WINNING WRITING: SUMMARY JUDGMENT PRACTICE IN TEXAS STATE COURTS

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Robert S. Davis

- Personal Information

Robert Davis was born in Dallas, Texas, on September 16, 1962.

- Professional Experience

After graduating from law school, Mr. Davis served as Briefing Attorney to the Honorable Justice Sue LaGarde, 5th Judicial District Court of Appeals in Dallas, Texas from 1988 to 1989. Thereafter, Mr. Davis was appointed as Law Clerk to United States District Judge William M. Steger from 1989 to 1991. Mr. Davis is a Regional Counsel for Texas Association of Counties and has extensive experience in representing governmental entities and government officials in all types of litigation. Mr. Davis also has extensive experience in first party and third party litigation for major insurance carriers, drafting coverage opinions for insurance carriers and in medical malpractice litigation for private practitioners as well as county health authorities. Since 1994, Mr. Davis has tried 60 lawsuits in state and federal court to verdict, and he has handled approximately 65 appellate cases during that same period. He was admitted to the Texas bar in November, 1988. Mr. Davis was also admitted to practice before the United States District Court for the Eastern District of Texas in 1990, the United States Court of Appeals for the 5th Circuit in 1991, the United States District Court for the Northern District of Texas in 1991, the United States District Court for the Western District of Texas in 1991, the United States District Court for the Southern District of Texas in 2001 and the Supreme Court of the United States in 1998.

- Educational Background

Mr. Davis received his preparatory education at Trinity University in San Antonio, Texas, where he received a Bachelor of Science Degree in History in 1985. Mr. Davis' legal education was at Southern Methodist University, where he graduated with a Juris Doctor Degree in 1988. During law school, Mr. Davis served as the assistant legislative liaison for Dallas District Attorney Henry Wade and his successor, Dallas District Attorney John Vance. During the period of time that Mr. Davis worked for Mr. Wade, the Texas Governor's Office published a paper written by Mr. Davis on recidivism and the need for increased prison capacity, and excerpts of the paper were published by the major news media in Texas.

- Professional Development

Mr. Davis served as President of the Smith County Young Lawyers Association from 1994 to 1995, Co-Chairman of the Eastern District of Texas Historical Committee from 1996 to 1997. Mr. Davis is currently a member of the Smith County Bar Association, Eastern District of Texas Bar Association, and the Defense Research Institute. Mr. Davis is the author or co-author of several publications and papers including: "Bail Bonds: Emerging Liability Issues," 1999 Regional Law Enforcement Workshop Series, February 1999; Co-Author, "Jail Litigation: From Class Action Lawsuits to Pro Se Litigation," 1999 Fall Law Enforcement Regional Workshops - Mitigating Liability in County Jails, November 1999."Civil Rights Litigation Update," Texas Association of Counties, Northeast Texas Seminar, August 29, 1998; "Anatomy of a Law Enforcement Lawsuit," County Management Institute Seminar, April 8, 1998; "Jail Litigation: From Pro-Se Lawsuits to Class Actions," State Bar of Texas Seminar Suing and Defending Governmental Entities, 1997; "Bail-Bond Forfeitures," Northern and Eastern County Judges Association of Texas, 1997; "A Court Divided: The 5th Circuit Court of Appeals and the Politics of Judicial Reform," 52 TEX. B. J. 706 (1989)(book review); "The Choice: Increased Prison Capacity or Increased Recidivism," published by the Governor's Office of the State of Texas, 1986; "Using Abstract Questions to Develop Critical Thinking Skills in Social Studies," Holt, Rinehart & Winston, Inc. 1984; and "Selecting a United States President in 1984," MaGraw Hill Book Company, 1984.

Christi J. Kennedy

- Personal Information

Christi Johnson Kennedy was born in New Orleans, Louisiana on October 9, 1955. She and her husband, Richard W. Kennedy, reside in Tyler, Texas.

- Professional Experience

After graduating from law school in 1993, Mrs. Kennedy was admitted to the State Bar of Texas and joined the Tyler law firm of Potter, Minton, Roberts, Davis & Jones. While an associate of that firm, Mrs. Kennedy practiced primarily in the areas of business litigation, bankruptcy, and probate. She also served as staff attorney to the Honorable Roby Hadden, Justice of the Twelfth Judicial District Court of Appeals, from 1996-1997 and 1998-2000. Mrs. Kennedy has extensive appellate experience in both civil and criminal matters.

