CHAPTER 1.
DISPOSITION WITHOUT TRIAL

INTRODUCTION

JOSKE
v.
IRVINE
91 Tex. 574, 44 S.W. 1059
(1898)

Franklin & Cobbs, for plaintiff in error.
C. K. Breneman, for defendant in error.

DENMAN, J.

Joe Shely, an officer of the city of San Antonio, arrested James Irvine without a warrant, and confined him nearly 24 hours in the city prison. Irvine sued Alexander Joske to recover damages, claiming that such arrest was unlawful and directed by him. The arrest was not sought to be justified under any statute or charter provision, but under a city ordinance authorizing the arrest of suspicious characters without warrant. The trial court having instructed the jury that the arrest was unlawful, verdict and judgment were for plaintiff for $250, which having been affirmed by the court of civil appeals, Joske has brought the case to this court upon writ of error.

Said charge is assigned as error. The court of civil appeals overruled the assignment on the ground that the city charter did not authorize the council to pass such an ordinance. We were inclined to hold otherwise at the time of granting the application for writ of error, but do not feel called upon to determine the question, for the reason that we do not consider there is any evidence in the record of the existence of such an ordinance. The only testimony on the subject is that of Shely, as follows: 'I made the affidavit against Irvine. The warrant issued on the ground of suspicious character. Under the city ordinance we have a right to do so during investigation. * * * I have a right, as an officer acting in the discharge of his duty, to arrest anybody whom I think has committed an offense against the state or city. I thought this man had committed an offense from his own actions. I did not see him commit any offense. I had authority to arrest Mr. Irvine, and take him to the city jail and confine him there, without a warrant and without any complaint against him. I made complaint against him the next morning. I couldn't make it until the next morning, because the recorder was not there.' His evidence further shows that he arrested Irvine in the evening, but did not make the affidavit until the next morning.

We construe the first portion of his testimony above quoted as tending only to establish an ordinance authorizing the making of an affidavit against one as a suspicious character in order to hold him during an investigation of his case. It does not tend to show the existence of an ordinance authorizing a person's arrest without a warrant on the ground that the officer considers him a suspicious character. The latter portion of his testimony, above quoted, is merely the opinion of the officer as to his authority, and does not purport to state even the substance of an ordinance. It does not even appear to have been based upon an ordinance. It may have been his construction of the statutes and charter authorizing the city officers to arrest without warrant in certain cases. The existence and contents of the ordinance were facts to be established by proof. The proof did not bear upon those issues, but, assuming them to be established, Shely merely gave his opinion as to the authority conferred upon him thereby. This was only his opinion upon a question of law. Such an opinion could not establish the fact-the ordinance-upon which it was based. Since there was no evidence of an ordinance justifying the arrest without warrant, and since it cannot be justified either under the general statutes or any provision of the city charter, the trial court did not err in giving said charge. We are therefore of opinion that the record shows that plaintiff's arrest was unlawful.

But more must be shown to hold Joske liable therefor. Upon this subject the court charged the jury: 'If you believe from the testimony that the defendant, Alexander Joske, requested or directed the officer Joe Shely to arrest and confine said plaintiff in jail, then you are instructed that plaintiff is entitled to recover of defendant, Joske.' Joske, by proper assignment, urges that the giving of this charge was error, for the reason that there was no evidence tending to show that he 'requested or directed' the arrest. Irvine was driving a delivery wagon for Joske Bros., of which Alexander Joske was a member, and in the performance of his duties started out with a number of packages for delivery to various customers of the firm in the city of San Antonio. He returned at

night, and informed the stableman that some of the packages, the value of which seems to have been about $30, had been stoled from his wagon, and then, without informing Joske, went to his room. Very soon afterwards Alexander Joske and the stableman appeared at the room, and from that time Irvine's version of Joske's connection with his arrest, as given on his direct examination, is as follows: 'Mr. Joske called out, did I live there; called out my name, Jim Irvine. I answered, 'Yes, sir;' and he jumped up, and in a very angry way asked what I did with those goods and what I had done with the money. I said, 'Mr. Joske, I lost them.' He asked me where, and I told him where they had been stolen from my wagon. I don't know whether he believed my statement or not, but any way he went off, and came back with two police officers, and they questioned me regarding the packages which had been lost, and I told them all I knew about it; that they had been lost or stolen out of the wagon, and told them the place. Some of the police officers said, 'You had better come along with us.' Captain Roberts asked me to go along, and I did so. I had my coat on, and we went to the stable, and Mr. Joske asked the stableman what was my condition when I came in, and he said, 'He was drunk.' Mr. Joske also requested Captain Roberts to ask the stableman as to my condition when I came in, and the man answered that I was drunk. I told him that I was not. Then he took me to the store, and went inside, and looked over this delivery sheet. Then we went outside the store again, and Mr. Joske and the officers had a talk, and then Frank Roberts, captain of the police, told me I could go; and in the meantime Mr. Joske said, 'You come to my office in the morning, but don't take your horse and wagon along.' He discharged me right there. I said, 'All right.' So I went home, and the next morning I showed up at the office at his request. I had some change of theirs that I had out the day before. I went up to the shipping clerk, who was the man I did my business with, and I balanced up my account with the exception of $3 that the house owed me for work, which I retained. Then I waited till Mr. Joske came, and he called me into his office, and said: 'Tell me what you did with those goods, and I will make it as easy for you as possible; I won't hurt you,'—or words to that effect. Well, of course it made me feel right angry with Mr. Joske to think I had stolen the goods. I answered: 'Good Lord, Mr. Joske, you don't think for a moment I stole those goods, do you?' He said: 'What did you do with them? What was done with the money?' I said: 'They were stolen out of my wagon; that is all I can tell you about it.' Then he went to the shipping clerk, and asked: 'Has this man any C. O. D. money?' And the clerk said: 'Yes, sir; he has got three dollars.' Then he didn't say another word, but was very angry, and jumped to the telephone, and rang up police headquarters, and said: 'Send an officer here at once.' I waited till the officer came, and when he did come Mr. Joske met him, and talked with him, and then called me over to one side, and, with the officer, he asked me about those goods being lost, and I told him just what I have already said,—that they were stolen out of my wagon. Then the officer said: 'Mr. Joske says you have three dollars of his money.' I said that I had retained three dollars for wages which he owed me. He said I ought to pay Mr. Joske that money, and I said I would not do so until the law compelled me, because Mr. Joske had discharged me the night before without allowing me to make any explanation, or settle up with him for the goods lost or stolen, and that I intended to keep the money. He then told me there was a law compelling me to pay it, and that I had better pay it. I said that at that rate I would pay him, but that I didn't have enough in my pocket to pay him then, but that I could get it in two minutes; that I could go to my room and get it. He took me along, and we went in his buggy, and as we were going along I noticed that it was about twelve o'clock, and I thought my boarding house was nearest to the store,—nearer than my room,-and I would go there. I was pretty sure I could catch the man I roomed with, and that would save my going to my room, and we did so, and I asked him for a couple of dollars, and he let me have it, and we came back to Joske's,—Detective Shely and myself,—and Mr. Shely remarked to Mr. Joske that 'this man didn't go to his room for the money, but went to another man for it.' 'Well,' he says, 'I will make an affidavit against him, anyhow.' They talked together a little while, and I stayed in Mr. Shely's buggy, and he came back and I said, 'What is it?' And Mr. Shely said, 'You have got to go with me; you have got to go to jail.' They put me in jail, and kept me there all that evening and until ten o'clock the next morning.' Joe Shely, witness for defendant, Joske, testified as to the circumstances attending the arrest as follows: 'I was assistant city detective at that time. * * * I was called to Mr. Joske's store, * * * and found Mr. Joske and Mr. Irvine arguing and contending in a very boisterous way. Mr. Irvine seemed to be angry. I had a conversation with him and Mr. Joske, in which Mr. Joske desired Irvine to tell him what he had done with certain goods that he had taken out the day previous, and he refused to give an accounting, and seemed to be in various ways very aggressive towards Mr. Joske. When I came up and commenced to talk to him he addressed me in the same manner. * * * I told him that he couldn't abuse me; that I proposed to have him give an account of these things. He said he didn't have to. I told him he might have to, and then I told him who I was. He may not have known at the time that I was an officer. * * * Well, he studied a little bit, and then there was something said about the three dollars of Mr. Joske's money. I asked him what right he had to appropriate that money to his

own use. He said he was going to keep it until Mr. Joske paid him for his work. * * * I asked him what he had done with the money, and he said he had it in his room on Blum street, and I asked him to go up there with me. He got in the buggy with me, and we went around to the Menger, around the corner of Crockett and Alamo Plaza. * * * Irvine was not arrested then. He went with me voluntarily to get Mr. Joske's money. We went around there, and Irvine got out, and went into a restaurant. I got out of the buggy and followed him. I saw him talking to a man, and presently he came out. I saw him and the man together, and the man passed him something; and he came out, and got into the buggy with me, and we started back to go up Blum street, and he said we would go on back. I said, 'Well, let's go up to your room.' He said, 'No; that he had the money.' I said, 'You said you had the money at your room.' 'Well,' he says, 'I have got the money now to give to him.' I then told him that I wanted to know what he had done with those goods, or give an account of the things he had the evening before. He said he didn't have to. I told him that he would have to give an account of those things or go to his room, or that I would arrest him, and for him to take his choice. I told him that I wanted an explanation; that I demanded it as an officer; and he positively refused to give an explanation; and I drove back to Mr. Joske's, and called Mr. Joske out, and told him that I was going to put Irvine in jail. I brought him down, and put him in jail, and made an affidavit against him. In the first place, before I went away from there, Irvine challenged me to arrest him. That was in the store, in the presence of Mr. Joske and some of his clerks. He challenged me to arrest him, and defied me to do it. I told him I didn't want to arrest him, and Mr. Joske said he did not want to have him arrested at all, but what he wanted was an explanation or some satisfaction as to where his goods had gone to, and when I came back there Mr. Joske never advised me to arrest him or anything of that kind. I did it on my own responsibility. I told Irvine that I was an officer in the discharge of my duty, and that Mr. Joske had just turned the case over to me, and it was my duty to investigate it, and that I wanted him to tell me all about it. He refused positively to do so, and defied me to arrest him and put him in jail. I took him down, and advised with Capt. Druse, my chief. The captain advised me to go ahead, and whatever I did he knew would be right. He said, 'You are acquainted with the case, and you know the law and you know your business.' When I drove back to Mr. Joske's I called him out. He did not direct me to arrest Irvine in any way at all. Mr. Joske had nothing at all to do with the arrest of the man; never advised me to arrest him; just turned the case over to me, and wanted it investigated. * * * I could get from Irvine no explanation whatever in reference to the goods until after I put him in jail. After he had been in jail a while he sent for me, and told me where he was playing cards,-where he got drunk,—and I went up there and got information. I found out where the articles were lost. He told me that he had been drunk, and everything, and they corroborated what he had told me after he had been in jail three or four hours. The next morning after I came back, I went before the recorder and had the case dismissed.' Frank Roberts, captain of police, testified for defendant that when he was investigating the case on the evening the goods were lost, as detailed in Irvine's testimony above, 'Joske did not in any way direct me to arrest or imprison said Irvine; in fact, he told me not to do so. * * * By all sorts of examination I tried to ascertain from him the whereabouts of the missing property, and threatened to put him in jail if he did not tell; but from his dazed condition, and from his actions, I became satisfied that he did not know where the goods were.' Alexander Joske testified in his own behalf to all the circumstances connected with the several transactions referred to in the testimony above, his testimony agreeing substantially with that of Capt. Roberts and Shely. He also testified that he had no intention of having Irvine arrested, and told both Roberts and Shely that he did not wish to have him arrested, but that he merely sent for them in order to have them, as officers, trace up and recover his property. He also denied that he made the remark testified to by Irvine, to the effect that he was going to file a complaint against Irvine. He further testified that he never recovered the goods, and that he did not go to the police court. W. O. Hilgers, whom we understand to have been an employee of Joske Bros., testified as to the conversation between Shely and Joske, as Shely was about to leave the store the last time, as follows: 'Mr. Joske said: 'I don't want anything to do with the arrest. I just want my goods that belonged to me. I positively do not want anything to do with the arrest.' The above is all the testimony that we understand is material to the question under consideration.

The question for our determination may be stated thus: Is it a legitimate inference from this testimony that Joske 'requested or directed' the arrest? Or, in other words, should the trial court have instructed the jury that they could not so find therefrom? If so, it is our duty to set aside the verdict; if not, we have no power to do so. It is important, before proceeding to an examination of the evidence, to determine the rule of law by which the trial court should have been governed in deciding whether he would so instruct; for we are governed by the same rule in passing upon the question above stated. In 1870, BULLER, J., laid down the since much quoted and often misunderstood proposition that 'whether there be any evidence is a question for the judge; whether sufficient evidence, is for the jury.' *Company of Carpenters v. Hayward*, 1 Doug. 375. The correctness of this proposition

is generally admitted, but great difficulty has been experienced in determining the exact legal meaning of the phrase 'any evidence.' In 1868, WILLIS, J., in *Ryder v. Wombwell,* L. R. 4 Exch. 32, said: 'It was formerly considered necessary in all cases to leave the question to the jury if there was any evidence, even a scintilla, in support of the case; but it is now settled that the question for the judge (subject, of course, to review) is, as stated by MAULE, J., in *Jewell v. Parr*, 13 C. B. 916, not whether there is literally no evidence, but whether there is none that ought reasonably to satisfy the jury that the fact sought to be proved is established;' and held that plaintiff could not recover of a minor for a goblet valued at £15, and a pair of ornamental stud buttons valued at £25, the former being, within the knowledge of plaintiff at time of sale, intended by the minor as a present to a third person, there being no evidence offered by plaintiff that such articles were necessaries in the particular case, and set aside the verdict and judgment in favor of plaintiff and entered a nonsuit. In *Wittkowsky v. Wasson*, 71 N. C. 454, the court, in speaking of the meaning of the phrase 'any evidence,' say: 'Did it mean the slightest scintilla of evidence, or such only as that from which a jury might reasonably infer the existence of the alleged fact? The latter view has been adopted in this state and in England, and, so far as my researches have extended, in other states generally.' In *Hyatt v. Johnston*, 91 Pa. St. 200, it is said: 'Since the scintilla doctrine has been exploded, both in England and in this country, the preliminary question of law for the court is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence from which the jury can properly find the question for the party on whom the burden of proof rests, it should be submitted; if not, if should be withdrawn from the jury.' In *Baulec v. Railroad Co*., 59 N. Y. 356, the court said, quoting from *Toomey v. Railway Co*., 3 C. B. (N. S.) 149, that 'it is not enough to authorize the submission of a question, as one of fact, to a jury, that there is 'some evidence.' A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, would not justify the judge in leaving the case to the jury'; and held that a single act of casual neglect, though admissible as evidence, as held by this court in *Cunningham v. Railway Co*., 88 Tex. 534, 31 S. W. 629, was not sufficient to authorize a jury to find that an employé was incompetent, and that the retention of such employé in its service, after having investigated the facts connected with such act, would not authorize a finding that the company was guilty of negligence in continuing to employ him.

This court in *Lee v. Railway Co*., 89 Tex. 588, 36 S. W. 65, said: 'To authorize the court to take the question from the jury, the evidence must be of such a character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.' In *Mynning v. Railroad Co*., 64 Mich. 93, 31 N. W. 147, the rule is stated thus: 'If the circumstances are such that reasonable minds might draw different conclusions respecting the plaintiff's fault, he is entitled to go to the jury upon the facts. The judge takes the case from the jury only when it is susceptible of but one just opinion.' The supreme court of the United States have approved the rule announced in *Ryder v. Wombwell, supra. Railway Co. v. Munson*, 14 Wall. 442; *Commissioners v. Clark*, 94 U. S. 278; *Griggs v. Houston*, 104 U. S. 553.

From a careful examination of the cases, it appears (1) that it is the duty of the court to instruct a verdict, though there be slight testimony, if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established, such testimony, in legal contemplation, falling short of being 'any evidence'; and (2) that it is the duty of the court to determine whether the testimony has more than that degree of probative force. If it so determines, the law presumes that the jury could not 'reasonably infer the existence of the alleged fact,' and 'that there is no room for ordinary minds to differ as to the conclusion to be drawn from it.' The broad and wise policy of the law, formed in and descending to us through the crucibles of time, does not permit the citizen to be deprived of his property, his liberty, or his life upon mere surmise or suspicion, and places upon a trained judiciary the grave responsibility of determining as a question of law whether the testimony establishes more. 'There is, no doubt, a possibility, in all cases where the judges have to determine whether there is evidence on which the jury may reasonably find a fact, that the judges may differ in opinion, and it is possible that the majority may be wrong. Indeed, whenever a decision of the court below on such a point is reversed, the majority must have been so either in the court above or the court below. This is an infirmity which must affect all tribunals.' *Ryder v. Wombwell, supra*.

We are, then, called upon to determine whether the testimony in this case does more than to create a mere surmise or suspicion that Joske 'requested or directed' Irvine's arrest. We think it does not, if it can be said to go that far. It shows clearly that Joske was urging the officers to ferret out and recover, if possible, his goods, which Irvine had received and had not returned, and that both he and the officers were endeavoring to ascertain from Irvine the circumstances attending their loss, so that they might be traced. This Joske had a clear legal right to

do, and we are of opinion that from the mere exercise of this right the law will not permit the inference to be drawn that he 'requested or directed' the arrest, though it be conceded that but for its exercise the arrest would never have been made. It would be against reason to hold that the mere fact that a citizen has called upon the officer of the law to search for and recover his lost or stolen property will authorize the inference that he 'requested or directed' the arrest subsequently made. *Newell*, Mal. Pros. p. 108, § 7, and authorities cited; Tayl. Ev. § 118, and authorities cited. The evidence would probably justify a finding that the arrest was made in Joske's presence, though it would be difficult to conclude therefrom that Shely did not fully determine upon and in legal contemplation make the arrest at the time Irvine refused to go to his room, or give any explanation as to the circumstances under which the goods were lost. It would be a grave question whether any statement made by Irvine after that time would be admissible against him if on trial for a criminal offense. But if it be conceded that the evidence warrants the inference that the arrest was not made until they returned to the store, and Shely had the conversation with Joske, still we are of opinion that nothing is shown to have occurred there that would warrant the inference that Joske 'requested or directed' Shely to make the arrest. The conversation, as detailed by Shely, Joske, and Hilgers, shows the contrary, and that Shely made the arrest on his own responsibility, against Joske's request; and it is difficult to perceive just how Joske could have prevented the arrest at that time if he had seen fit to go beyond the exercise of his clear legal right to remain passive. But, if it be conceded that the jury had the right to lay out of the case the testimony of all these witnesses, then we are left without information as to the conversation, except that Irvine says that Joske said, 'I will make an affidavit against him anyhow.' We are of the opinion that this remark does not tend to show that Joske 'requested or directed' Shely to then make the arrest, but, on the contrary, if taken as true, it indicates a purpose on Joske's part to proceed in the mode prescribed by law, by making an affidavit, and thus placing the matter before the courts. If this purpose had been carried out, this suit for an illegal arrest could not have been maintained, though one for malicious prosecution may have been, under certain circumstances not necessary to mention here. *Mullen v. Brown*, 138 Mass. 114. Would the mere fact that Shely made the arrest immediately after leaving Joske warrant the conclusion that the latter 'requested or directed' him to make it? We think not. The whole case shows that Joske was pressing both the officers and Irvine to aid him in the recovery of his goods. This he had the legal right to do. There are no circumstances tending to show any collusion between Joske and the officers, or that he had or attempted to exercise any authority or control over them in the performance of what they supposed to be their duties, or that he, while ostensibly trying to recover his goods, was covertly seeking to procure Irvine's arrest. There is no direct testimony that Joske 'requested or directed' the arrest, and we are of the opinion that such fact cannot be reasonably inferred from the circumstances. 'An inference is a deduction which the reason of the jury makes from the facts proved.' 1 Rice, Ev. § 36. If the jury cannot reasonably make the deduction, the law does not authorize it. Upon the whole case, we are of opinion that the probative force of the testimony does not go beyond the point of creating a mere surmise or suspicion that Joske 'requested or directed' the arrest, and that, therefore, under the principles above discussed, there is not, in legal contemplation, 'any evidence' of that fact. It results that it was error for the court to give the charge complained of, for which the judgments of the court of civil appeals and the trial court will be reversed, and the cause remanded.

Note

The *Joske* decision was revisited in *City of Keller v. Wilson,* 168 S.W.3d 802 (Tex. 2005): The "scintilla" rule has been modified by the broader "meager circumstantial evidence" test, which allows the appellate court greater review power over fact findings based on circumstantial evidence.

In claims or defenses supported only by meager circumstantial evidence, the evidence does not rise above a scintilla (and thus is legally insufficient) if jurors would have to guess whether a vital fact exists. When the circumstances are equally consistent with either of two facts, neither fact may be inferred. In such cases, the courts must view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances. Thus, when the circumstantial evidence of a vital fact is meager, a reviewing court must consider not just favorable but all the circumstantial evidence and competing inferences as well.

1. *Traditional Motion for Summary Judgment*

Note

Texas summary judgment practice had been stable for many years. However, in 1997, the Texas Supreme Court amended TEX. R. CIV. PROC. 166a, by adding section i. to provide for a "no-evidence" summary judgment. In studying this chapter, the "traditional" summary judgment practice, which is still in place, will be examined first. This represents the procedures that will be used in all but "no-evidence" summary judgments. Attention will then turn to the "no-evidence" summary judgment practice, introduced in 1997. It will be necessary to contrast and compare the two types of summary judgment practice.

a. *The Frame Work of Summary Judgment Practice*

Notice. Under Tex. R. 166a(c), "Except on leave of court, with notice to the other party, the motion and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing." Notice of the date of the hearing should be included in the summary judgment notice. The non-movant waives the notice requirement by appearing at the hearing, without filing a motion for continuance. The notice require can also be waived by agreement.

Reply. Under Tex. R. Civ. P. 166a(c) "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."

Hearing. Under Tex. R. Civ. P. 166a(c) "No oral testimony shall be received at the hearing."

Judgment. Under Tex. R. Civ. P. 166b(e), the trial court may enter judgment on the entire case, or a part of the case. "If . . . judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, [the trial court] . . . shall . . . make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted according."

Appeal. A summary judgment which disposes of all issues and parties is subject to a final appeal. One that does not dispose of all issues and parties is interlocutory, and not appealable. However, it is important to remember the decision in *Mafrige v. Ross,* 866 S.W.2d 590 (Tex. 1993), which held that the inclusion of "Mother Hubbard" language or its equivalent in an order granting summary judgment makes an otherwise partial summary judgment final for appeal purposes. If a summary judgment order appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal.

Casso v Brand, 776 S.W.2d 551, 558 (Tex. 1989). This case describes the difference between the traditional summary judgment practice in Texas and the federal practice which recognizes the concept of a "no-evidence" summary judgment motion (now incorporated into the TEX. R. CIV. P. 166a(i). In 1989, in this case, the Texas Supreme Court held that Texas does not have to, and did not, adopt the more liberal summary judgment standard in public figure defamation actions used in fed court. The case gives a preview of the changes brought about by the 1997 amendment. It also demonstrates the flexibility available in traditional motion for summary judgment cases.

Texas (in all but Rule 166a(i) cases). In Texas, summary judgment are used only to eliminate patently unmeritorious claims and untenable defenses. The burden of proof is never shifted to the non-movant, unless, and until the movant has established its entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of its cause of action or defense as a matter of law. The Texas law is favorable to maintaining the action in court, and is, thus, favorable to plaintiffs.

Federal. Summary judgments in federal court are based on a different presumption and point of view. In federal court, under R56(c) the entry of summary judgment is proper, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex v. Catrett,* 477 U. S. 317,

324 (1986) (the federal standard places the burden of presenting competent evidence at the summary judgment hearing on the party who bears the burden of proof at trial). The federal law makes it difficult for the plaintiff to keep a case in court, and thus is favorable to defendants.

WFAA-TV, Inc. v. McLemore, 978 S.W.2d 568 (Tex. 1998), represents the product of *Casso v. Brand.* In an action by a public figure, a libel defendant is entitled to summary judgment under TEX. R. CIV. P. 166a(c), if it can negate actual malice, as a matter of law. A libel defendant can negate actual malice by presenting evidence that shows he or she did not publish the alleged defamatory statement with actual knowledge of any falsity, or with reckless disregard for the truth.

b. *The Legal Basis for a Conventional Motion for Summary Judgment*

Notes

1. The Texas summary judgment practice is designed to eliminate patently unmeritorious claims and untenable defenses while preserving the right to a jury trial on disputed fact issues. In order to be entitled to a summary judgment the movant needs to establish his entitlement to the summary judgment on the issues expressly presented to the trial court by conclusively establishing all essential elements of his cause of action or defense as a matter of law. It is only after this showing that a non-movant is required to come forward with competent evidence to avoid the summary judgment. A plaintiff meets this burden by producing evidence which conclusively establishes each element of his cause of action. This is identical to the burden he must establish if he moved for an instructed verdict during the trial of the case. *See Ortega-Carter v. American Int'l Adjustment Co*., 834 S.W.2d 439 (Tex. App.—Dallas 1992, writ denied). In *Randall's Food Mkts. v. Davis*, 891 S.W.2d 640 (Tex. 1995) the Court succinctly stated the requirements for a defendant to establish a motion for summary judgment as follows:

> To prevail on a motion for summary judgment, a movant must establish that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). A defendant who conclusively negates at least one of the essential elements of a cause of action is entitled to summary judgment as to that cause of action. *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993); *Gibbs v. General Motors Corp*., 450 S.W.2d 827, 828 (Tex. 1970). Likewise, a defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment. In reviewing a summary judgment, we must accept as true evidence in favor of the nonmovant, indulging every reasonable inference and resolving all doubts in his or her favor. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 315 (Tex. 1987).

2. On appeal from the granting of a motion for summary judgment, the standard of review and the presumptions favor reversal. In *Gibbs v. General Motors Corp*., 450 S.W.2d 827 (Tex. 1970) the court set out the standard for review in summary judgment cases in the following language:

> [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 not genuine issue of act as to one or more of the essential elements of the plaintiff's cause of action.

c. *The Burden upon the Movant for a Summary Judgment*

WALKER
v.
HARRIS
924 S.W.2d 375
(Tex. 1996)

Kenna M. Seiler, John M. Causey, Conroe, for Petitioners.
Lawrence Rothenberg, Houston, for Respondents.

ENOCH, JUSTICE.

This wrongful death action involves the duty of care a lessor owes to persons injured on the leased property by the criminal acts of third parties. The trial court granted summary judgment for the lessors, but the court of appeals reversed. 1995 WL 477560. We hold that the lessors, Deborah and William Walker, owed no legal duty to the decedent, Ronald Harris. We reverse the judgment of the court of appeals and render judgment that Harris's parents, Joyce and Donald Harris, take nothing.

The Walkers owned and operated two of ten separate fourplex apartment units in Brookshire, Texas. In 1990, Ronald Harris attended a party at one of the apartments and was stabbed to death by Andre Steffon Lasker somewhere near one of the Walkers' fourplexes. The parties dispute whether either Ronald Harris or Andre Lasker were invited guests at the party; neither Harris nor Lasker were the Walkers' tenants. The Harrises sued the Walkers for negligence, alleging that the Walkers knew or should have known that the area where the fourplex was located was known for criminal activity. They sought over $2,000,000 in actual damages based on the Walkers' alleged (1) negligent failure to warn the public, including Harris, of this condition, and (2) negligent failure to provide adequate security, including lighting, access control devices, or security guards. The Harrises also sought an unspecified amount of exemplary damages.

The Walkers sought summary judgment, arguing that a property owner generally has no duty to prevent the criminal acts of third parties. They asserted that although property owners may owe a duty to protect individuals from the criminal acts of third parties when the owners know or have reason to know that the third parties present an unreasonable risk of harm to those individuals, they did not owe such a duty because Harris's stabbing was not foreseeable. The Walkers also argued that Lasker's intentional acts were a superseding and proximate cause of Harris's harm. Without stating its reasons, the trial court granted the Walkers' motion for summary judgment. The court of appeals reversed and remanded, holding that a genuine issue of material fact existed regarding the adequacy of the security provided by the Walkers. 1995 WL 477560 *2.

I

To obtain a summary judgment, a defendant must either negate at least one element of the plaintiff's theory of recovery, *"Moore" Burger, Inc. v. Phillips Petroleum Co*., 492 S.W.2d 934, 936 (Tex. 1972), or plead and conclusively prove each element of an affirmative defense. *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 678 (Tex. 1979). After the defendant produces evidence entitling it to summary judgment, the burden shifts to the plaintiff to present evidence creating a fact issue. *"Moore" Burger*, 492 S.W.2d at 936-37. We take all evidence favorable to the nonmovant as true and indulge every reasonable inference in the nonmovant's favor. *Nixon v. Mr. Property Management Co*., 690 S.W.2d 546, 549 (Tex. 1985).

II

The existence of a duty is a question of law for the court to decide from the facts surrounding the occurrence in question. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *Greater Houston Transp. Co. v. Phillips*, 801 S.W.2d 523, 525 (Tex. 1990). As a general rule, a person has no legal duty to protect another from the criminal acts of a third person or control the conduct of another. *Centeq*, 899 S.W.2d at 197; *Phillips*, 801 S.W.2d at 525; *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983). Similarly, a landowner has no duty to prevent criminal acts of third parties who are not under the landowner's supervision or control. *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 21 (Tex. 1993); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex. 1987).

This general no-duty rule, however, is not absolute. *See, e.g., Exxon*, 867 S.W.2d at 21 (lessor who retains control over the security and safety of the premises owes a duty to a tenant's employee to use ordinary care to protect the employee if the lessor knows or has reason to know of an unreasonable and foreseeable risk of harm from the criminal acts of third parties); *Nixon*, 690 S.W.2d at 549 (apartment management owed a duty under an ordinance to a minor raped in vacant apartment to protect against such foreseeable criminal acts).

We need not decide and express no opinion on whether this case falls within any exception to the general no-duty rule. Whatever duty a lessor may have to protect persons injured on the leased premises against the criminal acts of third parties, that duty does not arise in the absence of a foreseeable risk of harm. Accordingly, the Walkers are entitled to summary judgment if they established as a matter of law that violent criminal acts like the stabbing were not foreseeable.

Foreseeability requires only that the general danger, not the exact sequence of events that produced the harm, be foreseeable. *Lofton v. Texas Brine Corp.*, 777 S.W.2d 384, 387 (Tex. 1989); *Nixon*, 690 S.W.2d at 550-51. In this case, the general danger the Walkers had to foresee was the danger of injury from violent crime on the premises. We have held that evidence of specific previous crimes on or near the premises may raise a fact issue on the foreseeability of criminal activity. *Nixon*, 690 S.W.2d at 550. The Harrises did not bring forth any summary judgment evidence raising a fact issue on foreseeability.

The summary judgment evidence relied on by both the Walkers and the Harrises, principally the deposition testimony of the Brookshire Police Chief, indicates that the neighborhood where the fourplexes are located is an area of low to moderate crime, that the residential neighborhood across the street from the apartments has "very little crime," and that the amount of crime at the fourplexes is "average" for apartments. The record further indicates that police were never called to the property for a violent crime, except for Ronald Harris's stabbing. The only other calls to the units were for matters such as domestic or neighbor disturbances. The summary judgment evidence also indicates that there were four prior incidents of vandalism and one instance when a refrigerator was taken from a vacant apartment. No one was ever burglarized. This summary judgment evidence establishes that the Walkers had no reason to foresee the likelihood of violent criminal activity at their fourplexes.

We hold that the Walkers established that the violent criminal act of Ronald Harris's stabbing was not foreseeable as a matter of law. Accordingly, the Walkers negated the duty element of the Harrises' cause of action and were entitled to summary judgment. We reverse the judgment of the court of appeals and render judgment that the Harrises take nothing.

d. *The Summary Judgment Procedure is a Form of Non-Jury Trial*

GOSWAMI
v.
METROPOLITAN SAVINGS AND LOAN ASSOCIATION
751 S.W.2d 487
(Tex. 1988)

A summary judgment proceeding is a trial within the meaning of TEX.R.CIV.P. 63.

Under Rule 63, in the absence of a sufficient showing of surprise by the opposing party, the failure to obtain leave of court when filing a late pleading may be cured by the trial court's action in considering the amended pleading. Thus, when the record is silent, it will be presumed that the trial court considered a late filed pleading, when it ruled upon the motion for summary judgment.

Notes

1. In *Roark v. Stallworth Oil & Gas*, 813 S.W.2d 493 (Tex. 1991) the Court held that an unplead 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. The Court continued:

> [U]nder our rules, unplead claims or defenses that are tried by express or implied consent of the parties are treated as if they had been raised by the pleadings. The party who allows an issue to be tried by consent and who fails to raise the lack of a pleading before submission of the case cannot later raise the pleading deficiency for the first time on appeal. There is no valid reason why these rules should not apply to issues raised in the motion for summary judgment. If the non-movant does not object to a variance between the motion for summary judgment and the movant's pleadings, it would advance no compelling interest of the parties or of our legal system to reverse a summary judgment simply because of a pleading defect.

2. *Lewis v. Blake*, 876 S.W.2d 314 (Tex. 1994): When a motion for summary judgment is served by mail, does TEX. R. CIV. P. 21a add three days to the 21-day notice period of the hearing prescribe by Rule 166a(c)? The effect of Rule 21a is to require that a summary judgment motion served by mail be served at least 24 days before the hearing. The phrase "at least" in Rule 166a(c) means that no fewer than 24 days must intervene between the day the motion is mailed, and the day of hearing. In other words, the hearing cannot be held before the 24th day after the day the motion is mailed.

Rule 4 applies to any period of time prescribed by the rules of procedure, and Rule 166a is one of those rules. Applying Rule 4 to Rule 166a(c), the day of service is not to be included in computing the minimum 21-day notice for hearing, and the day of hearing is. Thus, the 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.

3. *Martin v. Martin, Martin & Richards, Inc.,* 989 S.W.2d 357 (Tex. 1998). Although TEX. R. CIV. P. 166a(c) calls for a hearing on a motion for summary judgment, not every hearing called for under every rule of civil procedure necessarily requires an oral hearing. Unless required by the express language or the context of the particular rule, the term "hearing" does not necessarily contemplate either a personal appearance before the court or an oral presentation to the court. An oral hearing on a motion for summary judgment may be helpful to the parties and the court, just as oral argument is often helpful on appeal, but since oral testimony cannot be adduced in support of, or in opposition to, a motion for summary judgment, an oral hearing is not mandatory.

Notice of hearing or submission of a summary judgment motion is required, although it is not jurisdictional. The hearing date determines the time for response to the motion; without notice of hearing, the respondent cannot know when the response is due. The district court erred in granting defendant's motion for summary judgment without notice to Gary. The error was harmless, however, because the court fully considered Gary's response and reconfirmed its ruling.

4. *Dow Chemical Company v. Bright***,** 89 S.W.3d 602 (Tex. 2002): When both sides have moved for summary judgment and one motion is granted and one denied, the court shall determine all questions presented and render the judgment the trial court should have rendered. *See also City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000).

e. *Summary Judgment Evidence*

UNITED BLOOD SERVICES
v.
LONGORIA
938 S.W.2d 29
(Tex. 1997)

PER CURIAM.

In this summary judgment case, we decide whether the trial court abused its discretion by rejecting the non-movant's expert testimony. The court of appeals held that it did. 907 S.W.2d 605. Because we conclude that the court of appeals improperly substituted its opinion for that of the trial court on a matter committed to the trial court's discretion, we reverse the judgment of the court of appeals and render judgment that Plaintiffs take nothing.

Shortly after her birth in 1982, San Juanita Longoria contracted acquired immune deficiency syndrome (AIDS) and cytomegalovirus (CMV) following a transfusion of blood supplied by United Blood Services (UBS). After her death at age four, her parents sued UBS and the hospital where she received the transfusion. The trial court first granted summary judgment in favor of the hospital and UBS based on undisputed expert testimony that in 1982 the medical community did not know that AIDS was a blood-borne disease and no procedures were available for routine testing of blood for exposure to the AIDS virus. The court of appeals reversed, holding that the Longorias had raised a fact issue about the failure to screen for CMV, for which testing was available, and which testing might have eliminated donors at high risk for AIDS. *Longoria v. McAllen Methodist Hosp.*, 771 S.W.2d 663, 665 (Tex. App.—Corpus Christi 1989, writ denied).

On remand, UBS offered additional expert testimony on CMV testing, and also challenged the qualifications of Melvin Kramer, the Longorias' expert witness, to testify on the standard of care for the blood-banking industry. UBS pointed out that Kramer is not a doctor of medicine or osteopathy, has previously conceded that he did not consider himself an expert in blood banking, hematology, or immunology, never worked for a blood bank, never took any courses on blood banking, never published any articles related to blood banks, and obtained his Ph.D. by correspondence course from Pacific Western University, which is not accredited by any nationally recognized accrediting agency. The trial court again granted UBS's motion for summary judgment.

The court of appeals again reversed, pointing out that Kramer holds degrees in bacteriology, anthropology, and public health, and "through self education and reading the relevant medical literature in epidemiology, Kramer has further developed an expertise concerning the standard of care in the collection of blood." 907 S.W.2d at 613. The court noted, however, "we express no opinion concerning the ultimate admissibility of Kramer's testimony at trial, when the basis for his qualification as an expert may be more fully tested by UBS and subjected to closer scrutiny by the trial court." *Id.* at 613 n. 5.

Texas Rule of Civil Procedure 166a(f) requires that in summary judgment proceedings, supporting and opposing affidavits "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." When a party relies on expert testimony, this requirement includes proof of the expert's qualifications. Contrary to the court of appeals' notation, no difference obtains between the standards for evidence that would be admissible in a summary judgment proceeding and those applicable at a regular trial. *See Hidalgo v. Surety Savings & Loan Ass'n*, 462 S.W.2d 540, 545 (Tex. 1971).

Whether a witness is qualified to offer expert testimony is a matter committed to the trial court's discretion. *Broders v. Heise*, 924 S.W.2d 148 (Tex. 1996). The trial court must determine if the putative expert has "knowledge, skill, experience, training, or education" that would "assist the trier of fact." *See* TEX.R. CIV. EVID. 702. The burden of establishing an expert's qualifications is on the offering party. *Broders*, 924 S.W.2d at 151. We gauge abuse of discretion by whether the trial court acted without reference to any guiding rules or principles. *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 558 (Tex. 1995).

The trial court did not clearly abuse its discretion by rejecting Kramer's testimony. UBS's objections, which were, for the most part, based on facts conclusively established by the Longorias' responses to requests for admissions, demonstrate that Kramer did not have the particular knowledge, skill, experience, training, or education to testify to the relevant standard of care in this case. *See Broders*, 924 S.W.2d at 153 ("What is required is that the offering party establish that the expert has 'knowledge, skill, experience, training, or education' regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject.") (Emphasis added). While properly citing the correct standard of review, the court of appeals improperly substituted its opinion for that of the trial court's. *See Du Pont*, 923 S.W.2d at 558.

Accordingly, pursuant to Texas Rule of Appellate Procedure 170, without hearing oral argument, the Court reverses the judgment of the court of appeals and renders judgment that Plaintiffs take nothing.

Notes

1. *Earle v. Ratliff,* 998 S.W.2d 882 (Tex. 1999), holds that a summary judgment may be based on the affidavit of an interested expert witness if the basis for the expert's opinion is explained in the affidavit. In this medical malpractice case, the trial court entered summary judgment for the Dr. Earle. The plaintiff, Ratliff claims that Earle was negligent in performing the 1993 surgery. In his affidavit supporting his motion for summary judgment, Earle states that he did not breach the applicable standard of care in performing the 1993 surgery. "Both in 1991 and 1993," Earle's affidavit states, "use of Steffe pedicle screws and plates met the standard of care." The plaintiff offered the affidavit of their expert, Mooney. Mooney's affidavit states with respect to the 1993 surgery: "Considering the degree of spinal instability created by Mr. Ratliff's first surgery, and the fact that Mr. Ratliff's first set of AcroMed screws and plates resulted in hardware failure with loosening, the insertion of another device was medically unwarranted." In reversing the trial court's grant of summary judgment for Dr. Earl, the Supreme Court noted that "Mooney's statement raises the question whether, given Ratliff's failure to improve following the first surgical implantation and his increased spinal instability, a second implant was warranted. Earle's affidavit and other summary judgment evidence do not address this issue. *Summary judgment can be granted on the affidavit of an interested expert witness, like Earle, but the affidavit must not be conclusory. An expert's simple ipse dixit is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts.* Earle's affidavit does not explain why implantation of additional devices in the 1993 surgery was medically warranted, given Ratliff's history; the affidavit states only the conclusion that Earle met the applicable standard of care."

2. In a companion case to *Earle v. Ratliff*, the Supreme Court in *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999), restated the applicable rule: "An expert's opinion testimony can defeat a claim as a matter of law, even if the expert is an interested witness, such as the defendant. But *it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere ipse dixit of a credentialed witness. Conclusory statements made by an expert witness are insufficient to support summary judgment.*

3. *Little v. Texas Department of Criminal Justice*, 148 S.W.3d 374 (Tex. 2004): ". . . [W]hen testimony is contradictory, credibility is for the fact finder to decide. *Jones v. Tarrant Util. Co.*, 638 S.W.2d 862, 866 (Tex. 1982)."

CATHEY
v.
BOOTH
900 S.W.2d 339
(Tex. 1995)

Michael E. Starr, Douglas R. McSwane, Jr., Tyler, Monte F. James, and J. Kevin Oncken, Austin, for petitioners.

David B. Griffith and Robert D. Bennett, Gilmer, for respondents.

PER CURIAM.

The Texas Tort Claims Act requires a claimant to provide a governmental unit with formal, written notice of a claim against it within six months of the incident giving rise to the claim; however, the formal notice requirements do not apply if the governmental unit has actual notice of the claim. TEX. CIV. PRAC. & REM. CODE § 101.101. In this cause, we consider whether a hospital may receive actual notice of a claim against it from its own medical records. We conclude that, for a hospital to have actual notice, it must have knowledge of (1) a death or injury; (2) its alleged fault producing or contributing to the death or injury; and (3) the identity of the parties involved. Because the records at issue in this case do not convey to the hospital its possible culpability, we reverse the judgment of the court of appeals as to any remaining claims against Wood County Central Hospital and render judgment that the Booths take nothing from the Hospital.

Glenda Booth was admitted to Wood County Central Hospital with labor pains on August 1, 1990, following a course of prenatal care by Dr. George Cathey. Glenda and Jerry Booth's child was delivered stillborn on that day.

The Booths sued Dr. Cathey and the Hospital, alleging that their negligence resulted in the stillbirth of the Booths' child and in physical pain and mental anguish to the Booths. The Booths allege that the doctor and the Hospital were negligent in failing to diagnose and treat Glenda Booth's condition as a high risk pregnancy and in failing to diagnose and treat Glenda Booth for gestational diabetes.

The trial court granted summary judgment in favor of Dr. Cathey and the Hospital on all claims. The court of appeals affirmed as to the Booths' claims for the mental anguish that they suffered as a result of the negligent treatment of the fetus. Otherwise, the court of appeals reversed and remanded for a new trial. 893 S.W.2d 715, 720.

To prevail on a motion for summary judgment, a movant must establish that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). A defendant who conclusively negates at least one of the essential elements of each of the plaintiff's causes of action or who conclusively establishes all of the elements of an affirmative defense is entitled to summary judgment. *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex. 1993); *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984). In reviewing a summary judgment, we must accept as true evidence in favor of the nonmovant, indulging every reasonable inference and resolving all doubts in the nonmovant's favor. *Nixon v. Mr. Property Management Co*., 690 S.W.2d 546, 548-49 (Tex. 1985).

Section 101.101(c) of the Tort Claims Act provides that the formal notice requirements of section 101.101(a) "do not apply if the governmental unit has actual notice that death has occurred, that the claimant has received some injury, or that the claimant's property has been damaged." TEX. CIV. PRAC. & REM. CODE § 101.101(c). It is undisputed that the Booths failed to provide the Hospital with formal, written notice of their claims against it pursuant to section 101.101(a). The Booths assert, however, that the Hospital received actual notice of their claims. The Booths argue that section 101.101(c) requires only that a governmental unit have knowledge that a death, an injury, or property damage has occurred. We disagree.

The purpose of the notice requirement is to ensure prompt reporting of claims in order to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial. *See City of Houston v. Torres*, 621 S.W.2d 588, 591 (Tex. 1981). The interpretation of section 101.101(c) urged by the Booths would eviscerate the purpose of the statute, as it would impute actual notice to a hospital from the knowledge that a patient received treatment at its facility or died after receiving treatment. For a hospital, such an interpretation would be the equivalent of having no notice requirement at all because the hospital would be required to investigate the standard of care provided to each and every patient that received treatment.

We hold that actual notice to a governmental unit requires knowledge of (1) a death, injury, or property damage; (2) the governmental unit's alleged fault producing or contributing to the death, injury, or property damage; and (3) the identity of the parties involved. Our holding preserves the purpose of the notice statute, and is consistent with the holdings of the majority of the courts of appeals. *See Parrish v. Brooks*, 856 S.W.2d 522, 525 (Tex. App.—Texarkana 1993, writ denied); *Bourne v. Nueces County Hosp. Dist*., 749 S.W.2d 630, 632-33 (Tex. App.—Corpus Christi 1988, writ denied); *Tarrant County Hosp. Dist. v. Ray*, 712 S.W.2d 271, 274 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.). To the extent that *Texas Dep't of Mental Health & Mental Retardation v. Petty*, 817 S.W.2d 707, 717 (Tex. App.—Austin 1991), aff'd on other grounds, 848 S.W.2d 680 (Tex. 1992), is inconsistent with this opinion, we disapprove it.

As summary judgment proof, Wood County Central Hospital presented the affidavit of its administrator, Marion Stanberry, who stated that prior to its receipt of a letter dated July 7, 1992, the Hospital had no knowledge of any alleged injuries of Glenda or Jerry Booth or of any alleged fault of the Hospital with respect to such injuries.

The summary judgment evidence provided by the Booths does not raise a fact issue that Wood County Central Hospital had actual notice of any alleged culpability on its part producing or contributing to any injury to Glenda or Jerry Booth. The only evidence presented by the Booths concerning the Hospital's knowledge of its culpability is an affidavit from Dean Cromartie, an obstetrician who reviewed Glenda Booth's medical records and determined that Dr. Cathey and the Hospital were negligent in their treatment of Glenda Booth. Dr. Cromart-

ie explained that the Cesarean section was not performed on Glenda Booth until more than half an hour after the time that it was called for. Even if the Hospital was aware of the information in its medical records relied upon by Dr. Cromartie in forming his opinion, we hold that, as a matter of law, this information failed to adequately convey to the Hospital its possible culpability for mental and physical injuries to Glenda and Jerry Booth. *Cf. Dinh v. Harris County Hosp. Dist*., 896 S.W.2d 248, 252-53 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd w.o.j.).

Wood County Central Hospital and Dr. Cathey also argue that the judgment of the court of appeals should be reversed because the Booths failed to plead a cause of action for damages independent of the stillbirth. The Booths' pleadings contain allegations that Dr. Cathey and the Hospital were negligent in their treatment of Glenda Booth and allegations that such treatment resulted in physical and mental injuries to Glenda and Jerry Booth. A mother "may recover mental anguish damages suffered as a result of her injury which was proximately caused by [a doctor's or a hospital's negligence] and which includes the loss of her fetus." *Krishnan v. Sepulveda*, _____ S.W.2d _____, _____ [1995 WL 358844] (Tex. 1995). However, a father may not recover mental anguish damages from either the treating physician or the hospital because neither owes a duty to him. *Id*. at _____.

Accordingly, a majority of the Court grants the applications for writ of error, and, without hearing oral argument, affirms in part and reverses in part the judgment of the court of appeals. TEX. R. APP. P. 170. The Court renders judgment that the Booths take nothing from Wood County Central Hospital and that Jerry Booth take nothing from Dr. George Cathey. With regard to the claims asserted by Glenda Booth against Dr. George Cathey, the Court affirms the judgment of the court of appeals, which remanded those claims for trial.

Notes

1. *Texas Department of Criminal Justice v. Simons,* 140 S.W.3d 338 (Tex. 2004): Simons, an inmate incarcerated at the Terrell Unit of the TDCJ, was injured while working with a tractor, digging a post hole. The TDJC immediately investigated the accident. Simons did not mention the matter again to TDCJ prior to filing suit on 8/28/1996, two days before the two year statute of limitations would have run. Nearly five years later, on 8/20/2001, TDCJ filed a plea to the jurisdiction, arguing that, because it had not received notice of Simons's claim within six months of the incident, as required by section 101.101, its immunity from suit was not waived under the Tort Claims Act, and therefore the court lacked subject matter jurisdiction over the suit. In *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam), the Supreme Court construed section 101.101 of the Texas Tort Claims Act to provide that a governmental unit is entitled to receive formal, written notice of a claim against it within six months of the incident from which the claim arises, unless it has actual notice of the claim, including knowledge of its "alleged fault producing or contributing to the death, injury, or property damage". The trial court denied the plea, and TDCJ appealed. The court of appeals reversed and remanded. The Supreme Court held that the appeal should be dismissed. It is not necessary to determine whether TDCJ established that it lacked actual notice of Simons's claim. A claimant's failure to comply with § 101.101 does not deprive the trial court of subject matter jurisdiction. While compliance is no less mandatory, and a governmental unit is entitled to dismissal of the action for lack of notice, that right cannot properly be asserted in a plea to the jurisdiction from which an interlocutory appeal is allowed. Since notice under § 101.101 is not jurisdictional, an interlocutory appeal from the denial of a plea to the jurisdiction based on lack of such notice is not allowed.

2. *Life Ins. Co. of Virginia v. Gar-Dal*, 570 S.W.2d 378 (Tex. 1978): Although attaching the original document is the better practice, TEX. R. CIV. P. 166-A(e), TEX.R.CIV.P., in requiring the attachment of "sworn or certified copies of documents," does not require that originals be attached to summary judgment affidavits. The photocopy of the note attached to the affidavit under these circumstances (stating that the plaintiff was the owner and holder of the note and that the copy of was an accurate copy of the original) was a "sworn copy" within the meaning of Rule 166-A(e) and that, therefore, it was proper summary judgment evidence.

Further, this was, if anything, a defect of form, and defects of form are waived if not pointed out to the trial court before summary judgment is rendered.

Finally, conclusions in an affidavit (here, that all offsets and payments had not been credited to the note) are insufficient to raise an issue of fact (here, that plaintiff failed to credit all offsets and payments to the note).

RYLAND GROUP, INC.
v.
HOOD
924 S.W.2d 120 (Tex. 1996)

Chris E. Ryman, Michael O. Whitmire, Houston, for Petitioner.
K. Michael Mayes, Mark D. Haas, Conroe, for Respondents.

PER CURIAM.

This is a summary judgment case based on the statute of repose. In 1976, Ryland completed and sold a home. Later, Theresa Hood rented the home from its current owner. On June 8, 1991, the second story deck collapsed, seriously injuring Hood and her guests. Hood and her guests sued Ryland alleging that Ryland negligently used untreated lumber as the "runner board" for the deck that had completely rotted and deteriorated. Ryland moved for summary judgment asserting that the statute of repose barred Respondents' action because they did not file suit within the ten year statutory period prescribed by the statute of repose. Respondents raised fraudulent concealment and willful misconduct as affirmative defenses to the statute of repose in their response to Ryland's motion for summary judgment. They offered the affidavit of their expert, James Manning, a longtime contractor, as their only summary judgment proof to raise a fact issue. Ryland filed a reply alleging that Respondents did not prove their affirmative defenses. The trial court rendered summary judgment for Ryland.

The court of appeals reversed and remanded. 911 S.W.2d 931. The court of appeals concluded that: (1) Ryland conclusively established as a matter of law that the statute of repose, TEX. CIV. PRAC. & REM. CODE § 16.009, applies to this case; and (2) Manning's affidavit did not raise a fact issue about fraudulent concealment; however, (3) Manning's affidavit did raise a fact issue about whether Ryland's use of untreated lumber amounted to willful and intentional misconduct. Ryland argues that the court of appeals incorrectly reversed its summary judgment because: (1) Ryland conclusively established that § 16.009 bars the suit; and (2) Respondents did not satisfy their burden for raising a fact issue on willful misconduct. We agree and reverse the court of appeals.

The standards for reviewing a motion for summary judgment are well established. The movant has the burden of showing that there is no genuine material fact issue and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co. Inc*., 690 S.W.2d 546, 548 (Tex. 1985). When a defendant moves for summary judgment based on an affirmative defense, such as the statute of repose, the defendant, as movant, bears the burden of proving each essential element of that defense. *See City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979); *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972). A non-movant asserting fraudulent concealment has the burden "to come forward with proof raising an issue of fact with respect to" that claim. *See American Petrofina, Inc. v. Allen*, 887 S.W.2d 829 (Tex. 1994), *citing Nichols v. Smith*, 507 S.W.2d 518, 521 (Tex. 1974)(once defendant established its statute of limitations defense as a matter of law, plaintiff had burden to prove a fact issue about fraudulent concealment to defeat summary judgment).

The statute of repose requires a party to sue:

> . . . a person who constructs or repairs an improvement to real property not later than ten years after the substantial completion of the improvement in an action arising out of a defective or unsafe condition of the real property or a deficiency in the construction or repair of the improvement.

See TEX. CIV. PRAC. & REM. CODE § 16.009(a). The statute, however, does not bar an action "based on willful misconduct or fraudulent concealment in connection with the performance of the construction." TEX. CIV. PRAC. & REM. CODE § 16.009(e)(3); *Texas Gas Exploration Corp. v. Fluor Corp*., 828 S.W.2d 28, 32 (Tex. App.—Texarkana 1991, writ denied).

Ryland conclusively established that Respondents' damages occurred outside the statute's ten year limitation period. Respondents do not dispute that the statute of repose applies. Consequently, Ryland met its summary judgment burden to prove as a matter of law that section 16.009 applies because Respondents did not file suit within the ten year statutory period. *See Swilley*, 488 S.W.2d at 67. The question is whether Respondents in turn presented enough proof to raise a fact issue on their affirmative defenses—fraudulent concealment and willful

misconduct, to defeat Ryland's right to summary judgment. *See Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984).

Respondent's only summary judgment evidence was James Manning's affidavit. The relevant standard for an expert's affidavit opposing a motion for summary judgment is whether it presents some probative evidence of the facts at issue. *Trapnell v. John Hogan Interests, Inc.*, 809 S.W.2d 606, 611 (Tex. App.—Corpus Christi 1991, writ denied). Conclusory affidavits are not enough to raise fact issues. *Brownlee*, 665 S.W.2d at 112. They are not credible, nor susceptible to being readily controverted. *See* TEX. R. CIV. P. 166a(c).

Rule 166a(f) requires that "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f); *Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994)(affidavit lacking testimony that statements were unequivocally based on personal knowledge was legally insufficient). An interested witness' affidavit which recites that the affiant "estimates," or "believes" certain facts to be true will not support summary judgment. *See Lightfoot v. Weissgarber*, 763 S.W.2d 624, 628 (Tex. App.—San Antonio 1989, writ denied)(holding testimony based on affiant's best knowledge and belief does not meet Rule 166a(e)'s strict requirements); *Ardila v. Saavedra*, 808 S.W.2d 645, 647 (Tex. App.—Corpus Christi 1991, no writ). Such language does not positively and unqualifiedly represent that the "facts" disclosed are true. *Brownlee*, 665 S.W.2d at 112.

In his affidavit, Manning testified that he examined the deck and exterior of the house where the deck had been attached. He stated he was of the opinion that Ryland should have treated the runner board. The court of appeals concluded that "Manning's affidavit makes no claim, nor offers any evidence that Ryland had actual knowledge of the use of untreated wood, much less that they purposely concealed that knowledge." 911 S.W.2d at 935, *citing Baskin v. Mortgage & Trust, Inc.*, 837 S.W.2d 743, 746 (Tex. App.—Houston [14th Dist.] 1992, writ denied)(holding one cannot fraudulently conceal facts of which one has no actual knowledge). Yet, based on the same affidavit, the court of appeals concluded that Hood raised a fact issue about willful misconduct. 911 S.W.2d at 935. Manning's affidavit asserts:

> To use untreated lumber for a deck support in new construction, when treated lumber is specified, amounts to intentional or willful misconduct by the builder.

If Manning's affidavit cannot raise a fact issue that Ryland had actual knowledge of the untreated lumber, how can use of such be intentional? It cannot.

Moreover, Respondents provide no summary judgment evidence that the parties ever specified or contracted for the use of treated wood. Manning's affidavit further states:

> It is my understanding that neither the builder nor the subsequent deck renovator notified the inspectors, appraisers, owners, tenants, or any other party with an interest in the home of the use of the untreated wood. This failure to notify amounts to a concealment of a known violation of the specifications and industry practice. (emphasis added).

We should not equate Manning's "understanding" to personal knowledge about whether Ryland notified anyone about the use of untreated wood. *See Humphreys*, 888 S.W.2d at 470. Manning's opinion that Ryland's "failure to notify amounts to concealment or a known violation of the specifications and industry practice," is conclusory. Therefore, his affidavit does not raise a fact issue on willful misconduct. *See Brownlee*, 665 S.W.2d at 112.

Accordingly, the Court grants petitioner's application for writ of error, and under Texas Rule of Appellate Procedure 170, without hearing oral argument, we reverse the judgment of the court of appeals and render judgment that Respondents take nothing.

Notes

1. A legal conclusion in an affidavit is insufficient to raise an issue of fact in response to a motion for summary judgment or to establish the existence of a fact in support of a motion for summary judgment.

2. *McConathy v. McConathy,* 869 S.W.2d. 341 (Tex. 1994). Deposition excerpts used as summary judgment evidence need not be authenticated by a court reporter's certificate as well as an original affidavit certifying the authenticity of the copied excerpts.

3. The petition filed by the plaintiff, even if sworn to, is not summary judgment proof. *Hidalgo v. Surely Savings & Loan Ass'n*, 462 S.W.2d 540 (Tex. 1971). This does not mean that there cannot be summary judgments on the basis of pleading where, for example, the pleadings fail to state a cause of action. This is discussed below in subsection g.

4. *Campbell v Ft. Worth Bank & Trust Co.,* 705 S.W.2d 400 (Tex. App.—1986, n.r.e.). A summary judgment affidavit stating "To the best of my knowledge. . . ." is insufficient as summary judgment proof. Affidavits must be made upon personal knowledge. The statements in plaintiff's affidavit based upon the "best of his knowledge" constitutes no evidence at all.

5. *The requirements for an affidavit.* In *Acme Brick v Temple Associates, Inc.*, 816 S.W.2d 440 (Tex. App.—Waco 1991, writ denied), the document purporting to be an affidavit was signed by the person named in the statement; however, the signature appeared above and not below the statement in the jurat that the amount was just and correct. The court held that the document was, indeed, an affidavit. They described the requirements for an affidavit.

Statement in Writing. 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, & officially certified to by the officer under his seal of office.

Contents (Caption, Title, Venue, Body, Signature, and Jurat). An affidavit includes the caption or title, the venue, the signature of the affiant, the jurat & the body of the instrument.

The Jurat. The jurat of an affidavit is a certificate by a competent officer that the writing was sworn to by the person who signed it. No particular terminology is required to render a document an affidavit because it is the substance & not the form of an affidavit that is significant.

The Signature. An affiant's signature which is placed below the jurat for the purpose of subscribing to the instrument meets the object of the law. Thus, when Pamela Byas placed her signature on the document in question, she did so for the purpose of subscribing to the instrument. The law does not direct or guide where the necessary signature is to be located. Thus, the document constituted a valid affidavit.

6. *Mansions in the Forest, L.P. v. Montgomery County***,** 365 S.W.3d 314 (Tex. 2012): Montgomery County filed a condemnation action against portions of three properties owned by The Mansions and asked the court to appoint special commissioners to assess the fair market value of the condemned land and determine the diminution in value of the remainder. After the County deposited into the court's registry the amount found by the commissioners to be the fair market value of the condemned land and any damages caused by the seizure, the trial court issued a writ of possession; and the Mansions filed objections to the amount of the award. The County then moved for summary judgment on the issue of damages. In response, the Mansions filed Matthew Hiles's purported affidavit asserting that the commissioners should have awarded at least $800,000. Although the County objected to the affidavit on the grounds that it was untimely and conclusory, it did not object to the lack of a jurat. The trial court sustained the County's objections, excluded Hiles's purported affidavit, and granted summary judgment in the County's favor. The court of appeals affirmed, holding that the County's argument that the trial court properly excluded Hiles's affidavit because it lacked a jurat raised a defect of substance, rather than of form and therefore could be raised for the first time on appeal. ***Held*****:** An "affidavit" is defined by the Texas Government Code as "a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office." Although the Government Code requires that a written statement must be sworn to qualify as an affidavit, it does not require that the statement contain a jurat — a clause stating that the statement was sworn to before an authorized officer. Nor does Rule 166a. However, for a written statement that lacks a jurat to qualify as an "affidavit" un-

der the Government Code definition, "other evidence must show that it was sworn to before an authorized officer." There is no such evidence in this record; and the County failed to object to its absence. The County therefore waived error under Texas Rule of Appellate Procedure 33.1(a), which requires (1) a party to complain to the trial court by a timely request, objection, or motion; and (2) the trial court to rule or refuse to rule on the request, objection, or motion. These general requirements for the preservation of error serve "important prudential considerations," *i.e.*, affording the trial court an opportunity to rule before an appeal, thus maximizing correct decision-making, and affording the opposing party a chance to correct the error before an appeal. The Court therefore disapproves of the courts of appeals' extension of its hold in *Perkins v. Crittenden,* 462 S.W.2d 565, 568 (Tex. 1970), that "the jurat is an integral part of [Rule 166a(f)] which particularly refers to 'sworn or certified copies … referred to in an affidavit,'" to affidavits filed in opposition to a motion for summary judgment. The Court thus distinguishes the defect in filing unsworn or uncertified copies, which is not waivable, from the defect in filing an unsworn affidavit, which is waivable.

7. *In re E.I. DuPont de Nemours and Company*, 136 S.W.3d 218 (Tex. 2004): The plaintiffs contends that Connor's affidavit is not probative, because it is not based on personal knowledge. For an affidavit to have probative value, an affiant must swear that the facts, presented in the affidavit, reflect his/her personal knowledge. Connor swore that his statements were based on his "personal knowledge of the facts stated in the affidavit." Even though Connor later explained that his determinations were "[b]ased on [his] review of the DuPont human resources database for the legal department," an affiant's acknowledgment of the sources, from which he gathered his knowledge, does not violate the personal knowledge requirement. Therefore, Connor's affidavit satisfies the personal knowledge requirement.

8. *Fort Brown Villas III Condominium Association, Inc. v. Gillenwater*, 285 S.W.3d 879 (Tex. 2009): Texas Rule of Civil Procedure 193.6, which provides for the exclusion of evidence, due to an untimely response to a discovery request, applies in a summary judgment proceeding. Under Rule 193.6, discovery that is not timely disclosed, and witnesses that are not timely identified, are inadmissible as evidence. A party who fails to timely designate an expert has the burden of establishing good cause, or a lack of unfair surprise or prejudice, before the trial court may admit the evidence. A trial court's exclusion of an expert who has not been properly designated can be overturned only upon a finding of abuse of discretion. Before the no-evidence motion for summary judgment was introduced to Texas trial practice, courts did not apply evidentiary sanctions and exclusions for failure to timely designate an expert witness in a summary judgment proceeding. However, in 1997, the no-evidence summary judgment motion was introduced to the Texas Rules of Civil Procedure as Rule 166a(i), and in 1999, pretrial discovery rules were amended to include evidentiary exclusions under Rule 193.6. The new discovery rules establish a date certain for the completion of discovery, which depends on the discovery plan level, and not on the trial date. Under the new rules, there is no longer a concern that discovery will be incomplete at the summary judgment stage. Combined with the no-evidence motion for summary judgment rule, the "hard deadline" established by the pretrial discovery rules ensures that the evidence presented at the summary judgment stage and at the trial stage remains the same. Accordingly, the 193.6 exclusionary rule applies equally to both proceedings.

f. *The Traditional Summary Judgment Motion and Response*

HOUSTON
v.
CLEAR CREEK BASIN AUTH.
589 S.W.2d 671
(Tex. 1979)

Robert M. Collie, Jr., City Atty., Fulbright & Jaworski, David J. Beck, Houston, for petitioner.
Kronzer, Abraham & Watkins, Robert E. Ballard, Houston, for respondent.

SPEARS, JUSTICE.

Respondent Clear Creek Basin Authority, a statutory governmental entity existing under article 8280-311 (1965), sued the City of Houston for injunctive relief and statutory penalties, alleging the unlawful discharge of waste waters by treatment plants operated by the City in violation of chapter 26 of the Texas Water Code. The trial court granted summary judgment for the City of Houston, but the court of civil appeals reversed and remanded. 573 S.W.2d 839.

* * *

Clear Creek's suit alleges numerous violations of waste control orders of the Texas Water Quality Board and a common law nuisance as a result of the discharge of sewage into waters which ultimately flow into Galveston Bay. The Attorney General of Texas, on behalf of the Texas Water Quality Control Board and the State of Texas, intervened as a necessary party-plaintiff pursuant to the requirement of the Texas Water Code.

Clear Creek alleged in its first amended original petition that the City of Houston had committed numerous violations at 31 different locations. Defendant City admitted that four of these plants discharging effluent are situated within the territorial boundaries of Clear Creek Basin Authority set forth in section 2 of Article 8280-311, supra, and that these four plants exceeded the terms of the City's permit from the Water Quality Control Board during the periods of 1974 and 1976. The remaining plants were located upstream and outside of Clear Creek's territorial jurisdiction.

The City of Houston filed a motion for summary judgment, alleging three grounds: 1. The matters upon which Clear Creek bases its claims for relief fall within the primary jurisdiction of the Texas Water Quality Board; Clear Creek has failed to exhaust its administrative remedies; and that neither the Texas Water Quality Board nor the Texas Department of Water Resources has authorized the bringing of this action; 2. As a matter of law, Clear Creek cannot obtain relief for violations of the Texas Water Code which occur outside the territorial jurisdiction of the Authority; and 3. The action represents an attempt by Clear Creek to perform a function or service which the City of Houston is authorized to perform without the written consent of the governing body of the City of Houston, all in violation of Article 8280-311, sec. 5. Clear Creek filed this response to the motion:

I.

The only issue before this Court is a question of law: can a downstream victim of pollution sue an upstream polluter?

II.

The City has admitted that its sewer plants exceed the parameters of its permits on a regular basis. See Answers to Admissions and Interrogatories.

III.

The City's effluent is flushed into Clear Lake on a daily basis and causes pollution there. See deposition testimony of Sidney H. Tanner and Affidavits on file.

There is no Verbatim record of the hearing on the motion, but the trial court's judgment recites that at the hearing, Clear Creek withdrew its common law cause of action in open court and announced its desire to proceed only on the basis of its claims under chapter 26 of the Texas Water Code. It further recites that the City of Houston withdrew paragraphs 1 and 3 of its motion for summary judgment and desired to proceed to hearing only on

paragraph 2 challenging Clear Creek's right to sue for violations outside its jurisdictional boundaries. In this context, the trial court granted the City's motion for summary judgment.

In the meantime, and apart from the summary judgment proceeding, the City of Houston and the state Attorney General worked out a settlement agreement between them to which Clear Creek was not a party. The settlement agreement was incorporated in the trial court's final judgment but was made expressly contingent upon the judgment that Clear Creek take nothing being upheld on appeal. The settlement provided for an agreed injunction judgment obligating the City to construct and place into operation some $500,000,000 worth of additional waste water treatment plants, sludge disposal plants, and sewage diversion lines with a reporting schedule to the Texas Department of Water Resources and to the trial court.

The court of civil appeals, in reversing and remanding the cause for trial, held that a fact issue existed as to the alleged violations occurring within Clear Creek's territorial boundaries. The court reasoned that even if the admitted fact of those violations was not presented to the trial court at the hearing on summary judgment, this part of Clear Creek's cause of action was not waived because there was no written agreement of waiver filed under rule 11. The court said that the City had not carried its burden and was not entitled to a summary judgment despite Clear Creek's failure to specify the reasons why the motion should not be granted.

Petitioner City of Houston asserts nine points of error. The first alleged error is that the judgment of the court of civil appeals is erroneous for the reason that it is contrary to the requirement of rule 166-A, that "(I)ssues not expressly presented to the trial court by written motion, answer or other response, shall not be considered on appeal as grounds for reversal." The remaining points claim that Clear Creek waived and abandoned any fact issue and that it is estopped from asserting any complaints of violations occurring within the geographical boundaries of the Clear Creek Basin Authority.

The first question is whether the 1978 amendment to rule 166-A(c), providing that issues not expressly presented to the trial court may not be considered on appeal as grounds for reversal, precludes the court of civil appeals from reversing the summary judgment when the non-movant agreed to the submission to the trial court of a single issue of law. We hold that because the parties agreed on the submission of only one issue to the trial court and its ruling on that issue constituted the basis of the granting of the motion for summary judgment, Clear Creek is precluded from later urging on appeal the issue not presented, i.e., the violations of the four plants located within Clear Creek's boundaries.

A history of the summary judgment rule, rule 166-A, reflects that the high hopes of increasing judicial efficiency advanced by the proponents of the rule did not materialize. While no summary judgment rule was included in the initial promulgation of the rules of civil procedure in 1940, after considerable urging by legal scholars and commentators and by the Texas Civil Judicial Council, rule 166-A was adopted by this court, effective March 1, 1950. Pittsford and Russell, *Summary Judgment In Texas: A Selective Survey*, 14 HOUS. L. REV. 854 (1977). Despite predictions of success by its supporters, the rule has been fraught with misunderstanding. One prominent writer observed in 1961 that a poll of district judges throughout the state reflected many were skeptical about the efficacy of the rule because of frequent reversals by appellate courts. McDonald, *The Effective Use of Summary Judgment*, 15 SW. L.J. 365, 373-4 (1961). In 1977, a survey concluded that fewer than two percent of the civil cases disposed of in Texas in the six preceding years were decided by summary judgment. *See Pittsford and Russell, supra* at 854. Another survey of the cases decided by this court between 1968 and 1976 reflected that when a summary judgment was granted in the trial court, seventy percent of those cases were reversed and remanded for trial. Sheehan, *Summary Judgment: Let the Movant Beware*, 8 ST. MARY'S L.J. 253, 254 (1976).

Attempts within the bar to clarify summary judgment practice began to gain momentum in the early 1970's. After several unsuccessful attempts at revision, the Committee on the Administration of Justice of the State Bar of Texas voted in March of 1976 to recommend changes in rule 166-A that would require the non-movant to provide some assistance to the trial judge in narrowing the issues to be decided. That proposal was then considered by the Supreme Court Advisory Committee in March of 1977, and after several changes, was recommended to this court for adoption. The proposal recommended significant change in section (c), primarily by requiring the non-movant to "define specifically in writing" the controverted issues and defects in the movant's proof that would defeat the motion. The recorded minutes of the Advisory Committee reflect a prevailing sentiment to change the rule, to make summary judgments a more useful procedure in judicial administration, to require non-movant to specify his opposition to the motion, and to prevent the non-movant from "laying behind the log" within his objections until appeal.

A comparison of section of the rule as it existed before January 1, 1978, and as amended demonstrates the significance of the change in the mechanics of the summary judgment procedure. The new rule adopts the objectives of the Advisory Committee, but goes even further by precluding from consideration on appeal grounds not raised in the trial court in opposition to a summary judgment motion. The pre-1978 summary judgment rule had a chilling effect on the willingness of trial courts to utilize the intended benefits of the procedure. *See* McDonald, *The Effective Use of Summary Judgment*, 15 SW.L.J. 365, 375-382 (1961). The new rule attempts to encourage the trial court to utilize the summary judgment in appropriate cases.

Prior to January 1, 1978, section . . . read: . . . Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. The motion shall be served at least ten days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, 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. Section now reads: Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. Except on leave of court, the motion shall be served at least twenty-one days before the time specified for the hearing. Except on leave of court, the adverse party, not later than seven days prior to the day of hearing may serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, on file at the time of the hearing, or filed thereafter and before judgment with permission of the court, show that, except as to the amount of damages, 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 as expressly set out in the motion or in an answer or any other response. 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. 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. (emphasis added) A concomitant change to section (e) of the rule added this sentence: 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.

Responding to the criticism that a non-movant could "lay behind the log" in the trial court and urge deficiencies for the first time on appeal, the new section specifically prohibits this tactic by clearly requiring: . . . 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. (emphasis added)

The word "written" modifies not only the word "motion," but also the words "answer" and "other response." The "issues" required by the rule to be "expressly presented" are those pointed out to the trial court in written motions, written answers or written responses to the motion. The term "answer" in the context of the rule refers to an answer to the motion, not an answer generally filed in response to a petition. *Feller v. Southwestern Bell Tel. Co*., 581 S.W.2d 775 (Tex. Civ. App. Houston (14th Dist.) 1979, no writ). The movant must also expressly set out his grounds in writing: . . . The judgment sought shall be rendered forthwith if . . . and the moving party is entitled to judgment as a matter of law on the issues as expressly set out in the motion or in an answer or any other response.

Thus, both the reasons for the summary judgment and the objections to it must be in writing and before the trial judge at the hearing. The appellate court which must later decide whether the issue was actually presented to and considered by the trial judge will then be able to examine the transcript and make its determination. 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 a hearing. *Richards v. Allen*, 402 S.W.2d 158, 161 (Tex. 1966); rule 166-A(c).

If the issues are to be further restricted or expanded by the parties beyond those "expressly presented" by the written motion, the answer to the motion, or any other written response, the change must meet the requirements of rule 11 which provides: No 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.

The City of Houston contends that the parties orally agreed in open court at the hearing on the motion to narrow the issue to a single question of law does Clear Creek have standing under the code to sue for pollution originating outside its territorial boundaries? The City further maintains that if that agreement must comply with rule 11, the recitations in the judgment satisfy the requirements of the rule.

We agree that the parties in open court should be able to narrow the issues presented to the trial court provided the agreement is reduced to writing, signed, and filed with papers or "entered of record." If a party represents to the court that he waives a ground or objection that he has previously asserted in a written motion or response and agrees that a certain issue is the only issue before the court, rule 11 is satisfied if the oral waiver or agreement made in open court is described in the judgment or an order of the court. Rule 11 expressly approves this procedure.

The trial court's judgment reflects that the parties by agreement expressly presented only one issue to the court, and the requirements of rule 11 were met when the agreement was reflected in the judgment. Counsel for the City announced in open court that he was withdrawing grounds 1 and 3 of its motion for summary judgment. Clear Creek agreed to withdraw its common law cause of action, and the City of Houston agreed not to object to its revival if the case were remanded for a new trial. The only issue then remaining to be determined at the hearing on the motion for summary judgment, taking into consideration the motion, the written response, and the open-court representations of counsel recited in the judgment, was the second ground asserted by the City's motion the standing of Clear Creek to file a suit under the Texas Water Code for violations which occur upstream and Outside the jurisdictional boundaries of the Clear Creek Basin Authority. No other issues were presented to the trial court by either party, and he ruled on no others.

Clear Creek next argues that its pleadings on file in the case adequately assert its claim of violations by the four plants located within its territorial boundaries, that its response to the City's motion for summary judgment does not supersede Clear Creek's previous pleadings, and that it should not have to replead in its response to the motion what it had already pled.

Pleadings do not constitute summary judgment proof. *Hidalgo v. Sur. Sav. & Loan Ass'n*, 462 S.W.2d 540 (Tex. 1971). The new rule requires that contentions be expressly presented in the written motion or in a written answer or response to the motion, and pleadings are not to be considered in determining whether fact issues are expressly presented in summary judgment motions. The terms "answer" and "response" as used in the context of the rule clearly refer to the motion and not to the pleadings generally. *Feller v. Southwestern Bell Tel. Co., supra*. To hold otherwise would be to perpetuate the evil the rule change was designed to eliminate. The written answer or response to the motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion.

We are not to be understood, however, as shifting the burden of proof that exists in summary judgment proceedings. The trial court may not grant a summary judgment by default for lack of an answer or response to the motion by the non-movant when the movant's summary judgment proof is legally insufficient. The movant still must establish 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. *See Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972). Summary judgments must stand on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right.

While it would be prudent and helpful to the trial court for the non-movant always to file an answer or response, the non-movant needs no answer or response to the motion to contend on appeal that the grounds expressly presented to the trial court by the movant's motion are insufficient As a matter of law to support summary judgment. The non-movant, however, may not raise any Other issues as grounds for reversal. Under the new rule, the non-movant may not urge on appeal as reason for reversal of the summary judgment any and every New ground that he can think of, nor can he resurrect grounds that he abandoned at the hearing.

With the exception of an attack on the legal sufficiency of the grounds expressly raised by the movant in his motion for summary judgment, the non-movant must expressly present to the trial court any reasons seeking to avoid movant's entitlement, such as those set out in rules 93 and 94, and he must present summary judgment

proof when necessary to establish a fact issue. No longer must the movant negate all possible issues of law and fact that Could be raised by the non-movant in the trial court but were not. *See, e. g., "Moore" Burger Inc. v. Phillips Petroleum Co*., 492 S.W.2d 934 (Tex. 1972); *Doyle v. USAA*, 482 S.W.2d 849 (Tex. 1972); *Hidalgo v. Sur. Sav. & Loan Ass'n*, 462 S.W.2d 540 (Tex. 1971); *Womack v. Allstate Ins. Co*., 156 Tex. 467, 296 S.W.2d 233 (1957). In cases such as *Torres v. Western Cas. & Sur. Co*., 457 S.W.2d 50 (Tex. 1970) (existence of good cause for late filing of worker's compensation claim), *and Gardner v. Martin*, 162 Tex. 156, 345 S.W.2d 274 (1961) (failure of movant to attach certified copies of prior case to establish res judicata), the non-movant must now, in a written answer or response to the motion, expressly present to the trial court those issues that would defeat the movant's right to a summary judgment and failing to do so, may not later assign them as error on appeal.

Having held that Clear Creek is not entitled to defeat the summary judgment by raising a fact issue for the first time on appeal which was not expressly presented to the trial court, we now determine if the City of Houston is entitled to its summary judgment as a matter of law for the reason asserted in its motion. Specifically, the question is whether under the Texas Water Code, Clear Creek Basin Authority can sue to enforce the Code provisions prohibiting unauthorized discharges of polluting waste into the waters of the state when those discharges occur upstream and Outside the territorial jurisdiction of the Clear Creek Basin Authority. As we have said, this issue was the only question before the trial court.

* * *

[After reviewing the various statutes the Court holds] that a local government may not bring a statutory action for civil penalties and injunctive relief pursuant to § 26.124 of the Texas Water Code for discharges that occur outside its geographical boundaries.

* * *

The judgment of the court of civil appeals is reversed, and the judgment of the trial court is affirmed.

McCONNELL
v.
SOUTHSIDE INDEP. SCH. DIST.
858 S.W.2d 337
(Tex. 1993)

James M. Heidelberg, Stacy C. Ferguson, San Antonio, for petitioner.
John T. Fleming, Austin, for respondents.

HIGHTOWER, JUSTICE.

This case presents the question whether grounds for summary judgment must be expressly presented in the motion for summary judgment itself or whether such grounds may be presented in either a brief filed contemporaneously with the motion or in the summary judgment evidence. We conclude that grounds for summary judgment must be expressly presented in the summary judgment motion itself. Consequently, we reverse the judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

John S. McConnell (McConnell) sued Southside Independent School District (Southside) after Southside failed to renew his contract of employment. Southside moved for summary judgment, stating in its motion only that there were "no genuine issues as to any material facts". Southside also filed a twelve page brief in support of the motion in which it expressly presented the grounds allegedly establishing its entitlement to summary judgment. McConnell filed a written exception to the motion, arguing that the motion was defective in that it failed to present any grounds. The trial court overruled McConnell's exception and rendered summary judgment for Southside. The court of appeals affirmed, holding that "Rule 166a allows a summary judgment movant to set out the specific grounds for summary judgment in a brief served on all parties contemporaneously with the motion itself." 814 S.W.2d 247.

I.

McConnell argues that the specific grounds for summary judgment must be expressly presented in the motion for summary judgment itself and not in a brief filed contemporaneously with the motion or in the summary judgment evidence. We agree.

Motion For Summary Judgment

The first sentence of Rule 166a(c), added in 1971, plainly provides: "The motion for summary judgment shall state the specific grounds therefor." TEX. R. CIV. P. 166a(c). Several cases have paraphrased this requirement as follows:

The motion for summary judgment must itself state specific grounds on which judgment is sought . . . . The motion for summary judgment must stand or fall on the grounds it specifically and expressly sets forth . . . . There is authority to the effect that a summary judgment cannot be sustained on a ground not specifically set forth in the motion. *Westbrook Const. Co. v. Fidelity Bank of Dallas*, 813 S.W.2d 752, 754-55 (Tex. App.—Fort Worth 1991, writ denied) (emphasis added). *See, e.g., Roark v. Stallworth Oil and Gas, Inc*., 813 S.W.2d 492, 494-95 (Tex. 1991) ("[A]n unpleaded affirmative defense may also serve as the basis for a summary judgment when it is raised in the summary judgment motion . . . ."); *410/West Ave. Ltd. v. Texas Trust Savings Bank, F.S.B*., 810 S.W.2d 422, 424 (Tex. App.—San Antonio 1991, no writ) ("Motions for summary judgment 'stand or fall on the grounds specifically set forth in the motions.' "); *Hall v. Harris County Water Control & Improvement Dist*., 683 S.W.2d 863, 867 (Tex. App.—Houston [14th Dist.] 1984, no writ). Consequently, a literal reading of Rule 166a and these authorities indicate that the motion itself must state the grounds.

Other cases have considered the same language of Rule 166a when the motion for summary judgment presented no grounds. In *Boney v. Harris*, 557 S.W.2d 376 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ), the motion for summary judgment stated only that the defendant's answer was "insufficient in law to constitute a defense . . . ." *Id*. at 378. The court held that such a motion failed to satisfy the requirements of Rule 166a(c). *Id*. In another case in which the motion presented absolutely no grounds, the court held: The motion, however, does not state any grounds, specific or otherwise, upon which it is based, and, as a result, it is not in compliance with Rule 166-A as amended. *Moody v. Temple National Bank*, 545 S.W.2d 289, 290 (Tex. Civ. App.—Austin 1977, no writ). *See also Mallory v. Dorothy Prinzhorn Real Estate, Inc*., 535 S.W.2d 371, 372 (Tex. Civ. App.—Eastland 1976, no writ) (motion stating that "original answer is insufficient to raise a controverted fact issue" insufficient under rule 166a(c)).

* * *

All such rules [of procedure] can be applied under the rubric of literal construction to defeat their own purposes unless those purposes govern and define the rules. The underlying principles must control. 858 S.W.2d 344, 347 (Hecht, J., dissenting). The Texas Rules of Civil Procedure including Rule 166a should be clearly understandable and be applied in a predictable and consistent manner. In an attempt to avoid the effect of Rule 166a(c), the dissent would do a great disservice to the litigants whom we serve by rewriting the unambiguous text of Rule 166a In light of the dissent's perceptions concerning Rule 166a(c)'s "underlying purpose and principles." This approach would inject an element of uncertainty into every rule, no matter how clearly stated.

Consistent with the precise language of Rule 166a(c), we hold that a motion for summary judgment must itself expressly present the grounds upon which it is made. A motion must stand or fall on the grounds expressly presented in the motion. In determining whether grounds are expressly presented, reliance may not be placed on briefs or summary judgment evidence.

Non-Movant's Answer or Response

Likewise, issues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary judgment evidence. *See City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 678 (Tex. 1979) ("the non-movant must expressly present to the trial court any reasons seeking to avoid movant's entitlement . . . .").

The summary judgment pleading rules we announce today are consistent with the express language of Rule 166a requiring that the motion for summary judgment state the specific grounds therefor and further the purpose of Rule 166a to provide adequate information for opposing the motion, and to define the issues. *See Weaver v. Stewart*, 825 S.W.2d 183, 184-85 (Tex. App.—Houston [14th Dist.] 1992, writ denied) ("[Rule 166a] is im-

portant because it provides the opposing party with notice of all matters expected to be asserted in arguing the motion."). Carving exceptions to this simple requirement that the motion for summary judgment state the specific grounds frustrates the purpose of Rule 166a(c). Eventually the exceptions would consume the rule, and inject uncertainty into summary judgment proceedings concerning what issues were presented for consideration. Furthermore, it is certainly not unduly burdensome to require the movant to state the specific grounds in the motion for summary judgment. These rules also permit the trial court to consider a brief in support of a motion for summary judgment as guidance in making its determination whether the summary judgment evidence demonstrates that the moving party is "entitled to judgment," *see* TEX. R. CIV. P. 166a(c), but not in determining whether summary judgment grounds and issues are expressly presented. Finally, these rules further the policy of seeking clarity and simplicity in summary judgment practice. *See, e.g., Black v. Victoria Lloyds Ins. Co*., 797 S.W.2d 20, 27 (Tex. 1990) ("[T]he motion [for summary judgment] must identify or address the cause of action or defense and its elements." (emphasis added)).

II.

A corollary question concerns whether a burden exists to except or object to a defective motion for summary judgment or response. In certain situations, we conclude that such a burden exists.

Motion Presenting No Grounds

When the grounds for summary judgment are not expressly presented in the motion for summary judgment itself, any confusion may and should be resolved by exception in the trial court. However, summary judgments must stand or fall on their own merits, and the non-movant's failure to except or respond cannot supply by default the grounds for summary judgment or the summary judgment proof necessary to establish the movant's right—the movant's right is not established and the movant must still assert grounds in the motion for summary judgment itself and establish its entitlement to summary judgment. *See Clear Creek*, 589 S.W.2d at 678. While it would be prudent and helpful to the trial court for the non-movant always to file an [exception,] answer or response, the non-movant needs no [exception], answer or response to the motion to contend on appeal that the grounds expressly presented to the trial court by the movant's motion are insufficient as a matter of law to support the summary judgment. *Id.* (emphasis in original). Even if the non-movant fails to except or respond, if the grounds for summary judgment are not expressly presented in the motion for summary judgment itself, the motion is legally insufficient as a matter of law. Consequently, we conclude that Rule 166a does not require a non-movant to except in this situation.

Motion Presenting Only Certain Grounds

When the motion for summary judgment clearly presents certain grounds but not others, a non-movant is not required to except. This distinction was recognized and correctly resolved in *Roberts v. Southwest Texas Methodist Hospital*, when the court held: When a motion for summary judgment asserts grounds A and B, it cannot be upheld on grounds C and D, which were not asserted, even if the summary judgment proof supports them and the responding party did not except to the motion. 811 S.W.2d at 146. Why should a non-movant be required to except to a motion expressly presenting certain grounds and not others? The only effect of such a rule would be to alert the movant to additional unasserted grounds for summary judgment. Consequently, we conclude that Rule 166a does not require a non-movant to except in this situation.

Grounds Unclear from Motion

An exception is required should a non-movant wish to complain on appeal that the grounds relied on by the movant were unclear or ambiguous. *See Lochabay v. Southwestern Bell Media, Inc*., 828 S.W.2d 167, 170 n. 2 (Tex. App.—Austin 1992, no writ) ("Lochabay did not except to the motion for summary judgment, as he was required to do if he wished to claim lack of specificity."). Prudent trial practice dictates that such an exception should be lodged to ensure that the parties, as well as the trial court, are focused on the same grounds. This prevents the non-movant from having to argue on appeal each and every ground vaguely referred to in the motion. The practical effect of failure to except is that the non-movant loses his right to have the grounds for summary judgment narrowly focused, thereby running the risk of having an appellate court determine the grounds it believes were expressly presented in the summary judgment. Even in this situation, however, "[a]n appellate court cannot 'read between the lines, infer or glean from the pleadings or the proof' any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court [In the motion for summary judgment]." *Clark v. First National Bank of Highlands*, 794 S.W.2d 953, 956 (Tex. App.—Houston [1st Dist.]

1990, no writ) (*quoting Great-Ness Professional Serv., Inc. v. First Nat'l Bank of Louisville*, 704 S.W.2d 916, 918 (Tex. App.—Houston [14th Dist.] 1986, no writ)).

Non-Movant's Answer or Response

With one exception, the above rules apply equally to a non-movant's response. The non-movant must expressly present to the trial court, by written answer or response, any issues defeating the movant's entitlement. *Clear Creek*, 589 S.W.2d at 678 ("The written answer or response to the motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion."). If it is clear what issues the non-movant contends should defeat the movant's entitlement, the movant should be able to reply only to these issues. *See* TEX. R. CIV. P. 166a ("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."). Any confusion regarding what issues are expressly presented by the non-movant can also be resolved by exception. However, summary judgments must stand or fall on their own merits, and the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right. *Clear Creek*, 589 S.W.2d at 678. If a non-movant fails to present any issues in its response or answer, the movant's right is not established and the movant must still establish its entitlement to summary judgment. The effect of such a failure is that the non-movant is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant. *Id.* at 678.

III.

The summary judgment pleading rules we announce today are simple, equitable, and prevent the confusion that results when parties fail to expressly present grounds and issues entitling or defeating entitlement to summary judgment. They also prevent parties from arguing that grounds and issues were presented in lengthy briefs or voluminous summary judgment evidence. Finally, these rules ultimately prevent the controversies that result when appellate courts are forced to ascertain whether grounds and issues were expressly presented to the trial court.

Because Southside's motion for summary judgment stated no grounds and because McConnell properly excepted to this defect, the court of appeals erred in affirming the trial court's rendition of summary judgment for Southside. For these reasons, we reverse the judgment of the court of appeals and remand this cause to the trial court for further proceedings consistent with this opinion.

GONZALEZ, J., concurring.

HECHT, JUSTICE, dissenting.

* * * I do not join in the plurality opinion's extensive discussions of various other subjects, all obiter dicta, which are in some respects wrong and in all respects completely unnecessary to a decision of the dispute before us. * * *

CORNYN, J., joins in this dissenting opinion.

ENOCH, JUSTICE, dissenting.

I agree with the Court that the plain words of Rule 166a of the Texas Rules of Civil Procedure establish a bright line rule. The grounds for the granting of a motion for summary judgment must be stated in the motion. However, I would not address any of the other issues, nor can I agree that in this case the failure to include the grounds in the motion itself is harmful. The evidence in the record establishes that neither the court nor the non-movant was unaware, confused or mislead as to the specific grounds being relied upon by the movant. Therefore, I would affirm the judgment of the court of appeals.

PHILLIPS, C.J., joins in this dissenting opinion.

Note

Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d. 193 (2002): As recognized in *McConnell,* "When the motion for summary judgment clearly presents certain grounds but not others, a non-movant is not required to except. This distinction was recognized and correctly resolved in *Roberts v. Southwest Texas Methodist, Hospital,* 811 S.W.2d 141 (Tex. 1991), when the court held: 'When a motion for summary judgment asserts grounds A and B, it cannot be upheld on grounds C and D, which were not asserted, even if the summary judgment proof supports them and the responding party did not except to the motion.' " 858 S.W.2d at 342. The court also reiterated that a court cannot grant summary judgment on grounds that were not presented in the summary judgment motion.

RHONE-POULENC, INC.
v.
STEEL
997 S.W.2d 217
(Tex. 1999)

The trial court's case management orders did not shift the burden of proof from the movant, Rhône-Poulenc, to the nonmovants, the Steels, in a summary judgment proceeding under Rule166a(c) of the Texas Rules of Civil Procedure. Because Rule 166a(c) requires a summary judgment movant to prove it is entitled to judgment as a matter of law, the orders did not shift the burden from Rhône to the Steels. Rhône's summary judgment evidence did not meet Rule 166a(c)'s burden.

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. When the plaintiff pleads the discovery rule as an exception to limitations, the defendant must negate that exception as well.

Summary judgments must stand on their own merits. Accordingly, on appeal, the nonmovant need not have answered or responded to the motion to contend that the movant's summary judgment proof is insufficient as a matter of law to support summary judgment. When reviewing a summary judgment, the appellate court takes as true all evidence favorable to the nonmovant, and indulges every reasonable inference and resolve any doubts in the nonmovant's favor. On appeal, the movant still bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law.

Because September 19, 1992 fell on a Saturday, the Steels' lawsuit, filed on September 21, 1992, the first Monday after September 19, 1992, was, under Texas Rule of Civil Procedure 4, within two years from September 19, 1990.

CARPENTER
v.
CIMARRON HYDROCARBONS CORPORATION
98 S.W.3d 682
(Tex. 2002)

A motion for leave to file a late summary-judgment response should be granted when the nonmovant establishes good cause by showing that the failure to timely respond (1) was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) that allowing the late response will occasion no undue delay, or otherwise injure the party seeking summary judgment. Because Cimarron did not establish good cause, the trial court did not abuse its discretion in denying Cimarron leave to file a late response.

Any error in denying it had to be brought up (preserved and briefed) on appeal. The *Craddock v. Sunshine Bus Lines*, 133 S.W.2d 124 (Tex. 1939) standard does not apply to Cimarron's motion for new trial, because the rules of procedure provided Cimarron an opportunity, before judgment was rendered, to obtain a continuance or leave to file an untimely response. (Although the trial court denied that relief to the plaintiff here, its decision is

not contested in this appeal. Accordingly, the Court does not consider whether the trial court abused its discretion in denying plaintiff's continuance motion.).

g. ***Summary Judgment on the Pleadings***

TEXAS NATIONAL CORPORATION
v.
UNITED SYSTEMS INTERNATIONAL
493 S.W.2d 738
(Tex. 1973)

Parnass, Clement & Cline, James G. Clement, Irving, for petitioner.

Passman, Jones, Andrews, Coplin & Holley, Shannon Jones, Jr., and George Nachman, Dallas, for respondent.

GREENHILL, CHIEF JUSTICE.

The courts below have upheld a summary judgment for the plaintiff on a promissory note. The facts are fully set out in the opinion of the court of civil appeals. 487 S.W.2d 863. We reverse because the plaintiff failed to make the necessary summary judgment proof under Rule 166--A(e) of the Texas Rules of Civil Procedure.

Reducing the facts, the pleadings, and summary judgment proofs to their simplest form for purposes of this opinion, we find the following: the plaintiff's petition alleges that the note sued upon was executed to it by defendant, was due and unpaid, and that the plaintiff had been, since the execution of the note to the present, the owner and holder of the note. The petition is not sworn to. The petition also states that 'a copy of said note' is attached to the petition, marked Exhibit A, and referred to for all purposes. The copy of the note is not attested to as a 'sworn or certified copy.

The defendant filed a general denial.

The plaintiff then filed an unsworn motion for summary judgment which had attached to it an affidavit. The affidavit was executed by a vice president of the plaintiff corporation. He stated, among other things, that he had charge of the books and records of the plaintiff; that he had read the plaintiff's petition and had studied the exhibits attached thereto, and that 'I know of my own knowledge that the factual allegations contained in said petition are true and correct.' The affiant does not swear that the plaintiff is the owner and holder of the note. He does swear that the facts of the petition are true, and the petition states that plaintiff was (to the time of the filing of the petition) the owner and holder of the note. Neither the original nor a sworn copy of the note was attached to the affidavit or to the motion for summary judgment.

The defendant filed an answer to the motion for summary judgment. The answer pointed out that the plaintiff's motion for summary judgment and the affidavit were insufficient because 'neither the original of said note nor a true (sworn) copy thereof have been made a part of this case, and plaintiff has failed in its proof that it is the owner and holder and in possession of the promissory note.' This answer placed the problems squarely before the trial court, and it should have been heeded. Rule 166--A(e) provides for supporting proof for the motion for summary judgment; and as relevant here, it says: 'Sworn or certified copies of all papers . . . referred to in an affidavit shall be attached Thereto. . . .'

. . . there are at least two reasons why the trial court erred in granting the plaintiff's motion for summary judgment:

1. The factual statements to support the motion for summary judgment are in the pleadings, not in a sworn motion or affidavit in support of the motion. The affidavit does not swear that the plaintiff is the owner and holder of the note sued upon. The granting of the motion, therefore, falls under the rules announced in *Hidalgo v. Surety Savings & Loan* cited and discussed above.

2. Neither the original nor a sworn copy of the note was attached to a motion or an affidavit in support of the motion as required by Rule 166--A(e). A copy of the note, unsworn and uncertified, was at-

tached to the plaintiff's Pleadings, but exception was taken to this in the defendant's answer. Under the holding of *Youngstown Sheet & Tube Co. v. Penn*, cited and discussed above, the plaintiff's affidavit was subject to exception; and the defendant's point should have been sustained.

We point out again the desirability of counsel's following the wording of Rule 166--A(e). The opinion in Hidalgo clearly states that unless the case is one properly to be decided upon the pleadings, a motion for summary judgment should be supported by its own summary judgment proof as set out in the rule, and not by reference to the pleadings. The opinion in Youngstown clearly announces the policy that supporting proofs should be attached to the motion or an affidavit, not to the pleadings. And the opinions in *LaRue*, majority and dissenting, point out the high desirability of attaching the Original of the note to the motion or affidavit. If a sworn or certified copy, rather than the original of the note, is used, the motion or affidavit should clearly evidence that the plaintiff is the present owner and holder and in possession of the note.

The judgments of the courts below are reversed, and the cause is remanded to the district court.

NATIVIDAD
v.
ALEXSIS
875 S.W.2d 695
(Tex. 1994)

A summary judgment based on a pleading deficiency is proper if a party has had an opportunity by special exception to amend and fails to do so, or files a further defective pleading. A review of the pleadings in such case is de novo, with the reviewing court taking all allegations, facts, and inferences in the pleadings as true and viewing them in a light most favorable to the pleader. The reviewing court will affirm the summary judgment only if the pleadings are legally insufficient.

Notes

1. In the *Natividad* case the court stated that it was reviewing the pleadings in the summary judgment case de novo. The phrase "de novo review" can be used several ways. First, it may refer to an appeal from the justice court to the county court. Unless there is a statute (as in some minor criminal cases) for a substantial evidence review of the record in justice court, the trial in county court is de novo. This means that the trial begins anew, as if there had been no trial court in the justice court. The judgment of the justice court is meaningless in deciding the case in the county court.

The phrase "de novo review," however, can be used in other ways. The second, and primary, use for the phrase concerns questions of law. A trial court's ruling on evidentiary issues are subject to review on a abuse of discretion standard. A trial court's review on factual issues is subject to a factual sufficiency review. In those situations, the appellate court can reverse the trial court, but cannot substitute their decision for that of the trial court. However, on issues of law the appellate court is in as good a position as the trial court to determine the issue. This includes cross-motions for summary judgment, legal sufficiency issues, and ordinary issues of law. In these situations, the appellate court may substitute its judgment for that of the lower court, and render the judgment which the law requires.

2 *City of Garland v. Dallas Morning News*, 22 S.W.2d 351 (Tex. 2000) (Plurality Opinion by Justice Baker, joined by Justices Hankinson, O'Neill, and Gonzales; Concurring Opinion by Justice Enoch, joined by Chief Justice Phillips and Justice Abbott; Dissenting Opinion by Justice Owen, joined by Justice Hecht.) On cross-motions for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. When the trial court grants one motion and denies the other, the reviewing court should determine all questions presented. The reviewing court should render the judgment that the trial court should have rendered, including rendering judgment for the other movant.

3. *Friesenhahn v. Ryan,* 960 S.W.2d 656 (Tex. 1998). Before a court may grant a "no cause of action" summary judgment on the pleadings, it must give the parties an adequate opportunity to plead a viable cause of action. This is akin to the use of special exceptions to challenge the sufficiency of a pleading. When the trial

court sustains special exceptions, it must give the pleader an opportunity to amend the pleading. If a party refuses to amend, or the amended pleading fails to state a cause of action, then summary judgment may be granted. The same is true when a summary judgment is used to challenge the opponent's pleadings. Summary judgment is proper when the opponent refuses to, or cannot amend the pleadings to state a legal cause of action or defense. But, whether special exceptions or summary judgments are involved, the opponent must be given a reasonable period of time to amend the pleadings.

4. *Haase v. Glazne*, 62 S.W.3d 795 (Tex. 2001): Summary judgment may be granted when a party is ordered to replead and fails to do so.

2. *No Evidence Summary Judgment Practice*

HIGHT
v.
DUBLIN VETERINARY CLINIC
22 S.W.3d 614
(Tex. App.—Eastland 2000, pet. denied)

Brad Jackson, Jackson & Matthews, Dallas, for appellant.

Christopher J. Pruitt, Donald A. Ferrill, Brown, Thompson, