SUMMARY JUDGMENTS IN TEXAS*

*Judge David Hittner***
*Lynne Liberato****

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**United States District Judge, Southern District of Texas. Formerly Judge, 133rd District Court of Texas, Houston, Texas; B.S., New York University, 1961; J.D., New York University School of Law, 1964.

***Partner, Haynes and Boone, L.L.P., Houston; B.S., Sam Houston State University, 1974; M.S., East Texas State University, 1977; J.D., South Texas College of Law, 1980; President, State Bar of Texas, 2000–01.

I. INTRODUCTION

Texas Rule of Civil Procedure 166a,[1] which governs summary judgment practice,[2] permits a party to obtain a prompt disposition of a case

[1]Prior to the January 1, 1988 amendments to the Texas Rules of Civil Procedure, this rule was designated 166-A rather than 166a. TEX. R. CIV. P. 166a historical note (Vernon Supp. 2001).

[2]*See generally* Judge David Hittner & Lynne Liberato, *Summary Judgments In Texas*, 34 HOUS. L. REV. 1303 (1998); Judge David Hittner & Lynne Liberato, *Summary Judgments In Texas*, 35 S. TEX. L. REV. 9 (1994); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243 (1989); DAVID HITTNER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL: 5TH CIRCUIT EDITION, ch. 14 (West Group 2001); TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS (2d ed. 2001).

involving "patently unmeritorious claims and untenable defenses."[3] The rule provides a means of summarily terminating a case when a question of law is involved and "no genuine issue as to any material fact" exists.[4] When it was adopted in 1950, the purpose of the rule was, and remains, to eliminate delay and expense.[5] Rule 166a is not intended to deprive a litigant of a full hearing on the merits of any fact issue.[6] If the respondent raises a fact issue, the case should proceed to trial.

On September 1, 1997, Texas experienced a major change in summary judgment practice with the advent of no-evidence summary judgments.[7] In

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[3]Casso v. Brand, 776 S.W.2d 551, 556 (Tex. 1989) (quoting City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979)).

[4]TEX. R. CIV. P. 166a(c).

[5]Roy W. McDonald, *Summary Judgments*, 30 TEX. L. REV. 285, 286 (1952).

[6]Gulbenkian v. Penn, 252 S.W.2d 929, 931 (Tex. 1952) (noting that the purpose of summary judgment Rule 166a is not to deprive litigants of their right to trial when there is an issue of fact); Collins v. County of El Paso, 954 S.W.2d 137, 145 (Tex. App.—El Paso 1997, pet. denied); Alvarado v. Old Republic Ins. Co., 951 S.W.2d 254, 258 (Tex. App.—Corpus Christi 1997, no writ).

[7]On August 15, 1997, the Texas Supreme Court approved an amendment to Texas Rule of Civil Procedure 166a, which took effect on Sept. 1, 1997. *See* TEX. R. CIV. P. 166a, 948–49 S.W.2d (Tex. Cases) XXXV, XXXV–XLI (1997). The amendment added a new sub-section (i) to TEX. R. CIV. P. 166a. It reads as follows:

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

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

Part of that August 15, 1997 order approving the rule change reads that "[t]he comment appended to these changes, unlike other notes and comments in the rules, is intended to inform the construction and application of the rule." *Id.* 166a, 948–49 S.W.2d (Tex. Cases) XXXV (1997). Thus, in effect, the comment has the force of the rule. It reads:

> This comment is intended to inform the construction and application of the rule. Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize

other words, the party without the burden of proof at trial (usually the defendant), without having to produce any evidence at all, may move for summary judgment on the basis that the respondent (usually the plaintiff) has no evidence to support an element of its claim (or defense).[8] Since that time, there has been considerable case law addressing no-evidence summary judgments.

Summary judgment practice remains a technical procedure. This article discusses the procedural and substantive aspects of obtaining, opposing and appealing a summary judgment, review types of cases amenable to summary judgment, and, finally, provide an overview of federal summary judgment practice.

II. PROCEDURE FOR SUMMARY JUDGMENT

A. Motion for Summary Judgment

The summary judgment process begins with the filing of a motion.[9] In the absence of a motion for summary judgment by a party to the suit, no court has the power to render a judgment.[10] A motion for summary

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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).

Id. 166a cmt. to 1997 change.

[8] *Id.* 166a(i) cmt. to 1997 change.

[9] *See id.* 166a(a), (b), & (i).

[10] Williams v. Bank One, Tex., N.A., 15 S.W.3d 110, 116 (Tex. App.—Waco 1999, no pet.); Ulloa v. Davila, 860 S.W.2d 202, 204–05 (Tex. App.—San Antonio 1993, no writ); Hodde v. Young, 672 S.W.2d 45, 47 (Tex. App.—Houston [14th Dist.]), *writ ref'd n.r.e.*, 682 S.W.2d 236 (Tex. 1984) (agreeing with the appellate court that the trial court improperly denied defendant's counterclaim by summary judgment because plaintiff never moved for judgment specifically on the counterclaim).

judgment must rest on the grounds expressly presented in the motion.[11] The court cannot grant a summary judgment on a cause of action not specifically addressed in the motion for summary judgment.[12] The motion must state, with specificity, the grounds upon which the movant is relying[13] in order to define the issues and give the respondent adequate notice for opposing the motion.[14] To determine if the grounds are expressly presented in the motion, neither the court nor the movant may rely on supporting briefs or summary judgment evidence.[15] A trial court cannot grant more relief than is requested in the motion for summary judgment.[16] "Omission of one of [its] claims from a motion for summary judgment, [however,] does not waive the claim because a party can always move for partial summary judgment."[17]

The basis of a motion for summary judgment is the movant's contention that no genuine issue exists for any material fact and that the movant is entitled to judgment as a matter of law.[18] Regardless of the burden of

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[11]Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 912 (Tex. 1997); McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 339 (Tex. 1993) (discussing the paraphrasing of this requirement in several cases as indicating the motion "must itself state [the] specific grounds") (quoting Westbrook Constr. Co. v. Fid. Nat'l Bank, 813 S.W.2d 752, 754 (Tex. App.—Fort Worth 1991, writ denied)); *see also* City of Midland v. O'Bryant, 18 S.W.3d 209, 218 (Tex. 2000).

[12]*Sci. Spectrum*, 941 S.W.2d at 912 (limiting summary judgment to those grounds expressly presented in the motion); Stiles v. Resolution Trust Corp., 867 S.W.2d 24, 26 (Tex. 1993) (holding that "summary judgment cannot be affirmed on grounds not expressly set out in the motion or response"); Chessher v. Southwestern Bell Tel. Co., 658 S.W.2d 563, 564 (Tex. 1983) (per curiam) (holding that summary judgment may not be granted on issues not *"expressly presented"* to the trial court).

[13]*Stiles*, 867 S.W.2d at 26; Great-Ness Prof'l Servs., Inc. v. First Nat'l Bank, 704 S.W.2d 916, 918 (Tex. App.—Houston [14th Dist.] 1986, no writ) (concluding that misclassifying the specific ground for summary judgment as a "suit on a sworn account" was sufficient to defeat summary judgment even though the affidavit in support and the balance of the motion for summary judgment correctly alluded to a cause of action based upon a breach of a lease agreement).

[14]Westchester Fire Ins. Co. v. Alvarez, 576 S.W.2d 771, 772 (Tex. 1978); RR Publ'n & Prod. Co. v. Lewisville Indep. Sch. Dist., 917 S.W.2d 472, 473 (Tex. App.—Fort Worth 1996, no writ); *see also McConnell*, 858 S.W.2d at 343–44.

[15]*McConnell*, 858 S.W.2d at 340–41 (finding that the plain language of Rule 166a does not allow a movant to place grounds for summary judgment in a brief or summary judgment evidence); Benitz v. The Gould Group, 27 S.W.3d 109, 116 (Tex. App.—San Antonio 2000, no pet.).

[16]Walton v. City of Midland, 24 S.W.3d 853, 856 (Tex. App.—El Paso 2000, no pet.).

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

[18]TEX. R. CIV. P. 166a(c).

proof at trial, either party may file a motion for summary judgment by establishing each element of its claim or defense.[19] The party without the burden of proof also may file a motion for summary judgment urging that there is no evidence to support the respondent's claims or defenses.[20] The party with the burden of proof may never properly file a no-evidence summary judgment on its claims or defenses, nor may purely legal issues be the subject of a no-evidence summary judgment.[21]

Even though the grounds for summary judgment must appear in the motion itself, summary judgment evidence need not be set out or described in the motion to be considered.[22] Nonetheless, the usual practice, though not required by the supreme court, is to describe the summary judgment evidence.[23]

Rule 166a(i), which provides for no-evidence summary judgments, requires much less from the movant. The movant need not produce any evidence in support of its no-evidence motion.[24] Instead, the mere filing of the motion shifts the burden to the respondent to come forward with enough evidence to raise a genuine issue of material fact.[25] If the respondent does not, the court must grant the motion.[26]

While it need not be detailed, the no-evidence summary judgment motion must meet certain requirements. First, the motion must state the elements for which there is no evidence.[27] A defendant's motion should state the elements of the plaintiff's cause of action and specifically challenge the evidentiary support for an element of that claim.[28] It cannot rely on its reply to the respondent's response to provide the requisite

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[19]*See infra* Part IV (Burden of proof).

[20]*See infra* Part IV.B. (No-evidence summary judgment).

[21]Harrill v. A.J.'s Wrecker Serv., Inc., 27 S.W.3d 191, 194 (Tex. App.—Dallas 2000, pet. dism'd w.o.j.).

[22]Wilson v. Burford, 904 S.W.2d 628, 629 (Tex. 1995) (per curiam) (clarifying that only the *"grounds,"* and not the evidence, must be set out in the motion).

[23]*See infra* Part III.A.1. (Evidence; Unfiled Discovery).

[24]TEX. R. CIV. P. 166a(i).

[25]*Id.*; *see also infra* Parts IV.B., V.B. (Burden & Proof; No-evidence summary judgments; and Responding).

[26]TEX. R. CIV. P. 166a(i); *see also infra* Parts IV.B., V.B. (Burden & Proof; No-evidence summary judgments; Responding).

[27]TEX. R. CIV. P. 166a(i); Callaghan Ranch, Ltd. v. Killam, 53 S.W.3d 1, 4 (Tex. App.—San Antonio 2000, pet. denied); *see also infra* Parts IV.B., V.B. (Burden & Proof; No-evidence summary judgments; Responding).

[28]TEX. R. CIV. P. 166a cmt. to 1997 change.

specificity.[29] Second, the motion cannot be conclusory or generally allege there is no evidence to support the claims.[30] In other words, a motion that merely states that there is no evidence to support the other party's claim is insufficient.

Movants sometimes mix traditional motions for summary judgment with no-evidence summary judgments. For example, when the evidence was attached to a no-evidence summary judgment, the Waco Court of Appeals refused to consider the motion as a no-evidence summary judgment and instead reviewed it as a traditional motion for summary judgment.[31] In contrast, the El Paso Court of Appeals allowed detailed summary judgment evidence to be attached to the motion and held that this complied with the "requirement to specifically challenge the evidentiary support for an element of [a] claim."[32] The better practice, according to the Eastland Court of Appeals, is to file separate traditional and no-evidence motions.[33] As the court noted, "[a]nalysis is made more difficult when it appears that the movant may be relying on his or her summary judgment evidence yet is asserting that there is no evidence on a particular element of the non-movant's case."[34] It should be sufficient to file both types of motion in one document but the portion dealing with traditional bases for summary judgment should be clearly delineated from a separate section addressing no evidence points.

For any type of motion for summary judgment, an amended or substituted motion for summary judgment supersedes any preceding motion.[35] A ground contained in an initial summary judgment motion, but not included in a later amended motion, may not be used to support the affirmance of a summary judgment on appeal.[36]

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[29]*Callaghan Ranch, Ltd.*, 53 S.W.3d at 4.

[30]*Id.* at 3.

[31]Grimes v. Andrews, 997 S.W.2d 877, 880 n.1 (Tex. App.—Waco 1999, no pet.); *accord* Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 618–19 (Tex. App.—Eastland 2000, pet. denied).

[32]Saenz v. S. Union Gas Co., 999 S.W.2d 490, 493 (Tex. App.—El Paso 1999, pet. denied).

[33]Kelly v. LIN Television of Tex., L.P., 27 S.W.3d 564, 568 (Tex. App.—Eastland 2000, pet. denied).

[34]*Id.*

[35]Dallas Indep. Sch. Dist. v. Finlan, 27 S.W.3d 220, 231 (Tex. App.—Dallas 2000, pet. denied); *see also* Padilla v. LaFrance, 907 S.W.2d 454, 459 (Tex. 1995).

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

B. Pleadings

1. Amended Pleadings

A summary judgment proceeding is a "trial" with respect to filing amended pleadings according to Texas Rule of Civil Procedure 63, the Texas rule for calculating pertinent time periods.[37] Thus, leave of court must be obtained to file amended pleadings within seven days of the date of the summary judgment hearing.[38] The complaining party must demonstrate surprise and request a continuance to properly preserve a complaint regarding a pleading that has been filed within seven days of trial.[39] Even though a hearing may be set and reset, "the key date for purposes of Rule 63 [is] the date of the final hearing from which the summary judgment sprang."[40]

If the plaintiff amends the petition after being served with a motion for summary judgment, the defendant must file an amended or supplemental motion to address the newly pleaded cause of action.[41] Amending the motion is equally necessary for no-evidence summary judgments. If the plaintiff amends its petition adding new causes of action not addressed by the defendant's no-evidence motion for summary judgment, the defendant must file an amended motion for summary judgment identifying the elements of the newly pled theories for which there is no evidence. Otherwise, summary judgment on the entirety of the plaintiff's case will be

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[37]Wheeler v. Yettie Kersting Mem'l Hosp., 761 S.W.2d 785, 787 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *see also* Sosa v. Cent. Power & Light, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam) (applying Rule 63 of the Texas Rules of Civil Procedure to the time period prescribed for filings before a summary judgment hearing).

[38]*Sosa*, 909 S.W.2d at 895 (explaining that the day of filing is not counted to determine the seven-day limit, but the seventh day after filing is counted).

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

[40]Cantu v. Holiday Inns, Inc., 910 S.W.2d 113, 115 (Tex. App.—Corpus Christi 1995, writ denied).

[41]Worthy v. Collagen Corp., 921 S.W.2d 711, 714 (Tex. App.—Dallas 1995), *aff'd*, 967 S.W.2d 360 (Tex. 1998); Schauer v. Mem'l Care Sys., 856 S.W.2d 437, 443 (Tex. App.—Houston [1st Dist.] 1993, no writ) (explaining that the court's review "is limited to the DTPA claims raised in Worthy's second amended petition as challenged by Collagen in its second motion for summary judgment, which Collagen designated as a 'supplemental' motion"), *overruled in part on other grounds by* Huckabee v. Time Warner Entm't Co., 19 S.W.3d 413 (Tex. 2000) (stating that "a summary judgment that does not address . . . new grounds cannot be affirmed"); Johnson v. Rollen, 818 S.W.2d 180, 182–83 (Tex. App.—Houston [1st Dist.] 1991, no writ) (holding that a motion for summary judgment not addressing allegations in an amended petition cannot be granted).

improper because the no-evidence motion fails to address all of the plaintiff's theories of liability.[42] However, "[i]f 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."[43]

In cases with court-ordered discovery plans, the court may set the deadline for amended pleadings before the close of the discovery period.[44] In those instances, movants who wait to move for summary judgment until after the time expires for pleading amendments will not have to amend the summary judgment motion to address amended pleadings.

Unpleaded claims or defenses may form the basis for a summary judgment if the respondent does not object.[45] Specifically, the Texas Supreme Court has held:

> [A]n unpleaded affirmative defense may . . . serve as the basis for a summary judgment when it is raised in the summary judgment motion, and the opposing party does not object to the lack of a [Texas Rule of Civil Procedure] 94 pleading in either its written response or before the rendition of judgment.[46]

2. Pleading Deficiencies and Special Exceptions

The Texas Supreme Court strongly disfavors use of summary judgment motions to attack pleading deficiencies.[47] Texas has no equivalent of a

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[42]*Sosa*, 909 S.W.2d at 894–95; *see also* Welch v. Coca-Cola Enters., Inc., 36 S.W.3d 532, 541–42 (Tex. App.—Tyler 2000, pet. withdrawn); Specialty Retailers, Inc. v. Fuqua, 29 S.W.3d 140, 147–48 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

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

[44]TEX. R. CIV. P. 190.4(b)(4).

[45]Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 495 (Tex. 1991) (stating that unpleaded claims or defenses are treated as if they were raised by the pleadings when they are tried by express or implied consent of the parties); Patterson v. First Nat'l Bank of Lake Jackson, 921 S.W.2d 240, 244 (Tex. App.—Houston [14th Dist.] 1996, no writ) ("An unpleaded affirmative defense, however, cannot be the basis for summary judgment unless appellee fails to object to the lack of a pleading in either its written response or before the rendition of judgment."); Stewart Title Guar. Co. v. Aiello, 911 S.W.2d 463, 474 (Tex. App.—El Paso 1995), *rev'd on other grounds*, 941 S.W.2d 68 (Tex. 1997).

[46]*Roark*, 813 S.W.2d at 494; *see also* Finley v. Steenkamp, 19 S.W.3d 533, 541 (Tex. App.—Fort Worth 2000, no pet.).

[47]*In re* B.I.V., 870 S.W.2d 12, 13–14 (Tex. 1994); Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983) (explaining that "[w]hether pleadings fail to state a cause of action may not be resolved by summary judgment"); Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 9–10 (Tex.

Federal Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.[48] A summary judgment should not be based on a pleading deficiency that could be cured by amendment.[49] However, a respondent must raise a complaint that summary judgment was granted without opportunity to amend or it is waived.[50]

Special exception is the appropriate method to challenge the plaintiff's failure to state a cause of action.[51] This method allows the respondent an opportunity to amend before dismissal.[52] It has long been the rule that there is no general demurrer in Texas.[53] Special exceptions can be used in conjunction with the summary judgment process to identify and set up conditions to make a case for summary judgment. Subject to challenges to jurisdiction and venue, a party should file special exceptions identifying and objecting to nonjurisdictional defects apparent on the face of the opponent's pleadings.[54] If identification of the defect depends on

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1974) (concluding that the protective features of the special exception procedure should not be circumvented by summary judgment where the pleadings fail to state a cause of action); Saenz v. S. Union Gas Co., 916 S.W.2d 703, 705 (Tex. App.—El Paso 1996, writ denied) (stating that summary judgment should not be granted where the pleading deficiency could be cured by amendment); Garza v. State, 878 S.W.2d 671, 673 (Tex. App.—Corpus Christi 1994, no writ) (stating that summary judgment should not be determined by the sufficiency of the pleadings).

[48]Centennial Ins. Co. v. Commercial Union Ins. Cos., 803 S.W.2d 479, 482–83 (Tex. App.—Houston [14th Dist.] 1991, no writ) (explaining that the trial court contravened the letter and spirit of the Texas Rules of Civil Procedure and employed an unauthorized procedural mechanism to summarily dismiss plaintiffs' case without giving plaintiffs an opportunity to replead); *see also* TEX. R. CIV. P. 90–91 (providing for special exceptions for defects in pleadings and waiver of defects for failure to specially except).

[49]*In re B.I.V.*, 870 S.W.2d at 13.

[50]San Jacinto River Auth. v. Duke, 783 S.W.2d 209, 209–10 (Tex. 1990) (holding trial court's judgment may not be reversed where party does not present a timely request, objection, or motion to the trial court); Ross v. Arkwright Mut. Ins. Co., 933 S.W.2d 302, 305 (Tex. App.—Houston [14th Dist.] 1996, writ denied) (citing *San Jacinto River Auth.*, 783 S.W.2d at 209–10).

[51]TEX. R. CIV. P. 91; *see also* Lavy v. Pitts, 29 S.W.3d 353, 356 (Tex. App.—Eastland 2000, pet. denied).

[52]*Centennial Ins. Co.*, 803 S.W.2d at 483 (contending that dismissal for failure to state a cause of action is proper only after special exceptions have been sustained and plaintiff has had an opportunity to replead).

[53]TEX. R. CIV. P. 90 (establishing that "[g]eneral demurrers shall not be used"); *see also* Tex. Dep't of Corr. v. Herring, 513 S.W.2d 6, 10 (Tex. 1974) (stating Texas Rules of Civil Procedure 90 discarded the general demurrer); McFarland v. Reynolds, 513 S.W.2d 620, 626 (Tex. Civ. App.—Corpus Christi 1974, no writ) (concluding general demurrers should not be used).

[54]Agnew v. Coleman County Elec. Coop., Inc., 272 S.W.2d 877, 879 (Tex. 1954) (stating that if a party desires more specific allegations, it is entitled to enter special exceptions to the general pleading), *overruled on other grounds by* Burk Royalty Co. v. Walls, 616 S.W.2d 911

information extrinsic to the pleadings themselves, special exceptions are not appropriate.[55] Special exceptions must be directed at the plaintiff's *live* pleadings.[56] If the trial court sustains the special exceptions, the offending party may replead or the party may elect to stand on the pleadings and test the trial court's order on appeal.[57] The right to amend is absolute.[58]

A motion for summary judgment should not be based on a pleading deficiency that could be cured by amendment (for example, subject to a

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(Tex. 1981); Fort Bend County v. Wilson, 825 S.W.2d 251, 253 (Tex. App.—Houston [14th Dist.] 1992, no writ) (asserting that special exceptions should be used to force clarification of vague pleadings and question the sufficiency in law of the party's petition).

[55]Fernandez v. City of El Paso, 876 S.W.2d 370, 373 (Tex. App.—El Paso 1993, writ denied) (stating special exceptions must only address matters on the face of the other party's pleading); O'Neal v. Sherck Equip. Co., 751 S.W.2d 559, 562 (Tex. App.—Texarkana 1988, no writ) (concluding defendants may not seek relief by excepting to a pleading based on facts not apparent in the plaintiff's petition); Augustine v. Nusom, 671 S.W.2d 112, 114 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (holding it is error to present extrinsic facts as special exceptions); Travelers Indem. Co. v. Holt Mach. Co., 554 S.W.2d 12, 15 (Tex. Civ. App.—El Paso 1977, no writ) (asserting that special exceptions that raise extrinsic evidence are not valid).

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

[57]D.A. Buckner Constr., Inc. v. Hobson, 793 S.W.2d 74, 75 (Tex. App.—Houston [14th Dist.] 1990, no writ) (indicating that the rule is "well settled"); Geochem Labs., Inc. v. Brown & Ruth Labs., Inc., 689 S.W.2d 288, 289–90 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); Cameron v. Univ. of Houston, 598 S.W.2d 344, 345 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

[58]Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983) (quoting *Herring*, 513 S.W.2d at 10, for the proposition that "only after a party has been given an opportunity to amend" can a case be dismissed for failure to state a cause of action); Saenz v. S. Union Gas Co., 916 S.W.2d 703, 705 (Tex. App.—El Paso 1996, writ denied) (explaining that "plaintiffs must have an opportunity to cure a deficient petition by amendment before their lawsuit is dismissed as failing to state an actionable claim"); Centennial Ins. Co. v. Commercial Union Ins. Co., 803 S.W.2d 479, 483 (Tex. App.—Houston [14th Dist.] 1991, no writ) (finding that "the pleader must be given, as a matter of right, an opportunity to replead"). *But see Geochem Labs., Inc.*, 689 S.W.2d at 290 (indicating that there may not be a right to amend if "the trial court can determine that an amendment will not cure the defect").

special exception). If the opportunity to amend is given, and no amendment is made or instead a further defective pleading is filed, then summary judgment may be proper.[59] If a pleading deficiency is a type that cannot be cured by an amendment, then a special exception is unnecessary, and summary judgment is proper if the facts alleged "establish the absence of a right of action or [create] an insuperable barrier to a right of recovery."[60]

The review of summary judgment differs when based on the failure of a party to state a claim after either special exceptions or an amendment because review focuses on the pleadings of the respondent.[61] Review of the sufficiency of the amended pleadings is de novo.[62] The appellate court must take "all allegations, facts, and inferences in the pleadings as true and view[] them in a light most favorable to the pleader."[63] The court will reverse the motion for summary judgment if the pleadings, liberally construed, support recovery under any legal theory.[64] On the other hand, "[t]he reviewing court will affirm the summary judgment only if the

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[59]Natividad v. Alexsis, Inc., 875 S.W.2d 695, 699 (Tex. 1994); *see also* Friesenhahn v. Ryan, 960 S.W.2d 656, 659 (Tex. 1998); *Herring*, 513 S.W.2d at 10.

[60]Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972) (noting that cases where summary judgment is proper rather than utilizing the special exception are limited); Flax v. McNew, 896 S.W.2d 839, 841 n.2 (Tex. App.—Waco 1995, no writ).

[61]*See* Russell v. Tex. Dep't of Human Res., 746 S.W.2d 510, 513 (Tex. App.—Texarkana 1988, writ denied) (explaining that, after amendment, the focus shifts to the answers in the response).

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

[63]*Natividad*, 875 S.W.2d at 699; *Hall*, 919 S.W.2d at 467; *see also* Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210, 213 (Tex. 1988) (concluding that the reviewing court will accept as true all factual allegations in the plaintiff's petition to determine whether the petition states a factual basis for plaintiff's claim); Havens v. Tomball Cmty. Hosp., 793 S.W.2d 690, 691 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (stating that "the court must take as true every allegation of the pleading against which the motion is directed").

[64]Gross v. Davies, 882 S.W.2d 452, 454 (Tex. App.—Houston [1st Dist.] 1994, writ denied) (stating that if liberal construction of petition shows a valid claim, summary judgment should be reversed); Anders v. Mallard & Mallard, Inc., 817 S.W.2d 90, 93 (Tex. App.—Houston [1st Dist.] 1991, no writ) (arguing that a motion for summary judgment must be overruled if liberal construction of the pleading reveals a fact issue); Greater Southwest Office Park, Ltd. v. Tex. Commerce Bank Nat'l Ass'n, 786 S.W.2d 386, 388 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (explaining that the summary judgment must be reversed if the pleadings would support "a recovery under any theory of law"); Bader v. Cox, 701 S.W.2d 677, 686 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (discussing the "fair notice" requirement of pleadings).

pleadings are legally insufficient."[65] "To complain that summary judgment grounds are unclear, a non-movant must except to the motion."[66]

C. *Time for Filing Motion for Summary Judgment*

Rule 166a(a) provides that the party seeking affirmative relief may move for summary judgment at any time after the adverse party answers the suit.[67] A defendant may file a motion for summary judgment at any time,[68] even before answering the lawsuit.[69] However, a summary judgment may not be granted against a defendant who has no answer on file.[70]

The proper timing of a motion for summary judgment under Rule 166a(i) is more complicated. There must be an "adequate time for discovery."[71] "The rule does not require that discovery must [be] completed, only that there [has been] 'adequate time' [for discovery]."[72] Specifically, the rule provides:

> (i) No-Evidence Motion. *After adequate time for discovery,* a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.[73]

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[65]*Natividad*, 875 S.W.2d at 699.

[66]Lavy v. Pitts, 29 S.W.3d 353, 356 (Tex. App.—Eastland 2000, pet. denied) (citing Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 175 (Tex. 1995)).

[67]TEX. R. CIV. P. 166a(a).

[68]*Id.* 166a(b).

[69]Zimmelman v. Harris County, 819 S.W.2d 178, 181 (Tex. App.—Houston [1st Dist.] 1991, no writ) (finding it was clear that the defendant contested the claims and, thus, there was no basis for denying summary judgment solely because the motion for summary judgment was filed before the answer).

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

[71]TEX. R. CIV. P. 166a(i).

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

[73]TEX. R. CIV. P. 166a(i) (emphasis added).

The "Notes and Comments" addendum to the rule, which was promulgated in 1997, offers guidance for cases with discovery orders. It provides that "[a] discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before."[74]

The addedum to the rule makes no mention of how to proceed in the absence of a pretrial order. Later, the revised discovery rules filled that gap because all subsequent cases have a rule-imposed or court-imposed discovery plan with discovery periods.[75] Rule 190 provides three discovery plans, each of which has a "discovery period" for all civil cases filed after January 1, 1999.[76] Therefore, an "adequate time for discovery" may be measured against the "discovery period" assigned to a given case. The comment to Rule 166a(i) covers what now is called a "Level 3" case, which has a court-imposed discovery plan. Levels 1 and 2 have rule-imposed discovery periods. Thus, if the no-evidence motion for summary judgment is filed after the expiration of the discovery periods, presumptively there will have been an adequate time for discovery.

For Level 1 cases, an adequate time for discovery would occur thirty days before trial. The practical effect of this cutoff date is that the case is so far through the process, and the dollars are so relatively small, that many defendants may forego making a no-evidence motion for summary judgment in the last thirty days before trial. As a practical matter, it may be difficult to get the trial court to rule on the motion for summary judgment before trial.[77] For Level 2 cases, an adequate time for discovery would be the discovery cutoff of thirty days before the date set for trial or nine months after the first oral deposition is taken or the answers to the first written discovery are due, whichever is earlier.[78] In Level 2 family cases, the nonmovant responding to a motion for summary judgment filed thirty days before trial would have had an adequate time for discovery.[79] For Level 3 cases, the close of discovery under the court-ordered discovery

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[74] *Id.* 166a(i) cmt. to 1997 change.

[75] *Id.* 190.

[76] *Id.* 190.1; *see also* Tex. Sup. Ct. Order of Nov. 9, 1998, Misc. Docket No. 98-9196, 61 TEX. B.J. 1140 (Dec. 1998).

[77] *See* TEX. R. CIV. P. 190.2(c)(1); *see also* TEX. R. CIV. P. 190.2(d).

[78] *Id.* 190.3(b)(1)(B).

[79] *Id.* 190.3(b)(1)(A).

control plan determines the date after which an adequate time for discovery has passed.[80]

The timing restriction is not absolute. Movants on no-evidence summary judgments may properly file the motion before the expiration of the discovery period. The ability to file a no-evidence motion for summary judgment before the close of discovery supports judicial economy arguments; the presumption against the early filing of motions for summary judgment supports the right to a certain discovery window to allow a party to secure sufficient evidence to present the case to the jury.

In appropriate cases, a movant could show an adequate time for discovery has passed, even though the discovery period has not expired, by convincing the court that the respondent's claimed need for discovery is unfounded.[81] The respondent opposing an early-filed no-evidence motion for summary judgment should attempt to have it denied as premature by convincing the court that remaining discovery is likely to lead to controverting evidence and, in any event, that he or she is entitled to the additional time under the discovery plan.

Even if the no-evidence motion for summary judgment is filed after the close of discovery,[82] Rule 190.5 may provide a basis for a request for continuance of the motion for summary judgment. Rule 190.5 allows for a continuance in obtaining additional discovery after the close of the discovery period.

When a respondent contends he or she has not had an adequate time for discovery, he or she must file an affidavit or a verified motion for continuance explaining the need for further discovery.[83] The court may deny the motion for summary judgment, continue the hearing to allow additional discovery, or "make such other order as is just."[84]

Although practically it may apply to some traditional motions for summary judgment, the "adequate time for discovery" standard the rules only absolutely apply to no-evidence summary judgments.[85]

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[80] *Id.* 190.4(b)(2).

[81] *See* Specialty Retailers, Inc. v. Fuqua, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (detailing factors to be considered in granting a continuance); *see also* DAVID HITTNER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL: 5TH CIRCUIT EDITION, Ch. 14:117 (West Group 1996).

[82] *See infra* Part II.G. (Continuances).

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

[84] TEX. R. CIV. P. 166a(g).

[85] *See id.* 166a(a), (b).

D. Deadlines for Filing Motion for Summary Judgment

A motion for summary judgment shall be filed and served at least twenty-one days before the time specified for the hearing.[86] If different parties on the same side of the lawsuit file separate summary judgment motions, each movant should comply with the notice provisions of the rule.[87] Periods governing summary judgment procedures are now counted in the same manner as for other procedural rules.[88] The day of service of a motion for summary judgment is not to be included in computing the minimum twenty-one day notice for hearing.[89] However, the day of hearing is included in the computation.[90] If the motion is served by mail, three days are added to the twenty-one day notice period required prior to the hearing.[91] Thus, "[a] hearing on a motion for summary judgment may be set as early as the 21st day after the motion is served, or the 24th day if the motion is served by mail."[92]

The twenty-one day requirement is strictly construed by the courts and should be carefully followed.[93] "Summary judgment evidence may be filed late, but only with leave of court."[94] The party filing the late evidence must obtain a written order granting leave to file.[95] Rule 166a(c) authorizes the court to accept materials filed after the hearing so long as

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[86]*Id.* 166a(c); *see also* Cronen v. Pasadena, 835 S.W.2d 206, 209 (Tex. App.—Houston [1st Dist.] 1992, no writ) (applying Texas Rule of Civil Procedure 21a and finding that "a certificate of service creates a rebuttable presumption that the requisite notice [of the hearing] was" given), *overruled on other grounds by* Lewis v. Blake, 876 S.W.2d 314 (Tex. 1994) (per curiam); Krchnak v. Fulton, 759 S.W.2d 524, 528 (Tex. App.—Amarillo 1988, writ denied) (holding that the rule regarding certificate of service "creates a presumption that requisite notice was served and . . . has the force of a rule of law").

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

[88]*Lewis*, 876 S.W.2d at 316 (disapproving of a series of court of appeals' decisions that did not add the extra three days for service by mail or telephonic document transfer).

[89]*Id.*

[90]*Id.*

[91]*Id.*

[92]*Id.*

[93]Luna v. Estate of Rodriguez, 906 S.W.2d 576, 582 (Tex. App.—Austin 1995, no writ); Wavell v. Caller-Times Publ'g Co., 809 S.W.2d 633, 637 (Tex. App.—Corpus Christi 1991, writ denied), *overruled on other grounds by* Cain v. Hearst Corp., 878 S.W.2d 577 (Tex. 1994).

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

[95]*Id.* (finding no order in the record granting the party leave to file an affidavit late and, therefore, holding that the affidavit was not properly before the court and could not be considered for summary judgment).

those materials are filed before judgment.[96] If a summary judgment hearing is reset, the twenty-one day requirement does not apply to the resetting.[97] The respondent need only be given a reasonable time in which to prepare and file a response.[98] According to one court, reasonable notice "means at least seven days before the hearing on the motion [for summary judgment] because a [respondent] may only file a response to a motion for summary judgment not later than seven days prior to the date of the hearing . . . ."[99]

A party waives its challenge to failure to receive twenty-one days notice if "the party received notice of the hearing, appeared at it, filed no controverting affidavit, and did not ask for a continuance."[100] "An allegation that a party received less notice than required by statute does not present a jurisdictional question and therefore may not be raised for the first time on appeal."[101] It is error for the trial judge to grant a summary judgment without notice of the setting.[102] However, for the error to be reversable, the respondent must show harm.[103]

E. Deadlines for Response

Rule 166a(c) provides that "[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and

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

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

[98]*See id.* (quoting Int'l Ins. Co. v. Herman G. West, Inc., 649 S.W.2d 824, 825 (Tex. App.—Fort Worth 1983, no writ) (holding all that is required is reasonable notice of the reset hearing).

[99]LeNotre v. Cohen, 979 S.W.2d 723, 726 (Tex. App.—Houston [14th Dist.] 1998, pet. denied).

[100]Negrini v. Beale, 822 S.W.2d 822, 823 (Tex. App.—Houston [14th Dist.] 1992, no writ); *see also* Ajibade v. Edinburg Gen. Hosp., 22 S.W.3d 37, 40 (Tex. App.—Corpus Christi 2000, no pet.).

[101]*Negrini*, 822 S.W.2d at 823.

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

[103]*Id.*

serve opposing affidavits or other written response."[104] If the trial court imposes a shorter deadline to file a response, the respondent must object to preserve that error for appeal.[105] The seven-day rule applies equally to responses to cross-motions for summary judgment.[106] Any special exception to a lack of clarity or ambiguity in the motion for summary judgment is likewise subject to the seven-day deadline.[107] Amended pleadings may be filed without leave of court up to seven days before the hearing.[108]

Courts may allow a late response.[109] The respondent has the burden to obtain leave of court to file a late response.[110] The adverse party should exercise caution because the refusal to permit late filing is strictly discretionary.[111] If a court allows late filing of a response to a motion for summary judgment, the court "must affirmatively indicate in the record

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[104]TEX. R. CIV. P. 166a(c).