- Educational Background

Mrs. Kennedy attended Johns Hopkins University in Baltimore, Maryland and Louisiana State University in Baton Rouge, Louisiana. She received a Bachelor of Arts degree in Art History and History in 1977. Mrs. Kennedy studied law at Baylor University School of Law where she graduated *cum laude* with a Juris doctor degree in 1993. During law school, Mrs. Kennedy served as Lead Articles Editor (1992) and Editor-in-Chief (1993) of the *Baylor Law Review*. She also served as intern to United States District Judge Walter Smith in 1992. While in law school, Mrs. Kennedy authored a student article, *Travel Masters v. Star Tours: A Recent Texas Supreme Court Decision Highlights the Tension Between the Court and the Texas Legislature Regarding Covenants Not to Compete*, 44 BAYLOR L. REV. 937 (1992).

- Professional Development

Mrs. Kennedy is the President of the Smith County Lawyers Auxiliary and an ex-officio member of the Board of Directors of the Smith County Bar Association.
She has presented numerous lectures on bankruptcy and debt collection to regional chapters of the Texas Association of Business. She is a member of the Board of Directors of the East Texas Symphony Orchestra Association and a sustaining member of the Junior League of Tyler.

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I. INTRODUCTION

Tired of trying cases? Bored with jury selection? These problems are readily solved with the judicious use of summary judgment motions. Although Texas courts have traditionally employed a more stringent standard than federal courts for granting summary judgments, the adoption of a "no evidence" summary judgment in 1997 arguably relaxed the state standard. Further, the governmental liability practice area provides fertile ground for summary judgments with the variety of affirmative defenses available, *e.g.*, sovereign immunity, absolute immunity, qualified immunity, official immunity, in addition to other claims and defenses which readily lend themselves to motion practice. This article will address state summary judgment practice, but also identify areas in which that practice differs from federal procedure.

II. RULE 166a - SUMMARY JUDGMENT MOTIONS

A. The Traditional Summary Judgment Motion

Rule 166a(c) outlines the procedure and requirements for a traditional (as opposed to a "no evidence") summary judgment motion.

1. The Movant

Either a claimant or a defending party may move for a traditional summary judgment. TEX. R. CIV. P. 166a(a). A claimant may move for summary judgment upon all or any part of his claim, counterclaim, cross-claim, or declaratory judgment. *Id*. A party against whom a claim, counterclaim, cross-claim, or declaratory judgment is sought may move for summary judgment on all or any part of the claim, counterclaim, cross-claim, or declaratory judgment. *Id*.

A claimant may move for summary judgment on its own cause of action. In order to prevail, a claimant must prove that it is entitled to summary judgment by establishing each element of its own claim as a matter of law. *MMP, Ltd. v. Jones*, 710 S.W.2d 59,60 (Tex. 1986); *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970). A claimant may also move for summary judgment on the defendant's affirmative defense.

A defending party may move for summary judgment by disproving at least one element of the claimant's theory of recovery or by establishing each essential element of its affirmative defense. *Randall's Food Mkts, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). In order to obtain a summary judgment on an affirmative defense, the defending party must conclusively establish each element of its affirmative defense as a matter of law. *Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 927 (Tex. 1996). To obtain summary judgment on the claimaint's case, a defending party must conclusively negate (establish that no genuine issue of material fact exists) at least one essential element of the claimant's cause of action. *Garcia v. Levi Strauss & Co.*, 85 S.W.3d 362, 367 (Tex. App.–El Paso 2002, no pet.).

2. A Written Motion

The party seeking summary judgment must file a motion, as Texas courts may not render summary judgment without a motion. *Daniels v. Daniels*, 45 S.W.3d 278, 282 (Tex. App.–Corpus Christi 2001, no pet.); *Cockrell v. Central Savs. & Loan Ass'n*, 788 S.W.2d 221, 224 (Tex. App.–Dallas 1990, no writ).

