711 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). If a no-evidence motion fails to specify the elements of which there is no evidence, does not specifically challenge the evidentiary support for an element of a claim or defense, and is instead merely a general or conclusory no-evidence challenge to an opponent's claim or defense, the motion is incurably defective on its face. *Keszler*, 105 S.W.3d at 127.

*****Practice Note*****

In filing a no-evidence motion, no evidence should be relied upon. Previously, some courts had held that a movant could attach evidence to a no-evidence motion in order to challenge the evidentiary support of specific elements of the opposing side's claim or defense. *See, e.g., Howell v. Hilton Hotels Corp.,* 84 S.W.3d 708, 715 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Disagreeing, the Waco Court of Appeals held that attaching evidence to a motion for summary judgment meant that any request for judgment under Rule 166a(i) had to be disregarded, and the motion treated as a traditional motion. The Texas Supreme Court has rejected both of these approaches.

If a motion is filed that seeks summary judgment based only on a no-evidence claim, evidence attached to the motion can only be considered by the trial court if it creates a fact question. *Binur*, 135 S.W.3d at 651. Simply put, this evidence can only be considered if it defeats the motion to which it is attached.

D. The response to a no-evidence motion for summary judgment

1. If the non-movant needs more time for discovery, it should file a motion for continuance.

Historically, if a non-movant was resisting a traditional motion for summary judgment by alleging that it had not had adequate time for discovery prior to the hearing on the motion, it was required to have filed "either an affidavit explaining the need for further discovery or a verified motion for continuance." *Watson v. Dallas, Indep. Sch. Dist*., 135 S.W.3d 208 (Tex. App.—Waco 2004, no pet.).

Several of the courts of appeals have applied this same preservation requirement to a party opposing a no-evidence motion. *See, e.g. id., Collinsworth v. Eller Media Co.,* No.01-01-00749, 2003 Tex. App. LEXIS 4813, at **5-6 (Tex. App.—Houston [1st Dist.] June 5, 2003, no pet.); *Tempay, Inc. v. TNT Concrete & Constr., Inc.*, 37 S.W.3d 517, 520-21 (Tex. App.—Austin 2001, pet denied); *Greene v. City of Friendswood*, 22 S.W.3d 588, 594 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

The procedural standing of the traditional and no-evidence motions for summary judgment might lead some to question whether the continuance motion should be required. After all, the traditional motion can be filed anytime after an appearance, but the no-evidence motion is stricter, requiring that it be only granted "after adequate time for discovery." *See Keszler*, 105 S.W.3d at 130 n.10. The specific language of Rule 166a(i) would seem to place the burden of proving that an adequate time for discovery had passed on the movant, and reviewing this prong under whether the non-movant pled and proved a right to a continuance would seem to be burden-shifting. Regardless, unless and until the Texas Supreme Court clarifies this point, a non-movant should file an affidavit if it wishes to argue that the time for discovery was inadequate.

In responding to the timing issue, the non-movant should consider whether the lack of adequate time can be attributed to the movant's conduct. A party is not allowed to abuse the discovery process by withholding key evidence from its opponents, and then use a no-evindence motion to obtain judgment. *Specialty Retailers, Inc.*, 29 S.W.3d at 145-46. If the movant's conduct has delayed the discovery process, the non-movant should argue this point in defending against a no-evidence summary judgment.

2. The non-movant should file evidence sufficient to raise a fact question as to each challenged element.

In responding to a no-evidence motion for summary judgment, the party should be careful to not only present sufficient evidence to raise a fact issue regarding the challenged elements, but specifically connect the evidence to the challenged elements. It is not enough to globally state facts to support its allegations that fact questions exist, the non-movant should specifically cite to evidence and relate it to the challenged elements. *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862, 868-69 (Tex. App.—Houston [1st Dist.] 2002), *aff'd on other grounds*, 73 S.W.3d 193, 207-208 (Tex. 2002).

In *Brewer & Pritchard,* the court of appeals affirmed a no-evidence summary judgment because, although the non-movant gave overviews of the evidence with summarized argument, the court felt that it had been left to search the record to determine if the evidence was sufficient without specific guidance from the non-movant. *Id.* In affirming, the Texas Supreme Court held that the court of appeals erred in holding that the appellant had not met the minimum requirements of Rule 166a(i). *Brewer & Pritchard, P.C. v. Johnson*, 73 S.W.3d 193, 207-208 (Tex. 2002).

However, the language of the court should go a long way in convincing practitioners to avoid general briefing. It explained, "[w]hether Brewer & Pritchard adequately pointed out evidence relating to challenged elements of the conspiracy cause of action is a close question." *Id.* No attorney should want his or her client to read an opinion holding that poor briefing caused a waiver of an issue for review.

IV. THERE ARE SEVERAL PRE-HEARING PROCEDURAL RULES AFFECTING SUMMARY JUDGMENT PRACTICE OF WHICH THE PRACTITIONER MUST BE AWARE.

A. Submission of a summary judgment motion for the trial court's consideration requires 21 days notice to the non-movant.

In setting the deadlines for summary judgment proceedings, the rules work off of a hearing date. Except with leave of court, the rules require a movant to file and serve the motion and any supporting evidence at least 21 days before the hearing, and require the non-movant to file and serve the response and supporting evidence not later than 7 days before the date of the hearing. TEX. R. CIV. P. 166a(c). The rule states:

> Except on leave of court, with notice to opposing counsel, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response.

TEX. R. CIV. P. 166a(c). In Texas state court, summary judgments are usually only taken under submission after a non-evidentiary hearing, set by the trial court's coordinator at the movant's request.

But the parties should not rely on having an oral hearing. While an oral hearing might be helpful to the trial court and the parties, it is not mandatory in a summary judgment proceeding. *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998). A trial court can decide to take a summary judgment motion under submission without an oral hearing.

The deadlines in the rule merely require that the party opposing summary judgment have proper notice of the date of the hearing or of submission. *Id.* While not jurisdictional, it is error for a trial court to hear or take under submission a summary judgment that has not satisfied the notice and service deadlines in Rule 166a(c). *Id.* This error can be harmless if the record indicates that the trial court fully considered the response. *Id.*

Generally, however, proper notice by the movant is a prerequisite to obtaining summary judgment. *Birdwell v. Texins Credit Union*, 843 S.W.2d 246, 249 (Tex. App.—Texarkana 1992, no writ). This rule is intended to give the non-movant sufficient time to prepare and file a response to the motion. Provided that the non-movant received 21 days notice prior to the original hearing, the twenty one day notice requirement does not apply to a resetting of the hearing. *Id.* However, the trial court cannot take the motion under submission without the non-movant being given notice. *Courtney v. Gelber*, 905 S.W.2d 33, 35 (Tex. App.—Houston [1st Dist.] 1995, no writ).

*****Practice Note*****

Calculating deadlines for summary judgment proceedings can be trickier than it first seems: 21 days can actually mean 24 days. The Texas Supreme Court has held that the 21 day notice requirement must be read along with TEX. R. CIV. P. 21a, and when motion and notice of the hearing are served by mail, the hearing cannot be set until 24 days after the date of service. *Lewis v. Blake*, 876 S.W.2d 314, 315-16 (Tex. 1994).

This is different than the date of the response, which can be served by mailing 7 days before the hearing. *Holmes v. Ottawa Truck*, 960 S.W.2d 866, 869 (Tex. App.—El Paso 1997, pet. denied). The act of service by mail does not add three days to the date by which a response must be filed.

If less than 21 days notice is provided, the non-movant should, before or during the hearing, file a written objection on the basis of insufficient notice and file a motion to reset the hearing date. Proper notice of a summary judgment proceeding is a prerequisite to summary judgment. *Birdwell*, 843 S.W.2d at 249; *Rozsa v. Jenkinson*, 754 S.W.2d 507, 509 (Tex. App.-San Antonio 1988, no writ). The trial court errs in refusing a motion to reset the hearing to 21 days from the date of notice when the non-movant was not given the full 21 day notice required by Rule 166a(c).

Failure to timely file a written objection will waive the 21 day notice requirement. *Nguyen v. Short, How, Frels & Heitz*, 108 S.W.3d 558, 560 (Tex. App.—Dallas 2003, pet. denied). This objection should be filed before the hearing. The objection can only be made in a post-trial motion when a party is not given notice of the summary judgment hearing. *May v. Nacogdoches Mem. Hosp.*, 61 S.W.3d 623, 626 (Tex. App.—Tyler 2001, no pet.); *Nickerson v. E.I.L. Instruments, Inc.*, 817 S.W.2d 834, 836 (Tex. App. — Houston [1st Dist.] 1991, no writ).

If the non-movant also needs additional time (more than 21 days from notice) to take discovery, it should also file a motion for continuance under Rule 166a(g) and Rule 252. If only 21 days are needed, the continuance motion should not be used in place of the objection and motion to reset. The trial court's decision to deny a continuance motion is reviewed for abuse of discretion. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986)

B. A response must be filed 7 days before the hearing.

The non-movant must serve and file its written response and evidence no later than seven days prior to the hearing. TEX. R. CIV. P. 166a(c).

*****Practice Note*****

If a non-movant contends that it has not had adequate time for discovery before the summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. *Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996). If the non-movant fails to do so, it will be presumed that the trial court did not abuse its discretion in denying the motion for a continuance. *Villegas*, 711 S.W.2d at 626.

If, however, a party realizes that it has failed to timely respond despite proper notice, then it should seek a continuance and file a motion to file a late response. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 685-86 (Tex. 2002). A motion for leave to file a late summary-judgment response should be granted when a litigant establishes good cause for failing to timely respond. *Id.* at 688. Good cause is shown when: (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the response will occasion no undue delay or otherwise injure the party seeking summary judgment. *Id.*

In *Craddock v. Sunshine Bus Lines*, the Texas Supreme Court established that a party could get a default judgment entered against it set aside by establishing that: (1) the failure to answer or appear was not intentional or the result of conscious indifference, but was due to mistake or accident; (2) it has a meritorious defense; and (3) granting a new trial would not cause any delay or injury to the plaintiff. 133 S.W.2d 124, 126 (Tex. 1939). A party cannot rely on filing a *Craddock*-style motion for new trial after summary judgment is granted. *Carpenter*, 98 S.W.3d at 685-86. The Supreme Court has held that such relief is not available to a party that had notice of the summary judgment hearing in time to file a motion for continuance or to file a motion to allow for a late response. *Id.*

This rule does not apply where the non-movant was never served with notice of the summary judgment hearing. *Cantu v. Valley Baptist Med. Ctr.*, No. 13-02-321-CV, 2003 Tex. App. LEXIS 7379, at *3 n.2 (Tex. App.—Corpus Christi Aug. 28, 2003, no pet.) (Mem. Op.); *Olien v. University of Texas of the Permian Basin*, No. 08-02-00300-CV, 2003 Tex. App. LEXIS 1549, at *4 (Tex. App.—El Paso Feb. 20, 2003, no pet.) (Mem. Op.). Under that situation, the *Craddock* test would apply.

*****Practice Note*****

Practitioners should note that in *Carpenter*, the Texas Supreme Court specifically withheld deciding whether *Craddock*-type relief is available to a non-movant who discovers its mistake after the summary judgment hearing or rendition of judgment. *Id.* at 686.

Until the Texas Supreme Court rules otherwise, counsel for a non-movant that finds itself in this unenviable position should attempt to secure relief with a *Craddock*-style motion for new trial.

The more cautious approach is to file your response 7 days before the original hearing date after receiving 21 days notice. If a hearing setting is passed, attempt to secure the new hearing date, or at least an agreed number of days notice before any resetting, by a Rule 11 agreement to prevent being caught by surprise. If you cannot secure such an agreement, file a response based on the original date. Assuming you have timely notice of a resetting, there is always the opportunity to timely amend the response or, if within 7 days of the hearing, ask for permission to file a late amended response.

C. Each party should review the evidence, file timely written objections, and obtain a signed written order.

Before filing its motion or response, a party should seek to make sure that all of its summary judgment proof meets the evidentiary standards necessary for admissibility. Moreover, each party should review the opposing party's evidence for shortcomings.

Reviewing the evidence for objection should be a standard step in any practitioner's approach. Failure to timely complain of defects in the form of the other party's proof, before summary judgment is granted, waives any right to complain of these defects. *Life Ins. of Virginia v. Gar-Dal, Inc.*, 570 S.W.2d 378, 380-81 (Tex. 1978).

Defects in the form of evidence will not be grounds for reversal unless the opposing party specifically objected to the deficiency, and the other party was given an opportunity to amend, but refused. TEX. R. CIV. P. 166a(f). Generally, defects in form include the use evidence that is hearsay, lacks personal knowledge, is insufficient for an interested witness, is self-serving statements, is not the best evidence, is argumentative, and has competency problems. *In re J.G.W.*, No. 06-00-00170, 2001 Tex. App. LEXIS

5728, at *10 (Tex. App.—Texarkana Aug. 23, 2001, no pet.) (not designated for publication). But at least two courts of appeals have held that a failure to demonstrate personal knowledge is a defect of substance. *Dailey v. Albertson's Inc.*, 83 S.W.3d 222, 226 (Tex. App.—El Paso 2002, no pet.); *Fair Woman, Inc. v. Transland Mgmt. Corp.*, 766 S.W.2d 323, 324 (Tex. App.—Dallas 1989, no writ).

A defect in the substance of the opposing party's evidence is not waived, and can be raised for the first time on appeal. *See Clear Creek Basin Auth.*, 589 S.W.2d 677. Substantive defects, which cannot be waived, are those that leave the evidence legally insufficient. Examples would include: (1) the filing of a statement that is not a proper affidavit with jurat; *Perkins v. Crittenden*, 462 S.W.2d 565, 568 (Tex. 1970); or (2) affidavits which are nothing more than legal or factual conclusions. *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.)

"The courts of appeals are split on the issue of whether the failure to attach documents referenced in an affidavit is a defect in form or substance." *Brown v. Wong*, No. 05-99-00706-CV, 2000 Tex. App. LEXIS 2632 (Tex. App.—Dallas 2000, pet. denied) (not designated for publication).

*****Practice Note*****

For preservation purposes, ruling on objections to summary judgment evidence should be reduced to a signed written order. *Crocker*, 95 S.W.3d at 420-21. A trial court is not required to reduce to writing its rulings on summary judgment evidence without a timely request that it do so. *Id.* A party must obtain a written ruling on its objections "at, before, or very near the time that the trial court rules on the motion for summary judgment or risk waiver." *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). However, the trial court retains authority to sign a written order on objections to summary judgment evidence as long as it maintains plenary power. *Crocker*, 95 S.W.3d at 420-21.

Some authority exists for, in limited circumstances, preservation of objections to summary judgment based on an implied ruling, without a written signed order. *See, e.g., Trust v. Strayhorn*, 87 S.W.3d 756, 759-60 (Tex. App.—Texarkana 2002, no pet.). Practitioners should not rely on preserving error through an implied ruling, and should get a signed written order on their objections, or object on the record to the trial court's refusal to sign an order.

D. In making your arguments, be clear and do not use separate briefs.

The summary judgment rules do not mention anything about briefs. Nonetheless, it is not an uncommon practice for a party to file a skeleton motion or response, and provide its support in accompanying briefs. While this practice is not strictly prohibited, it is not without potential dangers.

First, the motion should specifically and clearly state each of the party's grounds. Judgment can only be upheld based on the arguments raised in the motion. If the motion states grounds A and B, it cannot be granted based on unasserted grounds C and D, even if the summary judgment proof supports the conclusion that judgment would be proper under these unasserted grounds. *McConnell*, 858 S.W.2d at 342.

The Texas Supreme Court has been clear that a movant has to put each of its arguments for summary judgment into its motion. The court explained:

> **The motion** for summary judgment must **itself** state specific grounds on which judgment is sought . . . **The motion** for summary judgment must stand or fall on the grounds **it** specifically and expressly sets forth . . . There is authority to the effect that a summary judgment cannot be sustained on a ground not specifically **set forth in the motion.**

Id. at 339 (quoting *Westbrook Const. Co. v. Fidelity Bank of Dallas*, 813 S.W.2d 752, 754-55 (Tex. App. -- Fort Worth 1991, writ denied) (bold and ellipses added by Supreme Court).

Accordingly, the court has held that the motion itself must expressly state its grounds, and "[i]n determining whether grounds are expressly presented, reliance may not be placed on briefs or summary judgment evidence." *Id*. at 341. The same is true for the response. The non-movant's arguments against summary judgment "must be expressly presented by written answer to the motion or by other written response to the motion." *Id.*

While neither the rules, nor the *McConnell* holding, preclude the practice of using supporting briefs, it seems to be an unnecessary risk. If a case can be better understood if the legal authority is separated out by issue, or if the various issues would leave one motion unwieldy, a party should consider filing separate motions for summary judgment on each distinct issue.

E. If the grounds of a motion for judgment are unclear, the non-movant should file special exceptions.

If the grounds for summary judgment are not clear, the non-movant should seek to require the movant to correct the motion. If the grounds asserted for summary judgment are not clear, the non-movant can, and should, file special exceptions to the motion in order to cure any confusion. *McConnell*, 858 S.W.2d at 342. Failure to file a special exception will waive any argument that the grounds relied on were unclear or ambiguous. *Id*. If the trial court overrules a proper special exception, the non-movant may raise this ruling as an additional argument on appeal. *Id.* at 343 n.6.

Moreover, filing special exceptions to clarify an unclear motion just makes practical sense:

> Prudent trial practice dictates that such an exception should be lodged to ensure that the parties, as well as the trial court, are focused on the same grounds. This prevents the non-movant from having to argue on appeal each and every ground vaguely referred to in the motion. The practical effect of failure to except is that the non-movant loses his right to have the grounds for summary judgment narrowly focused, thereby running the risk of having an appellate court determine the grounds it believes were expressly presented in the summary judgment.

Id. at 342-43.

F. When faced with a motion for summary judgment based on an affirmative defense, the non-movant should check to make sure the defense was pleaded by the movant.

The rules require that affirmative defenses be specifically pled and, in some enumerated instances, the pleading must be verified. TEX. R. CIV. P. 93, 94. However, the Texas Supreme Court has held that, if no proper objection is filed, unpleaded affirmative defenses raised in a summary judgment motion can serve as the basis for summary judgment. *Roark*, 813 S.W.2d 494-95. Drawing on the rules governing trial of unpleaded claims or defenses by consent, the court held that failure to object to the pleading error in the response filed with trial court waives this issue for appeal. *Id.* at 495.

This result might seem self evident. As the Texas Supreme Court noted, "If 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." *Id.* It may well be that the non-movant determines that there is no sufficient reason to raise the pleading error because it can be easily corrected.

However, it is not difficult to imagine a scenario in which the pleading element is crucial to a fair trial. Assume, as is often the case, that a party waits to bring its motion for summary judgment until after the close of the discovery process. If the summary judgment is based on an unpleaded affirmative defense, it is entirely possible that the opposing party may not have taken sufficient discovery to provide proof to dispute the motion. As a result, summary judgment on an unpleaded affirmative defense can be understood to be the very type of trial by surprise that the rules are seeking to avoid.

The *Roark* decision can be best understood as a decision about the proper placement of the burden for judicial efficiency. The trial court is not in a position to know every issue that has been explored by the parties in the discovery process. The non-movant is in a better position to determine if unfair surprise exists that should prevent the movant from simply amending its pleadings to cure the error. Allowing the issue to be raised for the first time on appeal could result in needless remand where the non-movant would not be able to demonstrate any surprise. By placing the burden on the party best placed to raise the complaint of surprise to the trial court, the decision helps to prevent this waste.

G. Pleadings can be amended, without leave of court, 7 days before the hearing.

When faced with a motion for summary judgment, the non-movant should also review the pleadings to see whether an amended pleading could resolve the issue or avoid judgment. Unless the date is set otherwise by a scheduling order, the rules allow a party to amend its pleading, without leave of court, as long as it does so at least seven days before trial. TEX. R. CIV. P. 63

This does not require seven days to elapse between the date of filing and the date of the hearing. Instead, the seven days is counted from the date of filing, in accordance with Rule 4. The date of filing itself is not counted, and then each day is counted, including the date of the hearing. *Sosa v. Central Power & Light*, 909 S.W.2d 893, 894-95 (Tex. 1995). As long as the hearing takes place on at least the seventh day from the date of the filing of the amended pleading, no leave of court is required.

Even if it is within seven days of the date of the hearing, if any party determines that its pleadings need to be amended, it should still file an amended pleading, as well as file a motion for leave. The rules state that if the amended pleading is within seven days of the hearing, it "shall be filed only after leave of the judgment is obtained, which leave shall be granted by the judgment unless there is a showing that such amendments will operate as a surprise to the opposite

party." TEX. R. CIV. P. 63; *Goswami*, 751 S.W.2d at 490 (holding that summary judgment hearing is a "trial" for purposes of Rule 63).

The requirement for leave in Rule 63 has been liberally interpreted such that, in the absence of a sufficient showing of surprise by the opposing party, the failure to obtain leave of court when filing a late pleading may be cured by the trial court's action in considering the amended pleading. *Goswami*, 751 S.W.2d at 490. In fact, if the record is silent as to any support to claim that the amended pleading was not considered, and the opposing party cannot show surprise or prejudice, leave of the court will be presumed. *Id.*

*****Practice Note*****

The presumption of leave for filing late amended pleadings should not be confused with: (1) the late filing of the response to the summary judgment; (2) the late filing of summary judgment evidence; or (3) objections to the form of summary judgment evidence. In each of these cases, the failure to obtain a written order from the trial court will waive the issue on appeal. *Goswami*, 751 S.W.2d at 490 n.1; *Gar-Dal, Inc.*, 570 S.W.2d at 380-81.

While a late amended pleading may be considered, the party should always make sure to amend its pleading before the summary judgment hearing. A trial court does not abuse its discretion in refusing to consider amended pleadings filed after the hearing without the trial court's consent, even if the amended pleadings are filed before the summary judgment is actually signed. *Bell v. Showa Denka, K.K.*, 899 S.W.2d 749, 756-57 (Tex. App.—Amarillo 1995, writ. denied).

To be safe, a party should always file its amended pleadings at least seven days before the hearing. Alternatively, the amended pleading should be filed before the hearing, along with a motion asking for leave to file it late.

*****Practice Note*****

If an amended pleading is filed, the movant should reevaluate its claims for summary judgment. If the non-movant files an amended pleading that raises claims or defenses with new distinct elements, not specifically challenged in the pending no-evidence motion, that motion cannot be used to defeat the new claims. *Keszler*, 105 S.W.3d at 128-29; *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 147-48 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). The movant cannot satisfy the requirements of Rule 166a(i) by addressing the new elements in its reply. *Specialty Retailers, Inc.*, 29 S.W.3d at 148. Instead, the movant should consider filing an amended motion or a second motion to address the new claims or defenses.

However, no new motion is required if the amended pleading merely raises variations on elements that were already at issue by the initial motion. *Keszler*, 105 S.W.3d at 128-29; *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 437 (Tex. App.—Houston [14th Dist.] 1999, no pet.). "If the amended petition 'only reiterates the same essential elements in another fashion,' then the original motion for summary judgment will adequately cover the new variations." *Specialty Retailers, Inc.*, 29 S.W.3d at 147.

V. SO IT IS TIME FOR THE SUMMARY JUDGMENT HEARING: NOW WHAT?

After navigating the procedural rules leading up to the summary judgment hearing, the actual hearing might seem somewhat anticlimactic. But aside from being an important part in convincing the trial judge to accept your arguments, the hearing itself presents several issues that a practitioner must consider.

A. The parties should be careful not to waive arguments at the hearing.

Current civil rules are designed to prevent trial by surprise, and this holds true of the rules for the summary judgment procedure. The rules require that all of the arguments supporting summary judgment, as well as those opposing it, have to be filed in writing before the hearing. *Casso v. Brand*, 776 S.W.2d 551, 553 (Tex. 1989). Neither the movant, nor the non-movant, can wait to surprise the opposing side at the hearing. However, the parties can agree to drastically change the case at the hearing itself.

While the summary judgment rules require the parties to submit the arguments and issues in writing, Rule 11 provides a tool by which, by agreement of the parties, the issues can be "further restricted or expanded . . . beyond those 'expressly presented' by the written motion, the answer to the motion, or any other written response." *Clear Creek Basin Auth.*, 589 S.W.2d at 677.

In *Clear Creek Basin Auth.*, the water authority sued the city, based on both common law nuisance and statutory claims, for allegedly discharging polluting waste water from treatment plants both inside and outside of the authority's jurisdiction. *Id*. at 673. The city filed for summary judgment on various grounds, and the authority responded with several points. No transcript was made of the summary judgment hearing, but the trial court's judgment reflected that at the hearing, in open court, the parties had agreed that the authority would drop all but its statutory claim for violations that occurred outside its jurisdictional boundaries, and the city would withdraw its summary judgment issues other than the question of whether the

authority could sue for violations outside its territorial boundaries. *Id.* at 673, 677-78.

After the trial court entered judgment in favor of the city, the authority appealed, and the court of appeals reversed based on the hold that a fact issue existed as to the alleged violations *within* the authority's territorial boundaries. *Id.* at 674. The Texas Supreme Court reversed, holding that, while issues cannot normally be raised orally at a summary judgment hearing, the parties could validly limit the issues by Rule 11 agreement, and that the authority had waived any right to appeal an issue outside of that agreed to at the hearing. *Id.* at 675-78.

Thus, counsel at a summary judgment hearing should not forget that Rule 11 allows the parties a way to contract around normal summary judgment procedures. Practitioners should carefully consider any agreements or stipulations that are entered into during the hearing.

VI. IF THE TRIAL COURT DECIDES TO GRANT SUMMARY JUDGMENT, WHAT SHOULD THE ORDER SAY?

A. In cases involving multiple parties or claims, make sure that the order is clear as to whether it is interlocutory or final.

While drafting an order granting summary judgment might seem like an afterthought, a prudent counsel will specifically focus on the language used in such an order. In cases involving multiple parties or claims, a summary judgment order is interlocutory, and thus not appealable, unless it disposes of all remaining parties and all remaining claims. *Park Place Hosp. v. Milo,* 909 S.W.2d 508, 510 (Tex. 1995).

While this rule might seem simply stated, it has generated considerable confusion in Texas courts. *Lehman v. Har-Con Corp.*, 39 S.W.3d 191, 203 (Tex. 2001). This confusion centers around determining when an order becomes final for purposes of appeal.

There is no magic language in a judgment that makes it final and appealable. Thus, when a summary judgment is entered in a case involving multiple parties or claims, confusion can be created as to what parties and claims have been resolved in the order, which remain pending, and when the appellate time clock begins to run. For a time, Texas attempted to remedy this confusion by decreeing that a summary judgment order was final if it contained language purporting to dispose of all claims and parties. *Id.* at 192. For instance, a summary judgment order was to be considered final in a multi-party case if it contained a "Mother Hubbard clause"—a recitation that all relief not expressly granted is denied. *Id.* This attempted solution proved unworkable.

Currently, the law requires that a summary judgment order is final for purposes of appeal if, and only if, it either: (1) actually disposes of all claims and parties then before the court, regardless of its language; or (2) it states with unmistakable clarity that it is a final judgment as to all claims and all parties. *Id.* at 192-93. This does not require any particular form, and finality must be determined by the language of the order and the record in the case. *Id.* at 195.

Thus, in each case, the practitioner must look at the order in the context of the proceeding to determine if it is worded correctly. The Texas Supreme Court has attempted to give some general points that can be helpful in reviewing an individual case. It explained:

> From the cases we have reviewed here, we conclude that when there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties. An order that adjudicates only the plaintiff's claims against the defendant does not adjudicate [**48] a counterclaim, cross-claim, or third party claim, nor does an order adjudicating claims like the latter dispose of the plaintiff's claims. An order that disposes of claims by only one of multiple plaintiffs or against one of multiple defendants does not adjudicate claims by or against other parties. An order does not dispose of all claims and all parties merely because it is entitled "final", or because the word "final" appears elsewhere in the order, or even because it awards costs. Nor does an order completely dispose of a case merely because it states that it is appealable, since even interlocutory orders may sometimes be appealable. Rather, there must be some other clear indication that the trial court intended the order to completely dispose of the entire case. Language that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties; but language that "plaintiff take nothing by his claims against X" when there is more than one defendant or other parties in the case does not indicate finality.

Id. at 205.

The fact that the trial court **should not** enter a final order does not change the finality of an order if the trial court **does** in fact enter a final order. This rule does not preclude the trial court from entering an erroneous final order. For instance, if a movant files for summary judgment on one of four claims asserted,

and the trial court enters summary judgment on all claims, the judgment is erroneous, but final. *Id.* at 200.

The rule reflects that finality turns on the intent of the trial court while it still has a justiciable case or controversy in front of it. Thus, if the trial court intentionally ends the litigation, even if erroneously, then it is a final order. Likewise, if the trial court does in fact resolve all claims between all parties, even if unknowingly, then it is a final order.

B. If a partial summary judgment is entered, consider whether severance would be proper to make it final.

If the case involves multiple distinct controversies, and a partial summary judgment is rendered, the parties to the partial summary judgment should consider whether a severance should be sought to prevent delaying a final resolution of the dispute. A partial summary judgment remains interlocutory until it is severed, at which point it becomes a final judgment. *Park Place Hosp.,* 909 S.W.2d at 510.

C. If the trial court based its decision on limited grounds, make that clear in the order.

If the trial court decides to grant summary judgment, but bases its decision on only a portion of the grounds asserted, the best practice would be to have the order accurately reflect the limited reasoning of the trial court. Such an order will not only potentially narrow the issues for appeal, but it will ensure that issues are not overlooked.

With either a traditional or a no-evidence motion, if the order granting summary judgment does not specify that it was based on any particular grounds, the decision will be upheld if supported on any grounds raised in the motion. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001); *Carr v. Brasher*, 46 S.W.3d 237, 569 (Tex. 2001). Given a scenario of multiple parties, claims or defenses, or numerous summary judgment grounds, a general order gives little direction to the parties in deciding how to approach a potential appeal.

The general order also necessarily increases the job of the appellate court. In reviewing a summary judgment, the court of appeals has to consider all grounds that are properly preserved for review and necessary for final disposition of the appeal. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996). If the trial court's judgment specifies the basis of its holding, the court of appeals can focus on those specific grounds.

This is not to say that a party prevailing in the trial court cannot also raise on appeal those alternative grounds on which the trial court did not base its decision. If, by cross-points, a movant raises alternative grounds to support its summary judgment which, though properly raised below were not reached by the trial court, the appellate court may consider these arguments in the interest of judicial economy. *Id.* at 625-26.

VII. WHAT HAPPENS ON APPEAL OF A SUMMARY JUDGMENT?

In reviewing an order granting summary judgment, the appellate court sits in the same position as the trial court. Whether to grant summary judgment is a question of law which is reviewed de novo. *See, e.g., Elson Thermoplastics*, 49 S.W.3d at 896.

If the order granting summary judgment does not specify that it was based on any particular grounds, the decision will be upheld if supported on any grounds raised in the motion. *Dow Chem. Co.*, 46 S.W.3d at 242; *Carr*, 46 S.W.3d at 569. Summary judgment cannot be granted based on arguments that are not filed in writing in the trial court, and the appellate court cannot grant a summary judgment for reasons not raised in the motion. *Cates*, 927 S.W.2d at 625.

When the trial court grants summary judgment and the losing party appeals, if the court of appeals reverses, it should normally remand the action back to the trial court. *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988). However, if the parties had both filed motions for summary judgment, and the trial court granted one and denied the other, then the appellate court should review all questions presented and may reverse the judgment and render the judgment that should have been rendered, including rendering judgment for the other side. *Id.*

If the court determines that only part of the summary judgment was proper, the court should reverse only in part. Under these facts, the appellate court should affirm in part, and reverse only the improper part of the order. *Bandera Elec. Coop. v. Gilchrist*, 946 S.W.2d 336, 336-37 (Tex. 1997).

VIII. CONCLUSION

Texas will only begin to gain the full benefits of summary judgment practice when it is fully accepted, and uniformly applied, across the state. By better understanding summary judgment procedures, practitioners can improve their services to their own client, and make for a fairer, more productive, and more efficient judicial system.