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

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

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

[108]Sosa v. Cent. Power & Light, 909 S.W.2d 893, 895 (Tex. 1995).

[109]Farmer v. Ben E. Keith Co., 919 S.W.2d 171, 176 (Tex. App.—Fort Worth 1996, no writ) (finding that the trial court has discretion to accept late-filed summary judgment evidence); Sullivan v. Bickel & Brewer, 943 S.W.2d 477, 486 (Tex. App.—Dallas 1995, writ denied) (noting the late filing of opposing proof is "entirely" discretionary); Ossorio v. Leon, 705 S.W.2d 219, 221 (Tex. App.—San Antonio 1985, no writ) (holding that the court may specifically grant leave to file a late response and consider those documents as proper support for a summary judgment motion); Travelers Constr., Inc. v. Warren Bros. Co., 613 S.W.2d 782, 785 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ) (holding that the trial court has discretion in allowing late filings).

[110]Neimes v. Ta, 985 S.W.2d 132, 139 (Tex. App.—San Antonio 1998, pet. dism'd by agr.).

[111]White v. Independence Bank, N.A., 794 S.W.2d 895, 900 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (holding that the trial court may refuse affidavits that are filed late); Folkes v. Del Rio Bank & Trust Co., 747 S.W.2d 443, 444 (Tex. App.—San Antonio 1988, no writ) (holding that denying permission to file a late response was not abuse of discretion); Pinckley v. Gallegos, 740 S.W.2d 529, 532 (Tex. App.—San Antonio 1987, writ denied) (holding that refusing to accept late filed affidavits was not abuse of discretion); Keever v. Hall & Northway Adver., Inc., 727 S.W.2d 704, 705 (Tex. App.—Dallas 1987, no writ) (holding that failing to accept late filed response was not abuse of discretion).

acceptance of the late filing."[112] The affirmative indication may be by separate order, by recitation in the summary judgment itself or an oral ruling contained in the reporter's record of the summary judgment hearing.[113] One court has determined that a docket entry is sufficient to show leave was granted.[114] Nonetheless, obtaining a separate order is advisable. Although an oral order recorded in a statement of facts from the hearing may not be sufficient, one court held that it was sufficient.[115] In the absence of such indication, the appellate court will presume that the judge refused the late filing, even if the response appears as part of the appellate transcript.[116]

Before the hearing on the motion for summary judgment a plaintiff may take a nonsuit after the time to respond to the motion for summary judgment.[117] However, as a dispositive motion, a partial summary judgment survives a nonsuit.[118]

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[112]*Farmer*, 919 S.W.2d at 176; *see also* Goswami v. Metro. Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988) (holding that an amended petition that is part of the record raises a presumption that leave of court was granted); M & M Constr. Co. v. Great Am. Ins. Co., 749 S.W.2d 526, 527 (Tex. App.—Corpus Christi 1988, writ dism'd w.o.j.) (stating that "there must be some affirmative indication in the record that the trial court permitted the late filing"); *cf.* Energo Int'l Corp. v. Modern Indus. Heating, Inc., 722 S.W.2d 149, 151–52 (Tex. App.—Dallas 1986, no writ) (stating that a docket entry is inadequate indication of acceptance).

[113]*See, e.g.*, *Farmer*, 919 S.W.2d at 176 (finding that a lack of indication in the record showing that leave was obtained leads to a presumption that leave was not obtained); *Neimes*, 985 S.W.2d at 139.

[114]Shore v. Thomas A. Sweeney & Assocs., 864 S.W.2d 182, 184–85 (Tex. App.—Tyler 1993, no writ) (holding that the docket entry appeared on the record and thus satisfied Texas Rule of Civil Procedure 166a). *But see Energo Int'l Corp.*, 722 S.W.2d at 151–52.

[115]Woodbine Elec. Serv., Inc. v. McReynolds, 837 S.W.2d 258, 261 (Tex. App.—Eastland 1992, no writ) (arguing that "[i]t would be exalting form over substance to shut our eyes to the recorded proceedings which occurred in open court . . . ."); *see also Neimes*, 985 S.W.2d at 139.

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

[117]Alvarado v. Hyundai Motor Co., 885 S.W.2d 167, 170 (Tex. App.—San Antonio 1994), *rev'd on other grounds*, Hyundai Motor Co. v. Alvarado, 892 S.W.2d 853 (Tex. 1995) (per curiam); Taliaferro v. Smith, 804 S.W.2d 548, 549–50 (Tex. App.—Houston [14th Dist.] 1991, no writ) (holding that in a summary judgment proceeding, a plaintiff may take a nonsuit at any time prior to judgment).

[118]Hyundai Motor Co. v. Alvarado, 892 S.W.2d 853, 855 (Tex. 1995) (per curiam) (stating that in order to give "any force to the partial summary judgment provisions, those judgments must withstand a nonsuit.").

Rule 166a does not specify when the movant's reply to the respondent's response should be filed. Case law indicates that the movant may file a reply up until the day of the hearing.[119] Any special exception by the movant as to vagueness or ambiguity in the respondent's response must be made at least three days before the hearing.[120]

F. Service

The motion for summary judgment and response should be served promptly on opposing counsel, and a certificate of service should be included in any motion for summary judgment. If notice is not given, the judgment may be reversed on appeal.[121] The respondent is entitled to receive specific notice of the hearing or submission date for the motion for summary judgment so that he or she is aware of the deadline for the response.[122] A certificate of service is prima facie proof that proper service was made.[123] To establish a lack of notice, the respondent must introduce evidence to controvert the certificate of service.[124]

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[119]*See, e.g.*, Wright v. Lewis, 777 S.W.2d 520, 522 (Tex. App.—Corpus Christi 1989, writ denied) (finding no harm in allowing objections to be filed before or even on the day of the hearing).

[120]McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 343 n.7 (Tex. 1993) (citing TEX. R. CIV. P. 21).

[121]Smith v. Mike Carlson Motor Co., 918 S.W.2d 669, 672 (Tex. App.—Fort Worth 1996, no writ) (explaining that "[a]bsence of actual or constructive notice violates a party's due process rights under the Fourteenth Amendment to the federal constitution."); Rozsa v. Jenkinson, 754 S.W.2d 507, 509 (Tex. App.—San Antonio 1988, no writ) (finding that notice was sent to an incorrect address and therefore the summary judgment was invalid). "[A]n allegation that a party received less notice [of a summary judgment hearing] than required by statute does not present a jurisdictional question and therefore may not be raised for the first time on appeal." Davis v. Davis, 734 S.W.2d 707, 712 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). Because the issue of notice may not be raised for the first time on appeal, there must be an objection in the trial court. *See id.* However, "a misleading notice is equal to no notice." Seckers v. Ocean Chems., Inc., 845 S.W.2d 317, 318 (Tex. App.—Houston [1st Dist.] 1992, no writ).

[122]Martin v. Martin, Martin & Richards, Inc., 989 S.W.2d 357, 359 (Tex. 1998) (per curiam).

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

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

One court has held that the record need not reflect receipt of notice by the respondent.[125] Constructive notice is imputed when the evidence indicates that the intended recipient engaged in instances of selective acceptance and refusal of certified mailings related to the case.[126]

A party may waive the twenty-one day notice requirement of a motion for summary judgment.[127] For example, in *Davis v. Davis*, two parties filed separate motions for summary judgment directed against the appellant.[128] One motion gave the appellant twenty-one days notice, but the other motion did not.[129] The trial court considered both motions simultaneously.[130] The appellate court found that the appellant waived any objection to the inadequacy of the notice period because he participated in the hearing without objection and failed to ask for a continuance, rehearing, or new trial.[131]

If the motion is mailed, a party is allowed an additional three days and the hearing may not be held before twenty-four days have elapsed.[132] In *Chadderdon v. Blaschke*, the court held that even though a motion for

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

[126]*Id.* at 102 (holding that complying with TEX. R. CIV. P. 21a is sufficient for constructive notice in such circumstances).

[127]Negrini v. Beale, 822 S.W.2d 822, 823 (Tex. App.—Houston [14th Dist.] 1992, no writ) (explaining that a party waives the twenty-one day requirement "where the party received notice of the hearing, appeared at it, filed no controverting affidavit, and did not ask for a continuance"); Brown v. Capital Bank, 703 S.W.2d 231, 233–34 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.) (finding that respondent's presentation of facts essential to oppose summary judgment in an oral submission, absent an affidavit stating such reasons, was not sufficient cause for continuance); Delta (Del.) Petroleum & Energy Corp. v. Houston Fishing Tools Co., 670 S.W.2d 295, 296 (Tex. App.—Houston [1st Dist.] 1983, no writ) (finding a waiver of notice when appellant made no motion for continuance, did not appear at the hearing, and made no post-trial motion complaining of lack of notice); Lofthus v. State, 572 S.W.2d 799, 800 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.) (explaining that if counsel, who appeared on day of the hearing, was given an opportunity to file affidavits opposing the motion for summary judgment and failed to do so, and failed to move for additional time, then he waived the objection to inadequate notice); Carr v. Densford, 477 S.W.2d 644, 646 (Tex. Civ. App.—Amarillo 1972, no writ) (finding that party waived the notice requirement because no request was made for additional time or for continuance).

[128]734 S.W.2d 707, 708–09 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

[129]*Id.* at 712.

[130]*Id.*

[131]*Id.*; *see also Negrini*, 822 S.W.2d at 823 (explaining that "[a]n allegation that a party received less notice than required by statute" is not a jurisdictional question so it "may not be raised for the first time on appeal.").

[132]Lewis v. Blake, 876 S.W.2d 314, 315 (Tex. 1994).

summary judgment was filed two months before the hearing on the motion, the fact that a notice of hearing was mailed twenty-one days before the hearing was reversible error because the notice of hearing was not mailed twenty-four days in advance.[133]

G. Continuances

When a respondent contends that he has not had adequate time for discovery before a summary judgment hearing, he must file either an affidavit explaining the need for further discovery or a verified motion for continuance.[134] Failure to do so waives the contention on appeal that the respondent did not have an adequate time for discovery.[135] The court may deny the motion for summary judgment, continue the hearing to allow additional discovery, or "may make such other order as is just."[136]

When a party receives notice of the summary judgment hearing in excess of the twenty-one days required by Rule 166a, denial of a motion for continuance based on a lack of time to prepare is not generally an abuse of discretion, although sympathetic trial judges frequently grant them.[137] In *Thomson v. Norton*, the appellate court found no abuse of discretion when the trial court refused to grant a continuance to a newly appointed attorney who desired additional time to become familiar with the law and facts in the case.[138] The court supported its decision on the grounds that the client was represented by a lawyer at all times before the hearing.[139]

In *Jones v. Papp*, the trial court denied the plaintiff's request for a continuance in a medical malpractice case to allow them time to locate an independent testifying expert to controvert the motion for summary judgment.[140] Observing that the action was on file for more than four years and that the nature of the lawsuit necessitated expert testimony, the

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[133]988 S.W.2d 387, 387–88 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

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

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

[136]TEX. R. CIV. P. 166a(g); FED. R. CIV. P. 56(f). For a discussion of federal application of the summary judgment continuance practice, *see infra* Part X.A.

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

[138]604 S.W.2d 473, 477–78 (Tex. Civ. App.—Dallas 1980, no writ).

[139]*Id.* at 478.

[140]782 S.W.2d 236, 242 (Tex. App.—Houston [14th Dist.] 1989, writ denied).

appellate court upheld the judgment.[141] On the other hand, in *Verkin v. Southwest Center One, Ltd.*, the appellate court found abuse of discretion when the trial court refused to grant a motion for continuance in a case that had been on file less than three months, when the motion stated sufficient good cause, was uncontroverted, and was the first motion for continuance.[142]

Respondents seeking additional time for discovery should "convince the court that the requested discovery is more than a 'fishing' expedition, is likely to lead to controverting evidence, and was not reasonably available beforehand despite [the respondent's] diligence."[143] Movants, when appropriate, should try to convince the court that the respondent's discovery efforts are simply a delay tactic. For example, the motion may be based on incontrovertible facts, involve pure questions of law, or request discovery that relates to immaterial matters.[144]

The no-evidence summary judgment rule specifically provides that no motion for summary judgment be filed "[a]fter adequate time for discovery."[145] The issue on appeal is whether the trial court abused its discretion in denying the motion for continuance of the summary judgment proceeding. Many respondents will argue that if they had had more time, they could have produced enough evidence to defeat the motion. Whether a respondent has had adequate time for discovery is "case-specific."[146] The factors the courts look to for no-evidence summary judgment continuances, not surprisingly, mirror those articulated for traditional summary judgments. A court may look to factors such as the amount of time the no-evidence motion has been on file, whether the movant has asked for stricter time deadlines for discovery, the amount of discovery that has already taken place, and whether the discovery deadlines that are already in place are specific or vague.[147]

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[141] *Id.*

[142] 784 S.W.2d 92, 96–97 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

[143] DAVID HITTNER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 14:117 (5th Cir. ed. 1996).

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

[145] *See* TEX. R. CIV. P. 166a(i).

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

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

In one mass-tort case, the court of appeals held that the plaintiffs had enjoyed adequate time for discovery when the case had been pending for ten years, and the plaintiffs had had almost a year after the filing of the no-evidence motion to conduct additional discovery.[148] In another case, the court held that two years and four months was an adequate time for discovery. The court held that the plaintiff had had adequate time to conduct discovery on a fraud claim because the evidence necessary to defeat the no-evidence motion—reliance and damages—"is the sort of evidence that should be immediately available to a plaintiff."[149]

If the court grants a continuance, the minimum twenty-one day period notice requirement for submission or hearing does not begin again because the twenty-one day period is measured from the original filing day.[150]

H. Hearing

While notice of a hearing is required, an oral hearing is not.[151] A hearing or submission date must be set because the time limits for responding are keyed to the hearing or submission date. Unless there is a hearing or submission date, the respondent cannot calculate its response due date and its due process rights are violated.[152]

Ordinarily, no oral testimony will be allowed at the hearing on a motion for summary judgment.[153] Furthermore, the court may not consider, at the hearing, oral objections to summary judgment evidence that are not a part of the properly filed, written summary judgment pleadings.[154] When a trial court is faced with

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[148]*In re* Mohawk Rubber Co., 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, orig. proceeding).

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

[150]Lewis v. Blake, 876 S.W.2d 314, 315–16 (Tex. 1994) (discussing the calculation of the twenty-one day notice requirement).

[151]Martin v. Martin, Martin & Richards, Inc., 989 S.W.2d 357, 359 (Tex. 1998).

[152]Courtney v. Gelber, 905 S.W.2d 33, 34–35 (Tex. App.—Houston [1st Dist.] 1995, no writ) (holding that even if all assertions in the motion for summary judgment are true, none justify the trial court's ruling on the motion without setting a hearing or submission date); *see also* Mosser v. Plano Three Venture, 893 S.W.2d 8, 12 (Tex. App.—Dallas 1994, no writ) (proclaiming that "[t]he failure to give adequate notice violates the most rudimentary demands of due process of law").

[153]TEX. R. CIV. P. 166a(c); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269 n.4 (Tex. 1992); Richards v. Allen, 402 S.W.2d 158, 160 (Tex. 1966) (detailing the only matters which may be considered as a basis for summary judgment as pleadings, depositions, admissions on file, and affidavits).

[154]*See id.*

"overlapping and intermingling" motions for summary judgment and other matters that allow oral testimony, the trial court should conduct separate hearings.[155] At the summary judgment hearing, counsel should strenuously oppose any attempt to use oral testimony to deviate from the written documents on file, and the court should not permit nor consider such testimony.[156] Parties may restrict or expand the issues "expressly presented" in writing if the change meets the requirements of Rule of Civil Procedure 11.[157] "An oral waiver or agreement made in open court satisfies Rule 11 if it is described in the judgment or an order of the court."[158] In *Clement v. City of Plano*, the court noted that the order granting the motion for summary judgment did not reflect any agreement.[159] Therefore, counsel's statements at the hearing, standing alone, did not amount to a Rule 11 exception and did not constitute a narrowing of the issues.

The proceedings generally need not be transcribed. As the court noted in *El Paso Associates, Ltd. v. J. R. Thurman & Co.*, to "permit 'issues' to be presented orally would encourage parties to request that a court reporter record summary judgment hearings, a practice neither necessary, nor appropriate to the purposes of such hearing."[160]

I. The Judgment

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

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[155]Liberty Mut. Fire Ins. Co. v. Hayden, 805 S.W.2d 932, 935 (Tex. App.—Beaumont 1991, no writ).

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

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

[158]Clement v. City of Plano, 26 S.W.3d 544, 549 (Tex. App.—Dallas 2000, no pet.).

[159]*Id.*

[160]786 S.W.2d at 19.

insufficient to support the order.[161] Now, if any theory advanced in a motion for summary judgment supports the granting of a summary judgment, a court of appeals may affirm regardless of whether the trial court specified the grounds on which it relied.[162] The court of appeals should consider all the grounds on which the trial court rules and may consider all the grounds the trial court does not rule upon.[163]

To ensure the trial court's intent to make a judgment final and appealable, the supreme court suggests the inclusion of the following language in the judgment: "This judgment finally disposes of all parties and claims and is appealable."[164]

J. Partial Summary Judgments

Motions for partial summary judgments are used frequently to dispose of some claims or some parties. They present certain opportunities and problems. One trap arises when a summary judgment granted for one defendant becomes final even though it does not specifically incorporate a partial summary judgment granted in favor of the only other defendant.[165] An order granting summary judgment concerning one claim but not disposing of all issues presented in a counterclaim is an interlocutory judgment.[166]

A partial judgment should refer to those specific issues addressed by the partial judgment. A partial summary judgment can be made final by requesting a severance of the issues or parties dismissed by the motion for partial summary judgment from those issues or parties remaining.[167] A trial court may not

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[161]Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 173 (Tex. 1995) (holding that because the trial court granted the defendant's motion for summary judgment without specifying any grounds, the motion would be upheld if any theories advanced by the defendant were meritorious); State Farm Fire & Cas. Co. v. S.S. & G.W., 858 S.W.2d 374, 380 (Tex. 1993) (explaining that if the trial court specifies the reasons for granting judgment, then proving that theory unmeritorious would cause a remand).

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

[163]*Cincinnati Life Ins. Co.*, 927 S.W.2d at 626 (finding that allowing alternative theories would be in the interest of judicial economy).

[164]Lehmann v. Har-Con Corp., 39 S.W.3d 191, 206 (Tex. 2001); *see infra* Part VII.D. (Appeals; Finality of Judgment).

[165]Ramones v. Bratteng, 768 S.W.2d 343, 344 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

[166]Chase Manhattan Bank v. Lindsay, 787 S.W.2d 51, 52 (Tex. 1990).

[167]*See* Hunter v. NCNB Tex. Nat'l Bank, 857 S.W.2d 722, 725 (Tex. App.—Houston [14th Dist.] 1993, writ denied) (defining a claim as "properly severable if: (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a

withdraw a partial summary judgment after the close of evidence in such a manner that the party is precluded from presenting the issues decided in the partial summary judgment.[168] A partial summary judgment survives a nonsuit.[169] The nonsuit results in a dismissal with prejudice as to the issues decided in the partial summary judgment.[170]

K. Sanctions

A motion for summary judgment asserting that there is no genuine issue of material fact is not groundless merely by the filing of a response which raises an issue of fact.[171] This tenet is true even if the response was or could have been anticipated by the movant.[172] Also, denial of a summary judgment alone is not grounds for sanctions.[173]

Rule 166a has its own particular sanctions provision concerning affidavits filed in bad faith. If a trial court concludes that an affidavit submitted with a motion for summary judgment was presented "in bad faith or solely for the purpose of delay," the court may impose sanctions on the party employing the offending affidavits.[174] Such sanctions include the reasonable expenses incurred by the other party, including attorney's fees, as a result of the filing of the affidavits.[175] Sanctions for submitting affidavits in bad faith may also include holding an offending party or attorney in contempt.[176] The comment to Rule 166a states that motions filed under the new rule are subject to sanctions provided for under existing law.[177]

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lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues").

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

[169]Newco Drilling Co. v. Weyland, 960 S.W.2d 654, 656 (Tex. 1998) (per curiam); Hyundai Motor Co. v. Alvarado, 892 S.W.2d 853, 854–55 (Tex. 1995) (per curiam).

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

[171]GTE Communications Sys. Corp. v. Tanner, 856 S.W.2d 725, 731 (Tex. 1993).

[172]*Id.*

[173]*Id.*

[174]TEX. R. CIV. P. 166a(h).

[175]*Id.*

[176]*Id.*

[177]TEX. R. CIV. P. 166a cmt. to 1997 change. Refer also to *infra* Part VII.E.

III. SUMMARY JUDGMENT EVIDENCE

A. General Principles

Summary judgment evidence must be presented in a form that would be admissible in a conventional trial proceeding.[178] Neither the motion for summary judgment, nor the response, even if sworn, is ever proper summary judgment proof.[179] When both parties move for summary judgment, the trial court may consider the combined summary judgment evidence of both parties to decide how to rule on the motions.[180] "The proper scope for a trial court's review of evidence for a summary judgment encompasses all evidence on file at the time of the hearing or filed after the hearing and before judgment with the permission of the court."[181] Summary judgment evidence must be submitted, at the latest, by the date the summary judgment was signed.[182] Evidence need not be attached to the motion itself, but rather may be attached to the brief in support.[183] The weight to be given a witness's testimony is a matter for the trier of fact, and a summary judgment cannot be based on an attack on a witness's credibility.[184] The standard of review for appellate review of the trial court's admission of summary judgment evidence is abuse of discretion.[185]

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[178]*See* Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1971) (proclaiming that trial judges should require "in summary judgment proceedings that trial be on independently produced proofs, such as admissions, affidavits and depositions"); Hou-Tex Printers, Inc. v. Marbach, 862 S.W.2d 188, 191 (Tex. App.—Houston [14th Dist.] 1993, no writ) (citing *Hidalgo*, 462 S.W.2d at 545).

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

[180]Jon Luce Builder, Inc. v. First Gibralter Bank, 849 S.W.2d 451, 453 (Tex. App.—Austin 1993, writ denied).

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

[182]Priesmeyer v. Pac. Southwest Bank, 917 S.W.2d 937, 939 (Tex. App.—Austin 1996, no writ) (per curiam).

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

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

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

1. Unfiled Discovery

The Rules of Civil Procedure no longer require the filing of most discovery with the trial court. The discovery material that is not filed is specified in Rule 191.4(a).[186] Discovery material that must be filed is specified in Rule 191.4(b).[187]

A subsection to the summary judgment rule, Rule 166a(d) requires that a party either attach the evidence to the motion or response or file a notice containing specific references to the unfiled material to be used, as well as a statement of intent to use the unfiled evidence as summary judgment proof.[188] Rule 166a(d) provides:

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

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[186]Rule 191.4(a) provides:

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

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

[187]Rule 191.4(b) provides:

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

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

[188]TEX. R. CIV. P. 166a(d).

> hearing if such proofs are to be used to oppose the summary judgment.[189]

Thus, Rule 166a(d) provides three methods to present unfiled discovery before the trial court in a summary judgment. First, a party may file the discovery with the trial court. Second, a party may file an appendix containing the evidence. Finally, a party may simply file a notice with specific references to the unfiled discovery. Nowhere does the rule require the proponent of the evidence to provide specific references to the discovery, if the actual documents are before the trial court, in order for the trial court to consider it.[190] Despite the wording of the rule that makes it appear that a "statement of intent" may be sufficient without the actual proof attached, it appears unwise to fail to attach the specific evidence. In *E.B. Smith Co. v. United States Fidelity & Guaranty Co.*, the Corpus Christi Court of Appeals held that the appellant's references to names, citation to pages in unfiled depositions and broad statements were not sufficient to constitute a specific reference under Rule 166a(d).[191] The court construed the term "specific references" to mean that the court must be shown the language from the unfiled discovery documents upon which the filing party is relying.[192]

2. Objections to Evidence

Failure to object to evidence at the trial court level waives any defects concerning form.[193] To be effective and preserve error for appeal, most courts of appeals have held that an order of a trial court sustaining an objection to summary judgment evidence must be reduced to writing, signed by the trial court, and entered of record.[194] A docket sheet entry does not meet this

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[189]TEX. R. CIV. P. 166a(d).

[190]Barraza v. Eureka Co., 25 S.W.3d 225, 228 (Tex. App.—El Paso 2000, pet. denied).

[191]850 S.W.2d 621, 623–24 (Tex. App.—Corpus Christi 1993, writ denied); *see also* Fojtik v. Charter Med. Corp., 985 S.W.2d 625, 628 (Tex. App.—Corpus Christi 1999, pet. denied).

[192]*E.B. Smith*, 850 S.W.2d at 624.

[193]Harris v. Spires Council of Co-Owners, 981 S.W.2d 892, 896 (Tex. App.—Houston [1st Dist.] 1998, no pet.); *see also infra* Part V. (Responding to a Motion for Summary Judgment).

[194]Well Solutions, Inc. v. Stafford, 32 S.W.3d 313, 316–17 (Tex. App.—San Antonio 2000, no pet.); Nugent v. Pilgrim's Pride Corp., 30 S.W.3d 562, 567 (Tex. App.—Texarkana 2000, pet. denied); Hou-Tex, Inc. v. Landmark Graphics, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Dolcefino v. Randolph, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Harris*, 981 S.W.2d at 897. *Contra* Frazier v. Yu, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied); Blum v. Julian, 977 S.W.2d 819, 823–24 (Tex. App.—Fort Worth 1998, no pet.).

requirement.[195] Absent a proper order sustaining an objection, any portion of the summary judgment evidence, including any evidence objected to by a party, is part of the appellate record.[196]

Texas Rule of Evidence 802 provides that "[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."[197] As applied to summary judgment evidence, Rule 802 has been held to mean that a hearsay objection is a defect in form that must be raised in a response or reply to a response.[198] Whether an affiant has personal knowledge and is competent are also objections to form and this must be raised and ruled upon at the trial level.[199]

3. Attach Affidavit to Motion for/Response to Summary Judgment

As with other summary judgment evidence, affidavits that are attached to pleadings rather than to the motion for summary judgment do not constitute summary judgment evidence.[200]

Affidavits attached to previously filed motions for summary judgment and responses present another issue. *Dousson v. Disch* is a case in which the court upheld a summary judgment following a second motion for summary judgment that incorporated by reference evidence attached to the first motion for summary judgment.[201] The *Dousson* court expressly disagreed with *Corpus Christi*

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

[196]*See id.* at 722–23 (holding that where the appellate record contained no written and filed order sustaining an objection to a report as summary judgment evidence, the report was proper evidence included in the record).

[197]TEX. R. EVID. 802.

[198]Wilson v. Gen. Motors Acceptance Corp., 897 S.W.2d 818, 822 (Tex. App.—Houston [1st Dist.] 1994, no writ); El Paso Assocs., Ltd. v. J.R. Thurman & Co., 786 S.W.2d 17, 19 (Tex. App.—El Paso 1990, no writ) (holding that where an affidavit was hearsay, but not properly objected to in writing prior to entry of judgment, it became admissible evidence); Dolenz v. A_B_, 742 S.W.2d 82, 83 n.2 (Tex. App.—Dallas 1987, writ denied) (concluding where a party did not object to affidavits that contained inadmissible hearsay, the party "waived any complaint as to consideration of inadmissible evidence as part of the summary judgment record").

[199]*See* Rizkallah v. Conner, 952 S.W.2d 580, 585–86 (Tex. App.—Houston [1st Dist.] 1997, no writ).

[200]Boeker v. Syptak, 916 S.W.2d 59, 61–62 (Tex. App.—Houston [1st Dist.] 1996, no writ); Sugarland Bus. Ctr., Ltd. v. Norman, 624 S.W.2d 639, 642 (Tex. App.—Houston [14th Dist.] 1981, no writ).

[201]629 S.W.2d 111, 112 (Tex. App.—Dallas 1981, writ dism'd w.o.j.).

Municipal Gas Corp. v. Tuloso-Midway Independent School District,[202] which held that "supporting proof should be attached to the motion or affidavit, not to the pleadings."[203]

Failure to reattach summary judgment evidence from an earlier motion for summary judgment may amount to only a defect in form.[204] Failure of the respondent to except, in writing, to the motion for summary judgment or the affidavit accompanying the motion will result in waiver.[205] Careful practice seems to dictate, at a minimum, incorporation by reference to the evidence filed with the previous motion or attachment of an entirely new set of supporting affidavits to all later motions and responses.

B. Pleadings as Evidence

Pleadings themselves, even if verified, do not constitute summary judgment evidence.[206] However, this rule is not as absolute as it appears. A plaintiff may not use its pleadings as "proof" to defeat an otherwise valid motion for summary judgment. However, the defendant may use the plaintiff's pleadings to obtain a summary judgment when the pleadings affirmatively negate the plaintiff's claim.[207] Sworn account cases are also an exception to the rule that pleadings are not summary judgment evidence. When the defendant files no proper verified denial of a suit on a sworn account, the pleadings can be the basis for

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[202] *Id.* (declining to follow *Corpus Christi Municipal Gas Corp.* to the extent that it holds that summary judgment evidence must be attached to the motion to constitute summary judgment proof).

[203] 595 S.W.2d 203, 204–05 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

[204] Evans v. First Nat'l Bank, 946 S.W.2d 367, 376 (Tex. App.—Houston [14th Dist.] 1997, writ denied); Murphy v. McDermott, 807 S.W.2d 606, 611 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (finding failure to attach summary judgment evidence not reversible error); Vaughn v. Burroughs Corp., 705 S.W.2d 246, 248 (Tex. App.—Houston [14th Dist.] 1986, no writ).

[205] *Evans*, 946 S.W.2d at 378.

[206] City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979); Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1971); Shawell v. Pend Oreille Oil & Gas Co., 823 S.W.2d 336, 338 (Tex. App.—Texarkana 1991, writ denied); Pinckley v. Gallegos, 740 S.W.2d 529, 534 (Tex. App.—San Antonio 1987, writ denied).

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

summary judgment.[208] Also, an opponent's pleadings may constitute summary judgment proof if they contain statements admitting facts or conclusions contrary to a claim or defense.[209] In *Hidalgo v. Surety Savings & Loan Ass'n*, the supreme court delineated when a summary judgment could be granted on the pleadings.[210] The court stated:

> We are not to be understood as holding that summary judgment may not be rendered, when authorized, *on the pleadings*, as, for example, when suit is on a sworn account under Rule 185, Texas Rules of Civil Procedure, and the account is not denied under oath as therein provided, or when the plaintiff's petition fails to state a legal claim or cause of action. In such cases summary judgment does not rest on proof supplied by pleading, sworn or unsworn, but on deficiencies in the opposing pleading.[211]

C. *Depositions*

If deposition testimony meets the standards for summary judgment evidence, it will support a valid summary judgment.[212] Deposition testimony is subject to the same objections that might have been made to questions and answers if the witness had testified at trial.[213] Depositions only have the force of an out of court admission and may be contradicted or explained in a summary judgment proceeding.[214] Deposition testimony may be given the same weight as any other summary judgment evidence. Such testimony has no controlling effect as compared to an affidavit, even

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[208]Andrews v. E. Tex. Med. Ctr.-Athens, 885 S.W.2d 264, 267 (Tex. App.—Tyler 1994, no writ); Enernational Corp. v. Exploitation Eng'rs, Inc., 705 S.W.2d 749, 750 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); Waggoners' Home Lumber Co. v. Bendix Forest Prods. Corp., 639 S.W.2d 327, 328 (Tex. App.—Texarkana 1982, no writ).

[209]Judwin Props., Inc. v. Griggs & Harrison, 911 S.W.2d 498, 504 (Tex. App.—Houston [1st Dist.] 1995, no writ).

[210]462 S.W.2d 540, 543–45 (Tex. 1971).

[211]*Id.* at 543 n.1.

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

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

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

if the deposition is more detailed than the affidavit.[215] Thus, if conflicting inferences may be drawn from two statements made by the same party, one in an affidavit and the other in a deposition, a fact issue is presented.[216] Several courts of appeals have held that a party cannot file an affidavit that contradicts that party's own deposition testimony, without explanation, to create a fact issue to avoid summary judgment.[217] If an affidavit contradicts earlier testimony, the affidavit must explain the reason for the change.[218] Without an explanation, the court assumes that the sole purpose of the affidavit is to avoid summary judgment, and as such, the affidavit merely presents a sham fact issue.[219] Thus, an affidavit may not be considered as evidence where it conflicts with the earlier sworn testimony. Deposition excerpts submitted as summary judgment evidence need not be authenticated.[220] Copies of the deposition pages alone are sufficient.[221]

D. Answers to Interrogatories and Requests for Admissions

1. Evidentiary Considerations

To be considered summary judgment proof, answers to interrogatories and requests for admissions must be otherwise admissible into evidence.[222] Interrogatories should be inspected for conclusions, hearsay, and opinion testimony, which must be brought to the attention of the trial court in a

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[215]Bauer v. Jasso, 946 S.W.2d 552, 556 (Tex. App.—Corpus Christi 1997, no writ); Cortez v. Fuselier, 876 S.W.2d 519, 521–22 (Tex. App.—Texarkana 1994, writ denied); Jones v. Hutchinson County, 615 S.W.2d 927, 930 n.3 (Tex. Civ. App.—Amarillo 1981, no writ).

[216]Randall v. Dallas Power & Light Co., 752 S.W.2d 4, 5 (Tex. 1988). Refer also to Part X. *infra* (discussing federal practice).

[217]Cantu v. Peacher, 53 S.W.3d 5, 10–11 (Tex. App.—San Antonio 2001, pet. denied); 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.).

[218]*Farroux*, 962 S.W.2d at 111.

[219]*Id.*

[220]McConathy v. McConathy, 869 S.W.2d 341, 341 (Tex. 1994) (per curiam).

[221]*Id.* at 341–42 (concluding that deposition excerpts submitted for summary judgment can be easily verified so that authentication is unnecessary). Any authentication requirement such as that articulated in *Deerfield Land Joint Venture v. Southern Union Realty Co.*, 758 S.W.2d 608, 610 (Tex. App.—Dallas 1988, writ denied), which requires that the entire deposition be attached to the motion along with the original court reporter's certificate to authenticate, has been specifically superceded by Texas Rule of Civil Procedure 166a(d). *McConathy*, 869 S.W.2d at 342.

[222]Farmer v. Ben E. Keith Co., 919 S.W.2d 171, 175 (Tex. App.—Fort Worth 1996, no writ) (stating that summary judgment evidence "must be presented in a form that would be admissible in trial").

responsive pleading. Answers to requests for admissions and interrogatories may be used only against the party filing them.[223] The respondent may not answer requests for admissions or interrogatories and then attempt to use these answers to defeat the motion on the ground that they raise a material fact issue.[224] Further, denials to requests for admissions are not proper summary judgment evidence.[225]

2. Deemed Admissions

An unanswered admission is automatically deemed admitted.[226] An unanswered admission is deemed admitted without the necessity of a court order, and any matter admitted is conclusively established against the party making the admission unless the court, on motion, allows the withdrawal of the admission.[227] Thus, when a party fails to answer requests for admissions, that party will be precluded from offering summary judgment proof contrary to those admissions.[228] "Admissions, once made or deemed by the court, may not be contradicted by any evidence, whether in the form of live testimony or summary judgment affidavits."[229] However, to be considered as proper summary judgment evidence, the requests must be on file with the court at the time of the hearing of the motion for summary

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

[224]Barragan v. Mosler, 872 S.W.2d 20, 22 (Tex. App.—Corpus Christi 1994, no writ); Walker v. Horine, 695 S.W.2d 572, 575 (Tex. App.—Corpus Christi 1985, no writ) (per curiam) (indicating that the rule is settled law); Jeffrey v. Larry Plotnick Co., 532 S.W.2d 99, 102 (Tex. Civ. App.—Dallas 1975, no writ) (noting that the defendant's contention that his answers to interrogatories and requests for admissions were sufficient to raise issues of material fact to defeat the motion for summary judgment was without merit).

[225]*Barragan*, 872 S.W.2d at 22; CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc., 809 S.W.2d 577, 584 (Tex. App.—Dallas 1991, writ denied); City of Richland Hills v. Bertelsen, 724 S.W.2d 428, 431 (Tex. App.—Fort Worth 1987, no writ); Denton Constr. Co. v. Mike's Elec. Co., 621 S.W.2d 846, 848 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.).

[226]TEX. R. CIV. P. 198.2(c).

[227]Hartman v. Trio Transp., Inc., 937 S.W.2d 575, 580 (Tex. App.—Texarkana 1996, writ denied); Wenco of El Paso/Las Cruces, Inc. v. Nazario, 783 S.W.2d 663, 665 (Tex. App.—El Paso 1989, no writ) (citing Texas Rule of Civil Procedure 169).

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

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

judgment.[230] Furthermore, the requests must meet the same time constraints as the motion for summary judgment and the response.[231]

Any matter established under Rule 169 (Requests for Admission) is conclusively established for the party making the admission unless it is withdrawn by motion or amended with permission of the court.[232]

E. Documents

A motion for summary judgment must be supported by its own proof and not by reference to the pleadings.[233] As such, supporting documents should be attached either to the affidavit that refers to the document or to the motion for summary judgment itself.[234] The respondent may use the movant's own exhibits against the movant to establish the existence of a fact question.[235] Documentation relied on to support a summary judgment must be sound in terms of its own evidentiary value. In *Dominguez v. Moreno*, a trespass to try title case, the plaintiff attached to the summary

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

[231]TEX. R. CIV. P. 166a(d) (specifying the time requirements for filing and serving discovery products as summary judgment proofs).

[232]*Carrillo*, 885 S.W.2d at 214; *Velchoff*, 710 S.W.2d at 614 (explaining that the party never moved to properly reply); *Home Indem. Co.*, 683 S.W.2d at 562 (referring to Texas Rule of Civil Procedure 169).

[233]Cuddihy Corp. v. Plummer, 876 S.W.2d 424, 426 (Tex. App.—Corpus Christi 1994, writ denied); Trimble v. Gulf Paint & Battery, Inc., 728 S.W.2d 887, 888 (Tex. App.—Houston [1st Dist.] 1987, no writ).

[234]Mbank Brenham, N.A. v. Barrera, 721 S.W.2d 840, 842 (Tex. 1986) (per curiam); Sorrells v. Giberson, 780 S.W.2d 936, 937–38 (Tex. App.—Austin 1989, writ denied) (reversing judgment for holder of a promissory note when the note was not attached to his affidavit and, thus, not part of the summary judgment record); *Trimble*, 728 S.W.2d at 888 (indicating that "[v]erified copies of documents, in order to constitute . . . summary judgment evidence, must be attached to the affidavit"). *But see* Zarges v. Bevan, 652 S.W.2d 368, 369 (Tex. 1983) (per curiam) (stating that absent controverting summary judgment proof, an affidavit attached to a motion for summary judgment that incorporated by reference a certified copy of a note attached to plaintiff's first amended petition, was sufficient to prove the movants were owners and holders of the note).

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

judgment motion a partial deed from the common source to his father.[236] The "deed" contained no signature, no date, and supplied nothing more than a granting clause and a description of the land.[237] The court held, in essence, that the writing was not a deed and was not the type of evidence that would be admissible at a trial on the merits.[238]

When using an affidavit to authenticate business records, the party offering the records must comply with Texas Rules of Evidence 803(6) and 902(10).[239]

1. Authentication

Under Texas Rule of Civil Procedure Rule 193.7, documents produced by the opposing party need not be authenticated.[240] Rule 193.7 provides that documents (or copies of documents) produced by the opposing party in response to written discovery are self-authenticating.[241] Thus, a

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[236]618 S.W.2d 125, 126 (Tex. Civ. App.—El Paso 1981, no writ).

[237]*Id.*

[238]*Id.*

[239]Norcross v. Conoco, Inc., 720 S.W.2d 627, 632 (Tex. App.—San Antonio 1986, no writ) (holding that invoices attached to the affidavit in support of the motion for summary judgment were not competent proof because they were not authenticated as required by TEX. R. CIV. EVID. 803(6) and 902(10)).

[240]Rule 193.7 provides:

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

TEX. R. CIV. P. 193.7.

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

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

document produced in response to written discovery authenticates that document for use against the producing party in any pretrial proceeding or at trial. As a result, this self-authentication eliminates the initial burden of authenticating the opposing party's documents used as evidence in support of a motion for summary judgment or response. The producing party, however, must still prove the document's authenticity if he or she uses it.

Because the objection to authenticity must be made within ten days after actual notice that the document will be used, and the response to the motion for summary judgment is due seven days before the summary judgment submission, the objection to authenticity may need to be made before filing the response to the motion for summary judgment.[242] Until the appellate courts clarify this issue, the safer course will be to object within ten days after the motion for summary judgment is filed and not wait until the filing of the response. The same problem exists for attempts to regain access to documents a party claims were inadvertently disclosed.[243]

As is true at trial, authentication does not establish admissibility.[244] Authentication is but one condition precedent to admissibility.[245] However, a party challenging the consideration of evidence in a summary judgment proceeding must make a written objection to the evidence.[246] Copies of original documents are acceptable if accompanied by a properly sworn affidavit that states that the attached documents are "true and correct" copies of the originals.[247] Counsel may authenticate documents.[248]

In *Norcross v. Conoco, Inc.*, the court reversed a summary judgment on a sworn account because the affiants merely stated that the attached copies of invoices and accounts were true and correct copies of the original

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TEX. R. CIV. P. 196.3(b).

[242]*Compare* TEX. R. CIV. P. 198.2 (allowing 30 days for response to requests for admissions), *with* TEX. R. CIV. P. 166a(d) (requiring summary judgment proof based on discovery products not on file with the clerk to be filed and served on all parties at least 21 days before the hearing).

[243]*See* TEX. R. CIV. P. 193 cmt. 4.

[244]*See* TEX. R. EVID. 901(a).

[245]TEX. R. CIV. P. 193 cmt. 7.

[246]City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 677 (Tex. 1979); *see infra* Part V.

[247]Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam); Hall v. Rutherford, 911 S.W.2d 422, 425 (Tex. App.—San Antonio 1995, writ denied); St. Paul Cos. v. Chevron U.S.A., Inc., 798 S.W.2d 4, 6 (Tex. App.—Houston [1st Dist.] 1990, writ dism'd by agr.) (citing TEX. R. EVID. 902).

[248]Leyva v. Soltero, 966 S.W.2d 765, 768 (Tex. App.—El Paso 1998, no pet.).

documents.[249] No reference was made concerning the affiants' personal knowledge of the information contained in the attached invoice records.[250] The affiants did not state that the invoice or accounts were just and true, or correct and accurate.[251] Thus, the court concluded that the invoices were not competent summary judgment proof.[252]

A trial court may take judicial notice of its own records in a case involving the same subject matter between the same or nearly identical parties.[253] However, on motion for summary judgment, certified copies of court records from a different case, even if pending in the same court, should be attached to the motion in the second case.[254] The failure of the movant to attach the records precludes summary judgment.[255]

F. Affidavits

Affidavits, which are sworn statements of facts signed by competent witnesses,[256] are the most common form of summary judgment proof. Rule 166a provides that a party may move for summary judgment with or without supporting affidavits.[257] However, before the adoption of the no-evidence summary judgment provision, it was unusual for a summary judgment to be granted without supporting affidavits. Proper no-evidence summary judgment motions do not require supporting evidence.[258] In other types of summary judgments, more often than not, affidavits are the vehicle used to show the court that there are no factual questions. Conversely, they are commonly used by the respondent in either no-

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[249]720 S.W.2d 627, 632 (Tex. App.—San Antonio 1986, no writ).

[250]*Id.*

[251]*Id.*

[252]*Id.* Refer also to Part IX.A.1. *infra.*

[253]*See* Gardner v. Martin, 162 Tex. 156, 345 S.W.2d 274, 276 (1961); *cf.* Trevino v. Pemberton, 918 S.W.2d 102, 103 n.2 (Tex. App.—Amarillo 1996, orig. proceeding) (holding that an appellate court may do the same).

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

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

[256]*See* TEX. GOV'T CODE ANN. § 312.011(1) (Vernon 1998) (defining "affidavit").

[257]*See* TEX R. CIV. P. 166a(a)–(b); *see also* Kilpatrick v. State Bd. of Registration for Prof'l Eng'rs, 610 S.W.2d 867, 871 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (stating that "[t]here is no requirement under [Texas Rule of Civil Procedure 166-A] that makes affidavits indispensable to rendition of summary judgment").

[258]TEX. R. CIV. P. 166a(i).

evidence motions or traditional summary judgment motions to demonstrate a fact issue.

A party need not supplement answers to interrogatories requesting designation of witnesses to use an affidavit of a previously undisclosed witness to support a summary judgment motion or response.[259]

1. Form of Affidavits

The requirements for affidavits under Texas Rule of Civil Procedure 166a(f) provide that the affidavit must show affirmatively that it is based on personal knowledge, and that the facts sought to be proved would be "admissible in evidence" at a conventional trial.[260]

A verification, attached to the motion or response, that the contents are within the affiant's knowledge and are both true and correct does not constitute a proper affidavit in support of summary judgment under Rule 166a(f).[261] The affidavit must itself set forth facts and show the affiant's competency, and the allegations contained in the affidavit must be direct, unequivocal and such that perjury is assignable.[262]

The requirement of Rule 166a(f) that the affidavit affirmatively show that the affiant is competent to testify to the matters contained in the affidavit is not satisfied by an averment that the affiant is over twenty-one years of age, of sound mind, capable of making this affidavit, never convicted of a felony, and personally acquainted with the facts herein stated. Rather, the affiant should detail those particular facts that demonstrate that he or she has personal knowledge.[263]

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[259]Huddleston v. Maurry, 841 S.W.2d 24, 28 (Tex. App.—Dallas 1992, writ dism'd w.o.j.); Gandara v. Novasad, 752 S.W.2d 740, 742–43 (Tex. App.—Corpus Christi 1988, no writ) (reasoning that the Rule 166b(6)(b) duty to supplement answers to interrogatories does not apply to summary judgments because of Rule 166a(c)'s more particular requirements concerning the deadlines for filing affidavits in support of a summary judgment).

[260]TEX. R. CIV. P. 166a(f); *see also* Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996) (quoting Rule 166a(f)); Humphreys v. Caldwell, 888 S.W.2d 469, 470 (Tex. 1994).

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

[262]*Keenan*, 754 S.W.2d at 394.

[263]Wolfe v. C.S.P.H., Inc. 24 S.W.3d 641, 646 (Tex. App.—Dallas 2000, no pet.); Coleman v. United Sav. Ass'n, 846 S.W.2d 128, 131 (Tex. App.—Fort Worth 1993, no writ) (explaining that a sufficient affidavit must show affirmatively how the affiant became personally familiar with the facts); Fair Woman, Inc. v. Transland Mgmt. Corp., 766 S.W.2d 323, 323–24 (Tex. App.—Dallas 1989, no writ) (holding that summary judgment failed despite the lack of a response because affiant did not state how she had personal knowledge).

Good practice dictates that phrases such as "I believe" or "to the best of my knowledge and belief" should never be used in a supporting affidavit. Statements based upon the "best of his knowledge" have been held insufficient to support a response raising fact issues.[264] Such statements, according to the Fort Worth Court of Appeals in *Campbell v. Fort Worth Bank & Trust*, are "no evidence at all."[265] The court explained: "A person could testify with impunity that to the best of his knowledge, there are twenty-five hours in a day, eight days in a week, and thirteen months in a year. Such statements do not constitute factual proof in a summary judgment proceeding."[266]

Conversely, *Moya v. O'Brien* suggests that the requirement that the affiant have personal knowledge does not preclude the use of the words "I believe" in a supporting affidavit, if the content of the entire affidavit shows that the affiant has personal knowledge.[267] The court noted, however, that "when the portions of the affidavits containing hearsay are not considered, the remaining statements in the affidavits contain sufficient factual information to sustain the burden of proving the allegations in the motion for summary judgment."[268]

In *Grand Prairie Independent School District v. Vaughan*, the supreme court considered a witness's affidavit, in which the words "on or about" were used to refer to a critical date.[269] The court found that "on or about" meant a date of approximate certainty, with a possible variance of a few days, and that the respondent never raised an issue of the specific dates.[270]

An affidavit in substantially correct form is essential summary judgment proof. In *Sturm Jewelry, Inc. v. First National Bank, Franklin,*

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[264]Shindler v. Mid-Continent Life Ins. Co., 768 S.W.2d 331, 334 (Tex. App.—Houston [14th Dist.] 1989, no writ); *see* Webster v. Allstate Ins. Co., 833 S.W.2d 747, 749 (Tex. App.—Houston [1st Dist.] 1992, no writ) (stating that the sworn statement made by the plaintiff's attorney that all information was true and correct was insufficient as a summary judgment affidavit).

[265]705 S.W.2d 400, 402 (Tex. App.—Fort Worth 1986, no writ).

[266]*Id.*

[267]618 S.W.2d 890, 893 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (noting that a close reading of the affidavits left no doubt that the affiants were speaking from personal knowledge); *see also* Krueger v. Gol, 787 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (explaining that failure to specifically state personal knowledge is not fatal if it is clearly shown that the affiant was speaking from personal knowledge).

[268]*Moya*, 618 S.W.2d at 893.

[269]792 S.W.2d 944, 945 (Tex. 1990) (per curiam).

[270]*Id.* (explaining that the affidavit with the particular language still provided enough certainty as to the crucial dates).

the court found that the absence of a jurat was a substantial defect and not a simple defect in form.[271] The plaintiff attached affidavits that were not "signed by a notary public or any other person authorized to administer an oath."[272] The court held that the jurat was an integral part of the Texas Rules of Civil Procedure 166a prescription for the form of an affidavit, and its absence made the plaintiff's affidavit a fundamentally defective instrument.[273] An affidavit may not be used to authenticate a copy of another affidavit.[274] A purely formal deficiency in an affidavit, however, can be waived if it is not properly raised at the trial level.[275]

It is generally not advisable for the attorney representing the movant to make the affidavit, since the affidavit must be based on personal knowledge and not on information or belief.[276]

2. Substance of Affidavits

The affidavit must set forth facts.[277] It cannot be conclusory.[278] Nor can it be based on subjective beliefs.[279] The line separating admissible statements of fact and inadmissible opinions or conclusions cannot always be precisely drawn. One of the policy considerations behind the

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[271]593 S.W.2d 813, 814 (Tex. Civ. App.—Waco 1980, no writ); *see also* Hall v. Rutherford, 911 S.W.2d 422, 425 (Tex. App.—San Antonio 1995, writ denied) (stating that without notarization a statement is not an affidavit and is not competent summary judgment proof); Elam v. Yale Clinic, 783 S.W.2d 638, 643 (Tex. App.—Houston [14th Dist.] 1989, no writ) (holding that the absence of a jurat is a substantive defect).

[272]*Sturm Jewelry*, 593 S.W.2d at 814.

[273]*Id.* (citing Perkins v. Crittenden, 462 S.W.2d 565, 568 (Tex. 1970)).

[274]*Hall*, 911 S.W.2d at 425.

[275]*Sturm Jewelry, Inc.*, 593 S.W.2d at 814 (citing Youngstown Sheet & Tube Co. v. Penn, 363 S.W.2d 230, 234 (Tex. 1962)).

[276]Wells Fargo Constr. Co. v. Bank of Woodlake, 645 S.W.2d 913, 914 (Tex. App.—Tyler 1983, no writ) (indicating that an affidavit made on information and belief of the attorney is not factual proof in a summary judgment proceeding). Refer also to Part III.F.4. *infra*.

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

[278]Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam) ("Conclusory affidavits are not enough to raise fact issues."); Beta Supply, Inc. v. G.E.A. Power Cooling Sys., Inc., 748 S.W.2d 541, 542 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

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

prohibition against conclusory affidavits is that they are not susceptible to being readily controvertible.[280]

In *Schultz v. General Motors Acceptance Corp.*, the court held that an affidavit supporting the creditor's motion for summary judgment merely recited a legal conclusion in stating that certain collateral was disposed of "at public sale in conformity with reasonable commercial practices . . . in a commercially reasonable manner."[281] Summary judgment was precluded, absent facts concerning the sale of the collateral in question.[282]

Texas courts have considered a number of other evidentiary issues for summary judgment affidavits. First, affidavits may not be based on hearsay.[283] However, "[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."[284] Next, affidavits that violate the parol evidence rule are not competent summary judgment evidence.[285] Third, if the prerequisites of Texas Rule of Evidence 803(6), which sets out the requirements for admitting a business record into evidence, are not met, a business record may not be proper summary judgment proof.[286]

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[280]*Ryland Group*, 924 S.W.2d at 122 (suggesting that conclusory affidavits do not raise fact issues because they are neither credible nor susceptible to being readily controverted).

[281]704 S.W.2d 797, 798 (Tex. App.—Dallas 1985, no writ) (quoting the movant's affidavit).

[282]*Id.*

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

[284]TEX. R. EVID. 802; *see* Dolenz v. A_B_, 742 S.W.2d 82, 83 n.2 (Tex. App.—Dallas 1987, writ denied).

[285]Fimberg v. FDIC, 880 S.W.2d 83, 86 (Tex. App.—Texarkana 1994, writ denied) (holding an affidavit to be impermissible parol evidence where the note at issue was not ambiguous); Rosemont Enters., Inc. v. Lummis, 596 S.W.2d 916, 923–24 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (holding that an affidavit alleging a prior contradicting agreement was barred by the parol evidence rule).

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

3. Effect of Improper Affidavits

Affidavits that do not meet the requirements of Rule 166a will neither sustain nor preclude a summary judgment,[287] and will not be entitled to evidentiary consideration.[288] If a deficiency in an affidavit is substantive, the opponent's right to argue the deficiency on appeal is not waived by failure to except during the permissible time limits.[289] However, defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.[290]

The personal knowledge requirement for affidavits is not met by a statement based upon the affiant's "own personal knowledge and/or knowledge which he has been able to acquire upon inquiry."[291] Such a statement "provide[s] no representation whatsoever" that the facts contained in the affidavit are true.[292]

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[287]Box v. Bates, 162 Tex. 184, 346 S.W.2d 317, 319 (1961) (indicating that, after rejecting the affidavit as conclusory, there was no other evidence on file); *see also* Aldridge v. De Los Santos, 878 S.W.2d 288, 296 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.).

[288]Clendennen v. Williams, 896 S.W.2d 257, 260 (Tex. App.—Texarkana 1995, no writ); Kotzur v. Kelly, 791 S.W.2d 254, 255–56 (Tex. App.—Corpus Christi 1990, no writ) (finding that evidence was unauthenticated and was therefore not summary judgment proof); *see* Perkins v. Crittenden, 462 S.W.2d 565, 567–68 (Tex. 1970) (finding that an acknowledgment was not an affidavit, as defined by statute, and did not constitute proper summary judgment proof).

[289]Progressive County Mut. Ins. Co. v. Carway, 951 S.W.2d 108, 117 (Tex. App.—Houston [14th Dist.] 1997, writ denied); Ramirez v. Transcon. Ins. Co., 881 S.W.2d 818, 829 (Tex. App.—Houston [14th Dist.] 1994, writ denied); Habern v. Commonwealth Nat'l Bank, 479 S.W.2d 99, 101 (Tex. Civ. App.—Dallas 1972, no writ) (concluding that the failure to object to a substantive defect did not constitute waiver); *see also* De Los Santos v. Southwest Tex. Methodist Hosp., 802 S.W.2d 749, 754–55 (Tex. App.—San Antonio 1990, no writ) (holding that an affidavit signed by an attorney on behalf of the affiant, even with the affiant's permission, is substantively defective and the objection was made in open court), *overruled on other grounds by* Lewis v. Blake, 876 S.W.2d 314 (Tex. 1994).

[290]TEX. R. CIV. P. 166a(f); *see also* Webster v. Allstate Ins. Co., 833 S.W.2d 747, 749 (Tex. App.—Houston [1st Dist.] 1992, no writ) (quoting Texas Rule of Civil Procedure 166a(f)); Walkoviak v. Hilton Hotels Corp., 580 S.W.2d 623, 626–27 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (quoting, in part, what is now Texas Rule of Civil Procedure 166a(f)).

[291]Humphreys v. Caldwell, 888 S.W.2d 469, 470 (Tex. 1994).

[292]*Id.* (finding that the affidavits used in a privilege dispute were defective because they failed to show they were based on personal knowledge and did not represent that the disclosed facts were true).

4. Affidavits by Counsel

The personal knowledge requirement of Rule 166a(f) has plagued attorneys signing summary judgment affidavits on behalf of their clients. Under Texas Rule of Civil Procedure 14, "[w]henever it may be necessary or proper for any party to a civil suit or proceeding to make an affidavit, it may be made by either the party or his agent or his attorney." While this seemingly approves counsel as an appropriate affiant for all purposes, courts have held that the rule does not obviate the need for personal knowledge of the facts in an affidavit.[293] Merely swearing that the affiant is the attorney of record for a party, and that the facts stated in the motion for summary judgment are within his or her personal knowledge and are true and correct, does not meet the personal knowledge test.[294] This type of affidavit is ineffectual to oppose a motion for summary judgment or support a motion for summary judgment on the merits, except as to attorney's fees.[295] Unless the summary judgment involves attorney's fees, the attorney's affidavit should explicitly state that the attorney has personal knowledge of the facts in the affidavit and should recite facts which substantiate the lawyer's alleged personal knowledge.

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[293] *E.g.*, Cantu v. Holiday Inns, Inc., 910 S.W.2d 113, 116 (Tex. App.—Corpus Christi 1995, writ denied) ("A party's attorney may verify the pleading where he has knowledge of the facts, but does not have authority to verify based merely on his status as counsel."); *Webster*, 833 S.W.2d at 749 (holding that the attorney's verification of summary judgment response was inadmissible as summary judgment proof both because pleadings, even if verified, are incompetent proof, and because the attorney's verification contained no factual recitals and contained no facts showing the attorney's competency to make the affidavit); Soodeen v. Rychel, 802 S.W.2d 361, 365 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (stating that attorney's affidavit attached to summary judgment response was ineffectual to oppose summary judgment because affidavit failed to demonstrate how the attorney was competent to testify on the decisive issue).

[294] *Webster*, 833 S.W.2d at 749 (holding that sworn statement by defendant's attorney that alleged the statements contained in the motion were correct was improper summary judgment evidence); Carr v. Hertz Corp., 737 S.W.2d 12, 13–14 (Tex. App.—Corpus Christi 1987, no writ) (holding attorney's affidavit ineffectual as summary judgment evidence because it did not show the affiant's competence as a witness to testify regarding the facts alleged).

[295] *Carr*, 737 S.W.2d at 13–14; *see also, e.g.*, *Webster*, 833 S.W.2d at 749; *Soodeen*, 802 S.W.2d at 365 (rejecting attorney's affidavit because it did not demonstrate attorney's competence to testify regarding negligent entrustment); Harkness v. Harkness, 709 S.W.2d 376, 378 (Tex. App.—Beaumont 1986, writ dism'd) (requiring an attorney who makes an affidavit to show personal knowledge of the facts); Landscape Design & Constr., Inc. v. Warren, 566 S.W.2d 66, 67 (Tex. Civ. App.—Dallas 1978, no writ) (disallowing attorney's affidavit as not stating personal knowledge of the facts).

If counsel is compelled to file an affidavit on the merits of a client's cause of action or defense, one court has suggested the proper procedure:

> While Rule 14 of the Texas Rules of Civil Procedure permits an affidavit to be made by a party's attorney or agent, this rule does not obviate the necessity of showing that the attorney has personal knowledge of the facts, as distinguished from information obtained from the client. Ordinarily, an attorney's knowledge of the facts of a case is obtained from the client. Consequently, if the attorney must act as affiant, the better practice is to state explicitly how the information stated in the affidavit was obtained.[296]

An attorney may authenticate documents.[297]

G. Other Evidence

Summary judgment proof is not limited to affidavits and discovery materials. Parties can, and have, introduced a variety of additional forms of proof, including stipulations,[298] photographs,[299] testimony from prior trials,[300] transcript from administrative hearings,[301] court records from other cases,[302] the statement of facts from an earlier trial (now called the reporter's record),[303] and judicial notice.[304]

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[296]*Landscape Design*, 566 S.W.2d at 67.

[297]Leyva v. Soltero, 966 S.W.2d 765, 768 (Tex. App.—El Paso 1998, no pet.).

[298]Kinner Transp. & Enters., Inc. v. State, 614 S.W.2d 188, 189 (Tex. Civ. App.—Eastland 1981, no writ).

[299]Langford v. Blackman, 790 S.W.2d 127, 132–33 (Tex. App.—Beaumont), *rev'd on other grounds*, 795 S.W.2d 742 (Tex. 1990) (per curiam).

[300]Murillo v. Valley Coca-Cola Bottling Co., 895 S.W.2d 758, 761–62 (Tex. App.—Corpus Christi 1995, no writ); Kazmir v. Suburban Homes Realty, 824 S.W.2d 239, 244 (Tex. App.—Texarkana 1992, writ denied) (accepting pleadings from other lawsuits as proper summary judgment evidence).

[301]Vaughn v. Burroughs Corp., 705 S.W.2d 246, 247 (Tex. App.—Houston [14th Dist.] 1986, no writ).

[302]Gilbert v. Jennings, 890 S.W.2d 116, 117 (Tex. App.—Texarkana 1994, writ denied); *see also Murillo*, 895 S.W.2d at 761.

[303]Austin Bldg. Co. v. Nat'l Union Fire Ins. Co., 432 S.W.2d 697, 698–99 (Tex. 1968) (affirming the lower court's remand because the plaintiff's submission of a statement of facts from a previous case was proper); *Murillo*, 895 S.W.2d at 761 (concluding that prior trial testimony from different proceedings may be summary judgment evidence); Executive Condos., Inc. v. State, 764 S.W.2d 899, 901 (Tex. App.—Corpus Christi 1989, writ denied).

H. Interested Witnesses and Expert Testimony

For many years, Texas courts held that interested or expert witness testimony would not support a summary judgment motion or response.[305] However, the 1978 amendment to Rule 166a specifically permits the granting of a motion for summary judgment based on the uncontroverted testimonial evidence of an interested witness, or of an expert witness, if the trier of fact must be guided solely by the opinion testimony of experts as to a subject matter.[306] The evidence must meet the following criteria: (1) it is clear, positive, and direct; (2) it is otherwise credible and free from contradictions and inconsistencies; and (3) it could have been readily controverted.[307]

1. Expert Opinion Testimony[308]

The law concerning use of expert witnesses testimony is complex and evolving.[309]

a. Requirements for Expert Witness Testimony

Expert testimony must be comprised of more than conclusory statements and must be specific.[310] For example, affidavits that recite that the affiant "estimates," "believes," or has an "understanding" of certain facts are not proper summary judgment evidence.[311] "Such language does

[304]Settlers Vill. Cmty. Improvement Ass'n v. Settlers Vill. 5.6, Ltd., 828 S.W.2d 182, 184 (Tex. App.—Houston [14th Dist.] 1992, no writ) (taking judicial notice of the definition of the term "mill").

[305]*E.g.*, Lewisville State Bank v. Blanton, 525 S.W.2d 696, 696 (Tex. 1975) (per curiam) (holding that the affidavit of an interested party will not support a summary judgment but may raise a question of fact); Gibbs v. Gen. Motors Corp., 450 S.W.2d 827, 828–29 (Tex. 1970) (holding that expert testimony by affidavit does not establish facts as a matter of law).

[306]TEX. R. CIV. P. 166a(c); *see also* Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam); Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam) (holding that affidavit was admissible as proper summary judgment evidence because it was readily controvertible); Duncan v. Horning, 587 S.W.2d 471, 472–73 (Tex. Civ. App.—Dallas 1979, no writ) (approving affidavit as competent summary judgment evidence under Texas Rule of Civil Procedure 166a(c) effective on January 1, 1978).

[307]TEX. R. CIV. P. 166a(c); *see Trico Techs. Corp.*, 949 S.W.2d at 310.

[308]*See* Part X.C.3.e. *infra* for a discussion of expert testimony in federal practice.

[309]*See generally* Harvey Brown, *Eight Gates for Expert Witnesses*, 36 HOUS. L. REV. 743 (1999); Harvey Brown, *Procedural Issues Under Daubert*, 36 HOUS. L. REV. 1133 (1999).

[310]Wadewitz v. Montgomery, 951 S.W.2d 464, 466–67 (Tex. 1997); Lara v. Tri-Coastal Contractors, Inc., 925 S.W.2d 277, 278–79 (Tex. App.—Corpus Christi 1996, no writ).

[311]Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam) (citing Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984)).

not positively and unqualifiedly represent that the 'facts' disclosed are true."[312] Likewise, legal conclusions of an expert are not probative to establish proximate cause.[313] "He must link his conclusions to the facts."[314] In one case, an affidavit that did not include the legal basis or reasoning for an attorney's expert opinion that he did not commit malpractice was "simply a sworn denial of [plaintiff's] claims."[315] Because it was conclusory, the court found it to be incompetent summary judgment evidence.[316]

"Mere conclusions of a lay witness are not competent evidence . . . for the purpose of controverting expert opinion evidence."[317] However, on subject matter in which the fact finder would not be required to be guided solely by the opinion testimony of experts, lay testimony may be

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[312]*Id.* (citing Lightfoot v. Weissgarber, 763 S.W.2d 624, 628 (Tex. App.—San Antonio 1989, writ denied)).

[313]Barraza v. Eureka Co., 25 S.W.3d 225, 230 (Tex. App.—El Paso 2000, pet. denied).

[314]*Id.*; Earle v. Ratliff, 998 S.W.2d 882, 890 (Tex. 1999).

[315]Anderson v. Snider, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam).

[316]*Id.*; *see also* Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 434–35 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

[317]Nicholson v. Mem'l Hosp. Sys., 722 S.W.2d 746, 751 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *see also* Hernandez v. Lukefahr, 879 S.W.2d 137, 142 (Tex. App.—Houston [14th Dist.] 1994, no writ); White v. Wah, 789 S.W.2d 312, 318 (Tex. App.—Houston [1st Dist.] 1990, no writ).

permitted.[318] Lay testimony may be accepted over that of experts.[319] Thus, in a situation where lay testimony is permitted, it can be sufficient to raise a fact issue.[320] Also, an expert's affidavit that is based on assumed facts that vary from the actual undisputed facts has no probative force.[321]

Finally, in a medical malpractice case, a party cannot use an expert report as summary judgment proof when the report was originally used for complying with the procedural requirements of the Medical Liability and Insurance Improvement Act.[322]

b. Sufficiency of Expert Opinion

In *E.I. du Pont de Nemours & Co. v. Robinson*, the Texas Supreme Court held that an expert's testimony must be based upon a reliable foundation and be relevant.[323] The effect and implementation of these prerequisites to admissibility are evolving and controversial.[324]

The genesis of the standards of reliability and relevance concerning expert testimony was the United States Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[325] It held that under the Federal Rules of Evidence, the trial court must ensure that all scientific evidence is not only "relevant," but also "reliable."[326] In *Kumho Tire v. Carmichael*, the Supreme Court held that the *Daubert* factors apply to engineers and other experts who are not scientists.[327] The court must determine, pursuant to Federal Rule of Evidence 702, whether the expert opinion is "scientifically valid," based on factors such as: (1) whether the theory or technique has been subjected to peer review and publication, (2) the known or potential rate of error of the technique, and (3) whether the theory or technique is "generally accepted" in the scientific community.[328]

Similarly, Texas Rule of Evidence 702 states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the

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[318]*See* McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986).

[319]*See id.*

[320]*See id.*

[321]Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995).

[322]TEX. REV. CIV. STAT. ANN. art. 4590i § 13.01(d) (Vernon Supp. 1999). Article 4590i requires a plaintiff to file an expert report within a certain period after the lawsuit is filed. Garcia v. Willman, 4 S.W.3d 307, 310 (Tex. App.—Corpus Christi 1999, no pet.).

[323]923 S.W.2d 549, 556 (Tex. 1995).

[324]*Id.* at 556–58; S.V. v. R.V., 933 S.W.2d 1, 19–20 (Tex. 1996).

[325]*See generally* 509 U.S. 579 (1993).

[326]*Id.* at 589.

[327]526 U.S. 137, 147 (1999).

[328]*Daubert*, 509 U.S. at 592–94.

evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."[329]

The other relevant evidentiary rule, Texas Rule of Evidence 705, provides that, "If the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible."[330]

These rules impose a gatekeeping obligation on the trial judge to ensure the reliability of all expert testimony.[331] The trial judge fulfills this obligation by determining as a precondition to admissibility that: (1) the putative expert is qualified as an expert, (2) the expert's testimony has a reliable basis in the knowledge and experience of the relevant discipline, and (3) the testimony is relevant.[332]

Use of experts in summary judgment practice requires meeting these standards for experts through summary judgment evidence. Many *Daubert/Robinson* battles are causation battles fought at the summary judgment stage. They are a unique mixture of trial and summary judgment practice. Generally, the defendant does one of two things: (1) moves for summary judgment on the grounds that its own expert testimony conclusively disproves causation and the plaintiff's expert testimony does not raise a fact issue on causation because he or she does not pass the *Daubert/Robinson* test; or more simply, (2) moves for summary judgment on the grounds that there is no evidence of causation because the plaintiff's causation expert testimony does not pass *Daubert/Robinson*.

The possible results of failure to meet the *Daubert/Robinson* tests are demonstrated by *Weiss v. Mechanical Associated Services, Inc.*[333] In *Weiss*, the San Antonio Court of Appeals determined that the trial court did not abuse its discretion in effectively excluding the plaintiff's expert testimony on causation by granting the defendant's motion for summary judgment.[334] The appellate court rejected any evidence by the expert on the grounds that it failed to meet the *Robinson* tests.[335]

This ruling carries the following implications: (1) in a summary judgment proceeding, the movant challenging the expert's testimony need

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[329]TEX. R. EVID. 702.

[330] *Id.* 705(c).

[331]Gammill v. Jack Williams Chevrolet, Inc., 972 S.W.2d 713, 726 (Tex. 1998).

[332]E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995).

[333]989 S.W.2d 120, 125-126 (Tex. App.—San Antonio 1999, pet. denied).

[334]*Id.*

[335]*Id.* at 125.

not request a *Robinson* hearing and secure a formal ruling from the trial court; and (2) the granting of the summary judgment, even if the order does not mention the expert challenge, in effect, is a ruling sustaining the movant's expert challenge.[336]

The El Paso Court of Appeals has held that if a trial court accepts an expert's testimony as admissible, the expert's opinion constitutes more than a scintilla of evidence to defeat a no-evidence summary judgment.[337] Conversely, it upheld a summary judgment because the expert's affidavit was not admissible and there is no other competent summary judgment evidence on breach of duty of proximate cause.[338]

c. *Procedural Issues*

In *United Blood Services v. Longoria*, the Texas Supreme Court required summary judgment proof of an expert's qualifications in support of the response to a motion for summary judgment.[339] Using an abuse of discretion standard, the supreme court upheld the trial court's determination that the expert was not qualified and entered a take-nothing judgment against the plaintiff who relied on the disqualified expert.[340] The supreme court specifically rejected the approach of waiting for trial.[341] Thus, as a practical matter, this holding means that a party relying on an expert in either its motion or response cannot wait until trial to develop the expert's qualifications.[342]

The proponent of an expert bears the burden of demonstrating an expert's qualifications, reliability and relevance.[343] Once a party objects to an expert's testimony, the party offering the expert has the burden of proof to establish that the testimony is admissible.[344] For example, in *Hight v. Dublin Veterinary Clinic*, the court found no abuse of discretion in striking an expert's affidavit.[345] Although the expert's affidavit provided

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[336] *Id.* at 124 n.6.

[337] Barraza v. Eureka Co., 25 S.W.3d 225, 232 (Tex. App.—El Paso 2000, pet. denied).

[338] *Id.*

[339] 938 S.W.2d 29, 30 (Tex. 1997) (per curiam).

[340] *Id.* at 30–31.

[341] *Id.* at 30.

[342] *See id.*

[343] *See* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995); *see, e.g.*, Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 620–21 (Tex. App.—Eastland 2000, pet. denied).

[344] Barraza v. Eureka Co., 25 S.W.3d 225, 230 (Tex. App.—El Paso 2000, pet. denied) (citing *Robinson*, 923 S.W.2d at 557).

[345] 22 S.W.3d at 622.

information that the expert reviewed various records and that certain general principles exist in connection with the use of anesthesia, the affidavit had no information concerning the methodology and the basis underlying the opinion testimony and how they related to the expert's opinion.[346] Without such information, the court found it impossible to determine the issue of reliability.[347]

The question then becomes, how does one qualify an expert and establish reliability and relevance in a summary judgment context? This question is complicated by the significant procedural issues between summary judgment proceedings and expert procedure.

In the federal courts, the Court of Appeals for the Third Circuit has suggested that a pretrial determination on admissibility of evidence under Federal Rule of Evidence 104 be the vehicle to determine a *Daubert* objection.[348] Furthermore, the Third Circuit points out that the obligation of the trial court to offer the parties an adequate opportunity to be heard may require a hearing at which the proper showing can be made, if possible.[349]

Another issue that arises is that underlying procedural differences may complicate the decision of how to deal with experts in summary judgment proceedings.

i. The Evidence Supporting the Summary Judgment is Evaluated Differently

In a summary judgment hearing, the trial court assumes that all evidence favorable to the non-movant is true, and determines if there is a genuine issue of fact.[350] In a *Daubert/Robinson* hearing, once a party objects to the expert's testimony, the party offering the expert bears the burden of responding to each objection and showing that the testimony is

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[346] *Id.*

[347] *Id.*

[348] United States v. Downing, 753 F.2d 1224, 1241 (3d Cir. 1985).

[349] Padillas v. Stork-Gamco, Inc., 186 F.3d 412, 417–18 (3d Cir. 1999) (reversing a summary judgment granted because the plaintiff's expert did not meet *Daubert* criteria, saying that the trial court should have conducted a Federal Rule of Evidence 104 hearing, with an opportunity for the plaintiff to develop a record).

[350] TEX. R. CIV. P. 166a(c); Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548–49 (Tex. 1985).

admissible by a preponderance of the evidence.[351] Then, the trial court evaluates evidence for reliability to determine admissibility.[352]

ii. The Standard of Review Applied on Appeal is Different

In reviewing the grant of a summary judgment, the appellate review is de novo.[353] In a *Robinson* review, the appellate court applies an abuse of discretion standard.[354]

iii. In a Summary Judgment Hearing, the Oral Argument is Typically Not Recorded and is Not Considered as Evidence

A *Daubert/Robinson* hearing typically is recorded and may supplement the record on appeal. No live testimony may be presented at a summary judgment hearing.[355] In a *Daubert/Robinson* hearing, however, there is opportunity for live testimony by the expert and his or her cross-examination. This form of evidence is especially important when the outcome of the *Daubert/Robinson* hearing is case determinative.

These differences create a hybrid and seemingly inconsistent approach between expert and summary judgment procedure. Possibilities of how to deal with experts in summary judgment proceedings include:

(a) A Daubert/Robinson *hearing.* The contrast between the summary judgment procedure and expert procedure supports the notion that the proponent of the expert may be best served by conducting a *Daubert/Robinson* hearing. In meeting its gatekeeping function, the trial judge must weigh the evidence and the credibility of the witnesses including the expert. Summary judgment procedure does not allow for this sort of give and take. Thus, if summary judgment opponents submit conflicting affidavits concerning one side's expert's qualifications, reliability or relevance, the judge logically cannot apply summary judgment standards. A hearing is appropriate.

Conversely, for strategic purposes, an opponent of the expert may not want an evidentiary hearing. Under the logic of *Weiss*, all the opponent must do is file a motion for summary judgment and object to the expert's

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[351] *See* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995).

[352] *See id.* at 557–58.

[353] Brooks v. Ctr. for Healthcare Servs., 981 S.W.2d 279, 281 (Tex. App.—San Antonio 1998, no pet.).

[354] United Blood Servs. v. Longoria, 938 S.W.2d 29, 31 (Tex. 1997) (per curiam).

[355] TEX. R. CIV. P. 166a(c); Jack B. Anglin Co. v. Tipps, 842 S.W.2d 266, 269 n.4 (Tex. 1992).

affidavit when it is attached as summary judgment evidence to the response.[356] If the court grants the summary judgment, there is no error in failing to conduct a *Daubert/Robinson* hearing and through the granting of the summary judgment motion, the expert is inferentially ruled unqualified, unreliable, or irrelevant. Thus, unless a respondent is certain the judge will not grant the summary judgment, the wise course of action is to arrange for a *Daubert/Robinson* hearing.

If the *Daubert/Robinson* hearing is conducted at the same time as the summary judgment hearing, do not submit other summary judgment evidence. The case authority is strict that all summary judgment evidence must be in writing and may not be presented at a summary judgment hearing. The wisest course would be to hold the *Daubert* hearing in advance of the summary judgment hearing. In that way, if the judge strikes the expert, the proponent can find another or attempt to bolster that expert.

(b) Depose own expert. To make a *Daubert/Robinson* showing, a party may have to depose its own expert extensively about the factual basis for his or her opinions and about the scientific foundation for them. Affidavits may be too unwieldy to cover all the ground necessary to qualify your expert.

(c) Prepare detailed affidavits. Written reports from experts, unless sworn to, are not proper summary judgment evidence.[357] If affidavits are used, the affidavits may require publications, articles or other qualifying material attached to them.

2. Non-Expert, Interested Witness Testimony

In addition to expert testimony, non-expert, interested party testimony may provide a basis for summary judgment.[358] The interested party's testimony must also be "clear, positive and direct, otherwise

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[356]*See* Weiss v. Mech. Associated Serv. Inc., 989 S.W.2d 120, 125–26 (Tex. App.—San Antonio 1999, pet. denied).

[357]TEX. R. CIV. P. 166a(f).

[358]Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam) (allowing the uncontroverted affidavit of a human resources manager in a workers compensation case because the plaintiff made no attempt to controvert it); Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam); Danzy v. Rockwood Ins. Co., 741 S.W.2d 613, 614–15 (Tex. App.—Beaumont 1987, no writ) (admitting affidavit of interested party, the owner of the defendant insurance company, which stated its policy regarding appellee's workers compensation policies).

credible . . . and could have been readily controverted."[359] This determination is made on a case by case basis.[360]

An example of competent interested party testimony is provided by *Texas Division-Tranter, Inc. v. Carrozza*.[361] In *Carrozza*, the supreme court found that, in a retaliatory discharge action under the workers compensation law, interested party testimony by supervisory and administrative personnel established a legitimate, non-discriminatory reason for the discharge.[362] The court explained that the affidavit testimony could have been readily controverted by facts and circumstances belying the employer's neutral explanation and thereby raising a material issue of fact.[363]

Statements of interested parties, testifying about what they knew or intended, are self-serving and do not meet the standards for summary judgment proof.[364] Nonetheless, the mere fact that summary judgment proof is self-serving does not necessarily make the evidence an improper basis for summary judgment.[365] Issues of intent and knowledge are not susceptible to being readily controverted and, therefore, are not appropriate for summary judgment proof.[366] However, if the affidavits of interested witnesses are detailed and specific, those affidavits may be objective proof sufficient to establish the witnesses' state of mind as a matter of law.[367]

IV. BURDEN OF PROOF FOR SUMMARY JUDGMENTS

When considering a motion for summary judgment, the trial court's duty is to determine whether there are any fact issues to try, not to weigh

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[359]TEX. R. CIV. P. 166a(c).

[360]Lukasik v. San Antonio Blue Haven Pools, Inc., 21 S.W.3d 394, 399 (Tex. App.—San Antonio 2000, no pet.) (citing TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE PROCEDURE AND REVIEW § 6.03[9][a] (1995)).

[361]876 S.W.2d 312, 313–14 (Tex. 1994) (per curiam).

[362]*Id.*

[363]*Id.* at 313.

[364]Grainger v. W. Cas. Life Ins. Co., 930 S.W.2d 609, 615 (Tex. App.—Houston [1st Dist.] 1996, writ denied) (disallowing affidavits in medical insurance case about the intention to repay the premiums of the appellants); Clark v. Pruett, 820 S.W.2d 903, 906 (Tex. App.—Houston [1st Dist.] 1991, no writ).

[365]Trico Techs. Corp. v. Montiel, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam).

[366]Allied Chem. Corp. v. DeHaven, 752 S.W.2d 155, 158 (Tex. App.—Houston [14th Dist.] 1988, writ denied) (disallowing affidavits showing that there was an intent to form a partnership); *see also Clark*, 820 S.W.2d at 906.

[367]Channel 4, KGBT v. Briggs, 759 S.W.2d 939, 942 (Tex. 1988).

the evidence or determine its credibility and try the case on affidavits.[368] With the advent of no-evidence summary judgments in Texas, the burden of proof on summary judgment will now be allocated in the same manner for defendants and plaintiffs in both state and federal court.[369] The party with the burden of proof at trial will have the same burden of proof in a summary judgment proceeding.[370]

A. When the Party with the Burden of Proof Moves for Summary Judgment (Claims and Affirmative Defenses)

When the party with the burden of proof seeks summary judgment, that party 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.[371]

1. Plaintiff as Movant on Affirmative Claims

When the plaintiff moves for summary judgment, the plaintiff must show entitlement to prevail on each element of the cause of action, except damages.[372] Damages are specifically exempted by Rule 166a(a).[373] The plaintiff meets the burden if he or she produces evidence that would be sufficient to support an instructed verdict at trial.[374] The plaintiff is not under any obligation to negate affirmative defenses.[375] "[T]he mere

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[368]Richardson v. Parker, 903 S.W.2d 801, 803 (Tex. App.—Dallas 1995, no writ); Spencer v. City of Dallas, 819 S.W.2d 612, 615 (Tex. App.—Dallas 1991, no writ).

[369]*See* TEX. R. CIV. P. 166a cmt. 1997.

[370]Barraza v. Eureka Co., 25 S.W.3d 225, 231 (Tex. App.—El Paso 2000, pet. denied).

[371]*See* M.D. Anderson Hosp. & Tumor Inst. v. Willrich, 28 S.W.3d 22, 23 (Tex. 2000); Rhone-Poulenc, Inc. v. Steel, 997 S.W.2d 217, 222 (Tex. 1999).

[372]*See, e.g.*, Green v. Unauthorized Practice of Law Comm., 883 S.W.2d 293, 297 (Tex. App.—Dallas 1994, no writ); Brooks v. Sherry Lane Nat'l Bank, 788 S.W.2d 874, 876 (Tex. App.—Dallas 1990, no writ); Bergen, Johnson & Olson v. Verco Mfg. Co., 690 S.W.2d 115, 117 (Tex. App.—El Paso 1985, writ ref'd n.r.e.).

[373]TEX. R. CIV. P. 166a(a). The exception that the plaintiff need not show entitlement to prevail on damages applies only to the amount of unliquidated damages, not to the existence of damages or loss. Unliquidated damages may be proved up at a later date.

[374]Fed. Deposit Ins. Corp. v. Moore, 846 S.W.2d 492, 494 (Tex. App.—Corpus Christi 1993, writ denied); Ortega-Carter v. Am. Int'l Adjustment Co., 834 S.W.2d 439, 441 (Tex. App.—Dallas 1992, writ denied); Braden v. New Ulm State Bank, 618 S.W.2d 780, 782 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

[375]*See infra* Part IV.A.2.

pleading of an affirmative defense without supporting proof will not defeat an otherwise valid motion for summary judgment."[376]

Where the plaintiff is the movant on its affirmative claims, the plaintiff must: (1) affirmatively demonstrate by summary judgment evidence that there is no genuine issue of material fact concerning each element of its claim for relief;[377] and (2) if defendant has asserted affirmative defenses, the plaintiff also must demonstrate the lack of any genuine issue of any material fact in the summary judgment record concerning those defenses.[378]

2. Affirmative Defenses

A defendant may move for a summary judgment based on an affirmative defense.[379] The defendant's burden is to prove conclusively all the elements of the affirmative defense as a matter of law such that there is no genuine issue of material fact.[380] "[A]n unpleaded affirmative defense may also serve as the basis for a summary judgment when it is raised in the summary judgment motion, and the opposing party does not object to the lack of a Rule 94 pleading in either its written response or before the rendition of judgment."[381]

The defendant urging summary judgment on an affirmative defense is in much the same position as a plaintiff urging summary judgment on an affirmative claim. The movant defendant must come forward with summary judgment evidence for each element of the affirmative defense.[382] Unless the movant conclusively establishes the affirmative defense, the respondent plaintiff has no burden to present summary judgment evidence

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[376]Hammer v. Powers, 819 S.W.2d 669, 673 (Tex. App.—Fort Worth 1991, no writ).

[377]TEX. R. CIV. P. 166a cmt. 1997.

[378]*Id.* Because the defendant has the burden of proof on affirmative defenses, the plaintiff need only point out the absence of evidence from the defendant. TEX. R. CIV. P. 166a(i).

[379]TEX. R. CIV. P. 166a(b); *see, e.g.*, Urrutia v. Decker, 992 S.W.2d 440, 441 (Tex. 1999).

[380]Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam); Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995); Montgomery v. Kennedy, 669 S.W.2d 309, 310–11 (Tex. 1984); Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972).

[381]Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 494 (Tex. 1991) (noting that petitioner sued for specific performance of contracts; in summary judgment motion, respondent relied upon an affirmative defense that was not included in earlier pleadings).

[382]Am. Petrofina, Inc. v. Allen, 887 S.W.2d 829, 830 (Tex. 1994) (involving fraudulent concealment affirmative defense); Nichols v. Smith, 507 S.W.2d 518, 520 (Tex. 1974) (stating that "the pleading of an affirmative defense will not, in itself, defeat a motion for summary judgment by a plaintiff whose proof conclusively establishes his right to an instructed verdict if no proof were offered by his adversary in a conventional trial on the merits.").

to the contrary.[383] Even so, it is a wise practice to file a response to every summary judgment motion.

Defendants seeking summary judgment based on the statute of limitations face a dual burden. In *Burns v. Thomas*, the Texas Supreme Court held that a defendant seeking a summary judgment on the basis of limitations must prove when the cause of action accrued.[384] The defendant must also negate the discovery rule by proving as a matter of law that there is no genuine issue of fact about when the plaintiff discovered or should have discovered the nature of the injury.[385] Thus, when the respondent interposes a suspension statute, the burden is on the movant to negate the applicability of the tolling statute.[386] This burden does not apply to a party seeking to negate the discovery rule when the respondent has not pleaded or otherwise raised the discovery rule.[387]

A plaintiff who has conclusively established the absence of disputed fact issues in his claim for relief will not be prevented from obtaining summary judgment because the defendant merely pleaded an affirmative

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[383]Torres v. W. Cas. & Sur. Co., 457 S.W.2d 50, 52 (Tex. 1970) (concluding that while the plaintiff would suffer a directed verdict at a trial based on the record for failing to carry the burden of proof, the plaintiff has no such burden on defendant's motion for summary judgment); *see also* Deer Creek Ltd. v. N. Am. Mortgage Co., 792 S.W.2d 198, 200–01 (Tex. App.—Dallas 1990, no writ) (holding that when the mortgage company sufficiently pleaded and proved release, the burden shifted to debtor to raise a fact issue as to a legal justification for setting aside the release).

[384]786 S.W.2d 266, 267–68 (Tex. 1990).

[385]*Id.*; *see also* Sanchez v. Johnson & Johnson Med., Inc., 860 S.W.2d 503, 508–09 (Tex. App.—El Paso 1993), *aff'd in part, rev'd in part*, 924 S.W.2d 925 (Tex. 1996); A.C. Collins Ford, Inc. v. Ford Motor Co., 807 S.W.2d 755, 759 (Tex. App.—El Paso 1990, writ denied) (explaining that while the discovery rule usually places the burden on the plaintiff, in a summary judgment proceeding the burden is on the defendant); Vance v. Bell, 797 S.W.2d 403, 405 (Tex. App.—Austin 1990, no writ) (holding that a party moving for summary judgment based on the statute of limitations has the burden to prove when the other party discovered or should have discovered the fraud). The discovery rule essentially states that the statute of limitations does not begin to run until discovery of the wrong or until the plaintiff acquires knowledge that, in the exercise of reasonable diligence, would lead to the discovery of the wrong. *See* Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990); *Burns*, 786 S.W.2d at 267; Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. 1967).

[386]Zale Corp. v. Rosenbaum, 520 S.W.2d 889, 891 (Tex. 1975) (per curiam) (holding that the burden was on the movant to prove the affirmative defense of limitations by conclusively establishing lack of diligence and the inapplicability of the tolling statute); Ardila v. Saavedra, 808 S.W.2d 645, 647 (Tex. App.—Corpus Christi 1991, no writ); Salazar v. Amigos Del Valle, Inc., 754 S.W.2d 410, 413 (Tex. App.—Corpus Christi 1988, no writ).

[387]*In re* Estate of Matejek, 960 S.W.2d 650, 651 (Tex. 1997) (per curiam).

defense.[388] An affirmative defense will prevent the granting of a summary judgment only if each element of the affirmative defense is supported by summary judgment evidence.[389]

A party raising an affirmative defense in opposition to a motion for summary judgment must either: (1) present a disputed fact issue on the opposing party's failure to satisfy his or her own burden, or (2) establish at least the existence of a fact issue on each element of his or her own affirmative defense by summary judgment proof.[390]

An "ordinary defense," which tends to deny or rebut factual assertions, is treated differently than an affirmative defense. In *Palmer v. Enserch Corp.*, before the hearing on the motion for summary judgment, the respondent amended its pleadings to include additional theories of liability resulting from a corporate merger.[391] When an affirmative defense is established, the burden of raising a disputed fact issue shifts to the respondent.[392] Conversely, in this case, because the motion for summary judgment did not address the additional theories of liability that were raised in the amended pleading, the movant did not meet its burden to establish a basis for summary judgment as a matter of law.[393]

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[388]Kirby Exploration Co. v. Mitchell Energy Corp., 701 S.W.2d 922, 926 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (holding that the mere recitation of facts is not sufficient to raise the affirmative defenses of equitable or statutory estoppel); Clark v. Dedina, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd); Taylor v. Fred Clark Felt Co., 567 S.W.2d 863, 866 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.) (reversing trial court's grant of summary judgment because appellant raised a fact issue concerning an affirmative defense).

[389]Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984) (holding that an affidavit supporting affirmative defense is only conclusory, and therefore, not sufficient summary judgment evidence).

[390]"Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 936–37 (Tex. 1972) (requiring the respondent to adduce evidence raising a fact issue concerning its defense); Coastal Corp. v. Atl. Richfield Co., 852 S.W.2d 714, 718 (Tex. App.—Corpus Christi 1993, no writ) (declaring the burden of proof rests with appellant to present summary judgment evidence raising a fact issue on its affirmative defense); Petroscience Corp. v. Diamond Geophysical, Inc., 663 S.W.2d 68, 69 (Tex. App.—Houston [14th Dist.] 1983) (explaining that the respondent could "either rely on appellee's failure to satisfy its burden or rely on their own affirmative defense"), *writ ref'd n.r.e.*, 684 S.W.2d 668 (Tex. 1984) (per curiam).

[391]728 S.W.2d 431, 433–34 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

[392]*Id.* at 435 (stating that once the movant establishes a right to summary judgment, the respondent must expressly present reasons to avoid judgment and support these reasons with proof); Hernandez v. Furr's Supermarkets, Inc., 924 S.W.2d 193, 195 (Tex. App.—El Paso 1996, writ denied).

[393]*Palmer*, 728 S.W.2d at 437.

A plaintiff attacking affirmative defenses by way of a no-evidence motion for summary judgment must state the elements of the affirmative defense for which there is no evidence.[394] Thus, the plaintiff must plead with specificity the elements of each affirmative defense that it claims lack evidence.[395]

B. When the Party Without the Burden of Proof Moves for "No-Evidence" Summary Judgment

The party without the burden of proof may move for summary judgment by disproving as a matter of law an essential element of the opponent's claim.[396] In addition, under the no-evidence summary judgment rule, a party without the burden of proof may simply move for summary judgment on the basis that the opponent lacks evidence to support an essential element of the proponent's claim.[397]

A party may never properly urge a no-evidence summary judgment on the claims or defenses on which it has the burden of proof.[398] A no-evidence summary judgment is proper when:

> (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or 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.[399]

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[394]TEX. R. CIV. P. 166a(i).

[395]Ebner v. First State Bank of Smithville, 27 S.W.3d 287, 305 (Tex. App.—Austin 2000, pet. denied).

[396]*See* TEX. R. CIV. P. 166a(c).

[397]*See id.* 166a(i). *See generally* Sarah B. Duncan, *No-Evidence Motions for Summary Judgment: Harmonizing Rule 166a(i) and Its Comment*, 41 S. TEX. L. REV. 873 (2000); Robert W. Clore, Comment, *Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants*, 29 ST. MARY'S L.J. 813 (1998).

[398]*See* Barraza v. Eureka Co., 25 S.W.3d 225, 231 (Tex. App.—El Paso 2000, pet. denied).

[399]Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (quoting Merrell Dow Pharmacy, Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997)).

1. Historical Development

Until 1997, summary judgment in federal court differed significantly from summary judgment in Texas state court.[400] The Supreme Court of Texas discussed the difference in *Casso v. Brand*.[401] In *Casso*, the supreme court noted that:

> [s]ummary judgments in federal courts are based on different assumptions, with different purposes, than summary judgments in Texas. In the federal system, "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'"[402]

The Supreme Court of Texas explained that "federal courts place responsibilities on both movants and non-movants in the summary judgment process."[403] The supreme court specifically refused to adopt the federal approach to summary judgments.[404] The court explained: "While some commentators have urged us to adopt the current federal approach to summary judgments generally, we believe our own procedure eliminates patently unmeritorious cases while giving due regard for the right to a jury determination of disputed fact questions."[405]

At the time of *Casso*, the fundamental difference between state and federal summary judgment practice was the showing required by the movant before summary judgment would be granted.[406] The court distinguished the two rules, stating:

> While the language of our rule is similar, our interpretation of that language is not. We use summary judgments merely "to eliminate patently unmeritorious claims and untenable defenses," and we never shift the burden of proof to the non-movant unless and until the movant has

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[400] *See generally* Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617 (1988) (highlighting the differences in practice despite the relative similarity in language of the two rules).

[401] 776 S.W.2d 551, 555–56 (Tex. 1989).

[402] *Id.* (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986)).

[403] *Id.*

[404] *See id.*

[405] *Id.* at 556–57 (citation omitted).

[406] *See id.* at 556.

> "establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law."[407]

In federal court, when the respondent bears the burden of proof at trial, that party alone has the burden of presenting competent evidence to avoid summary judgment.[408] Since 1997, this is also the state practice.

2. Federal Guidance for State Practice

In federal court, as under the new state standard, if the issue is one on which the movant does not bear the burden of proof and after an adequate time for discovery has passed, summary judgment is mandated if the respondent fails to make a showing sufficient to establish the existence of each element essential to its case.[409] The state courts have looked to the federal courts for guidance since the no-evidence summary judgment rule was promulgated in 1997.[410]

The facts in *Celotex Corp. v. Catrett*, the sentinel federal no-evidence summary judgment case, illustrate application of this standard of proof.[411] In *Celotex*, a widow sued an asbestos manufacturer for the asbestos-related death of her husband.[412] Celotex moved for summary judgment based on the widow's failure to produce any evidence that her husband had been exposed to its products.[413] The widow's response consisted of documents the manufacturer argued were inadmissible hearsay.[414] The Court found that Celotex could properly move for summary judgment without supporting evidence and on the basis of a claim that the widow could not produce sufficient evidence to raise a fact issue.[415] The Court remanded the case to the court of appeals for a determination of whether the evidence

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[407] *Id.* (quoting City of Houston v. Clear Creek Basin Auth. 589 S.W.2d 671, 678 n.5 (Tex. 1979)).

[408] *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

[409] *Id.*; Gunaca v. Texas, 65 F.3d 467, 469 (5th Cir. 1995) (applying the *Celotex* standard); *see also* TEX. R. CIV. P. 166a cmt. 1997.

[410] Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 432 (Tex. App—Houston [14th Dist.] 1999, no pet.).

[411] *See generally* 477 U.S. at 319.

[412] *Id.* at 319.

[413] *Id.*

[414] *Id.* at 320.

[415] *Id.* at 322–23.

filed by the widow in support of her response was sufficient to raise a fact issue.[416]

While *Celotex* marked a shift in the burden of proof in federal summary judgment practice, two other 1986 Supreme Court decisions, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[417] and *Anderson v. Liberty Lobby, Inc.*,[418] clarified the standard of summary judgment proof required. In basic terms, simply showing the existence of a fact issue will not suffice to defeat a "no-evidence" summary judgment; there must be a "genuine issue" regarding a "material fact."[419]

3. State Practice

The thrust of the no-evidence summary judgment rule is to require evidence from the respondent.[420] Potentially, a no-evidence motion for summary judgment could be two pages long and the response two feet thick. The movant need not produce any evidence in support of its no-evidence claim.[421] Instead, the mere filing of the motion shifts the burden to the respondent to come forward with enough evidence to take the case to a jury.[422] If the respondent does not come forward with such evidence, the court must grant the motion.[423]

The no-evidence summary judgment rule specifically requires that the motion state the elements as to which there is no evidence.[424] General assertions that there is no evidence to support the non-movant's claims are not sufficient.[425] As noted in the comment to the rule, the motion cannot be conclusory or generally allege there is no evidence to support the

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[416] *Id.* at 327–28. On remand, the court of appeals held that plaintiff's evidence was sufficient to survive summary judgment. Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 37–40 (D.C. Cir. 1987).

[417] 475 U.S. 574, 585–88 (1986).

[418] 477 U.S. 242, 247–52 (1986).

[419] *Matsushita Elec. Indus. Co.*, 475 U.S. at 585–87; *Anderson*, 477 U.S. at 247–52.

[420] *See* Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 432 (Tex. App—Houston [14th Dist.] 1999, no pet.).

[421] TEX. R. CIV. P. 166a(i).

[422] *See, e.g.*, Jim Rutherford Invs., Inc. v. Terramar Beach Cmty. Ass'n, 25 S.W.3d 845, 850 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); Jackson v. Fiesta Mart, Inc., 979 S.W.2d 68, 71 (Tex. App.—Austin 1998, no pet.).

[423] TEX. R. CIV. P. 166a(i).

[424] *Id.*

[425] Abraham v. Ryland Mortgage Co., 995 S.W.2d 890, 892 (Tex. App.—El Paso 1999, no pet.).

claims.[426] The motion should state the elements of the plaintiff's cause of action and then allege which of those elements lack any evidentiary support.[427]

A no-evidence summary judgment is essentially a pretrial directed verdict.[428] The amount of evidence required to defeat a no-evidence motion for summary judgment parallels the directed verdict and the no-evidence standard on appeal of jury trials.[429] Thus, if the respondent brings forth more than a scintilla of evidence, that will be sufficient to defeat a no-evidence motion for summary judgment.[430] The comment to the rule provides that the respondent need not marshal its proof, only point out that the evidence that raises a fact issue.[431] Determining how much evidence is sufficient to defeat a no-evidence summary judgment may involve difficult strategic decisions.

C. Both Parties as Movants

Both parties may move for summary judgment.[432] When both parties move for summary judgment, each party must carry its own burden, and neither can prevail because of the failure of the other to discharge its burden.[433]

When both parties move for summary judgment and one motion is granted and the other is overruled, all questions presented to the trial court may be presented for consideration on appeal, including whether the losing party's motion should have been overruled.[434] On appeal, the party appealing the denial of the motion for summary judgment must properly

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[426]TEX. R. CIV. P. 166a cmt. 1997.

[427]*Id.*

[428]*Cf.* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) (discussing the federal standard for summary judgment and concluding that it mirrors the directed verdict standard).

[429]Barraza v. Eureka Co., 25 S.W.3d 225, 231 (Tex. App.—El Paso 2000, pet. denied).

[430]*Id*; Macias v. Fiesta Mart, Inc., 988 S.W.2d 316, 317 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

[431]TEX. R. CIV. P. 166a cmt. 1997.

[432]*Id.* 166a(a)–(b).

[433]*See* Guynes v. Galveston County, 861 S.W.2d 861, 862 (Tex. 1993); Dallas Indep. Sch. Dist. v. Finlan, 27 S.W.3d 220, 226 (Tex. App.—Dallas 2000, pet. denied).

[434]Comm'rs Court of Titus County v. Agan, 940 S.W.2d 77, 81 (Tex. 1997); Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988) (per curiam); Tobin v. Garcia, 159 Tex. 58, 316 S.W.2d 396, 400–01 (1958).

preserve this error by raising, as a point of error (or issue presented), the failure of the trial court to grant the appellant's motion.[435]

The appeal should be taken from the summary judgment granted.[436] In *Adams v. Parker Square Bank*, both parties moved for summary judgment.[437] The appellant limited his appeal to the denial of his own summary judgment, rather than appealing from the granting of his opponent's summary judgment.[438] The court held that the appellant should have appealed from the order granting appellee's motion for summary judgment because an appeal does not lie solely from an order overruling a motion for summary judgment.[439]

In the absence of cross motions for summary judgment, an appellate court may not reverse an improperly granted summary judgment and render summary judgment for the nonmoving party.[440] Cross motions should be considered by the responding party, when appropriate, to secure on appeal a final resolution of the entire case (i.e., "reversed and rendered" rather than "reversed and remanded").[441]

The case of *Hall v. Mockingbird AMC/Jeep, Inc.* illustrates the advantage of filing a cross motion for summary judgment.[442] In *Hall*, the trial court granted a summary judgment for the plaintiff.[443] The court of appeals reversed the trial court's judgment and rendered judgment for the defendant.[444] The supreme court reversed and remanded the cause, stating that judgment could not be rendered for the defendant because the defendant did not move for summary judgment.[445]

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[435]Truck Ins. Exch. v. E.H. Martin, Inc., 876 S.W.2d 200, 203 (Tex. App.—Waco 1994, writ denied); Buckner Glass & Mirror, Inc. v. T.A. Pritchard Co., 697 S.W.2d 712, 714–15 (Tex. App.—Corpus Christi 1985, no writ); Holmquist v. Occidental Life Ins. Co., 536 S.W.2d 434, 438 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

[436]Adams v. Parker Square Bank, 610 S.W.2d 250, 250 (Tex. Civ. App.—Fort Worth 1980, no writ).

[437]*Id.*

[438]*Id.*

[439]*Id.* at 250–51.

[440]Herald-Post Publ'g Co. v. Hill, 891 S.W.2d 638, 640 (Tex. 1994) (per curiam); CRA, Inc. v. Bullock, 615 S.W.2d 175, 176 (Tex. 1981) (per curiam); City of West Tawakoni v. Williams, 742 S.W.2d 489, 495 (Tex. App.—Dallas 1987, writ denied).

[441]*See* Hall v. Mockingbird AMC/Jeep, Inc., 592 S.W.2d 913, 913–14 (Tex. 1979) (per curiam).

[442]*Id.*

[443]*Id.* at 913.

[444]*Id.*

[445]*Id.* at 914; *see also* Chevron, U.S.A., Inc. v. Simon, 813 S.W.2d 491, 491 (Tex. 1991) (per curiam); Alzo Adver., Inc. v. Indus. Props. Corp., 722 S.W.2d 524, 529 (Tex. App.—Dallas

V. RESPONDING TO AND OPPOSING A MOTION FOR SUMMARY JUDGMENT

Before the enactment of the Texas no-evidence summary judgment provision,[446] the most important development in summary judgment procedure was the Texas Supreme Court's decision in *City of Houston v. Clear Creek Basin Authority*.[447] In that case, the supreme court held that "both the reasons for the summary judgment and the objections to it must be in writing and before the trial judge at the hearing."[448] In so holding, the court considered Rule 166a(c), which states in part: "Issues not expressly presented to the trial court by *written* motion, answer or other response shall not be considered on appeal as grounds for reversal."[449] The court also considered the 1978 addition to Rule 166a, which provides: "Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."[450]

The necessity for a response is much more dramatic when the movant has filed a proper no-evidence motion for summary judgment. If the respondent fails to produce summary judgment evidence raising a genuine issue of material fact, the court must grant the motion.[451] In other words, the respondent *must* file a response.

1986, writ ref'd n.r.e.) (reversing and remanding cause for tenant's failure to move for summary judgment in trial court); Int'l Med. Sales, Inc. v. Prudential Ins. Co. of Am., 690 S.W.2d 84, 86 (Tex. App.—Dallas 1985, no writ) (reversing and remanding the case because the prevailing party failed to move for summary judgment).

[446] TEX. R. CIV. P. 166a(i).

[447] 589 S.W.2d 671, 672 (Tex. 1979).

[448] *Id.* at 677; *see also* Cent. Educ. Agency v. Burke, 711 S.W.2d 7, 8–9 (Tex. 1986) (per curiam) (holding that the court of appeals improperly reversed summary judgment based on grounds not properly before the court); State Bd. of Ins. v. Westland Film Indus., 705 S.W.2d 695, 696 (Tex. 1986) (per curiam) (holding that the court of appeals may not reverse summary judgment on grounds not properly before it); Griggs v. Capitol Mach. Works, Inc., 701 S.W.2d 238, 238 (Tex. 1985) (per curiam) (stating that the court will not hear an appeal objecting to summary judgment when appellant failed to make the same objection to the motion for summary judgment in trial court); Munoz v. Gulf Oil Co., 693 S.W.2d 372, 373 (Tex. 1984) (per curiam) (concluding that statement of facts, not properly before the trial court that granted summary judgment, could not be considered on appeal).

[449] *Clear Creek Basin Auth.*, 589 S.W.2d at 676 (quoting Rule 166a(c)) (emphasis removed).

[450] TEX. R. CIV. P. 166a(f).

[451] *Id.* 166a(i).

A. Necessity for Response

Responding to a no-evidence summary judgment motion is virtually mandatory.[452] For a traditional motion for summary judgment, it is not absolutely necessary, in theory, to file a response to a motion for summary judgment filed by a party with the burden of proof.[453] Nonetheless, failing to file a response is not lying behind a log, but laying down your arms. Once the movant with the burden of proof has established the right to a summary judgment on the issues presented, the respondent's response should present to the trial court a genuine issue of material fact that would preclude summary judgment.[454] Failure to file a response does not authorize summary judgment by default.[455] As a matter of practice, however, the attorney who receives a motion for summary judgment filed against a client should always file a written response, even though technically no response to a traditional summary judgment motion may be necessary when the movant's summary judgment evidence is legally insufficient.[456]

If the movant's grounds are unclear or ambiguous, the respondent should specially except and assert that the grounds relied upon by the movant are unclear or ambiguous.[457]

The respondent must expressly present to the trial court any reasons for avoiding the movant's right to a summary judgment.[458] In the absence of a

[452] *Id.*

[453] *Id.* 166a(c).

[454] Abdel-Fattah v. PepsiCo, Inc., 948 S.W.2d 381, 383 (Tex. App.—Houston [14th Dist.] 1997, no writ); Wheeler v. Aldama-Luebbert, 707 S.W.2d 213, 215 (Tex. App.—Houston [1st Dist.] 1986, no writ) (concluding that the plaintiff must raise an issue of fact with regard to the elements negated in the defendant's motion for summary judgment).

[455] Cotton v. Ratholes, Inc., 699 S.W.2d 203, 205 (Tex. 1985) (per curiam) (explaining that *Clear Creek Basin* did not shift the burden of proof and, thus, the trial court cannot grant summary judgment by default); *see also* Hammond v. Katy Indep. Sch. Dist., 821 S.W.2d 174, 176–77 (Tex. App.—Houston [14th Dist.] 1991, no writ) (citing *Clear Creek* that the movant must establish entitlement to summary judgment on the merits and not on the respondent's failure to respond); Combs v. Fantastic Homes, Inc., 584 S.W.2d 340, 344 (Tex. Civ. App.—Dallas 1979) (refusing to allow a summary judgment for lack of a response when proof was insufficient), *writ ref'd n.r.e.*, 596 S.W.2d 502 (Tex. 1979) (per curiam).

[456] M.D. Anderson Hosp. & Tumor Inst. v. Willrich, 28 S.W.3d 22, 23 (Tex. 2000); Cove Invs., Inc. v. Manges, 602 S.W.2d 512, 514 (Tex. 1980) (noting that, technically, no response is required when the movant's proof is legally insufficient).

[457] McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 342–43 (Tex. 1993) (indicating that failure to specially except runs the risk of having the appellate court find another basis for summary judgment in the vague motion).

[458] *Id.* at 343.

response raising such reasons, these matters may not be raised for the first time on appeal.[459] This requirement applies even if the constitutionality of a statute is being challenged[460] and if there are defects in form.

B. Responding to a No-Evidence Summary Judgment Motion

A respondent must respond to a proper no-evidence summary judgment motion by producing summary judgment evidence raising a genuine issue of material fact.[461] The same principles apply in the summary judgment context to a directed verdict[462] or a "no-evidence" standard applied to a jury verdict.[463] Preexisting summary judgment law applies such that if the respondent's evidence provides a basis for conflicting inferences, a fact issue will arise.[464] Also, the presumption remains that evidence favorable to the respondent will be taken as true, every reasonable inference will be indulged in favor of the respondent, and any doubts will be resolved in the respondent's favor.[465]

The comment to Rule 166a(i) provides that "[t]o 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."[466] "To marshal one's evidence is to arrange *all of*

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[459]State Bd. of Ins. v. Westland Film Indus., 705 S.W.2d 695, 696 (Tex. 1986) (per curiam); *see also* Griggs v. Capitol Mach. Works, Inc., 701 S.W.2d 238, 238 (Tex. 1985) (per curiam) (stating that petitioner could not argue in court a point he did not first present to the trial court); State v. Lot 10, Pine Haven Estates, 900 S.W.2d 400, 401 (Tex. App.—Texarkana 1995, no writ); Castleberry v. Goolsby Bldg. Corp., 608 S.W.2d 763, 765 (Tex. Civ. App.—Corpus Christi 1980) (holding that respondent may not assert the existence of issues not presented by either party to the trial court), *aff'd*, 617 S.W.2d 665 (Tex. 1981).

[460]City of San Antonio v. Schautteet, 706 S.W.2d 103, 104 (Tex. 1986) (per curiam) (holding that the constitutionality of city ordinance not raised in trial court could not be considered on appeal).

[461]TEX. R. CIV. P. 166a(i).

[462]In federal court, a summary judgment has been termed a pretrial directed verdict. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251–52 (1986) (noting that the inquiry for both the summary judgment and directed verdict are the same); Duffy v. Leading Edge Prods., Inc., 44 F.3d 308, 312 (5th Cir. 1995) (stating that the evidence required to avoid summary judgment is the same to avoid a directed verdict).

[463]*See, e.g.*, Universal Servs. Co. v. Ung, 904 S.W.2d 638, 640–42 (Tex. 1995) (reversing a denial of a directed verdict on a "no-evidence" standard); *see* W. Wendell Hall, *Revisiting Standards of Review in Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1118–19 (1993) (stating that the standard of review depends upon a complaint preserved by a motion for new trial).

[464]Randall v. Dallas Power & Light Co., 752 S.W.2d 4, 5 (Tex. 1988) (per curiam).

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

[466]TEX. R. CIV. P. 166a cmt. 1997.

the evidence in the order that it will be presented at trial."[467] A party is not required to present or arrange all of its evidence in response to a summary judgment motion.[468] However, Rule 166a(i) explicitly provides that in response to a no-evidence summary judgment motion, the respondent must present some summary judgment evidence raising a genuine issue of material fact on the element attacked, or the motion must be granted.[469]

The respondent must come forward with evidence that would qualify as "summary judgment evidence," which is evidence that meets the technical requirements for summary judgment proof.[470] In state court, the respondent must provide deposition excerpts, affidavits, the opponent's answers to interrogatories and requests for admissions, stipulations, certified public records, authenticated documents, and or other evidence cases hold is proper summary judgment evidence to survive summary judgment.[471] Non-summary judgment evidence, such as unsworn witness statements, expert's reports or unauthenticated documents (except those produced by the opposing party), is not proper summary judgment evidence and cannot defeat a no-evidence summary judgment motion.[472] A respondent retains the right to non-suit even after a hearing on a no-evidence motion for summary judgment, so long as the trial court has not ruled.[473]

C. *Inadequate Responses*

Neither the trial court nor the appellate court has the duty to sift through the summary judgment record to see if there are other issues of law or fact that could have been raised by the respondent, but were not.[474] For example, a response that merely asserts that depositions on file and other exhibits "'effectively illustrate the presence of contested material fact[s]'"

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[467]*In re* Mohawk Rubber Co., 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, orig. proceeding) (citations omitted) (emphasis in original).

[468]*Mohawk*, 982 S.W.2d at 498.

[469]*Id.*

[470]TEX. R. CIV. P. 166a(i).

[471]Llopa, Inc. v. Nagel, 956 S.W.2d 82, 87 (Tex. App.—San Antonio 1997, writ denied).

[472]*Id.*

[473]Pace Concerts, Ltd. v. Resendez, No. 04-01-00265-CV, 2001 WL 54188, at *3 (Tex. App.—San Antonio Jan. 16, 2002, no pet).

[474]Walton v. City of Midland, 24 S.W.3d 853, 858 (Tex. App.—El Paso 2000, no pet.); Holmes v. Dallas Int'l Bank, 718 S.W.2d 59, 60 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); Wooldridge v. Groos Nat'l Bank, 603 S.W.2d 335, 344 (Tex. Civ. App.—Waco 1980, no writ).

will not preclude summary judgment.[475] Further, a motion for summary judgment is not defeated by the presence of an immaterial fact issue.[476] Generally, an amended answer by itself will not suffice as a response to a motion for summary judgment.[477]

Absent a written response to a motion for summary judgment, prior pleadings raising laches and the statute of limitations are insufficient to preserve those issues for appeal.[478]

VI. MOTIONS FOR REHEARING

Occasionally, a party in a summary judgment proceeding will file a motion for rehearing/new trial following the granting of a motion for summary judgment.[479] A motion for new trial is unnecessary to preserve complaints directed at the summary judgment because a motion for new trial is not a prerequisite for an appeal of a summary judgment proceeding.[480] However, a motion for new trial is necessary to preserve error concerning complaints lost due to physical absence from the summary judgment hearing.[481] Another reason to file a motion for new trial is to extend appellate timetables. Just as for an appeal from a jury trial, a motion for new trial following a grant of summary judgment extends appellate timetables.[482] While not technically a request for a new trial, safe practice is to title a motion for rehearing as a "Request for

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[475]I.P. Farms v. Exxon Pipeline Co., 646 S.W.2d 544, 545 (Tex. App.—Houston [1st Dist.] 1982, no writ) (quoting the defendant's response to the motion for summary judgment).

[476]Marshall v. Sackett, 907 S.W.2d 925, 936 (Tex. App.—Houston [1st Dist.] 1995, no writ); Austin v. Hale, 711 S.W.2d 64, 68 (Tex. App.—Waco 1986, no writ); Borg-Warner Acceptance Corp. v. C.I.T. Corp., 679 S.W.2d 140, 144 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

[477]Hitchcock v. Garvin, 738 S.W.2d 34, 36 (Tex. App.—Dallas 1987, no writ); Meineke Disc. Muffler Shops, Inc. v. Coldwell Banker Prop. Mgmt. Co., 635 S.W.2d 135, 137 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

[478]*See* Barnett v. Houston Natural Gas Co., 617 S.W.2d 305, 306 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.); Johnson v. Levy, 725 S.W.2d 473, 476–77 (Tex. App.—Houston [1st Dist.] 1987, no writ) (reversing summary judgment even though no response was filed by respondent because movant failed to make a proper showing that the findings of the bankruptcy court precluded disposition of later suit in state court).

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

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

[481]*Id.* at 262–63.

[482]*See* Padilla v. LaFrance, 907 S.W.2d 454, 458–59 (Tex. 1995).

Rehearing and Motion for New Trial" so that there is no issue concerning whether the pleading is sufficient to extend the timetables.

Most Texas courts of appeals hold that the *Craddock* rule concerning default judgments applies to summary judgment proceedings in so-called default summary judgments where the respondent fails to respond to the motion.[483] Under *Craddock*, the trial court abuses its discretion if it denies a motion for a new trial after a default judgment if the respondent establishes: (1) the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident;[484] (2) the motion for a new trial sets up a meritorious defense;[485] and (3) the motion is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.[486]

Additionally, in *Nickerson v. E.I.L. Instruments, Inc.*, the Houston First Court of Appeals held that the trial court's action in granting the respondent's motion for new trial, immediately reconsidering the motion for summary judgment, and again granting judgment, could not cure a defect in notice of the hearing.[487] Once the motion for new trial was granted, the respondent should have been given reasonable notice of the hearing.[488] The court decided that seven days notice of the hearing after granting a motion for new trial is reasonable notice.[489]

If a court denies a summary judgment motion, it has the authority to reconsider and grant a motion for summary judgment[490] or change or modify the original order.[491]

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[483]*See* Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 133 S.W.2d 124, 126 (Tex. 1939); Huffine v. Tomball Hosp. Auth., 979 S.W.2d 795, 798–99 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

[484]*Craddock*, 133 S.W.2d at 126.

[485]*Id.*

[486]*Id.*

[487]817 S.W.2d 834, 836 (Tex. App.—Houston [1st Dist.] 1991, no writ).

[488]*See id.*

[489]*Id.* (indicating that the court should give "at least seven days notice" of the summary judgment hearing).

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

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

VII. APPEALABILITY

By their nature, summary judgments are frequently appealed, and the courts are receptive to reversing them.[492] Generally an order granting a summary judgment is appealable; an order denying a summary judgment is not.[493] The denial of a no-evidence summary judgment under new section (i) "is no more reviewable by appeal or mandamus than" the denial of other motions for summary judgment.[494] Thus, the general rule is that they are not appealable.[495] An interlocutory appeal from a denial of a summary judgment (or other interlocutory order) may be taken if the trial court signs a written order for which: (1) the parties agree that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion, (2) an immediate appeal from the order may materially advance the ultimate termination of the litigation, and (3) the parties agree to the order.[496]

An appellate court can affirm a summary judgment if any of the theories advanced in it are meritorious.[497]

A. Exception: Both Parties File Motions For Summary Judgments

An exception to the rule that an order denying a summary judgment is not appealable arises when *both* parties file motions for summary judgment, and the court grants one of the motions and overrules the other.[498] When both parties file motions for summary judgment and one is granted and the other overruled, the appellate court may determine all

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[492]*See generally* 6 ELAINE GRAFTON CARLSON, TEXAS CIVIL PRACTICE § 28:1–:26 (1992) (reviewing the many summary judgment issues to appeal).

[493]*See id.* § 28:3; *see also* Novak v. Stevens, 596 S.W.2d 848, 849 (Tex. 1980) (explaining that the denial of a motion for summary judgment is not a final order and, thus, not appealable); Huffines v. Swor Sand & Gravel Co., 750 S.W.2d 38, 41 (Tex. App.—Fort Worth 1988, no writ). In addition to the exception that an order denying a summary judgment may be appealed when both parties file motions in which one is granted and one is denied, another exception is made for orders denying a motion for summary judgment based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon 1997 & Supp. 2002).

[494]TEX. R. CIV. P. 166a cmt. to 1997 change.

[495]Hines v. Comm'n for Lawyer Discipline, 28 S.W.3d 697, 700 (Tex. App.—Corpus Christi 2000, no pet.).

[496]TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(d) (Vernon Supp. 2002).

[497]Bright v. Dow Chem. Co., 1 S.W.3d 787, 789 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

[498]Tobin v. Garcia, 159 Tex 58, 316 S.W.2d 396, 400 (Tex. 1958) (overruling the previous rule of Rogers v. Royalty Pooling Co., 157 Tex. 304, 302 S.W.2d 938 (Tex. 1957)).

questions presented, including the propriety of the order overruling the losing party's motion.[499] "A party appealing the denial of a summary judgment[, however,] must properly preserve this issue on appeal" by raising the failure to grant the motion in the brief.[500] On appeal, the proper course is for the appellate court to render judgment on the motion that should have been granted.[501] However, before a court of appeals may reverse a summary judgment for the other party, "both parties must ordinarily have sought final . . . relief in their cross motions for summary judgment."[502]

In *Cincinnati Life Insurance Co. v. Cates*, the supreme court expanded the ability of the courts of appeals to consider denials of summary judgment motions.[503] In it, the court directed courts of appeals to consider all summary judgment grounds the trial court rules on, including those on which it denied the summary judgment,[504] and allowed the court of appeals to consider grounds which were urged and preserved for review but on which the court did not rule.[505]

B. Exception: Government Immunity; Media Defendants

The Texas Civil Practice and Remedies Code authorizes the appeal of an order denying a summary judgment in immunity cases. Section 51.014(5) provides:

> (a) A person may appeal from an interlocutory order of a district court, county court at law, or county court that . . . (5) denies a motion for summary judgment that is based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state.[506]

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[499]Bradley v. State, 990 S.W.2d 245, 247 (Tex. 1999); Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988) (per curiam).

[500]Buckner Glass & Mirror, Inc. v. T.A. Pritchard Co., 697 S.W.2d 712, 714 (Tex. App.—Corpus Christi 1985, no writ); *see also* Truck Ins. Exch. v. E.H. Martin, Inc., 876 S.W.2d 200, 203 (Tex. App.—Waco 1994, writ denied).

[501]Members Mut. Ins. Co. v. Hermann Hosp., 664 S.W.2d 325, 328 (Tex. 1984); *see also* Cadle Co. v. Butler, 951 S.W.2d 901, 905 (Tex. App.—Corpus Christi 1997, no writ).

[502]CU Lloyds of Tex. v. Feldman, 977 S.W.2d 568, 569 (Tex. 1998).

[503]927 S.W.2d 623, 625–26 (Tex. 1996).

[504]*Id.* at 626.

[505]*Id.* (finding that such review would be in the interest of judicial economy).

[506]TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon 1997 & Supp. 2002).

This section permits interlocutory appeals filed by individual governmental employees.[507] In such an interlocutory appeal, the appellate court will only consider those portions of the defendant's motion for summary judgment that relate to "'official or quasi-judicial'" immunity.[508] If a governmental entity contends only that it is not liable because of *sovereign* immunity, no appeal may be taken from the denial of a summary judgment.[509] The Texas Supreme Court does not have jurisdiction over interlocutory appeals from summary judgments denying government immunity unless there is a dissent in the court of appeals or there is conflict jurisdiction.[510]

The Texas Civil Practice and Remedies Code also allows an appeal from a denial of a summary judgment based on a claim against the media arising under the free speech or free press clauses of the United States or Texas Constitutions.[511] This rule does not confer jurisdiction on the appellate court to consider a libel plaintiff's cross point of error.[512]

C. Exception: Permissive Appeal

Under a new statute, if the parties agree, the appellate courts may accept jurisdiction over an interlocutory order.[513] This procedure may be especially useful in a summary judgment context when the parties seek resolution of a determinative issue in a case.[514] An application to appeal must be filed within 10 days of the signing of the partial summary judgment.[515]

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[507] *Id.*

[508] Aldridge v. De Los Santos, 878 S.W.2d 288, 294 (Tex. App.—Corpus Christi 1994, writ dism'd w.o.j.).

[509] *See* City of Houston v. Kilburn, 849 S.W.2d 810, 811–12 (Tex. 1993) (per curiam) (discussing interlocutory appeals from an order denying a motion for summary judgment based on the assertion of *qualified* immunity).

[510] Collins v. Ison-Newsome, No. 05-97-01760-CV, 1999 WL 33454389 (Tex. App.—Dallas Nov. 9, 1999), *pet. dism'd w.o.j.*, No. 00-0277, 2001 WL 1590340, at *2 (Tex. Dec. 13, 2001); Gonzalez v. Avalos, 907 S.W.2d 443, 444 (Tex. 1995) (per curiam) (referring to Texas Supreme Court jurisdiction statute, TEX. GOV'T CODE ANN. § 22.001 (Vernon 1988)).

[511] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6) (Vernon 1997 & Supp. 2002); *see also* Huckabee v. Time Warner Entm't Co., 19 S.W.3d 413, 419–20 (Tex. 2000); Rogers v. Cassidy, 946 S.W.2d 439, 443 (Tex. App.—Corpus Christi 1997, no writ).

[512] Evans v. Dolcefino, 986 S.W.2d 69, 75 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

[513] Tex. Civ. Prac. & Rem. Code § 51.014(d)–(f).

[514] *See generally* Harris & Liberato, *State Court Jurisdiction Expanded to Allow for Permissive Appeals*, 64 Tex. Bar. J. 31 (Jan. 2002).

[515] *See* Tex. Civ. Prac. & Rem. Code § 51.014(f).

D. Finality of Judgment

"[A]n appeal may be prosecuted only from a final judgment . . . ."[516] Generally, to be final, a judgment must dispose of all parties and issues in the case.[517] In *North East Independent School District v. Aldridge*, the Texas Supreme Court articulated the following presumption of finality rule:

> When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits . . . it will be presumed for appeal purposes that the Court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.[518]

The rule applicable to summary judgments is different. The presumption of finality rule, as discussed in *Aldridge*, does not apply to summary judgment cases.[519] A summary judgment that does not dispose of all parties and issues in the pending suit is interlocutory and is not appealable unless the trial court orders a severance of that phase of the case.[520] In the absence of an order of severance, a party against whom an interlocutory summary judgment has been rendered does not have a right of appeal until the partial judgment is merged into a final judgment, disposing of the whole case.[521]

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[516]De Los Santos v. Occidental Chem. Corp., 925 S.W.2d 62, 64 (Tex. App.—Corpus Christi), *rev'd on other grounds*, 933 S.W.2d 493 (Tex. 1996); Tingley v. N.W. Nat'l Ins. Co., 712 S.W.2d 649, 650 (Tex. App.—Austin 1986, no writ). *But see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon 1997 & Supp. 2002) (setting out six exceptions to the final judgment rule).

[517]Cherokee Water Co. v. Ross, 698 S.W.2d 363, 365 (Tex. 1985) (per curiam); N. E. Indep. Sch. Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966); *De Los Santos*, 925 S.W.2d at 64.

[518]*Aldridge*, 400 S.W.2d at 897–98.

[519]Houston Health Clubs, Inc. v. First Court of Appeals, 722 S.W.2d 692, 693 (Tex. 1986) (per curiam).

[520]*See* Wheeler v. Yettie Kersting Mem'l Hosp., 761 S.W.2d 785, 787 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (deciding the trial court should have entered only a partial summary judgment as defendant's motion covered only some of plaintiff's statutory claims). Texas Rule of Civil Procedure 41 provides that "[a]ny claim against a party may be severed and proceeded with separately." TEX. R. CIV. P. 41. "A claim may be properly severed if it is part of a controversy which involves more than one cause of action, and the trial judge is given broad discretion in the manner of severance . . . ." Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982).

[521]*See* Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 510 (Tex. 1995); Mafrige v. Ross, 866 S.W.2d 590, 591 (Tex. 1993).

In *Lehmann v. Har-Con Corp.*, the Texas Supreme Court recently modified the procedure for determining whether a judgment is final.[522] That procedure, which had caused a great deal of confusion, had been set out in *Mafrige v. Ross*.[523] Under *Mafrige*, the "Mother Hubbard" provision in a judgment order, stating "all relief not expressly granted herein is denied," was sufficient to make an otherwise partial summary judgment final and appealable.[524] If the judgment granted more relief than requested, it was reversed and remanded but not dismissed. Thus, if the summary judgment on claims raised in the motion was proper, the court of appeals was to have affirmed the judgment of the trial court in part and reversed in part because only a partial summary judgment should have been rendered. The court was then to have remanded the case to the trial court for further proceedings. This process caused considerable confusion and sometimes led to unjust results.

In *Lehmann*, the court overruled *Mafrige* to the extent it states that "Mother Hubbard" clauses indicate "that a judgment rendered without a conventional trial is final for purposes of appeal."[525] The court of appeals is to look to the record in the case to determine whether an order disposes of all pending claims and parties.[526] The court also suggested the following language in a judgment to clearly show the trial court's intention that the judgment be final and appealable. The language it suggested is: "This judgment finally disposes of all parties and all claims and is appealable."[527] The court also noted than an order "must be read in light of the importance of preserving a party's right to appeal."[528] It expressly provided that the appellate court could abate the appeal to permit clarification by the trial court if it is uncertain about the intent of the order.[529] This ruling is consistent with the court's philosophy that form should not be elevated over reaching the substance of the case.

In a recent case relying on *Lehmann*, the supreme court remanded a case in which a judgment had not disposed of a claim for attorney's fees,

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[522] *See generally* 39 S.W.3d 191 (Tex. 2001).

[523] 866 S.W.2d at 590–91.

[524] *See* 866 S.W.2d at 592.

[525] 39 S.W.3d at 203–04; *see also* Braeswood Harbor Partners v. Harris County Appraisal Dist., No. 01-00-01034-CV, 2002 WL 24430, at *1-*2 (Tex. App.—Houston [14th Dist.] Jan. 10, 2002, no pet.).

[526] *Id.* at 205–06.

[527] *Id.* at 206.

[528] *Id.*

[529] *Id.*

but had awarded costs.[530] The court held that the summary judgment was not final because a party could move for a partial summary judgment, and there is no presumption that a motion for summary judgment addresses all of movant's claims.[531] It also noted that the award of costs did not make a judgment final.[532]

A defendant (or plaintiff on an affirmative defense) is not entitled to summary judgment on the entire case unless the defendant files a summary judgment that challenges the evidentiary support for every theory of liability alleged.[533] Thus, "the motion for summary judgment . . . must be analyzed in light of the pleadings to ensure that the motion effectively defeats every cause of action raised in the petition."[534] To complain on appeal about failure of the motion for summary judgment to address all causes of action alleged, the respondent appellant should specifically assign that failure as error.[535]

Determining whether a summary judgment is final may especially be a problem with multi-party litigation.[536] A summary judgment granted for one defendant is final even though it does not specifically incorporate a previous partial summary judgment granted in favor of the only other defendant.[537] Upon nonsuit of any remaining claims, an interlocutory summary judgment order instantly becomes final and appealable.[538]

Additionally, failure to dispose of or sever a counterclaim results in an interlocutory or partial summary judgment, and, thus, an appeal from such judgment is not proper.[539] An order granting summary judgment for one claim, but not referring to issues presented in a counterclaim, is an

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[530]McNally v. Guevara, 52 S.W.3d 195, 196 (Tex. 2001).

[531] *Id.*

[532] *Id.*

[533]*See* Yancy v. City of Tyler, 836 S.W.2d 337, 341 (Tex. App.—Tyler 1992, writ denied).

[534]*Id.*

[535]Uribe v. Houston Gen. Ins. Co., 849 S.W.2d 447, 450 n.3 (Tex. App.—San Antonio 1993, no writ).

[536]*See, e.g.*, Schlipf v. Exxon Corp., 644 S.W.2d 453, 454–55 (Tex. 1982) (per curiam) (properly granting summary judgment in a suit involving multiple plaintiffs, defendants, and intervenors).

[537]Ramones v. Bratteng, 768 S.W.2d 343, 344 (Tex. App.—Houston [1st Dist.] 1989, writ denied); *see* Newco Drilling Co. v. Weyand, 960 S.W.2d 654, 656 (Tex. 1998).

[538]Merrill Lynch Relocation Mgmt., Inc. v. Powell, 824 S.W.2d 804, 806 (Tex. App.—Houston [14th Dist.] 1992, orig. proceeding).

[539]Tingley v. N.W. Nat'l Ins. Co., 712 S.W.2d 649, 650 (Tex. App.—Austin 1986, no writ) (per curiam).

interlocutory judgment.[540] By assuming jurisdiction over a summary judgment that fails to dispose of a counterclaim, the court of appeals commits fundamental error.[541] The supreme court will notice and correct such error even though neither party asserts it.[542] The filing of a cross action does not, in and of itself, preclude the trial court from granting a summary judgment in all or part of another party's case.[543] A severance would be appropriate in such an instance.[544]

While a severance frequently will be the appropriate method to convert an interlocutory summary judgment into a final appealable summary judgment, severance may not always be proper. For a severance to be proper, more than one cause of action must be involved in the controversy, the severed cause must be one that can be asserted independently, and the severed action must not be so interwoven with the remaining action that they involve identical issues or, in some circumstances, relate to the same subject matter.[545]

The supreme court has set out a specific test for finality in probate appeals:

> If there is an express statute, such as the one for the complete heirship judgment, declaring the phase of the probate proceedings to be final and appealable, that statute controls. Otherwise, if there is a proceeding of which the order in question may logically be considered a part, but one or more pleadings also part of that proceeding raise issues or parties not disposed of, then the probate order is interlocutory. For appellate purposes, it may be made final by a severance order, if it meets the severance criteria . . . . In setting this standard, we are mindful of our policy to

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[540]Chase Manhattan Bank, N.A. v. Lindsay, 787 S.W.2d 51, 53 (Tex. 1990) (orig. proceeding) (per curiam).

[541]N.Y. Underwriters Ins. Co. v. Sanchez, 799 S.W.2d 677, 679 (Tex. 1990) (per curiam).

[542]*Id.*

[543]C.S.R., Inc. v. Mobile Crane, Inc., 671 S.W.2d 638, 643 (Tex. App.—Corpus Christi 1984, no writ).

[544]*See id.* at 643–44 (explaining that the trial court's severance did not constitute an abuse of discretion). "A trial court has wide discretion in granting severances." Waite v. BancTexas-Houston, N.A., 792 S.W.2d 538, 542 (Tex. App.—Houston [1st Dist.] 1990, no writ) (citing TEX. R. CIV. P. 41).

[545]Nicor Exploration Co. v. Fla. Gas Transmission Co., 911 S.W.2d 479, 481–82 (Tex. App.—Corpus Christi 1995, writ denied); S.O.C. Homeowners Ass'n v. City of Sachse, 741 S.W.2d 542, 544 (Tex. App.—Dallas 1987, no writ); Weaver v. Jock, 717 S.W.2d 654, 662 (Tex. App.—Waco 1986, writ ref'd n.r.e.).

> avoid constructions that defeat bona fide attempts to appeal.[546]

E. Standard of Review

In an appeal from a trial on the merits, the standard of review and presumptions run in favor of the judgment.[547] In contrast, in an appeal from a summary judgment, the standard of review and presumptions run against the judgment.[548] The Texas Supreme Court's decision in *Gibbs v. General Motors Corp.* sets out the standard of appellate review for summary judgments (except for no-evidence motions for summary judgment).[549] In *Gibbs*, the supreme court stated:

> [T]he question on appeal, as well as in the trial court, is *not* whether the summary judgment proof *raises fact issues* with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary judgment proof *establishes as a matter of law that there is no genuine issue of fact* as to one or more of the essential elements of the plaintiff's cause of action.[550]

When reviewing a no-evidence summary judgment, the courts generally apply the same legal sufficiency standard applied in reviewing a directed verdict.[551]

The supreme court further set out the the rules to be followed by an appellate court in reviewing a summary judgment record in *Nixon v. Mr. Property Management Co.*[552] The court enumerated the rule as follows:

> 1. The movant for summary judgment has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law.

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[546]Crowson v. Wakeham, 897 S.W.2d 779, 783 (Tex. 1995).

[547]*See* Texas Dep't of Pub. Safety v. Martin, 882 S.W.2d 476, 482–83 (Tex. App.—Beaumont 1994, no writ).

[548]*See* Hall, *supra* note 463, at 1088–90 (1993) (evaluating the standard of review for summary judgment). An updated version of Hall's article has been published. *See* W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 417 (1998).

[549]450 S.W.2d 827, 828 (Tex. 1970).

[550]*Id.*; *see also* Phan Son Van v. Pena, 990 S.W.2d 751, 753 (Tex. 1999).

[551]Moore v. K Mart Corp., 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied); *see infra* Part IV.B. (No-evidence Summary Judgment).

[552]690 S.W.2d 546, 548–49 (Tex. 1985).

> 2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.
>
> 3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.[553]

For those occasions when a summary judgment denial is appealable, the standard of review is the same.[554] The appellate court will not consider evidence that favors the movant's position unless it is uncontroverted.[555]

The standard of review for whether there has been an adequate time for discovery is abuse of discretion.[556] Rulings concerning the admission or exclusion of summary judgment evidence are reviewed under an abuse of discretion standard.[557] Whether to grant sanctions is a matter of discretion.[558]

F. Appellate Record

The appellate court may consider only the evidence that is on file before the trial court at the time of the hearing or with permission of the court, is filed after the hearing but before judgment.[559] When the summary judgment record is incomplete, any omitted documents are presumed to support the trial court's judgment.[560] In *DeSantis v. Wackenhut Corp.*, the only proof offered by the movant was an affidavit that was not included in

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[553]*Id.* (citing Montgomery v. Kennedy, 669 S.W.2d 309, 310–11 (Tex. 1984) and Wilcox v. St. Mary's Univ., Inc., 531 S.W.2d 589, 592–93 (Tex. 1975)); *see also* Bergen, Johnson & Olson v. Verco Mfg. Co., 690 S.W.2d 115, 117 (Tex. App.—El Paso 1985, writ ref'd n.r.e.).

[554]Ervin v. James, 874 S.W.2d 713, 715 (Tex. App.—Houston [14th Dist.] 1994, writ denied).

[555]Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co., 391 S.W.2d 41, 47 (Tex. 1965); Corp. Leasing Int'l, Inc. v. Groves, 925 S.W.2d 734, 736 (Tex. App.—Fort Worth 1996, writ denied).

[556]Specialty Retailers, Inc. v. Fuqua, 29 S.W.3d 140, 145 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *see infra* Part II.C. (Time for Filing).

[557]Barraza v. Eureka Co., 25 S.W.3d 225, 228 (Tex. App.—El Paso 2000, pet. denied).

[558]Chapman v. Hootman, 999 S.W.2d 118, 124 (Tex. App.—Houston [14th Dist.] 1999, no pet.)

[559]TEX. R. CIV. P. 166a(c); Taylor v. Sunbelt Mgmt., Inc., 905 S.W.2d 743, 745 (Tex. App.—Houston [14th Dist.] 1995, no writ); Gandara v. Novasad, 752 S.W.2d 740, 743 (Tex. App.—Corpus Christi 1988, no writ) (citing TEX. R. CIV. P. 166a(c)).

[560]DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 689 (Tex. 1990); Tate v. E.I. Du Pont de Nemours & Co., 954 S.W.2d 872, 874 (Tex. App.—Houston [14th Dist.] 1997, no writ.).

the appellate record.[561] The court upheld the summary judgment for the movant because the burden was on the respondent challenging the summary judgment to bring forward the record from the summary judgment proceeding in order to prove harmful error.[562] In *DeBell v. Texas General Realty, Inc.*, it was clear that the trial court considered at least one deposition that was not brought forward on appeal.[563] The appellate court presumed that the missing deposition would have supported the summary judgment granted by the trial court.[564]

Occasionally, a trial judge will receive a request to file findings of fact and conclusions of law after the granting of a motion for summary judgment.[565] This request should be denied.[566] Because the judge has no factual disputes to resolve, findings of fact, conclusions of law, and statements of facts have no place in summary judgment matters.[567] A request for them will *not* extend the appellate timetable in a summary judgment case.[568]

G. Appellate Briefs

The appellee in a summary judgment case is in a very different posture on appeal than an appellee in a case that was tried on its merits. The appellate court reviews the evidence in a summary judgment case in a light

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[561] *DeSantis*, 793 S.W.2d at 689.

[562] *Id.*

[563] 609 S.W.2d 892, 893 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

[564] *Id.*; *see also* Ingram v. Fred Oakley Chrysler-Dodge, 663 S.W.2d 561, 561–62 (Tex. App.—El Paso 1983, no writ); Castillo v. Sears, Roebuck & Co., 663 S.W.2d 60, 63 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

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

[566] *Id.* at 204 (explaining that it is well-established that such a request is improper).

[567] IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp., 938 S.W.2d 440, 441 (Tex. 1997) (finding that "if summary judgment is proper, there are no facts to find, and the legal conclusions have already been stated in the motion and response"); Cotton v. Ratholes, Inc., 699 S.W.2d 203, 204 (Tex. 1985) (per curiam) (indicating that the trial court erroneously made findings of fact and that the appeals court correctly disregarded those findings); Starnes v. Holloway, 779 S.W.2d 86, 90 (Tex. App.—Dallas 1989, writ denied); Singleton v. LaCoure, 712 S.W.2d 757, 761 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

[568] *IKB Indus. (Nigeria) Ltd.*, 938 S.W.2d at 443; Linwood v. NCNB Tex., 885 S.W.2d 102, 103 (Tex. 1994) (per curiam). Texas appellate procedure provides that the usual 30 days for perfecting an appeal is extended to 90 days upon the filing of findings of fact and conclusions of law, if they are either required by the rules of civil procedure, or if not required, could properly be considered by the appellate court. TEX. R. APP. P. 26.1(a)(4).

most favorable to the respondent appellant.[569] Because the appellate court will be reviewing the summary judgment with all presumptions in favor of the appellant,[570] it is not enough to rest on the decision of the trial court. An appellee in a summary judgment appeal must thoroughly and carefully brief the case. The appellee should not simply refute the appellant's arguments, but should aggressively present to the appellate court the express reasons why the trial court was correct in granting summary judgment.[571]

The appellate rules allow an appellant the option of including points of error or questions presented.[572] For appellants choosing points of error, the supreme court has approved the following single, broad point of error on appeal: "'The trial court erred in granting the motion for summary judgment.'"[573] This wording will allow argument as to all the possible grounds upon which summary judgment should have been denied.[574] Nonetheless, the appellant must attack each basis on which the summary judgment could have been granted.[575]

Issues not expressly presented to the trial court may not be considered at the appellate level, either as grounds for reversal or as other grounds in

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

[570]*Id.*

[571]*See* Dubois v. Harris County, 866 S.W.2d 787, 790 (Tex. App.—Houston [14th Dist.] 1993, no writ).

[572]TEX. R. APP. P. 38.1(e).

[573]Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970) (indicating that this statement alone would be sufficient); *see also* Cassingham v. Lutheran Sunburst Health Serv., 748 S.W.2d 589, 590 (Tex. App.—San Antonio 1988, no writ) (approving general assignment of error by appellant to allow argument of all possible grounds). *But see* A.C. Collins Ford, Inc. v. Ford Motor Co., 807 S.W.2d 755, 760 (Tex. App.—El Paso 1990, writ denied) (criticizing *Malooly Bros.*). Other, more specific points may be used, but the judgment must be affirmed if there is another possible ground on which the judgment could have been entered. Dubow v. Dragon, 746 S.W.2d 857, 859 (Tex. App.—Dallas 1988, no writ).

[574]*Malooly Bros., Inc.*, 461 S.W.2d at 121. *But see* Rodriguez v. Morgan, 584 S.W.2d 558, 559 (Tex. Civ. App.—Austin 1979, writ ref'd n.r.e.) (citing *Malooly Bros., Inc.*, 461 S.W.2d at 121, and affirming the summary judgment because the appellant failed to assign error or brief the several grounds upon which the court granted summary judgment). Given this court's discussion of the lack of briefing on other grounds, this case appears to stand for the need to adequately brief each issue raised by the summary judgment, rather than the requirement of separate points of error. *See id.* at 559.

[575]Reese v. Beaumont Bank, N.A., 790 S.W.2d 801, 804 (Tex. App.—Beaumont 1990, no writ).

support of a summary judgment.[576] If the motion fails to address a claim, the movant is not entitled to summary judgment on that claim and judgment will be reversed and remanded to the trial court if it is based on that claim.[577] In *Combs v. Fantastic Homes, Inc.*, the court defined "issue" within the context of Rule 166a as follows:

> [A] summary judgment cannot be attacked on appeal on a question not presented to the trial court, either as a specific ground stated in the motion or as a fact issue presented by the opposing party in a written answer or other response. Accordingly, we hold that the opposing party, without filing an answer or other response, may raise for consideration on appeal the insufficiency of the summary-judgment proof to support the specific grounds stated in the motion, but that he may not, in the absence of such an answer or other response, raise any other "genuine issue of material fact" as a ground for reversal. In other words, the opposing party may challenge the grounds asserted by the movant, but he may not assert the existence of "issues" not presented to the trial court by either party.[578]

Cases disposed of by summary judgment often have voluminous transcripts.[579] The importance of meeting the briefing requirements, such

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[576]Bell v. Showa Denko K.K., 899 S.W.2d 749, 756 (Tex. App.—Amarillo 1995, writ denied); W.R. Grace Co. v. Scotch Corp., 753 S.W.2d 743, 748 (Tex. App.—Austin 1988, writ denied) (noting the raising of a new ground on appeal is prohibited); Dickey v. Jansen, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). Refer also to Part II.A *supra*.

[577]Sci. Spectrum, Inc. v. Martinez, 941 S.W.2d 910, 912 (Tex. 1997) (deciding that, because Science Spectrum addressed only one of the two causes of action brought by the plaintiff, it was not entitled to summary judgment on the unaddressed claim).

[578]584 S.W.2d 340, 343 (Tex. Civ. App.—Dallas 1979), *writ ref'd*, 596 S.W.2d 502 (Tex. 1979) (per curiam); *see also* Carlisle v. Phillip Morris, Inc., 805 S.W.2d 498, 518 (Tex. App.—Austin 1991, writ denied) (establishing that where a trial court enters a summary judgment order that does not specify the particular ground on which it is based, the appealing party must show that each independent argument alleged is insufficient to support the trial court's order); Dhillon v. Gen. Accident Ins. Co., 789 S.W.2d 293, 295 (Tex. App.—Houston [14th Dist.] 1990, no writ) (holding that the judgment of the trial court cannot be affirmed on any grounds not specifically presented in the motion for summary judgment).

[579]*See, e.g.*, Montgomery v. Kennedy, 669 S.W.2d 309, 310 (Tex. 1984); Martin v. Martin, 840 S.W.2d 586, 588 (Tex. App.—Tyler 1992, writ denied); A.C. Collins Ford, Inc. v. Ford Motor Co., 807 S.W.2d 755, 760 (Tex. App.—El Paso 1990, writ denied) (questioning the *Malooly* rule as the case presented 1700 pages of transcripts).

as referencing the page of the record where the matter complained of may be easily found, cannot be overemphasized.[580]

H. Judgment on Appeal

An appellate court should consider all summary judgment grounds the trial court rules upon and the movant preserves for appellate review that are necessary for final disposition of the appeal.[581] It now makes no difference whether or not the trial court specifies the reason in its order for granting the motion for summary judgment.[582] When properly preserved for appeal, the court of appeals should review the grounds upon which the trial court granted the summary judgment and those upon which it denied the summary judgment.[583] In other words, the court of appeals must consider all grounds on which the trial court rules and may consider grounds on which it does not rule "in the interest of judicial economy."[584] Under the rules of appellate procedure, which require each party challenging the judgment to file an independent notice of appeal, it may be necessary to file a separate notice of appeal to properly preserve this claim that the summary judgment could be sustained on a point overruled or not ruled upon by the trial court.[585]

If a summary judgment is reversed, the parties are not limited to the theories asserted in the original summary judgment at a later trial on the merits.[586] The court of appeals may affirm the liability part of the summary judgment and reverse the damages portion of the summary judgment.[587] After a party has moved unsuccessfully for summary judgment and later loses in a conventional trial on the merits, an interlocutory order overruling the summary judgment motion is not reviewable on appeal.[588] Penalties have been assessed for bringing an

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[580]*See generally* TEX. R. APP. P. 38.1 & 38.2 (outlining the requirements of the appellant's and appellee's briefs).

[581]Cincinnati Life Ins. Co. v. Cates, 927 S.W.2d 623, 626 (Tex. 1996).

[582]*Id.*

[583]*Id.*

[584]*Id.*

[585]TEX. R. APP. P. 25.1(c) (stating that the appeals court "may not grant a party who does not file a notice of appeal more favorable relief than did the trial court except for just cause").

[586]Hudson v. Wakefield, 711 S.W.2d 628, 631 (Tex. 1986).

[587]St. Paul Cos. v. Chevron U.S.A., Inc., 798 S.W.2d 4, 7 (Tex. App.—Houston [1st Dist.] 1990, writ dism'd by agr.).

[588]Pennington v. Gurkoff, 899 S.W.2d 767, 769 (Tex. App.—Fort Worth 1995, writ denied); Jones v. Hutchinson County, 615 S.W.2d 927, 930 (Tex. Civ. App.—Amarillo 1981, no writ).

appeal that the appellate court held to be taken for delay and without sufficient cause.[589]

I. Bills of Review

A bill of review is an equitable proceeding by a party to a former action who seeks to set aside a judgment that is no longer appealable or subject to a motion for new trial.[590] A petitioner must ordinarily plead and prove: (1) a meritorious claim or defense; (2) that he was unable to assert due to the fraud, accident, or wrongful act of his opponent; (3) unmixed with any fault or negligence of his own.[591] A summary judgment may be appropriate to challenge whether a party bringing a bill of review has adequately established these requirements.[592]

VIII. ATTORNEY'S FEES

The amount of an award of attorney's fees rests in the sound discretion of the trial court, and its judgment will not be reversed without showing that the court abused its discretion.[593] For a claim for attorney's fees under Chapter 38 of the Texas Civil Practice and Remedies Code, the court may take judicial notice of the customary and usual attorney's fees and the case file contents without further evidence being presented.[594]

An appeals court cannot set aside an award of attorney's fees merely because it would have allowed more or less than the trial court.[595]

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[589]*See, e.g.*, Triland Inv. Group v. Tiseo Paving Co., 748 S.W.2d 282, 285 (Tex. App.—Dallas 1988, no writ) (holding that the appellate court may award an amount, not to exceed 10% of the amount of damages awarded, to the prevailing appellee if an appeal is taken for delay).

[590]Transworld Fin. Servs. Corp. v. Briscoe, 722 S.W.2d 407, 407 (Tex. 1987).

[591]*Id.* at 407–08; Baker v. Goldsmith, 582 S.W.2d 404, 406–07 (Tex. 1979); *cf.* Peralta v. Heights Med. Ctr. Inc., 485 U.S. 80, 82 (1988) (stating the grounds a petitioner must show in federal court in order to have a judgment set aside through a bill of review).

[592]*See, e.g.*, Ortega v. First Republic Bank Fort Worth, N.A., 792 S.W.2d 452, 453 (Tex. 1990); *see also* Caldwell v. Barnes, 941 S.W.2d 182, 187 (Tex. App.—Corpus Christi 1996), *rev'd on other grounds*, 975 S.W.2d 535 (Tex.1998); Blum v. Mott, 664 S.W.2d 741, 744–45 (Tex. App.—Houston [1st Dist.] 1983, no writ).

[593]Reintsma v. Greater Austin Apartment Maint., 549 S.W.2d 434, 437 (Tex. Civ. App.—Austin 1977, writ dism'd).

[594]TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1997); *see also* Flint & Assocs. v. Intercontinental Pipe & Steel, Inc., 739 S.W.2d 622, 626 (Tex. App.—Dallas 1987, writ denied) (taking judicial notice of case file contents).

[595]Crouch v. Tenneco, Inc., 853 S.W.2d 643, 646 (Tex. App.—Waco 1993, writ denied); City of Houston v. Blackbird, 658 S.W.2d 269, 274 (Tex. App.—Houston [1st Dist.] 1983, writ

However, it does have authority, by examining the entire record, to determine whether a particular award is excessive.[596] Appellate court justices may draw upon their knowledge as judges and lawyers and determine the matter in light of the testimony, the record, and the amount in controversy.[597]

Attorney's fees must be specifically pleaded to be recovered. Failure to specifically request attorney's fees in the appellate court would not prevent the court from authorizing such an award.[598] When a movant includes attorney's fees in a summary judgment motion, in effect, the movant has added another cause of action. Unless the court has taken judicial notice under section 38.004 of the Civil Practice and Remedies Code, this cause of action in a summary judgment case is measured by the same standard used for summary judgment proof.[599] If attorney's fees are recoverable under section 38.001 of the Civil Practice and Remedies Code,[600] in addition to the other summary judgment requirements, the time and notice requirements of section 38.002 must be met in order to support an award of attorney's fees.[601]

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dism'd); Espinoza v. Victoria Bank & Trust Co., 572 S.W.2d 816, 828 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

[596]Giles v. Cardenas, 697 S.W.2d 422, 429 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

[597]*Id.*; Republic Nat'l Life Ins. Co. v. Heyward, 568 S.W.2d 879, 887 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.) (quoting Southland Life Ins. Co. v. Norton, 5 S.W.2d 767, 766–69 (Tex. Comm'n App. 1928, holding approved)).

[598]Superior Ironworks, Inc. v. Roll Form Prods., Inc., 789 S.W.2d 430, 431 (Tex. App.—Houston [1st Dist.] 1990, no writ).

[599]Bakery Equip. & Serv. Co. v. Aztec Equip. Co., 582 S.W.2d 870, 873 (Tex. Civ. App.—San Antonio 1979, no writ); Lindley v. Smith, 524 S.W.2d 520, 524 (Tex. Civ. App.—Corpus Christi 1975, no writ) (pointing out that the pleadings would not be proof as in a summary judgment case).

[600]Section 38.001 provides:

> A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:
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> (1) rendered services;
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> (2) performed labor;
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> (3) furnished material;
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> (4) freight or express overcharges;
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> (5) lost or damaged freight or express;
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> (6) killed or injured stock;
>
> (7) a sworn account; or
>
> (8) an oral or written contract.

TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997).

[601]Section 38.002 provides:

An affidavit by the movant's attorney should be added to the motion for summary judgment.[602] Such an affidavit is "expert opinion testimony" that may be considered regarding reasonable attorney's fees.[603] Additionally, the attorney for the respondent may file an affidavit contesting the reasonableness of the movant's attorney's affidavit in support of attorney's fees, thus creating a fact issue.[604]

A. Fixed Percentage Fees

Promissory notes frequently provide for attorney's fees in a fixed percentage clause that requires the payment of a stipulated percentage of the unpaid balance upon default.[605] In a summary judgment hearing, when the note includes a stipulated percentage of the unpaid balance as attorney's fees, proof concerning the reasonableness of the fixed percentage fee is not required unless the pleadings and proof challenge the reasonableness of that amount.[606] Thus, where a respondent offers no

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> To recover attorney's fees under this chapter:
> (1) the claimant must be represented by an attorney;
> (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
> (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.

TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (Vernon 1997).

[602]Grimes v. Corpus Christi Transmission Co., 829 S.W.2d 335, 340 (Tex. App.—Corpus Christi 1992, writ denied); Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A., 666 S.W.2d 549, 554 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd).

[603]Giao v. Smith & Lamm, P.C., 714 S.W.2d 144, 148 (Tex. App.—Houston [1st Dist.] 1986, no writ); *see also Gensco*, 666 S.W.2d at 554 (stating that the affidavit of an attorney is sufficient to show the reasonableness of fees); Sunbelt Constr. Corp. v. S & D Mech. Contractors, Inc., 668 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.) (noting an attorney's affidavit as to reasonable fees is sufficient). *See infra* Part X.C.3.e. (regarding expert witness testimony).

[604]Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc., 754 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1988, writ denied); *Giao*, 714 S.W.2d at 148; Gen. Specialties, Inc. v. Charter Nat'l Bank-Houston, 687 S.W.2d 772, 774 (Tex. App.—Houston [14th Dist.] 1985, no writ).

[605]*See* Kuper v. Schmidt, 161 Tex. 189, 338 S.W.2d 948, 950–51 (1960) (discussing the collection of attorney's fees upon default).

[606]Highlands Cable Television, Inc. v. Wong, 547 S.W.2d 324, 327 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.); *see also Kuper*, 338 S.W.2d at 950–51.

summary judgment evidence to indicate that the stipulated amount was unreasonable, the trial court's award of attorney's fees is proper.[607]

B. Reasonable Percentage Fees

Promissory notes may provide for attorney's fees in a *reasonable* percentage clause that requires the maker to pay a reasonable fee upon default.[608] Although this type of clause requires opinion evidence, an attorney's affidavit is admissible.[609] Thus, a summary judgment based upon the affidavit testimony of the movant's attorney can be an appropriate vehicle for recovery of such attorney's fees.[610] Whenever the word "reasonable" appears in connection with the recovery of or entitlement to attorney's fees, an affidavit in support of such fees should be included in the motion for summary judgment.[611]

IX. TYPES OF CASES AMENABLE TO SUMMARY JUDGMENT

Some types of cases particularly lend themselves to summary judgment disposition; other categories of cases are not appropriate for summary judgment disposition.[612]

A. Sworn Accounts

Motions for summary judgment often are used in suits on sworn accounts.[613] Texas Rule of Civil Procedure 185 provides that a suit on a sworn account may be proper in the following instances:

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[607]Houston Furniture Distribs., Inc. v. Bank of Woodlake, N.A., 562 S.W.2d 880, 884 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

[608]*See, e.g.*, Woods Exploration & Producing Co. v. Arkla Equip. Co., 528 S.W.2d 568, 570 (Tex. 1975) (regarding two notes which provided for reasonable attorney's fees (not to exceed ten percent)).

[609]Refer to Part III.F.4. *supra*.

[610]Cap Rock Elec. Coop., Inc. v. Tex. Utils. Elec. Co., 874 S.W.2d 92, 101 (Tex. App.—El Paso 1994, no writ).

[611]Corp. Funding, Inc. v. City of Houston, 686 S.W.2d 630, 631 (Tex. App.—Texarkana 1984, writ ref'd n.r.e.) (reversing an award of attorney's fees because no proof was offered that the awarded fee was reasonable).

[612]Juvenile matters usually are not a proper subject for summary judgment. *See* State v. L_ J_ B_, 561 S.W.2d 547, 549 (Tex. Civ. App.—Dallas 1977), *rev'd on other grounds*, 567 S.W.2d 795 (Tex. 1978). Refer to Parts IX.E & IX.F *infra*.

[613]*See, e.g.*, Wright v. Christian & Smith, 950 S.W.2d 411, 412 (Tex. App.—Houston [1st Dist.] 1997, no writ); Jeff Robinson Bldg. Co. v. Scott Floors, Inc., 630 S.W.2d 779, 779 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.).

> When any action or defense is founded upon an open account or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept . . . .[614]

An action brought under Rule 185 is one of procedure, not of substantive law, with regard to the evidence necessary to establish a prima facie case of the right to recover.[615] In a suit on a sworn account, a litigant whose opponent has not filed a proper answer under Rule 185 and Texas Rule of Civil Procedure 93(10)[616] may secure what is essentially a summary judgment on the pleadings. In effect, noncompliance with these rules concedes that there is no defense.[617]

If the defendant in a suit on a sworn account fails to file a written denial under oath, that party will not be permitted at trial to dispute the receipt of the items or services or the correctness of the stated charges.[618] As a general rule, a sworn account is prima facie evidence of a debt, and the account need not be formally introduced into evidence unless the account's existence or correctness has been denied in writing under oath.[619]

1. Requirements for Petition

A sworn account petition should be supported by an affidavit that the claim is, "within the knowledge of affiant, just and true . . . ."[620] No

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[614]TEX. R. CIV. P. 185.

[615]Rizk v. Fin. Guardian Ins. Agency, Inc., 584 S.W.2d 860, 862 (Tex. 1979); Meaders v. Biskamp, 159 Tex. 79, 316 S.W.2d 75, 78 (1958); Hou-Tex Printers, Inc. v. Marbach, 862 S.W.2d 188, 190 (Tex. App.—Houston [14th Dist.] 1993, no writ); Achimon v. J.I. Case Credit Corp., 715 S.W.2d 73, 76 (Tex. App.—Dallas 1986, writ ref'd n.r.e.) (holding assignee of retail installment contact failed to state a sworn account).

[616]TEX. R. CIV. P. 93(10) (requiring a denial of an account be verified by affidavit).

[617]Enernational Corp. v. Exploitation Eng'rs, Inc., 705 S.W.2d 749, 750 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); *see* Hidalgo v. Sur. Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1971); Waggoners' Home Lumber Co. v. Bendix Forest Prods. Corp., 639 S.W.2d 327, 328 (Tex. App.—Texarkana 1982, no writ). Refer also to Part III.B *supra*.

[618]Vance v. Holloway, 689 S.W.2d 403, 404 (Tex. 1985) (per curiam) (quoting Rule 185); Airborne Freight Corp. v. CRB Mktg., Inc., 566 S.W.2d 573, 574 (Tex. 1978) (per curiam) (calling the rule well settled); Murphy v. Cintas Corp., 923 S.W.2d 663, 665 (Tex. App.—Tyler 1996, writ denied).

[619]*See Airborne Freight Corp.*, 566 S.W.2d at 575.

[620]TEX. R. CIV. P. 185.

particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings.[621] If special exceptions are filed and sustained, the account (invoice or statement account) should show the nature of the item sold, the date, and the charge.[622] If challenged by special exceptions, then technical and unexplained abbreviations, code numbers, and the like are insufficient to identify items and terms and must be explained.[623] Also, if special exceptions are sustained, the language used in the account must have a common meaning and must not be of the sort understood only in the industry in which it is used.[624] If invoicing and billing is done with only computer numbers or abbreviations, a key to this "business shorthand" should be attached to the pleadings or be readily available if repleading is necessary.[625]

2. Answer/Denial

The answer must consist of a written denial supported by an affidavit denying the account.[626] When a party suing on a sworn account files a motion for summary judgment on the *sole* ground that the respondent's pleading is insufficient under Rule 93(10) because no proper sworn denial is filed, the respondent may still amend and file a proper sworn denial.[627] The respondent is not precluded from amending and filing a proper sworn denial *to the suit itself* at any time allowed under Texas Rule of Civil Procedure 63.[628]

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[621] *Id.*; *Enernational Corp.*, 705 S.W.2d at 750 (quoting TEX. R CIV. P. 185).

[622] *See* Hassler v. Tex. Gypsum Co., 525 S.W.2d 53, 55 (Tex. Civ. App.—Dallas 1975, no writ).

[623] *See id.*

[624] *See id.*

[625] *See* Price v. Pratt, 647 S.W.2d 756,757 (Tex. App.—Corpus Christi 1983, no writ).

[626] *See* TEX. R. CIV. P. 185; *see also* Huddleston v. Case Power & Equip., Co., 748 S.W.2d 102, 103 (Tex. App.—Dallas 1988, no writ). In *Huddleston*, the court held that a sworn general denial is insufficient to rebut the evidentiary effect of an appropriate affidavit in support of a suit on a sworn affidavit. *Id.* at 103–04. Further, the court held that the "written denial, under oath" mandated under Rule 185 must conform to Rule 93(10), which requires the plaintiff's claim to be put at issue through a special verified denial of the account. *Id.* at 103.

[627] Requipco, Inc. v. Am-Tex Tank & Equip., Inc., 738 S.W.2d 299, 303 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); Magnolia Fruit & Produce, Inc. v. Unicopy Corp. of Tex., 649 S.W.2d 794, 797 (Tex. App.—Tyler 1983, writ dism'd). *But see* Bruce v. McAdoo, 531 S.W.2d 354, 356 (Tex. Civ. App.—El Paso 1975, no writ) (holding an "amended answer . . . presented more than four years after the original answer and more than a year after the first amended answer" was not timely, and, therefore, not proper).

[628] *See Magnolia Fruit & Produce Inc.*, 649 S.W.2d at 797.

In *Brightwell v. Barlow, Gardner, Tucker & Garsek*, the court considered whether it was proper for the verified denial to appear only in the affidavit in response to the motion for summary judgment, but not in the defendant's answer.[629] The court stated that Rules 185 and 93 (now Rule 93(10)), when read together and applied to suits on sworn accounts, mandate that the language needed to effectively deny the plaintiff's sworn account *must appear in a pleading of equal dignity* with the plaintiff's petition, and thus must appear in the defendant's answer.[630]

The filing of a proper, verified denial overcomes the evidentiary effect of a sworn account and forces the plaintiff to offer proof of the claim.[631] This principle applies to a later summary judgment motion.[632] If a verified denial is filed, the plaintiff must submit common-law proof of the case.[633] The necessary common-law elements of an action on account are: (1) that there was a sale and delivery of merchandise; (2) that the amount of the account is just, that is, that the prices are charged in accordance with an agreement, and that they are the usual, customary and reasonable prices for that merchandise; and (3) that the amount is unpaid.[634]

3. Summary Judgment

Rule 185 also provides that a systematic record, properly verified, "shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath."[635] Thus, if the affidavit supporting the sworn account petition tracks the language of Rule 185 and meets the personal knowledge requirement of Rule 166a(f), it generally has been considered proper summary judgment proof in the absence of a sufficient answer to the original petition.[636]

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[629]619 S.W.2d 249, 251 (Tex. Civ. App.—Fort Worth 1981, no writ).

[630]*Id.* at 253 (quoting Zemaco, Inc. v. Navarro, 580 S.W.2d 616, 620 (Tex. Civ. App.—Tyler 1979, writ dism'd); Notgrass v. Equilease Corp., 666 S.W.2d 635, 639 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

[631]Rizk v. Fin. Guardian Ins. Agency, Inc., 584 S.W.2d 860, 862 (Tex. 1979); Norcross v. Conoco, Inc., 720 S.W.2d 627, 629 (Tex. App.—San Antonio 1986, no writ).

[632]*Norcross*, 720 S.W.2d at 629.

[633]Pat Womack, Inc. v. Weslaco Aviation, Inc., 688 S.W.2d 639, 641 (Tex. App.—Corpus Christi 1985, no writ).

[634]*Id.*; *see also* Worley v. Butler, 809 S.W.2d 242, 245 (Tex. App.—Corpus Christi 1990, no writ) (applying these elements in a suit for attorney's fees).

[635]TEX. R. CIV. P. 185.

[636]TEX. R. CIV. P. 166a(f) (requiring affidavits to be made on personal knowledge). Although specifically authorized to make an affidavit under Rule 185, attorneys should do so only if they possess personal knowledge of the facts set forth in the affidavit. TEX. R. CIV. P.

A second affidavit in addition to that attached to the plaintiff's petition may be advisable to support a motion for summary judgment on a sworn account. This second affidavit should set forth, once again, the allegations of the sworn account petition. Strictly speaking, this additional affidavit is unnecessary if the answer on file is insufficient under Rules 185 and 93(10).[637] If the answer is sufficient under these rules, summary judgment is not precluded, but a second affidavit must be filed substantiating the account as a business record under Texas Rule of Evidence 803(6).[638]

The attorney opposing a summary judgment in a suit based on a sworn account should immediately determine if a sworn denial in accordance with Rules 93(10) and 185 is already on file. If not, he or she should file one. It is sufficient to file a sworn answer denying the account that is the "foundation of the plaintiff's action."[639] The filing of an answer in strict compliance with Rules 93(10) and 185 does not, however, preclude the need to also file a written response to a motion for summary judgment.[640] As a matter of practice, attorneys should *always* file a written response to all motions for summary judgment.[641]

B. Written Instruments

Suits on written instruments such as contracts, promissory notes, and leases are commonly the subject of motions for summary judgment. Traditional summary judgments are the vehicle to bring a summary judgment before the court. No-evidence motions for summary judgments do not apply to these types of cases where the interpretation of the document is at issue and the matter would not be determined based on a fact issue. A summary judgment is proper in cases involving the interpretation of a writing when the writing is determined to be

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185; *e.g.*, Livingston Ford Mercury, Inc. v. Haley, 997 S.W.2d 425, 429–30 (Tex. App.—Beaumont 1999, no pet.).

[637]Special Marine Prods., Inc. v. Weeks Welding & Constr., Inc., 625 S.W.2d 822, 827 (Tex. App.—Houston [14th Dist.] 1981, no writ) (stating that it is the state of the pleadings and the defendant's failure to file a sufficient sworn denial under Rule 185 and not the plaintiff's additional sworn affidavit under Rule 166-A that provides the basis for summary judgment); TEX. R. CIV. P. 93(10).

[638]TEX. R. EVID. 803(6).

[639]TEX. R. CIV. P. 93(10); *see also* TEX. R. CIV. P. 185 (allowing the filing of a written denial that states each and every item that constitutes the foundation of any action or defense as either just and true or unjust and untrue).

[640]Refer to Part V. *supra*.

[641]Refer to Part V. *supra*.

unambiguous.[642] Whether a contract is ambiguous is a question of law for the court to decide.[643] If a contract is worded in such a manner that it can be given a definite or certain legal meaning, then it is not ambiguous.[644] An ambiguity in a contract may be either patent or latent.[645] When the writing contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue.[646]

In a suit on a guaranty instrument, a court may grant a summary judgment only if the right to it is established in the record as a matter of law.[647] If the guaranty instrument is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous, and the court will construe the contract as a matter of law.[648]

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[642]Hofland v. Fireman's Fund Ins. Co., 907 S.W.2d 597, 599 (Tex. App.—Corpus Christi 1995, no writ); RGS, Cardox Recovery, Inc. v. Dorchester Enhanced Recovery Co., 700 S.W.2d 635, 638 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). "If the written instrument is so worded that it can be given a certain or definite legal meaning or interpretation, then it is not ambiguous and the court will construe the contract as a matter of law." Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983); *see also* Mem'l Med. Ctr. of East Tex. v. Keszler, 943 S.W.2d 433, 434 (Tex. 1997) (concluding that the interpretation of a release's validity or ambiguity is decided by the court as a question of law); R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc., 596 S.W.2d 517, 518 (Tex. 1980) (stating that the question of whether a contract is ambiguous is one of law for the court); Hancock v. Krause, 757 S.W.2d 117, 119 (Tex. App.—Houston [1st Dist.] 1988, no writ) (stating that where there is no ambiguity in a testamentary instrument and extrinsic evidence of circumstances existing at the time the will was written, construction of the testamentary instrument is a question of law for the court); Universal Sav. Ass'n v. Killeen Sav. & Loan Ass'n, 757 S.W.2d 72, 75–76 (Tex. App.—Houston [1st Dist.] 1988, no writ) (relating that the construction of letters of credit is a question of law for the court).

[643]Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857, 861 (Tex. 2000).

[644]Nat'l Union Fire Ins. Co. v. CBI Indus., Inc., 907 S.W.2d 517, 520 (Tex. 1995); *Coker*, 650 S.W.2d at 393.

[645]Friendswood Dev. Co. v. McDade & Co., 926 S.W.2d 280, 282–83 (Tex. 1996) (per curiam) (distinguishing a patent ambiguity as one that is evident on the face of the contract and a latent ambiguity as one that exists not on the face of the contract but in the contract's failure by reason of some collateral matter when applied to the subject matter with which it deals).

[646]Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1979); Donahue v. Bowles, Troy, Donahue, Johnson, Inc., 949 S.W.2d 746, 753 (Tex. App.—Dallas 1997, writ denied); Thompson v. Hambrick, 508 S.W.2d 949, 952 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (explaining that where there is ambiguity in an agreement, summary judgment is improper).

[647]W. Bank-Downtown v. Carline, 757 S.W.2d 111, 114 (Tex. App.—Houston [1st Dist.] 1988, writ denied); Baldwin v. Sec. Bank & Trust, 541 S.W.2d 908, 910 (Tex. Civ. App.—Waco 1976, no writ).

[648]*Coker*, 650 S.W.2d at 393; *Carline*, 757 S.W.2d at 114.

In promissory note cases, the supporting affidavits generally are provided by the owner and holder of the note, such as a corporate or bank officer. An example of such a case is *Batis v. Taylor Made Fats, Inc.*[649] In *Batis*, the court found plaintiff's summary judgment proof, which consisted of an affidavit by the business records custodian, sufficient to uphold a summary judgment.[650] Failure to attach a copy of the promissory note in a summary judgment motion in a suit on a note is fatal to the summary judgment.[651]

1. Application of the Parol Evidence Rule

In cases based on written instruments, a common defense both at trial and on motions for summary judgment is an allegation of contemporaneous representations (parol evidence) that would entitle the defendant to modify the written terms of the note or contract.[652] The parol evidence rule generally intends to keep out extrinsic evidence of oral statements or representations relative to the making of a contractual agreement when that agreement is valid and complete on its face.[653] In general, a written instrument that is clear and express in its terms cannot be varied by parol evidence.[654]

2. Exception to the Parol Evidence Rule

An important exception to the Parol Evidence Rule permits extrinsic evidence to show fraud in the inducement of a written contract.[655] The

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[649]626 S.W.2d 605, 607 (Tex. App.—Fort Worth 1981, writ ref'd n.r.e.); *see also* Jackson T. Fulgham Co. v. Stewart Title Guar. Co., 649 S.W.2d 128, 130 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (referring to an affidavit of the vice-president of a title company that stated the company was the holder of the note).

[650]*Batis*, 626 S.W.2d at 607.

[651]Sorrells v. Giberson, 780 S.W.2d 936, 937 (Tex. App.—Austin 1989, writ denied) (holding that the note cannot serve as a basis for summary judgment because the appellee failed to attach a copy of it to the affidavit filed in support of the motion for summary judgment).

[652]TEX. BUS. & COM. CODE ANN. § 2.202 (Vernon 1994); *e.g.*, Carter v. Allstate Ins. Co., 962 S.W.2d 268, 270 (Tex. App.—Houston [1st Dist.] 1998, pet. denied); Hallmark v. Port/Cooper-T. Smith Stevedoring Co., 907 S.W.2d 586, 590 (Tex. App.—Corpus Christi 1995, no writ) (stating that the parol evidence rule does not preclude enforcement of prior contemporaneous agreements which are collateral to, not inconsistent with, and do not vary or contradict express or implied terms or obligations thereof).

[653]TEX. BUS. & COM. CODE ANN. § 2.202 (Vernon 1994).

[654]*Id.*; *see also* Pan Am. Bank of Brownsville v. Nowland, 650 S.W.2d 879, 884 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

[655]Town N. Nat'l Bank v. Broaddus, 569 S.W.2d 489, 491 (Tex. 1978) (holding parol evidence was admissible to show that the maker of a note was induced by fraud); Friday v. Grant

supreme court addressed this problem in *Town North National Bank v. Broaddus*.[656] In that case, three parties signed a note as obligors.[657] After default, the bank brought suit against the obligors.[658] The bank then moved for summary judgment against two of the co-obligors; the other party had filed for bankruptcy and was dismissed.[659] Defendants alleged that a bank officer told them that they would not be held liable on the note.[660] This misrepresentation, they argued, created fraud in the inducement.[661] The defendants argued that this alleged fraud raised a question of fact precluding a grant of summary judgment.[662] The court held that extrinsic evidence is admissible to show fraud in the inducement of a note only if, in addition to the showing that the payee represented to the maker he would not be liable on such note, there is a showing of some type of trickery, artifice, or device employed by the payee.[663] In upholding the summary judgment for the bank, the supreme court stated, "a negotiable instrument which is clear and express in its terms cannot be varied by parol agreements or representations of a payee that a maker or surety will not be liable thereon."[664]

C. *Statute of Limitations*

Summary judgment may be proper in cases where the statute of limitations is pleaded as a bar to recovery.[665] The movant for a summary judgment on the basis of the running of the statute of limitations assumes

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Plaza Huntsville Assocs., 713 S.W.2d 755, 756 (Tex. App.—Houston [1st Dist.] 1986, no writ) (stating that a successful prima facie showing of fraud in the inducement is an exception to the parol evidence rule); Albritton Dev. Co. v. Glendon Invs., Inc., 700 S.W.2d 244, 246 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) (stating that the terms of a negotiable instrument cannot be varied by parol evidence without a showing of a fraudulent scheme or trickery).

[656]569 S.W.2d 489, 490–94 (Tex. 1978).

[657]*Id.* at 490.

[658]*Id.*

[659]*Id.*

[660]*See id.* at 490–91 (illustrating how the bank officer indicated that the dismissed third party would be responsible for the note).

[661]*Id.* at 491.

[662]*Id.* at 490.

[663]*Id.* at 494.

[664]*Id.* at 491.

[665]*See, e.g.*, Hall v. Stephenson, 919 S.W.2d 454, 464–65 (Tex. App.—Fort Worth 1996, writ denied); Salazar v. Amigos Del Valle, Inc., 754 S.W.2d 410, 412 (Tex. App.—Corpus Christi 1988, no writ) (stating that the party moving for summary judgment on the basis of the running of limitations assumed the burden of showing as a matter of law that limitations barred the suit).

the burden of showing as a matter of law that the suit is barred by limitations.[666] Thus, the defendant must (1) conclusively prove when the cause of action accrued; and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury.[667] The discovery rule must be negated by the defendant movant only if it is raised.[668] In a legal malpractice case, the burden to establish the accrual date is on the defendant attorney who seeks a summary judgment.[669] Any of the plaintiff's claims or defenses pled in response to the defendant's affirmative defense on which the plaintiff would have the burden of proof at trial, including the discovery rule, fraudulent concealment or tolling suspension provision may be properly challenged by a no-evidence summary judgment motion.

If the movant establishes that the statute of limitations bars the action, the respondent must then adduce summary judgment proof raising a fact issue to avoid the statute of limitations.[670] The doctrine of relation back prevents a successful statute of limitations claim if the amended petitions relate back to a timely filed claim that does not arise from a wholly different transaction.[671] Defective pleadings that are not excepted to may satisfy the statute of limitations.[672] To obtain summary judgment on the grounds that an action was not served within the applicable limitations period, the movant must show that, as a matter of law, diligence was not

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[666]Velsicol Chem. Corp. v. Winograd, 956 S.W.2d 529, 530 (Tex. 1997) (per curiam); Delgado v. Burns, 656 S.W.2d 428, 429 (Tex. 1983) (per curiam).

[667]Jennings v. Burgess, 917 S.W.2d 790, 793 (Tex. 1996); Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990); Woods v. William M. Mercer, Inc., 769 S.W.2d 515, 518 n.2 (Tex. 1988).

[668]*In re* Estate of Matejek, 960 S.W.2d 650, 651 (Tex. 1997) (per curiam).

[669]Estate of Arlitt v. Paterson, 995 S.W.2d 713, 719 (Tex. App.—San Antonio 1999, pet. denied).

[670]KPMG Peat Marwick v. Harrison County Hous. Fin. Corp., 988 S.W.2d 746, 748 (Tex. 1999).

[671]Long v. State Farm Fire & Cas. Co., 828 S.W.2d 125, 127–28 (Tex. App.—Houston [1st Dist.] 1992, writ denied) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.068 (Vernon 1997)).

[672]Sullivan v. Hoover, 782 S.W.2d 305, 306–07 (Tex. App.—San Antonio 1989, no writ) (stating that a petition advising the defendant of the nature of the cause of action against him is all that is needed to arrest the statute of limitations).

used to effectuate service.[673] Existence of due diligence in effecting service is usually a fact issue.[674]

D. Res Judicata, Collateral Estoppel, Statutes of Repose

Summary judgment is also proper in a case barred by res judicata.[675] A partial summary judgment may be proper on an issue precluded by collateral estoppel.[676] A partial summary judgment that is interlocutory and non-appealable is not final and cannot support a plea of res judicata.[677]

The "transactional approach" applies to res judicata.[678] In other words, a later suit will be barred if it arises out of the same subject matter of a previous suit and which through the exercise of diligence, could have been litigated in a prior suit.[679] Issue preclusion or collateral estoppel, as distinguished from res judicata, applies to any earlier adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.[680] The court in *Acker v. City of Huntsville* stated, "[t]he seminal test for finality sufficient to justify issue preclusion is whether the decision in the prior case is procedurally definite—was it adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered."[681]

Relitigation of an issue will be barred by collateral estoppel if: (1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action, (2) those facts were essential to the judgment in the first

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[673]Gant v. DeLeon, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam).

[674]Keeton v. Carrasco, 53 S.W.3d 13, 18 (Tex. App.—San Antonio 2001, pet. filed); Taylor v. Rellas, No. 11-01-00144-CV, 2002 WL 24133, at *2 (Tex. App.—Eastland 2002, no pet. h.)

[675]Barr v. Resolution Trust Corp. *ex rel.* Sunbelt Fed. Sav., 837 S.W.2d 627, 628–29 (Tex. 1992) (explaining that res judicata prevents the relitigation of a claim or a cause of action that has been finally adjudicated and may invoke a motion for summary judgment).

[676]*Id.* at 628 (stating that issue preclusion or collateral estoppel prevents relitigation of specific issues already resolved in a prior suit).

[677]Mower v. Boyer, 811 S.W.2d 560, 562 (Tex. 1991) (concluding that in this case, the interlocutory partial summary judgment was not final because expressly leaving open the issue of consideration did not have a res judicata effect).

[678]*Barr*, 837 S.W.2d at 631 (adopting the approach that the scope of res judicata can extend to causes of action or defenses which arise out of the same subject matter litigated in the first suit).

[679]*Id.*

[680]Acker v. City of Huntsville, 787 S.W.2d 79, 82 (Tex. App.—Houston [14th Dist.] 1990, no writ) (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982)).

[681]*Id.*

action, and (3) the parties were cast as adversaries in the first action.[682] Findings by a federal court beyond those necessary to make a decision are not "actually litigated" or "necessary to the outcome" so as to form the basis for collateral estoppel or res judicata.[683]

When filing or answering a motion for summary judgment, the earlier judgment should be attached to the motion or response.[684]

Summary judgment may also be appropriate in a case barred by a statute of repose. A statute of repose differs from a traditional statute of limitations. A traditional statute of limitations runs from the time that a cause of action accrues, which is not later than when the injured party discovers a defect or injury.[685] With a statute of repose, the period begins running when the improvement is substantially completed rather than when a cause of action accrues.[686] Therefore, a statute of repose can cut off a right of action before an injured party discovers or reasonably should have discovered the defect or injury.[687]

The Texas statute of repose does not, however, bar an action based on willful misconduct or fraudulent concealment in connection with the performance of the construction or repair.[688] Thus, if the statute of repose period has expired, the respondent having an affirmative defense of

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[682]Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990) (quoting Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984)).

[683]Shell Pipeline Corp. v. Coastal States Trading, Inc., 788 S.W.2d 837, 843 (Tex. App.—Houston [1st Dist.] 1990, writ denied) (explaining that the situation applies after the federal court determined it did not have subject matter jurisdiction); *see also* Allen v. Port Drum Co., 777 S.W.2d 776, 777–78 (Tex. App.—Beaumont 1989, writ denied) (stating the federal requirements to barring prior judgments under doctrine of res judicata); Flippin v. Wilson State Bank, 780 S.W.2d 457, 459 (Tex. App.—Amarillo 1989, writ denied) (discussing the elements of res judicata under federal law).

[684]Anders v. Mallard & Mallard, Inc., 817 S.W.2d 90, 94 (Tex. App.—Houston [1st Dist.] 1991, no writ); Chandler v. Carnes Co., 604 S.W.2d 485, 486 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.) (holding a certified copy of a prior judgment must be attached to a motion for summary judgment to be properly based on the doctrine of res judicata).

[685]Lambert v. Wansbrough, 783 S.W.2d 5, 6 (Tex. App.—Dallas 1989, writ denied).

[686]Tumminello v. U.S. Home Corp., 801 S.W.2d 186, 188 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

[687]Johnson v. City of Fort Worth, 774 S.W.2d 653, 654 n.1 (Tex. 1989) (per curiam).

[688]TEX. CIV. PRAC. & REM. CODE ANN. § 16.009(e) (Vernon 1997); *see also* Ryland Group, Inc. v. Hood, 924 S.W.2d 120, 121–22 (Tex. 1996) (per curiam) (holding that the statute of repose applied because a witness's affidavit did not raise a fact issue as to the defendant's possible willful and intentional misconduct).

fraudulent concealment must present enough proof to raise a fact issue; otherwise, summary judgment will be held proper.[689]

E. Equitable Actions

Summary judgment in a case governed by equitable principles presents even more potential difficulties than in the usual summary judgment case.[690] In a case governed by equitable principles, there are no clear guidelines for determining what is a material fact.[691] The main guiding principle in equitable actions is that an unfair or unjust result should be prevented.[692] While summary judgment may occasionally be appropriate in equity cases, it is not appropriate where the summary judgment record does not fully develop the facts on which the trial court's equitable discretion must be exercised, and where the facts that are developed, though controverted, can give rise to more than one reasonable inference.[693]

F. Medical Malpractice

Summary judgments find their use primarily in two defenses to medical malpractice: (1) using expert testimony to negate breach of duty and proximate cause, and (2) urging the tolling of the statute of limitations.[694]

1. Negation of Elements of Medical Malpractice

In the past, the defendant physician in a malpractice case would file a motion for summary judgment that was accompanied by detailed affidavits from an expert witness or from the defendant that conclusively negated two elements of the plaintiff's malpractice cause of action: breach of duty

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[689] *Ryland Group, Inc.*, 924 S.W.2d at 121–22 (concluding that conclusory affidavits are not enough evidence to raise a fact issue about willful misconduct in order to defeat summary judgment).

[690] Fleetwood v. Med. Ctr. Bank, 786 S.W.2d 550, 556 (Tex. App.—Austin 1990, writ denied).

[691] *Id.*

[692] Johnson v. Cherry, 726 S.W.2d 4, 8 (Tex. 1987) (stating that the equitable power of a court exists to do what is fair).

[693] *Fleetwood*, 786 S.W.2d at 557.

[694] *See* Jennings v. Burgess, 917 S.W.2d 790, 791–92 (Tex. 1996) (rejecting the use of the open courts provision of the Texas Constitution to override the statute of limitations in a medical malpractice case); Pinckley v. Gallegos, 740 S.W.2d 529, 531–32 (Tex. App.—San Antonio 1987, writ denied) (using expert testimony to deny causation).

and proximate cause.[695] In a medical malpractice cause of action, the plaintiff must prove by competent testimony that the defendant's negligence proximately caused the plaintiff's injury.[696] To do so, the plaintiff must prove four elements: (1) a duty by the physician to act according to a certain standard, (2) a breach of the applicable standard of care, (3) an injury, and (4) a causal connection between the breach of care and the injury.[697] Now, under no-evidence summary judgment practice, a defendant doctor may move for summary judgment on the basis that the plaintiff has no evidence to support one or more of the elements.[698]

The threshold question in a medical malpractice case is the medical standard of care.[699] That standard must be established so that the fact finder can determine whether the doctor's act or omission deviated from the standard of care to the extent that it constituted negligence or malpractice.[700] The standard of care by which physicians' acts or omissions are measured is that degree of care that a physician of ordinary prudence and skill, practicing in the same or a similar community, would have exercised in the same or similar circumstances.[701]

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[695]*E.g.*, *Pinckley*, 740 S.W.2d at 532–34 (stating that "Texas cases affirming summary judgments based solely on expert affidavits in medical malpractice cases are legion" and holding that the two expert affidavits were proper and sufficient to negate two essential elements of appellant's cause of action).

[696]Duff v. Yelin, 751 S.W.2d 175, 176 (Tex. 1988); *see also* Hart v. Van Zandt, 399 S.W.2d 791, 792 (Tex. 1965) (stating that expert opinion speculating on the possibility that the injury might have occurred from the doctor's negligence and from other causes not the fault of the doctor was insufficient evidence).

[697]LeNotre v. Cohen, 979 S.W.2d 723, 727 (Tex. App.—Houston [14th Dist.] 1998, pet. denied); *Pinckley*, 740 S.W.2d at 531; Wheeler v. Aldama-Luebbert, 707 S.W.2d 213, 217 (Tex. App.—Houston [1st Dist.] 1986, no writ).

[698]TEX. R. CIV. P. 166a(i); *e.g.*, Gomez v. Tri City Cmty. Hosp., Ltd., 4 S.W.3d 281, 283 (Tex. App.—San Antonio 1999, no pet.).

[699]Rodriguez v. Reeves, 730 S.W.2d 19, 21 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.).

[700]*Id.*

[701]Chambers v. Conaway, 883 S.W.2d 156, 158 (Tex. 1993); James v. Brown, 637 S.W.2d 914, 918 (Tex. 1982) (stating that a psychiatrist owes a duty to exercise that degree of skill ordinarily employed under similar circumstances by similar specialists in the field); Guidry v. Phillips, 580 S.W.2d 883, 885 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.) (quoting Hood v. Phillips, 554 S.W.2d 160, 165 (Tex. 1977), in explaining that the burden of proof is on the patient to establish that the physician has undertaken a form of treatment that a reasonable and prudent member of the medical profession would not have undertaken under the same or similar circumstances).

If proceeding under a traditional motion for summary judgment, a movant must take care in preparing the physician's affidavit. The medical standard of care must be established.[702] Mere conclusory statements are not sufficient.[703] Affidavits that do not thoroughly set out the standard of care applicable to the procedure involved at the time of the complained of incident and that fail to thoroughly explain how the standard was met or excluded are not sufficient summary judgment evidence.[704] In *Hammonds v. Thomas*, the affidavit of a defendant physician was deemed insufficient to establish the applicable standard of care in the community when it merely stated the doctor was familiar with the standard of care and the treatment was within that standard.[705] The affidavit must state the standard.[706]

In response, in order to maintain a cause of action against a doctor for malpractice, the plaintiff patient must prove by a doctor of the same school of practice (or with knowledge of the specific issue which would qualify the expert to give an opinion on that subject) as the defendant that the diagnosis or treatment complained of was such that it constitutes negligence and that it was a proximate cause of the plaintiff patient's injuries.[707]

A lay person with no medical background may not use his or her own affidavit in an attempt to raise a fact issue.[708] Mere conclusions of a lay

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[702] *Rodriguez*, 730 S.W.2d at 21.

[703] Snow v. Bond, 438 S.W.2d 549, 551 (Tex. 1969) (explaining that an expert witness should give information about those standards without summarizing, qualifying, or embellishing his evidence with expressions of opinion as to the conduct that might be expected of a hypothetical doctor similarly situated); Alvarado v. Old Republic Ins. Co., 951 S.W.2d 254, 262 (Tex. App.—Corpus Christi 1997, writ denied).

[704] Hammonds v. Thomas, 770 S.W.2d 1, 2 (Tex. App.—Texarkana 1989, no writ).

[705] *Id.* (stating that medical experts can state their opinions on whether conduct amounts to negligence and proximate cause, but that there still must be specific evidence as to the medical standard of care).

[706] *Id.*

[707] Broders v. Heise, 924 S.W.2d 148, 153 (Tex. 1996) (upholding the exclusion of testimony from a doctor not qualified by knowledge or experience to give an expert opinion on the specific practices alleged to be negligent); Hart v. Van Zandt, 399 S.W.2d 791, 797 (Tex. 1965) (reversing a judgment based on a witness's lack of qualification where expertise was common to several schools of practice); Shook v. Herman, 759 S.W.2d 743, 747 (Tex. App.—Dallas 1988, writ denied) (affirming summary judgment where plaintiff failed to controvert defendant doctor's affidavit with evidence from a doctor of the same field that the actions were negligent and a proximate cause of plaintiff's injuries).

[708] Lopez v. Carrillo, 940 S.W.2d 232, 234 (Tex. App.—San Antonio 1997, writ denied) (explaining that "[i]f a defendant-movant in a medical malpractice action negates an element of

witness are not usually competent to controvert expert medical opinion. For that reason, Texas courts have uniformly rejected the argument in medical malpractice appeals that the opinions and conclusions of the plaintiff affiant raised a fact issue to rebut the summary judgment proof presented by the defendant physician.[709]

2. Statute of Limitations

A defendant is entitled to a summary judgment if he or she conclusively establishes that the plaintiff's cause of action is barred by the applicable statute of limitations.[710] A defendant who fails to show conclusively that the limitations period has run under applicable limitations periods is not entitled to summary judgment.[711] To satisfy this burden, the defendant must conclusively negate any relevant tolling doctrines the plaintiff asserted at the trial court.[712] The plaintiff must plead and prove the "discovery rule" as an affirmative defense to circumvent the bar of limitations if it has been pleaded or otherwise raised by the defendant.[713] This is true even though the discovery rule generally no longer applies to medical malpractice claims.[714] The plaintiff must raise the fact that he could not have discovered and filed suit within the two-year period in order

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plaintiff's cause of action by competent summary judgment proof (*i.e.*, expert testimony), the non-movant plaintiff is required to present expert testimony in order to raise a fact issue"); Nicholson v. Mem'l Hosp. Sys., 722 S.W.2d 746, 751 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); *Hart*, 399 S.W.2d at 792 (stating that "[i]n determining negligence in a [medical malpractice] case . . ., which concerns the highly specialized art of treating disease, the court and jury must be dependent on expert testimony").

[709]*E.g.*, Garza v. Levin, 769 S.W.2d 644, 646 (Tex. App.—Corpus Christi 1989, writ denied); *Shook*, 759 S.W.2d at 747; *Nicholson*, 722 S.W.2d at 751.

[710]Diaz v. Westphal, 941 S.W.2d 96, 101 (Tex. 1997) (dismissing a derivative wrongful death claim because the plaintiff's decedent failed to timely file a malpractice claim); Delgado v. Burns, 656 S.W.2d 428, 429 (Tex. 1983) (per curiam) (remanding the case for trial where the defendant failed to establish when limitation period began to run).

[711]AmWest Savs. Ass'n v. Shatto, 905 S.W.2d 400, 405 (Tex. App.—Austin 1995, writ denied) (remanding for trial where defendant failed to conclusively rebut plaintiff's allegation that the limitations period had not run).

[712]Jennings v. Burgess, 917 S.W.2d 790, 793 (Tex. 1996).

[713]Smith v. Knight, 608 S.W.2d 165, 166 (Tex. 1980) (per curiam) (considering a legal malpractice case); *see also In re* Matejek, 960 S.W.2d 650, 651 (Tex. 1997).

[714]Morrison v. Chan, 699 S.W.2d 205, 208 (Tex. 1985) (reaffirming Medical Liability Act's abolition of the discovery rule in medical malpractice cases).

to challenge the absolute two-year statute of limitations under the "open courts" provision of the Texas Constitution.[715]

The Texas Supreme Court, in *Borderlon v. Peck*, held that in a medical malpractice case, article 4590i, section 10.01 did not abolish fraudulent concealment as a basis for extending limitations in health care liability actions.[716] Fraudulent concealment is a type of equitable estoppel doctrine.[717] "It works to bar a defendant from relying on the statute of limitations as an affirmative defense to a claim where the defendant was under a duty to disclose the existence of a negligent act or injury to the wronged party, but concealed it."[718] The physician-patient relationship imposes this duty upon a physician.[719] "[W]hen a physician conceals a cause of action from a patient, the physician is estopped from relying on the defense of limitations until the patient learns of the cause of action or should have learned about it through the exercise of reasonable diligence."[720]

The estoppel effect of fraudulent concealment terminates when the patient learns of facts, conditions, or circumstances that would cause a reasonably prudent person to make an inquiry that, if pursued, would lead to discovery of the concealed cause of action.[721] Knowledge of these facts is equivalent to knowledge of the cause of action for the purposes of tolling the statute.[722]

G. Libel Actions

Libel actions are often resolved by summary judgment, not only because of the strong constitutional protections that apply, but also because many of the issues that determine summary judgment have been held to be matters of law. Understanding the elements and fundamentals of libel law is necessary to summary judgment analysis of these cases. Unlike most summary judgment actions, Texas law allows an interlocutory appeal from

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[715] *Id.* at 206–08 (rejecting a challenge first raised in the petition for rehearing); *see also* Desiga v. Scheffey, 874 S.W.2d 244, 250–53 (Tex. App.—Houston [14th Dist.] 1994, no writ) (reviewing the situations where the open courts provision of the Texas Constitution has applied).

[716] 661 S.W.2d 907, 909 (Tex. 1983) (reminding that the estoppel effect of concealment ends when the plaintiff knew or should have known the cause of action had accrued).

[717] Evans v. Conlee, 741 S.W.2d 504, 506 (Tex. App.—Corpus Christi 1987, no writ).

[718] *Id.*

[719] *Id.*

[720] *Id.*

[721] *Borderlon*, 661 S.W.2d at 909.

[722] *Id.*

a denial of a summary judgment based on a claim against the media arising under the free speech or free press clauses of the United States or Texas Constitutions.[723]

1. Applicable Libel Law

In Texas, libel is a defamatory statement in written form, published to one or more third persons, tending to injure a living person's reputation and, as a result, exposing the person to public hatred, contempt, or ridicule, or causing financial injury.[724] Where the plaintiff is a public figure, the United States Constitution requires more than simple negligence; to prevail, a libel plaintiff must prove "actual malice," in the constitutional sense.[725]

To publish with actual malice, the defendant must have circulated the defamatory statement knowing that it was false or with "reckless disregard" as to its falsity.[726] "Reckless disregard" is not negligence. It is "a high degree of awareness of probable falsity" and requires the plaintiff to prove that the defendant "in fact entertained serious doubts as to the truth of his publication."[727] Failure to investigate or failure to act reasonably before publishing the statement is distinct from actual malice.[728] Further, a plaintiff must prove actual malice by clear and convincing evidence, rather than by mere preponderance of the evidence.[729] These

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[723]TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(6) (Vernon 1997); *see also* KTRK Television, Inc. v. Fowkes, 981 S.W.2d 779, 786 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

[724]TEX. CIV. PRAC. & REM. CODE ANN. § 73.001 (Vernon 1997); Hill v. Herald-Post Publ'g Co., 877 S.W.2d 774, 778 (Tex. App.—El Paso 1994), *aff'd in part, rev'd in part*, 891 S.W.2d 638 (Tex. 1994).

[725]New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 152–55 (1967) (stating that given the protections of the First Amendment public officials can recover for libel only when they can prove deliberate falsehood or reckless publication).

[726]*Sullivan*, 376 U.S. at 280.

[727]Carr v. Brasher, 776 S.W.2d 567, 571 (Tex. 1989) (quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968)).

[728]*St. Amant*, 390 U.S. at 731 (reiterating precedent "that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing").

[729]A.H. Belo Corp. v. Rayzor, 644 S.W.2d 71, 85 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.).

requirements are designed to protect freedom of speech and freedom of the press.[730]

2. Questions of Law

Whether a statement is reasonably capable of a defamatory meaning initially is a question of law for the court.[731] An allegedly libelous statement should be construed as a whole in light of the surrounding circumstances, considering how a person of ordinary intelligence would view the entire statement.[732] Only if the language is ambiguous or of doubtful import should a jury determine a statement's meaning and its effect on the mind of an ordinary reader.[733] Whether a plaintiff is a public figure is an issue of law for the court to decide.[734]

3. Plaintiffs' Burden of Showing Actual Malice

The higher burden of proof placed on the plaintiff in libel cases involving actual malice encourages summary judgment disposition. In *Anderson v. Liberty Lobby, Inc.*, the United States Supreme Court held that in determining whether an issue of fact prevents summary judgment, the judge must bear in mind that a plaintiff at trial must prove actual malice by clear and convincing evidence and, thus, the court may not deny summary judgment based on evidence that is insufficient to allow a rational finder of fact to find actual malice by clear and convincing evidence.[735]

Summary judgments can be obtained even though the author or publisher's subjective state of mind is at issue. Actual malice must exist within the mind of the defendant at the time the publication is made.[736] In *Casso v. Brand*, the Texas Supreme Court held that an affidavit of an interested party concerning his state of mind and lack of actual malice can

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[730]For a discussion of the historical precedents protecting these Constitutional guarantees, and especially the Founding Fathers' views, see *Sullivan*, 376 U.S. at 269–76.

[731]Musser v. Smith Protective Serv., 723 S.W.2d 653, 654 (Tex. 1987).

[732]*Id.* at 655.

[733]*Id.*

[734]Gertz v. Robert Welch, Inc., 418 U.S. 323, 328, 352 (1974) (upholding trial judge's ruling that plaintiff was not a public figure before sending the case to the jury); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809, 811 (Tex. 1976) (reviewing the appeals court's determination that plaintiff was both a public official and a public figure).

[735]477 U.S. 242, 254, 264–68 (1986).

[736]Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 646 (Tex. 1995) (holding that employer's qualified privilege to discuss employee wrongdoing is defeated if motivated by actual malice at the time of publication).

support summary judgment in a libel case.[737] This decision specifically overruled earlier decisions to the contrary.[738]

In *Carr v. Brasher*, decided the same day as *Casso*, the Texas Supreme Court again affirmed summary judgment for libel defendants in a case where the defendants negated actual malice with their own affidavits.[739] In both *Carr* and *Casso*, the court noted that a libel plaintiff must ordinarily produce independent evidence of actual malice in order to refute the defendant's denial.[740] Therefore, summary judgment is proper where a defendant denies actual malice and the plaintiff is unable to offer proof that actual malice exists.[741]

H. Governmental Immunity

Official immunity is an affirmative defense.[742] Thus, the burden is on the defendant to establish all elements of the defense.[743] A government official is entitled to the benefit of official immunity so long as the official is (1) acting within the course and scope of his or her authority, (2) performing discretionary functions, and (3) acting in good faith.[744]

To prove good faith, a government official must show that his or her acts were within the realm of what a reasonably prudent government official could have believed was appropriate at the time.[745] This standard is met when the government official shows that the reasonably prudent government official, under the same or similar circumstances, would have believed that the benefit to the community from the activity in question substantially outweighed the risk of harm from the activity.[746] To controvert the government official's summary judgment proof on good faith, "the plaintiff must show that 'no reasonable person in the defendant's position could have thought the facts were such that they justified

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[737]776 S.W.2d 551, 559 (Tex. 1989) (finding defendant's affidavit sufficient when plaintiff failed to offer controverting evidence).

[738]*Id.* at 557–59.

[739]776 S.W.2d 567, 571 (Tex. 1989).

[740]*Casso*, 776 S.W.2d at 558–59; *Carr*, 776 S.W.2d at 571.

[741]*Casso*, 776 S.W.2d at 558; *Carr*, 776 S.W.2d at 571.

[742]Univ. of Houston v. Clark, 38 S.W.3d 578, 580 (Tex. 2000); City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex. 1994).

[743]*Id.*

[744]Bozeman v. Trevino, 804 S.W.2d 341, 343 (Tex. App.—San Antonio 1991, no writ) (finding a qualified immunity for police officers).

[745]*Chambers*, 883 S.W.2d at 656–57.

[746]*Id.* at 656.

defendant's acts.'"[747] Unlike most other denials of motions for summary judgment, summary judgment denials in governmental immunity cases may be appealed.[748]

X. FEDERAL SUMMARY JUDGMENT PRACTICE

A. Procedure for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[749] Rule 56(c) thus governs the procedural requirements for motions for summary judgment in federal court.[750] Federal law also governs other procedural issues concerning summary judgment motions, such as the rules of evidence,[751] the sufficiency of affidavits,[752] and the timing and form of motions.[753] In diversity cases, applicable state law governs substantive issues.[754]

1. Timing

A defending party may move for summary judgment at any time.[755] Claimants, however, must wait until (1) twenty days from commencement of an action, or (2) after service of a motion for summary judgment by the opposing party to move for summary judgment.[756] Local rules or scheduling orders may impose different deadlines for filing motions.[757]

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[747] *Id.* at 657 (quoting Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993)).

[748] TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(5) (Vernon 1997); *see also* Univ. of Tex. S.W. Med. Ctr. of Dallas v. Margulis, 11 S.W.3d 186, 187–88 (Tex. 2000).

[749] FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986); Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 293 (5th Cir. 2000).

[750] FED. R. CIV. P. 56(c).

[751] FED. R. EVID. 101.

[752] FED. R. CIV. P. 56(e).

[753] FED. R. CIV. P. 56(a)–(c); *see also* FED. R. CIV. P. 7(b).

[754] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[755] FED. R. CIV. P. 56(a)–(b).

[756] FED. R. CIV. P. 56(a).

[757] FED. R. CIV. P. 16(c)(5).

Further, if the respondent has not had an adequate time for discovery, summary judgment may be premature.[758]

2. Notice of Motion

The movant must file its motion for summary judgment at least ten days[759] before the date of a hearing on the motion.[760] The "hearing" required for summary judgments need not be an oral hearing.[761] Instead, the ten-day rule means that the respondent must be given notice ten days before the court will take the matter under advisement.[762] An attorney desiring an oral hearing should check local rules and the judge's procedures manuals on file, if any, and file a specific motion for an oral hearing, as federal judges often have policies severely restricting oral argument on motions. Regardless of whether the court holds an oral hearing, the respondent must be afforded the requisite ten days to file a response.[763] However, the district court generally is not required to inform the respondent that the motion will be considered on a certain date.[764] The Fifth Circuit strictly enforces the ten-day notice rule.[765]

This rule also protects the respondent when a court decides to treat a motion to dismiss as one for summary judgment.[766] Federal Rule of Civil Procedure 12(b) provides that a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) will be treated as one for summary judgment when matters outside the pleadings are considered by the court.[767] The responding party must be given ten days notice after the

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[758]FED. R. CIV. P. 56(f); Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986); *see supra* Part II.C.

[759]Practitioners should always check their local rules as well as Federal Rule of Civil Procedure 6(a) to ensure timely filing. FED R. CIV. P. 6(a). For example, if the applicable period of time is less than eleven days, intermediate Saturdays, Sundays, and legal holidays are excluded. *Id.*

[760]FED. R. CIV. P. 56(c). Local rules may require longer notice.

[761]Hamman v. S.W. Gas Pipeline, Inc., 721 F.2d 140, 142 (5th Cir. 1983).

[762]Jackson v. Widnall, 99 F.3d 710, 713 (5th Cir. 1996) (noting that the adverse party must have 10 days to respond to a motion for summary judgment); *see also* White v. Tex. Am. Bank/Galleria, N.A., 958 F.2d 80, 83 (5th Cir. 1992); *Hamman*, 721 F.2d at 142.

[763]*Jackson*, 99 F.3d at 713; Daniels v. Morris, 746 F.2d 271, 274–75 (5th Cir. 1984).

[764]*Daniels*, 746 F.2d at 275 (stating that Rule 56 does not require advance notice of a certain date).

[765]Love v. Nat'l Med. Enters., 230 F.3d 765, 771 (5th Cir. 2000).

[766]Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993) (applying Rule 56 to a motion to dismiss based on failure to state a claim).

[767]FED. R. CIV. P. 12(b)(6); *see infra* Part X.D (discussing Rule 12(b)(6) motions that the court considers as Rule 56 motions). The inverse of this rule is also true: "where a motion for

court accepts for consideration matters outside the pleadings.[768] The court need not, however, specifically notify the parties that the court will consider the motion to dismiss as a motion for summary judgment.[769] Counsel should thus remain aware that, although such notice is often given, it is not required.

The ten-day notice rule applies when the district court enters summary judgment sua sponte.[770] "The district court may enter summary judgment sua sponte if the parties are provided with reasonable notice and an opportunity to present argument opposing the judgment."[771] The district court's failure to give such notice may be harmless error if the respondent has no additional evidence or if all of the respondent's additional evidence is reviewed on appeal and does not present a genuine issue of material fact.[772] If the party against whom summary judgment was entered had a potentially valid defense that it was not on notice to raise, harm may be present and the district court's order may be reversed on appeal.[773]

3. Deadline to Respond to a Motion for Summary Judgment

The Federal Rules of Civil Procedure contain no specific provision concerning the deadline for a response to a motion for summary

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summary judgment is solely based on the pleadings or only challenges the sufficiency of the plaintiff's pleadings, then such a motion should be evaluated in much the same way as a Rule 12(b)(6) motion to dismiss." St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440 (5th Cir. 2000).

[768]Washington v. Allstate Ins. Co., 901 F.2d 1281, 1284 (5th Cir. 1990) (quoting Clark v. Tarrant County, 798 F.2d 736, 746 (5th Cir. 1986) (noting that the 10-day requirement begins to toll when a court could properly treat a 12(b)(6) motion as a summary judgment)).

[769]*Washington*, 901 F.2d at 1284 (citing *Clark*, 798 F.2d at 746, and stating that notice is not required when the court determines it is proper to consider a motion to dismiss as a summary judgment).

[770]*Love*, 230 F.3d at 770–71; *St. Paul*, 224 F.3d at 435.

[771]*St. Paul*, 224 F.3d at 435.

[772]Geraghty & Miller, Inc. v. Conoco Inc., 234 F.3d 917, 923 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2592 (2001) (ruling that the sua sponte grant of summary judgment was harmless error, where the district court's post-summary judgment consideration and rulings cured any procedural defect); *Love*, 230 F.3d at 771 (finding that the trial court did not plainly err by ruling sua sponte on the motion for summary judgment); *St. Paul*, 224 F.3d at 435 (determining that the district court's grant of summary judgment sua sponte was not harmless because the plaintiff had evidence that could have created a genuine issue of material fact).

[773]Mannesman Demag Corp. v. M/V Concert Express, 225 F.3d 587, 595 (5th Cir. 2000) (reversing the grant of summary judgment when the third-party defendant had a potentially valid defense that it was not able to raise due to the sua sponte grant of summary judgment).

judgment.[774] Rule 56(c) merely states that "[t]he adverse party prior to the day of hearing may serve opposing affidavits."[775] Local rules, however, may specify the date that responses must be filed. For example, in the Northern and Southern Districts of Texas the response must be filed within twenty days of the filing of the motion;[776] in the Eastern District of Texas the response is due fifteen days from service of the motion;[777] and in the Western District of Texas the response is due eleven days from service of the motion.[778] Failure to respond to a motion for summary judgment will be taken as a statement of no opposition[779] and may lead to entry of summary judgment against the non-responding party.[780]

4. Status of Discovery

If an adequate time for discovery has not passed so that the respondent may present fact issues to prevent summary judgment, Rule 56(f) provides that a court may deny the motion for summary judgment, order a continuance, or order other appropriate relief.[781] If the respondent to a motion for summary judgment believes that disposition of the case is premature, he or she should file a Rule 56(f) motion with the proper supporting affidavit.[782] Failure to seek this relief may result in the

[774]FED. R. CIV. P. 56 (mentioning no set time for responses).

[775]FED. R. CIV. P. 56(c).

[776]N. DIST. TEX. LOCAL R. 7.1(e); S. DIST. TEX. LOCAL R. 7.3.

[777]E. DIST. TEX. LOCAL R. 7(e).

[778]W. DIST. TEX. LOCAL R. 7(d).

[779]*E.g.*, S. DIST. TEX. LOCAL R. 7.4.

[780]FED. R. CIV. P. 56(e). *But see supra* Parts V.A, X.B.2.b. (explaining that the district court may not grant a summary judgment merely because no response was filed or because the local rules were violated).

[781]FED. R. CIV. P. 56(f). The Supreme Court, in *Celotex Corp. v. Catrett*, stated that a sufficient time for discovery must have elapsed before a summary judgment is appropriate. 477 U.S. 317, 326 (1986). In *Celotex*, the summary judgment motion was filed one year after the lawsuit commenced, which the court found to be adequate time for discovery. *Id.* at 326. By contrast, when a motion for summary judgment was filed "shortly after the . . . answer to the complaint and . . . neither party ha[d] conducted any discovery," the Fifth Circuit reversed a summary judgment on the ground that sufficient time had not elapsed. Fano v. O'Neill, 806 F.2d 1262, 1266 (5th Cir. 1987).

[782]United States v. Bloom, 112 F.3d 200, 205 n.17 (5th Cir. 1997); Wichita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992) (stating that "[t]he purpose of Rule 56(f) is to provide non-movants with a much needed tool to keep open the doors of discovery in order to adequately combat a summary judgment motion"); Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990) (stating that "Rule 56(f) authorizes the opponent of a summary judgment motion to seek a continuance to obtain controverting affidavits or necessary discovery").

consideration and entry of summary judgment,[783] as well as waiver of the prematurity argument on appeal.[784]

As a practical matter, the respondent seeking a continuance to conduct further discovery under Rule 56(f) should convince the court that the requested discovery is more than a fishing expedition, is likely to lead to controverting evidence, and was not reasonably available beforehand despite the respondent's diligence. The court may be more inclined to grant a continuance if the respondent files discovery requests concurrently with Rule 56(f) declarations.

The party opposing continuance or further discovery (i.e., the movant for summary judgment) should try to convince the court that the respondent's discovery requests are simply a delay tactic. For example, the Rule 56(f) motion may be based on incontrovertible facts, may involve pure questions of law, or may request discovery that relates to immaterial issues.[785] The Fifth Circuit has held that "[a] plaintiff's entitlement to discovery prior to a ruling on a summary judgment motion may be cut off when, within the trial court's discretion, the record indicates that further discovery will not likely produce facts necessary to defeat the motion."[786]

The decision to grant the continuance is within the sound discretion of the trial court and will be sustained unless the court has acted arbitrarily or in a clearly unreasonable manner.[787] For example, the Fifth Circuit upheld the denial of a continuance when the plaintiff had ample time for discovery and the plaintiff's request was conclusory in nature.[788] The Fifth Circuit has also found that as little as nine months from the time the action was

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[783]FED. R. CIV. P. 56(e).

[784]Potter v. Delta Air Lines, Inc., 98 F.3d 881, 887 (5th Cir. 1996) (holding that a party who does not make a Rule 56(f) motion is foreclosed from arguing inadequate time for discovery on appeal).

[785]Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1442 (5th Cir. 1993) (stating that to obtain a continuance to obtain further discovery in responding to a motion for summary judgment, a party must indicate to the court why it needs additional discovery and how the additional discovery will create a genuine issue of material fact).

[786]Cormier v. Pennzoil Exploration & Prod. Co., 969 F.2d 1559, 1561 (5th Cir. 1992); *see also* Paul Kadair, Inc. v. Sony Corp., 694 F.2d 1017, 1030 (5th Cir. 1983) (stating that "[a] 'bare assertion' that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment" (quoting Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981)).

[787]Transamerica Ins. Co. v. Avenell, 66 F.3d 715, 721 (5th Cir. 1995); *Krim*, 989 F.2d at 1441; Carriere v. Sears, Roebuck & Co., 893 F.2d 98, 102 (5th Cir. 1990); Fontenot v. Upjohn Co., 780 F.2d 1190, 1193 (5th Cir. 1986).

[788]Nat'l Ass'n of Gov't Employees v. City Pub. Serv. Bd., 40 F.3d 698, 714 (5th Cir. 1994).

filed may constitute sufficient time for discovery.[789] In another case, the Fifth Circuit upheld a summary judgment granted fourteen months after the commencement of the case even though the plaintiff's discovery efforts had been considerably frustrated.[790] The court reasoned that the plaintiff should have filed a motion requesting a continuance for further discovery pursuant to Rule 56(f).[791]

B. Standards of Proof for Summary Judgment Motions

1. When the Movant Bears the Burden of Proof[792]

The Federal Rules of Civil Procedure expressly permit the party bearing the burden of proof to move for summary judgment on its claim, counterclaim, or cross-claim.[793] To obtain summary judgment in its favor, a claimant must affirmatively demonstrate by admissible evidence that there is no genuine issue of material fact concerning each element of its claim for relief.[794] In addition, if the defendant has asserted an affirmative defense, the plaintiff must identify the lack of any genuine issue of any material fact concerning those defenses.[795] Because the defendant has the burden of proof on affirmative defenses, the plaintiff need only demonstrate the absence of evidence on the affirmative defense.[796]

2. When the Movant Does Not Bear the Burden of Proof

a. Movant's Initial Burden

When a movant seeks summary judgment on a claim upon which it does not bear the burden of proof, it bears an initial burden under Federal Rule of Civil Procedure 56(c) to demonstrate the absence of a genuine issue of material fact on the adverse party's claim.[797] The movant cannot rely on a conclusory statement that the respondent has not presented

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[789]Fano v. O'Neill, 806 F.2d 1262, 1266 (5th Cir. 1987).

[790]*Avenell*, 66 F.3d at 721.

[791]*Id.*

[792]The burden of proof at trial is determined by the pleadings. *E.g.*, United States v. MMR Corp., 907 F.2d 489, 499 (5th Cir. 1990).

[793]FED. R. CIV. P. 56(a) & (c).

[794]Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

[795]*Id.*

[796]*Id.* at 322–23.

[797]FED. R. CIV. P. 56(c).

evidence on an essential element of its claim.[798] Rather, the moving party must specifically point out to the court the absence of evidence showing a genuine dispute.[799] The more difficult question is how to make this showing. The movant must identify the specific issue or issues on which it claims the respondent has no supporting evidence and demonstrate the absence of such evidence.[800] In so doing, the movant may: (1) demonstrate the absence of evidence on a crucial element of the opposing party's case,[801] (2) present evidence that disproves some essential element of the opposing party's case,[802] or (3) rely on the complete absence of proof of an essential element of the respondent's case.[803]

The Fifth Circuit discussed this burden in *St. Paul Mercury Insurance Co. v. Williamson*.[804] The plaintiff, asserting a RICO claim, argued that the defendants did not meet their initial burden of pointing out the absence of a triable issue.[805] The Fifth Circuit disagreed, stating that the defendants "did proffer evidence in support of their motion for summary judgment. In addition to pointing out the lack of evidence supporting [plaintiff's] RICO claims, they offered affidavits, depositions, and other relevant documentary evidence."[806] Although the defendants' evidence admittedly related to the "pattern of racketeering" issue, rather than the pertinent "investment in a RICO enterprise" inquiry, the Fifth Circuit found that the plaintiffs had satisfied Rule 56(c).[807]

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[798]St. Paul Mercury Ins. Co. v. Williamson, 224 F.3d 425, 440 (5th Cir. 2000) (recognizing that when a defending party moves for summary judgment, it may not rely on a conclusory statement that the other party has no evidence; rather, the moving party must demonstrate that there are no factual issues warranting trial); Lavespere v. Niagra Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990) (holding that the movant may bear its burden by highlighting a lack of proof concerning an essential element of the respondent's case).

[799]*Celotex*, 477 U.S. at 323.

[800]Little v. Liquid Air Corp., 952 F.2d 841, 847 (5th Cir. 1992); *see also* Hughes v. City of Garland, 204 F.3d 223, 226–27 (5th Cir. 2000) (stating that the propriety of summary judgment centered around the plaintiff's alleged failure to produce evidence with respect to one element of her cause of action).

[801]*Celotex Corp.*, 477 U.S. at 325 (plaintiff was asked to identify all companies who manufactured the product and did not list the defendant).

[802]*Id.* at 323. For example, an admission.

[803]*Id.* at 325.

[804]*See generally* 224 F.3d 425 (5th Cir. 2000).

[805]*Id.* at 440.

[806]*Id.*

[807]*Id.*

b. Respondent's Burden

The respondent to a motion for summary judgment must come forward with specific facts showing that there is a genuine issue for trial.[808] If the respondent fails to make this showing, summary judgment in the movant's favor is appropriate.[809] The burden is on the respondent seeking to avoid a summary judgment to show that there is a genuine issue of material fact.[810] Without a response on file, Rule 56(e) provides that the court shall grant the motion for summary judgment.[811] However, the Fifth Circuit has stated that a motion for summary judgment cannot be granted simply because of lack of opposition, even if the failure to oppose the motion violates a local rule.[812]

C. Responding to the Motion for Summary Judgment

1. Supreme Court Precedent

The seminal case regarding summary judgments in federal court is *Celotex Corp. v. Catrett.*[813] In *Celotex*, a widow sued an asbestos manufacturer for the asbestos-related death of her husband.[814] The defendant moved for summary judgment based on the widow's failure to produce evidence that her husband had been exposed to its products.[815] The defendant argued that the widow's response consisted of inadmissible hearsay.[816] The Court found that summary judgment would be mandated if the plaintiff failed, after adequate time for discovery, to present evidence

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[808]FED. R. CIV. P. 56(e).

[809]Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986); *see* Hughes v. City of Garland, 204 F.3d 223, 226–27 (5th Cir. 2000); Gunaca v. Texas, 65 F.3d 467, 469 (5th Cir. 1995).

[810]*See Celotex Corp.*, 477 U.S. at 324; Doe v. Beaumont Indep. Sch. Dist., 240 F.3d 462, 473 (5th Cir. 2001) (reversing summary judgment and stating that "[a] trial must sort out these assertions of fact"); Prejean v. Foster, 227 F.3d 504, 514 (5th Cir. 2000) (reversing grant of summary judgment where fact issue remained regarding voting district configurations).

[811]FED. R. CIV. P. 56(e).

[812]Hibernia Nat'l Bank v. Administracion Cent. Sociedad Anonima, 776 F.2d 1277, 1279 (5th Cir. 1985) (reversing the district court's grant of summary judgment and remanding because the court could not determine if the trial court had granted the motion on the merits rather than on the respondent's failure to oppose the motion); *see also* Hetzel v. Bethlehem Steel Corp., 50 F.3d 360, 362 n.3 (5th Cir. 1995); *cf.* Kelley v. Price-Macemon, Inc., 992 F.2d 1408, 1411–12 (5th Cir. 1993); Eversley v. MBank Dallas, 843 F.2d 172, 174 (5th Cir. 1988).

[813]*See generally* 477 U.S. 317 (1986).

[814]*Id.* at 319.

[815]*Id.*

[816]*Id.* at 320.

of matters on which she had the burden of proof.[817] It remanded the case to the court of appeals to determine whether the evidence submitted by the plaintiff was sufficient to defeat the motion for summary judgment.[818] The Court's ruling illustrates that it was not the defendant's burden to negate such issues.[819] Rather, the plaintiff had to come forward to demonstrate a genuine issue of material fact to be heard at trial.[820]

In addition to *Celotex*, practitioners should be familiar with *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[821] and *Anderson v. Liberty Lobby, Inc.*,[822] in which the Court expounded upon the meaning of the term "genuine issue of material fact." *Anderson* is instructive regarding what evidence raises a genuine issue sufficient to preclude entry of summary judgment. At issue in *Anderson* was the question whether, in a suit for libel in a *New York Times* case,[823] the heightened evidentiary requirements applicable to proof of actual malice (that is, the standard of clear and convincing evidence) must be considered for purposes of a motion for summary judgment.[824] Answering in the affirmative, the Court ruled that the trial judgment "must bear in mind the actual quantum and quality of proof necessary to support liability."[825] When evaluating the evidence presented by the respondent, "the judge must view the evidence presented through the prism of the substantive evidentiary burden."[826] There is no genuine issue for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the respondent.[827]

The *Anderson* decision also discussed the "materiality" element, stating that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[828] The Court explained that the materiality determination rests

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[817] *Id.* at 322–23.

[818] *Id.* at 327–28.

[819] *Id.* at 323.

[820] *Id.* at 324.

[821] *See generally* 475 U.S. 574 (1985).

[822] *See generally* 477 U.S. 242 (1985).

[823] In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964), the Supreme Court held that in a libel suit brought by a public official, the First Amendment requires the plaintiff to show that the defendant acted with actual malice in publishing the alleged defamatory statement.

[824] 477 U.S. at 247.

[825] *Id.* at 254.

[826] *Id.*

[827] Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Love v. Nat'l Med. Enters., 230 F.3d 765, 770 (5th Cir. 2000).

[828] 477 U.S. at 248.

on the substantive law, and the substantive law identifies which facts are critical and which are irrelevant.[829] The Court stated that materiality is only a criterion for categorizing factual disputes in relation to the legal elements of the claim.[830]

Matsushita Electric considered what evidence was required to preclude entry of summary judgment in an antitrust conspiracy case.[831] Under section 1 of the Sherman Antitrust Act, to survive a properly supported summary judgment motion by the defendants, the plaintiffs had to present evidence that excluded the possibility that the alleged conspirators acted independently.[832] The Supreme Court turned to the applicable substantive law to analyze what facts would be material and, thus, crucial to the plaintiffs to survive summary judgment.[833]

A genuine issue of fact does not exist if the respondent's evidence merely shows that "there is some metaphysical doubt as to the material facts."[834] Moreover, there is an inverse relationship between the quality of the evidence the respondent must present and the overall plausibility of the respondent's claims.[835] If the claims of the party bearing the burden of proof appear "implausible," that party must respond to the motion for summary judgment with more persuasive evidence to support its claim than would otherwise be required.[836]

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[829] *Id.*

[830] *Id.*

[831] 475 U.S. at 585–87.

[832] *Id.* at 588.

[833] *Id.* at 588–98.

[834] *Id.* at 586; *see* Evans v. City of Houston, 246 F.3d 344, 355 (5th Cir. 2001). In *Evans*, the plaintiff sued the City of Houston for race and age discrimination and retaliation. *Id.* at 347. The Fifth Circuit noted that "merely disputing an employer's assessment of a plaintiff's work performance will not necessarily support an inference of pretext." *Id.* at 355 (citation omitted). A plaintiff in an employment discrimination suit (utilizing the burden-shifting scheme under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)) cannot survive summary judgment merely because he or she disagrees with the employer's characterization of her work history. *Id.* Rather, the issue is whether the employer's perception of the employee's performance, accurate or not, was the true reason for the adverse employment action. *Id.* "[T]he only question on summary judgment is whether the evidence of retaliation, in its totality, supports an inference of retaliation." *Id.*

[835] *Matsushita Elec. Indus. Co.*, 475 U.S. at 587.

[836] *Id.*

2. Items in Response

The respondent cannot establish a genuine issue of material fact by relying upon the allegations in its pleadings.[837] After a motion for summary judgment is filed, the respondent must respond by affidavit, pleadings, depositions, answers to interrogatories or admissions on file to set forth specific facts showing there is a genuine issue of material fact for trial to avoid summary judgment.[838] The response may include: (1) admissible summary judgment evidence,[839] (2) a memorandum of points and authorities,[840] (3) any objections to the movant's evidence,[841] and (4) a request for more time for discovery, when appropriate.[842]

The court must view all the evidence in the light most favorable to the respondent.[843] The respondent need not necessarily present his or her own summary judgment evidence. Instead, if the respondent believes that evidence already submitted by the movant indicates the existence of a genuine issue of material fact, the respondent may direct the court's attention to that evidence and rely on it without submitting additional evidence.[844] In any event, the respondent must set forth specific facts showing there is a genuine issue for trial.[845]

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[837]Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990); Fontenot v. Upjohn Co., 780 F.2d 1190, 1195–96 (5th Cir. 1986) (indicating there is no reason for a trial when there is no evidence to support the pleadings).

[838]FED. R. CIV. P. 56(e); *see* Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986); Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 515 (5th Cir. 2001).

[839]FED. R. CIV. P. 56(e); *Okoye*, 245 F.3d at 510 n.5 (stating that hearsay statements were not competent summary judgment evidence).

[840]*E.g.*, S. DIST. TEX. LOCAL R. 7.1(B) (opposed motions shall include or be accompanied by authority).

[841]*E.g.*, FDIC v. N.H. Ins. Co., 953 F.2d 478, 484 (9th Cir. 1991).

[842]FED. R. CIV. P. 56(f).

[843]United States v. Bloom, 112 F.3d 200, 205 (5th Cir. 1997); Resolution Trust Corp. v. Sharif-Munir-Davidson Dev. Corp., 992 F.2d 1398, 1401 (5th Cir. 1993).

[844]Isquith v. Middle S. Utils., Inc., 847 F.2d 186, 199–200 (5th Cir. 1988).

[845]*E.g.*, Rizzo v. Children's World Learning Ctrs., Inc., 84 F.3d 758, 762 (5th Cir. 1996); *cf.* Dahlberg & Co. v. Chevron U.S.A., Inc., 836 F.2d 915, 920 (5th Cir. 1988) (stating "[a]ppellant had the opportunity to raise [an] issue by way of affidavit or other evidence" in response to the summary judgment but elected to rely solely on legal argument).

3. Summary Judgment Evidence

a. Declarations and Affidavits

Declarations or affidavits submitted in connection with summary judgment proceedings must: (1) be based on personal knowledge,[846] (2) state facts as would be admissible in evidence (evidentiary facts, not conclusions),[847] and (3) show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.[848]

"Unsupported affidavits . . . setting forth . . . conclusions of law are insufficient to either support or defeat a motion for summary judgment."[849] A party cannot create an issue of fact by merely presenting testimony through a declaration that contradicts previous sworn testimony, such as deposition testimony.[850] From a practical standpoint, failure to produce opposing affidavits frequently will doom an otherwise meritorious response.[851]

b. Documents

Sworn or certified copies of all documents or parts of documents referred to in a declaration must be attached to the declaration or served

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[846]FED. R. CIV. P. 56(e); *see also* FDIC v. Selaiden Builders, Inc., 973 F.2d 1249, 1254 n.12 (5th Cir. 1992); Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 80–81 (5th Cir. 1987) (objecting that movant's affidavit was not from personal knowledge).

[847]FED. R. CIV. P. 56(e); Crescent Towing & Salvage Co. v. M/V Anax, 40 F.3d 741, 745 (5th Cir. 1994) (holding that mere conclusions and statements that a document exists are not enough to grant summary judgment); Salas v. Carpenter, 980 F.2d 299, 304–05 (5th Cir. 1992) (holding that conclusory assertions were not admissible as summary judgment evidence); *see also* Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 515 (5th Cir. 2001) (noting that the employee's statement in a Title VII discrimination suit was unsworn and, therefore, was not competent summary judgment evidence).

[848]Fed. R. Civ. P. 56(e); *e.g.*, Dulplantis v. Shell Offshore, Inc., 948 F.2d 187, 191 (5th Cir. 1991) (relying on Rule 56(e) which requires that the affiant be competent to testify to matters in the affidavit).

[849]Orthopedic & Sports Injury Clinic v. Wang Labs., Inc., 922 F.2d 220, 225 (5th Cir. 1991) (quoting Galindo v. Precision Am. Corp., 754 F.2d 1212, 1216 (5th Cir. 1985)).

[850]*Compare* Thurman v. Sears, Roebuck & Co., 952 F.2d 128, 136 n.23 (5th Cir. 1992) (rejecting the use of a second affidavit to contradict previous sworn deposition testimony), *with* Randall v. Dallas Power & Light Co., 752 S.W.2d 4, 5 (Tex. 1988) (per curiam) (stating if conflicting inferences may be drawn from two statements made by the same party, one in an affidavit and the other in a deposition, a fact issue is presented).

[851]FED. R. CIV. P. 56(c) & (e).

concurrently.[852] Documents should be properly authenticated; mere attachment to a declaration does not make them admissible.[853]

c. *Discovery Products*

Summary judgment evidence may also consist of deposition testimony, interrogatory answers, or admissions.[854] As with other documentary evidence, these discovery documents must be properly authenticated (for example, by affidavit or declaration establishing the accuracy of the attached copy).[855] To use discovery responses, a party must serve and file them with appropriate authentication, usually by attaching them as exhibits to an attorney's declaration.[856] Only those portions of deposition testimony otherwise admissible at trial are proper summary judgment proof.[857]

The party submitting deposition testimony transcripts as summary judgment evidence must identify the precise sections of the testimony that support its position. The district court has no duty to search through voluminous transcripts to find the testimony that allegedly raises a genuine issue of material fact.[858]

Admissions made pursuant to Federal Rule of Civil Procedure 36 are conclusive as to the matters admitted.[859] These admissions "cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record."[860] Rather, if a party seeks to avoid the consequences of failing to timely respond to Rule 36 requests for admissions, it should move the court to amend or withdraw the admissions in accordance with Rule 36(b).[861]

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[852]FED. R. CIV. P. 56(e); *Okoye*, 245 F.3d at 515 (5th Cir. 2001).

[853]Meserole v. M/V Fina Belgique, 736 F.2d 147, 149 (5th Cir. 1984) (stating that an unsworn letter from an expert is inadmissible as summary judgment evidence).

[854]FED. R. CIV. P. 56(c).

[855]FED. R. CIV. P. 56(c) & (e).

[856]*Id.*

[857]*E.g.*, Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 175–76 (5th Cir. 1990) (stating the general rule that summary judgment is subject to the same admissibility rules as evidence for trial).

[858]*E.g.*, Jones v. Sheehan, Young & Culp, P.C., 82 F.3d 1334, 1338 (5th Cir. 1996) ("Rule 56, therefore, saddles the non-movant with the duty to 'designate' the specific facts in the record that create genuine issues precluding summary judgment, and does not impose upon the district court a duty to survey the entire record in search of evidence to support a non-movant's opposition.").

[859]FED. R. CIV. P. 36; *In re* Carney, 258 F.3d 415, 420 (5th Cir. 2001).

[860]*In re Carney*, 258 F.3d at 420.

[861]FED. R. CIV. P. 36(b); *In re Carney*, 258 F.3d at 420.

d. Pleadings

In federal court, verified pleadings may be treated as affidavits if they meet the requirements of Federal Rule of Civil Procedure 56(e), which requires that the facts asserted be within the pleader's personal knowledge and be otherwise admissible evidence.[862] Admissions by respondents in their pleadings, even if unverified, are competent summary judgment evidence.[863]

The use of cross-references to pleadings should be kept to a minimum in summary judgment practice. Although Federal Rule of Civil Procedure 10(c) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion,"[864] counsel's use of this tactic should be utilized sparingly, especially in cases with numerous pleadings. The better practice is to attach all pertinent exhibits to the motion currently pending before the court. More importantly, local rules may require that summary judgment evidence be included in an appendix attached to the motion.[865]

e. Expert Testimony

In order to be considered competent summary judgment evidence, an expert's testimony must be relevant and reliable.[866] The trilogy of United States Supreme Court cases on admissibility of expert testimony regarding "scientific, technical, or other specialized knowledge"—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[867] *General Electric Co. v. Joiner*,[868] and *Kumho Tire Co. v. Carmichael*[869]—instruct the standards by which trial courts must evaluate expert testimony.[870]

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[862]*See* FED. R. CIV. P. 56(e).*Compare* Isquith v. Middle S. Utils., Inc., 847 F.2d 186, 194 (5th Cir. 1988) (recognizing the use of verified pleadings if the requirements of Rule 56(e) are met), *with* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979) (stating that pleadings themselves do not constitute summary judgment proof).

[863]*Isquith*, 847 F.2d at 195 (showing that the defendants wanted to use plaintiff's pleadings as admissions).

[864]FED. R. CIV. P. 10(c).

[865]*See, e.g.*, N. DIST. TEX. LOCAL R. 7.1(i); S. DIST. TEX. LOCAL R. 7.7.

[866]Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993).

[867]*See generally* 509 U.S. 579 (1993).

[868]*See generally* 522 U.S. 136 (1997).

[869]*See generally* 526 U.S. 137 (1999).

[870]For an excellent discussion on these three cases, *see* Margaret A. Berger, *The Supreme Court's Trilogy on the Admissibility of Expert Testimony*, published in REFERENCE MANUAL ON SCIENTIFIC EVIDENCE p. 9–38 (Federal Judicial Center ed., 2d ed. 2000).

Daubert mandates that trial judges, in accordance with Federal Rules of Evidence 104(a) and 702, act as "gatekeepers" by excluding unreliable scientific evidence.[871] In performing this function, the district court must determine whether the proffered scientific testimony is grounded in the methods and procedures of science by examining a non-exclusive list of factors.[872] Those factors include: (1) whether the theory or technique can be (and has been) tested, (2) whether the theory or technique has been subjected to peer review and publication, (3) the known or potential rate of error, and (4) degree of acceptance within the community.[873]

In *Joiner*, the Supreme Court considered the standard of review to apply in reviewing a district court's exclusion of expert testimony under *Daubert*.[874] The district court in *Joiner* had excluded the opinions of the plaintiff's expert under *Daubert* and granted the defendant's motion for summary judgment.[875] The Court of Appeals for the Eleventh Circuit reversed, stating that the Federal Rules of Evidence displayed a preference for admissibility of expert testimony that warranted a particularly stringent standard of review.[876] The United States Supreme Court granted certiorari to consider the appropriate standard of review for the appellate courts in reviewing a trial court's decision to admit or exclude evidence under *Daubert*.[877] The Court held that the abuse of discretion standard of review was appropriate, rather than the more stringent standard suggested by the Eleventh Circuit.[878]

Most recently, in *Kumho Tire*, the Supreme Court granted certiorari to resolve confusion in the lower courts regarding whether the *Daubert*'s standards related only to scientific evidence (often referred to as "hard science"), or whether the gatekeeping function also applied to "technical, or other specialized knowledge" categories of evidence (often referred to as "soft science").[879] The Court held that trial courts should apply the

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[871] 509 U.S. at 589.

[872] *Id.* at 591–92.

[873] *Id.* at 593–94.

[874] *See generally* 522 U.S. 136 (1997).

[875] Joiner v. Gen. Elec. Co., 864 F.Supp. 1310, 1327 (N.D. Ga. 1994), *rev'd*, 522 U.S. 136 (1997).

[876] Joiner v. Gen. Elec. Co., 78 F.3d 524, 529 (11th Cir. 1996), *rev'd* 522 U.S. 136 (1997).

[877] *Joiner*, 522 U.S. at 142–43.

[878] *Id.* at 141–43.

[879] 526 U.S. 137, 146 (1999). Federal Rule of Evidence 702 refers to "scientific, technical, or other specialized knowledge." FED. R. EVID. 702. *Daubert*'s holding was limited by its facts to admissibility of scientific evidence. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993).

Daubert analysis to all expert testimony, not just scientific testimony.[880] The "trial court may consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability."[881] The Court reiterated that the test of reliability is flexible and that the *Daubert* factors will not necessarily apply to all experts in every case,[882] a point often overlooked by practitioners who attempt to exclude all experts identified in their opponent's case.

In addition, practicioners should be aware that Federal Rule of Evidence 702, which governs testimony by experts, was amended in 2000 in response to *Daubert* and its progeny.[883] Rule 702 now reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[884]

(i) Application to Federal & Texas Summary Judgment Practice

In federal summary judgment practice, the party seeking to proffer expert testimony must establish the relevancy and reliability of its expert's testimony—or risk the trial court's exclusion of the testimony pursuant to *Daubert*. These rules also implicate Texas summary judgment practice.[885] Under Texas Rule of Civil Procedure 166a(i), the respondent to a "no-evidence" motion must be able to overcome a challenge pursuant to *E.I. du Pont de Nemours and Co. v. Robinson*[886] and *Gammill v. Jack Williams Chevrolet, Inc.*[887] (*Daubert*'s and *Kumho*'s corollaries in Texas state court)

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[880] *Kumho Tire Co.*, 526 U.S. at 141.

[881] *Id.*

[882] *Id.* at 141–42.

[883] FED. R. EVID. 702; *see also* FED. R. EVID. 702 advisory committee notes.

[884] FED. R. EVID. 702. Former Rule 702 provided: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." FED. R. EVID. 702 (amended 2000).

[885] *See* Part III.H. *supra.*

[886] *See generally* 923 S.W.2d 549 (Tex. 1995).

[887] *See generally* 972 S.W.2d 713 (Tex. 1998).

when relying upon expert testimony to defeat a no-evidence summary judgment motion.[888] Accordingly, neither the movant nor respondent can wait until trial to develop an expert's qualifications, given the potentially serious ramifications of exclusions of the expert's testimony at the dispositive motion stage.[889]

As a practice point, counsel should consider filing a motion to exclude an expert together with its motion for summary judgment. If the respondent's case is dependent upon the admissibility of the expert's testimony, the district court may grant summary judgment contemporaneously with or shortly after excluding the expert's testimony. An example of this situation is demonstrated by *Barrett v. Atlantic Richfield Co.*[890] In *Barrett*, the district court excluded expert testimony because it was inadmissible under *Daubert*.[891] After striking the experts, the court granted summary judgment in the defendants' favor.[892] On appeal, the court affirmed the exclusion of the experts' testimony under *Daubert* because the proposed testimony consisted of "unsupported speculation" and was thus unreliable.[893] The Fifth Circuit further affirmed the grant of summary judgment, noting that after striking the expert testimony, the plaintiffs had failed to provide any further summary judgment evidence in support of their claims.[894]

More recently, in *Michaels v. Avitech, Inc.*, a negligence action arising from the crash of a private plane, the Fifth Circuit indirectly considered the impact of *Daubert* expert testimony in the context of a summary judgment motion.[895] The district court had struck the expert's reports for violations of discovery disclosure requirements.[896] The Fifth Circuit ruled that the district court erred in striking the reports, yet stated that "[i]t remains to

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[888]Further, in *United Blood Services v. Longoria*, the Texas Supreme Court required summary judgment proof of an expert's qualifications in support of the response to a summary judgment motion. 938 S.W.2d 29, 30 (Tex. 1997) (per curiam). The court, using an abuse of discretion standard (similar to the United States Supreme Court in *Joiner*), upheld the trial court's exclusion of expert testimony. *Id.* at 31.

[889]*Id.* at 30–31.

[890]*See generally* 95 F.3d 375 (5th Cir. 1996).

[891]*Id.* at 382.

[892]*Id.* at 383.

[893]*Id.* (citing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 590 (1993)).

[894]*Id.* at 383.

[895]*See generally* 202 F.3d 746 (5th Cir. 2000).

[896]*Id.* at 750.

determine whether the plaintiff can withstand summary judgment, even considering all of his experts and reports."[897]

The court noted that the theory of the plaintiff's expert "would likely have been inadmissible at trial under *Daubert*," and that it was "perhaps remiss to attempt a *Daubert* inquiry at the appellate level when the district court did not perform one."[898] Nevertheless, to determine whether the plaintiff had provided sufficient and competent summary judgment evidence in his response, "it would be equally remiss for [the court] to ignore the fact that a plaintiff's expert evidence lacks any rational probative value."[899] On summary judgment, if the evidence gives rise to numerous inferences that are equally plausible, yet only one inference is consistent with the plaintiff's theory, the plaintiff does not satisfy his summary judgment burden "absent at least some evidence that excludes the other potential [proximate] causes."[900] Because the plaintiff's expert made no attempt to rule out other sources of proximate cause, the court held that his testimony was not "significantly probative" as to the issue of negligence and, thus, was not enough to preclude summary judgment.[901]

f. Objections to Evidence

Objections to summary judgment evidence must be raised either orally or in writing, at or before the hearing; otherwise, objections are ordinarily deemed waived.[902] The party contesting an affidavit has the burden to object to its inadmissible portions.[903] Failure to object permits the district court to consider the entire affidavit.

D. Rule 12(b)(6) Motion to Dismiss Treated as Rule 56 Motion for Summary Judgment

"Where matters outside the pleadings are considered . . . on a motion to dismiss," Rule 12(b) "requires the court to treat the motion as one for

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[897] *Id.* at 751 (citing *In re* TMI Litigation, 193 F.3d 613, 716 (3d Cir. 1999)).

[898] *Id.* at 753.

[899] *Id.*

[900] *Id.*

[901] *Id.* at 754.

[902] *E.g.*, Donaghey v. Ocean Drilling & Exploration Co., 974 F.2d 646, 650 n.3 (5th Cir. 1992) (citing McCloud River R.R. Co. v. Sabine River Forest Prods., Inc., 735 F.2d 879, 882 (5th Cir. 1984)).

[903] *McCloud River*, 735 F.2d at 882 (finding that *Sabine* failed to raise an objection to the affidavit); *see also* FED. R. CIV. P. 56(e) (stating that an adverse party must state specific facts showing a genuine issue for trial).

summary judgment and to dispose of it as required by Rule 56."[904] If a Rule 12(b)(6) motion has been converted to a Rule 56 motion for summary judgment, the summary judgment rule governs the standard of review.[905] In this manner, the respondent is entitled to the procedural safeguards of the summary judgment rule.[906]

A respondent must have ten days to respond to a motion for summary judgment.[907] However, under Rule 56, the district court is not required to give ten days notice beyond its decision to treat a Rule 12(b)(6) motion as one for summary judgment.[908] The standard is whether the opposing party had ten days notice after the court accepted for consideration matters outside the pleadings.[909] The notice required is only that the district court could treat the motion as one for summary judgment, not that the court would in fact do so.[910]

Washington v. Allstate Insurance Co. provides an example of this principle.[911] In *Washington*, the defendant attached a copy of a statute to its motion to dismiss, and the plaintiff attached a copy of the repair estimates to his response.[912] After twenty days had passed, the court treated the defendant's motion to dismiss as a motion for summary judgment and granted the motion.[913] The court determined that the plaintiff was on notice that the trial court could treat the motion to dismiss

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[904]Washington v. Allstate Ins. Co., 901 F.2d 1281, 1283–84 (5th Cir. 1990); *see also* FED. R. CIV. P. 12(b)(6).

[905]Songbyrd, Inc. v. Bearsville Records, Inc., 104 F.3d 773, 776 (5th Cir. 1997) (noting that the review would be de novo, applying the same standards as the trial court); *Washington*, 901 F.2d at 1284 (explaining that the appeals court may apply a summary judgment standard of review despite the trial court's mislabeling it as a 12(b)(6) motion).

[906]*Washington*, 901 F.2d at 1284.

[907]FED. R. CIV. P. 56(c).

[908]*Washington*, 901 F.2d at 1284 (quoting Clark v. Tarrant County, 798 F.2d 736, 746 (5th Cir. 1986)).

[909]*See* Fernandez-Montes v. Allied Pilots Ass'n, 987 F.2d 278, 283 n.7 (5th Cir. 1993) (noting that even if summary judgment is granted sua sponte, the ten day notice and opportunity to respond requirement of Rule 56 still governs).

[910]Isquith v. Middle S. Utils., Inc., 847 F.2d 186, 195–96 (5th Cir. 1988) (quoting the court's prior rejection of the argument for notice that the court would treat the motion to dismiss as one for summary judgment in *Clark v. Tarrant County*, 798 F.2d 736, 746 (5th Cir. 1986)).

[911]*See generally* 901 F.2d 1281 (5th Cir. 1990).

[912]*Id.* at 1284.

[913]*Id.*

as one for summary judgment because the parties attached documents to both the motion to dismiss and the response; therefore, the notice provisions of Rule 12(b) and Rule 56 were not violated.[914]

1. Standard of Review for Converted 12(b)(6) Motions

When a 12(b)(6) motion has been converted to a motion for summary judgment, the disposition of the motion does not turn on whether the complaint states a claim.[915] Instead, disposition depends on whether the plaintiff has raised an issue of material fact, which, if proved, would entitle it to relief as a matter of law.[916] For example, in *Bossard*, the district court granted the defendant's 12(b)(6) motion to dismiss after considering information outside the pleadings.[917] The plaintiff appealed, claiming that it stated a claim upon which relief could be granted.[918] The appellate court affirmed, noting that once a court considers evidence outside the pleadings, a 12(b)(6) motion is then treated as a motion for summary judgment.[919]

E. Appealing Summary Judgments

1. The District Court's Order on Summary Judgment

The prevailing movant should try to obtain an order with a specific finding that it carried its burden of proof and that there is no genuine issue of material fact. The Fifth Circuit has stated that although Rule 56 does not technically require the trial court to state its reasons for granting a motion for summary judgment, a detailed discussion is of great importance.[920] "In all but the simplest case, such a statement [of the reasons for granting summary judgment] usually proves not only helpful, but essential."[921] This prevents the appellate court from having to "scour the entire record while it ponders the possible explanations" for the entry of summary judgment.[922] The movant should, therefore, submit a

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[914] *Id.* (noting that district courts have the authority to enter summary judgment sua sponte as long as the nonmoving party was on notice to come forward with all evidence).

[915] Bossard v. Exxon Corp., 559 F.2d 1040, 1041 (5th Cir. 1977) (per curiam).

[916] *Id.*

[917] *Id.*

[918] *Id.*

[919] *Id.*

[920] McIncrow v. Harris County, 878 F.2d 835, 835–36 (5th Cir. 1989) (quoting Heller v. Namer, 666 F.2d 905, 911 (5th Cir. 1982) (footnote omitted in original)).

[921] Laird v. Integrated Res., Inc., 897 F.2d 826, 829 n.3 (5th Cir. 1990) (quoting Jot-Em-Down Store (JEDS), Inc. v. Cotter & Co., 651 F.2d 245, 247 (5th Cir. 1981)).

[922] *Jot-Em-Down Store (JEDS), Inc.*, 651 F.2d at 247.

proposed opinion with reasons for granting the motion, rather than a form order merely stating that the motion has been granted.[923]

2. When Summary Judgments are Appealable

If the trial court grants summary judgment and disposes of all claims, the judgment is appealable.[924] When the district court denies summary judgment, appeal is usually unavailable. In this situation, the court's decision constitutes an interlocutory order from which the right to appeal is unavailable until entry of judgment following a trial on the merits.[925] Exceptions to this rule exist in situations such as the denial of qualified immunity.[926] Further, upon certification the district court's denial of motion for summary judgment may be reviewed by permissive interlocutory appeal,[927] but such certification is relatively rare.

Likewise, a grant of summary judgment in favor of one of several defendants is an unappealable interlocutory order.[928] However, one Fifth Circuit case has stated that, when a grant of summary judgment in favor of one defendant near the time of trial will prejudice the trial preparation of another defendant, the district court should continue the trial in order to allow an interlocutory appeal.[929]

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[923]In federal court, as discussed above, the district court should give reasons for granting the motion for summary judgment. In contrast, it is currently acceptable for Texas state courts to grant an order for summary judgment without expressing its reasons.

[924]*See* Samaad v. City of Dallas, 940 F.2d 925, 940 (5th Cir. 1991) (noting that, generally, only the final judgment of the district court is appealable). Caution must be taken in determining what is a final judgment for purposes of appeal. The pendency of a motion for attorney's fees, for example, does not prevent the running of time for filing a notice of appeal on the merits. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199–203 (1988); Treuter v. Kaufman County, 864 F.2d 1139, 1142–43 (5th Cir. 1989).

[925]Ozee v. Am. Council on Gift Annuities, Inc., 110 F.3d 1082, 1093 (5th Cir. 1997) (stating that a denial of summary judgment is ordinarily an unappealable interlocutory order); *Samaad*, 940 F.2d at 940.

[926]*E.g.*, Chiu v. Plano Indep. Sch. Dist., 260 F.3d 330, 340–41 (5th Cir. 2001) (noting that the appellate court can review the materiality of any factual disputes, but not their genuineness, on appeals of the denial of qualified immunity); Bazan v. Hidalgo County, 246 F.3d 481, 490 (5th Cir. 2001).

[927]28 U.S.C. § 1292(b) (1994).

[928]*See* Guillory v. Domtar Indus. Inc., 95 F.3d 1320, 1328–29 (5th Cir. 1996).

[929]*Id.* (finding that the timing of summary judgment did not warrant reversal and prejudice had not occurred in this case).

3. Standard of Review on Appeal

In reviewing the district court's ruling on a motion for summary judgment, the circuit court applies the same standard that governs the district court.[930] Therefore, the appellate court will not affirm a summary judgment ruling unless, after de novo review,[931] the record reflects "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[932]

Following this standard, the appellate court must review the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party.[933] The court will only consider materials in the pretrial record that would have been admissible.[934] In contrast, the appellate court will decide questions of law in the same manner as it decides questions of law outside the summary judgment context—by de novo review.[935] In diversity actions, the appellate court will review de novo the district court's application of state law.[936] On appeal, the appellate court may affirm a summary judgment on any ground, even grounds other than those stated by the trial court.[937]

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[930]Bussian v. RJR Nabisco, Inc., 223 F.3d 286, 293 (5th Cir. 2000); Lafreniere Park Found. v. Broussard, 221 F.3d 804, 807 (5th Cir. 2000).

[931]Cabrol v. Town of Youngsville, 106 F.3d 101, 105 (5th Cir. 1997); Berry v. Armstrong Rubber Co., 989 F.2d 822, 824 (5th Cir. 1993); Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1412 (5th Cir. 1993).

[932]FED. R. CIV. P. 56(c).

[933]*Bussian*, 223 F.3d at 293, 302 (reversing the grant of summary judgment when "reasonable and fair-minded persons" could conclude from the summary judgment evidence that the defendant was liable under ERISA for breach of fiduciary duty); Michaels v. Avitech, Inc., 202 F.3d 746, 751 (5th Cir. 2000); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir. 1992) (quoting Baton Rouge Bldg. & Constr. Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986) (per curiam)).

[934]*Michaels*, 202 F.3d at 751.

[935]*Id.*

[936]DeLeon v. Lloyd's London, 259 F.3d 344, 347 (5th Cir. 2001).

[937]Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 511 (5th Cir. 2001); *Michaels*, 202 F.3d at 751 (stating that "summary judgment can be affirmed on any legally sufficient ground, even one not relied on by the district court"); Cabrol v. Town of Youngsville, 106 F.3d 101, 105 (5th Cir. 1997) (stating that "[w]hen reviewing an order granting summary judgment, we are not limited to the district court's conclusions but can affirm a district court's judgment on any grounds supported by the summary judgment record"); Thompson v. Ga. Pac. Co., 993 F.2d 1166, 1167–68 (5th Cir. 1993) (per curiam); Bernhardt v. Richardson-Merrell, Inc., 892 F.2d 440, 444 (5th Cir. 1990).

XI. CONCLUSION

While following the technically complex summary judgment procedures detailed in this article is fundamental, it does not ensure successful prosecution of, or defense against, a motion for summary judgment. Effective advocacy in summary judgment practice depends on strategic timing decisions, development and use of evidence, written persuasion, and knowledge of the judge. These factors, combined with technical correctness, ultimately determine success in summary judgment practice.