Rule 166a "does not limit the number of times a motion for summary judgment may be filed." *McCartney v. May*, 50 S.W.3d 599, 604 (Tex. App.–Amarillo 2001, no pet.) (where movant decided not to file interlocutory appeal from denial of immunity, that denial was still

interlocutory and movant could re-urge motion in trial court). Because the denial of a motion for summary judgment is interlocutory, the movant may re-urge its motion in the trial court after its denial. *Id*.

3. Grounds

A movant must expressly state the grounds for summary judgment. Issues not expressly presented to the trial court by written motion or in an answer or other response shall not be considered on appeal as grounds for reversal. TEX. R. CIV. P. 166a(c); *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997); *Stiles v. Resolution Trust Corp*., 867 S.W.2d 24, 26 (Tex. 1993). In order to succeed, a movant must demonstrate that "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion." TEX. R. CIV. P. 166a(c).

In the no-evidence context, the Fourteenth Court of Appeals adopted the federal standard for materiality and genuineness. *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 433 (Tex. App.–Houston [14th Dist.] 1999, no pet.). A fact is "material" only if it affects the ultimate outcome of the suit under the governing law. Id. (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A "genuine issue" of material fact exists only if the evidence is such that reasonable jurors could find the fact in favor of the non-movant. *Id*.

4. The Burden

In a traditional summary judgment, the movant has the burden to prove there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *M.D. Anderson v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). If the movant does not meet its burden, the non-movant has no burden. *Id*. However, if the movant conclusively establishes that it is entitled to judgment, the burden then shifts to the non-movant to produce evidence sufficient to create a fact issue on a material fact. *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989).

5. Time for Filing

A claimant may move for summary judgment at any time after the adverse party has appeared or answered. TEX. R. CIV. P. 166a(a). A defending party may move for summary judgment at any time. *Id*.

The summary judgment motion, together with supporting evidence, must be on file at least 21 days before the time specified for the hearing. TEX. R. CIV. P. 166a(c). The non-movant must file its response not later than seven days prior to the hearing. *Id*. The day of service of the motion or response is not counted in the 21 day period, but the day of the hearing is counted. *Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex. 1994). If the motion for summary judgment is served by mail, the notice period consists of the 21 days required by Rule 166a plus the three days allowed for service by mail. TEX. R. CIV. P. 21a; *Holmes v. Ottawa Truck, Inc*., 960 S.W.2d 866, 869 (Tex. App.–El Paso 1997, pet. denied) (holding, however, that non-movant's response is timely if served by mail seven days prior to hearing - three-day provision of Rule 21a not applicable to response).

The time requirements relating to summary judgments are strictly construed, but the non-movant's failure to object to late notice of the motion waives error relating to insufficient notice. *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 582 (Tex. App.–Austin 1995, no writ). A party, whether movant or non-movant, may seek leave of court to file the motion, response, or supporting evidence late. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). The court must make a written order granting leave to file the motion, response, or evidence late. *Id*.; *see also INA of Texas v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985).

B. "No Evidence" Summary Judgment Motion

Prior to 1997, Texas summary judgment practice differed sharply from the federal. 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.' FED. RULE CIV. PROC. 1." *Celotex v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). "Texas law, of course, is different." *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). "We use summary judgments merely 'to eliminate patently unmeritorious claims and untenable defenses and we never shift the burden of proof to the non-movant unless and until the movant has 'establish[ed] his entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his cause of action or defense as a matter of law.'" *Casso*, 776 S.W.2d at 556 (internal citations omitted). In other words, prior to 1997, a defending party could not prevail on summary judgment by identifying the absence of evidence on one or more elements of a claimant's cause of action. *Garcia v. John Hancock Variable Life Ins. Co.*, 859 S.W.2d 427, 435-36 (Tex. App.–San Antonio 1993, writ denied); *Lesbrookton, Inc. v. Jackson*, 796 S.W.2d 276, 285-86 (Tex. App.–Amarillo 1990, writ denied) (refusing to adopt federal standard which allowed movant to prevail on summary judgment when non-movant could not produce evidence of an essential element of its claim).

In 1997, the Texas Supreme Court added the "no-evidence" summary judgment to the practitioner's arsenal. Rule 166a(i) provides:

> 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).

1. The Movant

Unlike the traditional summary judgment, the "no-evidence" summary judgment may only be made by the party without the burden of proof on a claim or defense. TEX. R. CIV. P. 166a(i); *Young Ref. Corp. v. Pennzoil Co.*, 46 S.W.3d 380, 385 (Tex. App.–Houston [1st Dist.] 2001, pet. denied) (a "no-evidence" motion can be used only to defeat a claim for which an adverse party would have the burden of proof at trial); *Harrill v. A.J.'s Wrecker Serv., Inc*., 27 S.W.3d 191, 194 (Tex. App.–Dallas 2000, pet. dism'd) (party may not bring a "no-evidence" motion for summary judgment on its own affirmative defense); *Heiser v. Eckerd Corp.*, 983 S.W.2d 313, 316 (Tex. App.–Fort Worth 1998, no pet.); *Galveston Newspapers, Inc. v. Norris*, 981 S.W.2d 797, 799 (Tex. App.–Houston [1st Dist.] 1998, pet. denied).

2. A Written Motion

Although Rule 166a(i) does not require that the movant expressly state that the motion is made under subsection (i) or that the motion is a "no-evidence" motion, it is "good practice to specifically state, in the caption or elsewhere, that it is brought under (i), if that is intended." *Welch v. Coca-Cola Enterprises, Inc*., 36 S.W.3d 532, 536 (Tex. App.–Tyler 2000, no pet.); *see also Garrett v. L.P. McQuistion Community Hosp.*, 30 S.W.3d 653, 655 (Tex. App.–Texarkana 2000, no pet.) (while Rule !66a does not require a motion to state under shich subdivision it is brought, the "better practice is to refer to the appropriate subjection in the title or body of the motion"). A movant is not required to produce evidence in support of its "no-evidence" motion. *Miller v. Elliott*, 94 S.W.3d 38, 42 (Tex. App.–Tyler 2002, pet. denied).

3. Grounds

As grounds for the "no-evidence" motion, the movant must state 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 at trial. *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex. App.–San Antonio 2000, pet. denied). "The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general challenges to an opponent's case." TEX. R. CIV. PROC. 166a(i) cmt. to 1997 change.

The movant should specifically identify the element or elements which it contends are unsupported by evidence. *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App.–Houston [14th Dist.] 2000, pet. denied); *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 438 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (movant must specify the essential elements of the claim or defense as to which there is no evidence). Where the movant fails to specifically identify the "no-evidence" elements, courts may treat the motion as a traditional motion for summary judgment and correctly place the burden on the movant. *Michael v. Dyke*, 41 S.W.3d 746, 751-52 (Tex. App.–Corpus Christi 2001, no pet.); *Amouri v. Southwest Toyota, Inc.*, 20 S.W.3d 165, 168 (Tex. App.–Texarkana 2000, pet. denied); but see *Roth v. FFP Operating, L.P.*, 994 S.W.2d 190, 194 (Tex. App.–Amarillo 1999, pet. denied) (specificity requirement is satisfied if grounds in motion give "fair notice" to non-movant).

Courts have differed as to whether an objection is necessary to preserve a complaint for appeal that the no-evidence motion was not sufficiently specific as to the challenged element of the claimant's case. *See Callaghan Ranch Ltd.*, 53 S.W.3d at 3 (a no-evidence motion that is not specific in challenging a particular element of a plaintiff's case is legally insufficient, and the issue of specificity may be raised for the first time on appeal); *but see Walton v. Phillips Petroleum Co.*, 65 S.W.3d 262, 268 (Tex. App.–El Paso 2001, no pet.) (objection is necessary to preserve complaint that motion did not meet requirements of Rule 166a(i)).

4. Time for Filing

Unlike the traditional motion, the "no-evidence" motion may only be filed "after adequate time for discovery." TEX. R. CIV. P. 166a(i). Rule 166a(i) does not define the "adequate time for discovery." TEX. R. CIV. P. 166a(i). The comment to the 1997 change provides some guidance in cases with a pretrial scheduling order. "A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before." TEX. R. CIV. P. 166a(i) cmt. to 1997 change. Thus, the comment appears to require that "ordinarily" a movant wait until the end of the discovery period to file a no-evidence motion.

Texas intermediate appellate courts have not drawn a bright line requiring that discovery be completed before the "no-evidence" motion may be granted. At least two courts have drawn a distinction between "adequate time for discovery" and the "completion" of discovery. *Carter v. McFadyen*, 93 S.W.3d 307, 311 (Tex. App.–Houston [14th Dist.] 2002, pet. denied) ("the comment that a 'no-evidence' motion would be permitted after the discovery period does not prohibit an earlier motion in all cases"); *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App.–Texarkana 1998, orig. proc.) ("The rule, however, does not require that discovery must be completed. It provides that a no-evidence summary judgment may be granted 'after adequate time for discovery.'").

Our courts have applied a fact-intensive, case specific analysis to determine if there has been "adequate time for discovery." *Restaurant Teams Int'l, Inc. v. MG Securities Corp.*, 95 S.W.3d 336, 339 (Tex. App.–Dallas 2002, no pet.) ("whether a non-movant has had adequate time for discovery under 166a(i) is case

specific"); *McClure v. Attebury*, 20 S.W.3d 722, 729 (Tex. App.–Amarillo 1999, no pet.). To determine whether adequate time for discovery has passed, courts examine the following factors:

a. the nature of the case;
b. the nature of evidence necessary to controvert the no-evidence motion;
c. the length of time the case was active;
d. the amount of time the no-evidence motion was on file;
e. whether the movant had requested stricter deadlines for discovery;
f. the amount of discovery already taken place; and
g. whether the discovery deadlines in place were specific or vague.

Restaurant Teams Int'l, Inc., 95 S.W.3d at 339.

C. The Response

1. Traditional Summary Judgment

Rule 166a(c) provides that the non-movant "may file and serve opposing affidavits or other written response." TEX. R. CIV. P. 166a(c). Thus, the Rule itself does not require the non-movant to respond at all. Where the non-movant does not respond, the movant must still carry its summary judgment burden, *i.e.*, to prove all essential elements of its cause of action or defense as matter of law. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). The court may not grant a summary judgment by default simply because the non-movant failed to file a response. *Clear Creek*, 589 S.W.2d at 678. If the non-movant does respond, the response must be in writing. *Clear Creek*, 589 S.W.2d at 678. If the non-movant does not present summary judgment evidence, the non-movant's only recourse on appeal is to attack the legal sufficiency of the movant's grounds. *Id.*

2. No Evidence Summary Judgment

In all cases, a non-movant should file a response to a "no-evidence" summary judgment motion. "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). "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." TEX. R. CIV. P. 166a(i) cmt. to 1997 change.

The proof required to defeat a "no-evidence" summary judgment is the same as that required to avoid a directed verdict during trial. Therefore, the non-movant must produce more than a scintilla of evidence. *Nicholson v. Smith*, 986 S.W.2d 54, 58 (Tex. App.–San Antonio 1999, no pet.). Evidence is quantified as more than a mere scintilla when reasonable and fair minded people would differ in their conclusions. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). When the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact, the evidence is not "more than a scintilla and is not sufficient to avoid a "no-evidence" summary judgment. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983); *Graves v. Komet*, 982 S.W.2d 551, 553 (Tex. App.–San Antonio 1998, no pet.)

3. Timing

"Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response." TEX. R. CIV. P. 166a(c). The day of service of the response is not counted in the seven day period, but the day of the hearing is counted. *Baker v. Gregg County*, 33 S.W.2d 72, 77-78 (Tex. App.–Texarkana 2000, pet. dism'd) (in computing the seven day period in Rule 166a, the day triggering the period of time is not included). As expressed in the rule, courts may allow a late summary judgment response. The court's decision, however, is discretionary and will not be reversed absent an abuse of that

discretion. *White v. Independence Bank, N.A.*, 794 S.W.2d 895, 900 (Tex. App.–Houston [1st Dist.] 1990, writ denied) (citing examples of opinions affirming trial courts' exercise of discretion, whether for refusal or allowance of late filing). Further, the record must affirmatively indicate that the court accepted the late filing. *INA of Texas v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985); *Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171, 176 (Tex. App.–Fort Worth 1996, no writ). In the absence of proof that the court accepted the late filing, an appellate court presumes that the trial judge refused the late filing. *INA of Texas*, 686 S.W.2d at 615; *Waddy v. City of Houston*, 835 S.W.2d 97, 101 (Tex. App.–Houston [1st Dist.] 1992, writ denied).

D. Objections to the Motion

The summary judgment response should include objections to deficiencies in the form or substance of the motion. Failure to object results in waiver of the deficiency, but does not waive the issue that the movant's grounds for summary judgment were insufficient as a matter of law. *Roadside Stations, Inc. v. & HBF, Ltd.*, 904 S.W.2d 927, 930, 932 (Tex. App.–Fort Worth 1995, no writ). If the movant's grounds for summary judgment are vague or ambiguous, the non-movant should file special exceptions to the motion. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342-43 (Tex. 1993); *Lavy v. Pitts*, 29 S.W.3d 353, 356 (Tex. App.–Eastland 2000, pet. denied) ("to complain that summary judgment grounds are unclear, a non-movant must except to the motion"). The non-movant must file the special exceptions seven days before the summary judgment hearing, and must obtain a ruling on the special exceptions at or prior to the summary judgment hearing. *McConnell*, 858 S.W.2d at 354 n.7; *Lavy*, 29 S.W.3d at 356.

E. Continuance

Rule 166a itself contemplates the necessity for a continuance to obtain summary judgment evidence for a response. "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." TEX. R. CIV. P. 166a(g). Thus, the non-movant should not delay in reviewing and analyzing the need for evidence to respond to a summary judgment motion. On the contrary, if the necessary evidence, whether affidavit or deposition testimony, is not available, the non-movant should immediately move the court for a continuance so that it may obtain the necessary evidence. The party seeking a delay to obtain additional evidence should "file either an affidavit explaining the need for further discovery or a verified motion for continuance." *Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *Blanche v. First Nationwide Mortgage Corp*., 74 S.W.3d 444, 450-51 (Tex. App.–Dallas 2002, no pet.) (applies *Tenneco* holding to no-evidence motions for summary judgment). The motion or affidavit should set forth the discovery that has been conducted and the particular evidence that the non-movant will obtain during the period of the continuance. The decision to grant or deny a continuance to obtain additional discovery is discretionary. *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682, 685 (Tex. 2002); *Restaurant Teams Int'l, Inc. v. MG Securities Corp.*, 95 S.W.3d 336, 342 (Tex. App.–Dallas 2002, no pet.).

In the "no-evidence" context, a motion for continuance should recite, where proper, that there has not been adequate time for discovery. Failure to request a continuance waives any argument that the party had inadequate time for discovery. *Blanche*, 74 S.W.3d at 451.

F. The Reply

The summary judgment reply allows the movant to have the last word and is perhaps the most overlooked aspect of the movant's

summary judgment practice. The rule does not require that a movant file a reply to the non-movant's response, nor does it specify a time in which the movant must file the reply, if any. The movant should carefully review the response filed by the opponent, paying particular attention to the opponent's statement of legal issues and the "facts." The movant should point out to the court any misstatements of law. More important, however, the movant should identify any misstatements of the facts from the evidence. A non-movant may misstate or mischaracterize its evidence in an effort to create a genuine issue of fact. Often, the grant or denial of summary judgment rests on the version of the "facts" accepted by the court. The court may not always review the actual evidence attached to the motion, but may rely on the parties' characterization of that evidence. In this instance, it is critical that the movant point out any errors in the non-movant's recitation of facts.

G. The Hearing

No oral hearing is required before the grant of a summary judgment. *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998). Where the court sets a motion for submission instead of hearing, the applicable time periods for service of the motion, response, or objections run from the submission date. If the court does conduct a hearing, the court will consider only the written submissions and argument of counsel. TEX. R. CIV. P. 166a(c). No oral testimony is allowed in summary judgment practice. *Martin*, 989 S.W.2d at 359; *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 n.4 (Tex. 1992).

H. Judgment

Since 1993, Texas courts have been plagued with confusion over the finality of summary judgment orders. Traditionally, an order was a final, appealable order if it disposed of all claims and all parties. *H.B. Zachry Co. v, Thibodeaux*, 364 S.W.2d 192, 193 (Tex. 1963). In 1993, the Texas Supreme Court held that a partial summary judgment was final for purposes of appeal if it contained a Mother Hubbard clause ("all relief not expressly granted is denied"). *See Mafrige v. Ross*, 866 S.W.2d 590, 592 (Tex. 1993). The supreme court overruled *Mafrige*, holding that the inclusion of a Mother Hubbard clause does not indicate that a summary judgment order is a final, appealable order. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 203-04 (Tex. 2001). Lehmann attempted to clarify the finality of summary judgments, holding

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

Lehmann, 39 S.W.3d at 192-93. *Lehmann* is an attempt to clear the muddied waters that resulted after *Mafrige*. However, parties should exercise caution in reviewing summary judgment orders. *Lehmann* specifically addresses the situation in which a court grants a "take nothing" judgment in favor of the defendants, but the defendants had only moved for a partial summary judgment. According to the *Lehmann* decision, this judgment is final, but erroneous. *Lehmann*, 39 S.W.3d at 200.

I. Appeal of the Summary Judgment

If granted, a final summary judgment is an appealable order. The appellate court is not limited to the grounds relied upon by the trial court, but may affirm the summary judgment on any ground presented to the trial court. Thus, the appellee (successful summary judgment movant below) should urge the trial court to consider not only the grounds for summary judgment relied upon by the trial court, but all other grounds presented to the trial court. *See*

Harwell v. State Farm Mutual Auto. Ins. Co., 896 S.W.2d 170, 173 (Tex. 1995).

As a general rule, the denial of summary judgment is not appealable. However, there are certain statutory exceptions, including the denial of a 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. TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5).

III. SUMMARY JUDGMENT EVIDENCE

A. Attach Evidence to the Motion or Response

Summary judgment evidence should be attached to the motion or response. Rule 166a(d) provides for the use of discovery products not on file with the clerk, "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 . . . ." TEX. R. CIV. P. 166a(d). However, the better practice is to attach evidence to the motion to avoid pitfalls relating to the sufficiency of the "specific references to the discovery" or the statement of intent. *See, e.g., E.B. Smith Co. v. United States Fidelity & Guaranty Co.*, 850 S.W.2d 621, 624 (Tex. App.–Corpus Christi 1993, writ denied) (court held references to unfiled discovery were not sufficient to constitute a "specific reference" within the meaning of Rule 166a(d)).

B. Forms of Summary Judgment Evidence

1. The Affidavit

An affidavit is "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." TEX. GOV'T CODE ANN. § 312.011(1). In the summary judgment context, affidavits must be "made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f). 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. *Id*.

a. Facts, Not Legal Conclusions

An affidavit is a statement of a fact or facts. TEX. GOV'T CODE ANN. 312.011(1). Legal conclusions in an affidavit do not raise an issue of fact or establish a fact. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) ("Conclusory affidavits are not enough to raise fact issues"); *Hawthorne v. Star Enterprises, Inc.*, 45 S.W.3d 757, 759 (Tex. App.–Texarkana 2001, pet. denied) ("conclusory statements or statements based purely on personal opinion are not competent summary judgment evidence" "a statement is conclusory if it expresses a subjective belief and gives no factual support for that belief"); *Haynes v. City of Beaumont*, 35 S.W.3d 166, 178 (Tex. App.–Texarkana 2000, no pet.) (a conclusory statement is one that does not provide the underlying facts to support the conclusion).

b. Must Be Signed and Sworn

An affidavit must be signed by the person making the statement. *De Los Santos v. Southwest Texas Methodist Hosp.*, 802 S.W.2d 749, 755 (Tex. App.–San Antonio 1990, no writ), *overruled on other grounds, Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex. 1994). An affidavit signed with the permission of the "affiant" is not an affidavit. *Id*. Further, the affidavit must be sworn to before an officer authorized to administer oaths. Without a certificate by a competent officer that the writing was sworn to by the person who signed it, a statement is not an affidavit and is not competent summary judgment proof. *City of San Juan v. Gonzalez*, 22 S.W.2d 69, 72 (Tex. App.–Corpus Christi 2000, no pet.). An

acknowledgment is merely a statement that the person signing an instrument executed the instrument for the purposes and consideration expressed therein, and does not constitute a sworn statement. *City of San Juan*, 22 S.W.2d at 73.

Although the Government Code section 312.011(1) states that an affidavit must be sworn to "before an officer authorized to administer oaths," there is some authority that the affiant is not required to sign the affidavit in the presence of the notary. *In re V.R.W.*, 41 S.W.3d 183, 191 (Tex. App.–Houston [14th Dist.] 2001, no pet.) (affidavit made pursuant to Texas Family Code section 161.103, which requires statement be "verified before a person authorized to take oaths").

c. Personal Knowledge

Affidavits must be based on personal knowledge. TEX. R. CIV. P. 166a(f); *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994). A mere recital that an affidavit is "based on personal knowledge" is insufficient. Rather, an affidavit should demonstrate that the affiant personally knows the facts and should demonstrate how the affiant gained his knowledge of the facts. *City of Hidalgo v. Prado*, 996 S.W.2d 364, 373 (Tex. App.–Corpus Christi 1999, no pet.); *see also Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (statement about affiant's understanding of facts was insufficient); *Humphreys*, 888 S.W.2d at 470 (affiant's testimony that he acquired facts from inquiry of others was insufficient). Affidavits made "on information and belief" are not made on personal knowledge, unless there is independent evidence in the affidavit that demonstrates the manner in which the affiant acquired his knowledge. *Slater v. Metro Nissan of Montclair*, 801 S.W.2d 253, 254 (Tex. App.–Fort Worth 1990, writ denied).

d. Set Forth Facts As Would Be Admissible in Evidence

Affidavit testimony must be admissible, as if it were being presented at trial. *United Blood Servs. v. Longoria*, 938 S.W.2d 29, 30-31 (Tex. 1997). Accordingly, affidavits should not contain hearsay. *See Querner Truck Lines, Inc. v. Alta Verde Indus., Inc.*, 747 S.W.2d 464, 468 (Tex. App.–San Antonio 1988, no writ). However, like trial testimony, hearsay contained in an affidavit is admissible unless objected to. *Well Solutions, Inc. v. Stafford*, 32 S.W.2d 313, 317 (Tex. App.– San Antonio 2000, no pet.).

e. Affiant Must Be Competent

Courts consider the following three elements in making determination of competency of witness to testify: 1)the competence of witness to observe intelligently events in question at time of occurrence, 2) the capacity of witness to recollect events, and 3) the capacity of witness to narrate facts. *Hollinger v. State*, 911 S.W.2d 35, 38-39 (Tex. App.–Tyler 1995, pet. ref'd). The ability to narrate facts requires the witness to understand questions that are asked, frame intelligent answers to those questions, and to understand moral responsibility to tell truth. *Id*.

2. Depositions

Deposition excerpts are routinely used in support of or to oppose a motion for summary judgment. Like affidavits, the deposition testimony is subject to the same objections as trial testimony. Therefore, a party opposing deposition testimony should examine the testimony for admissibility issues, such as hearsay. [cite] Deposition excerpts should be attached to the motion or response, but need not be authenticated. *McConathy v. McConathy*, 869 S.W.2d 341, 341 (Tex. 1994).

3. Other Discovery Products

As with other forms of summary judgment evidence, discovery products must be "otherwise admissible." *Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171,. 175 (Tex. App.–Fort Worth 1996, no writ). Answers to interrogatories and requests for admission

cannot be used as summary judgment evidence by the party that answered them, but only by an opposing party. TEX. R. CIV. P. 197.3, 198.3. Like other summary judgment evidence, the better practice is to attach the relevant discovery products to the motion for summary judgment.

C. Credibility of Witnesses

The trial court has no authority to determine the relative credibility of summary judgment witnesses, whether by affidavit or deposition, to try a cause on summary judgment evidence. *Higginbotham v. Davis*, 35 S.W.3d 194, 198 (Tex. App.–Waco 2000, pet. denied).

III. EXPERT WITNESSES IN SUMMARY JUDGMENTS

Prior to 1978, Texas courts rejected affidavits of interested or expert witnesses for conclusively establishing a fact in the summary judgment context. *Gibbs v. General Motors Corp*., 450 S.W.2d 827, 828-29 (Tex. 1970). However, Rule 166a has since been amended to provide:

> A summary judgment may be based on uncontroverted testimonial evidence of an interested witness, or of an expert witness as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts, if the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted.

TEX. R. CIV. PROC. 166a(c). Where subject matter requires expert testimony to guide the trier of fact, conclusions of a lay, or non-expert, witness are not sufficient to controvert the expert opinion. *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).

Table of Authorities

Cases

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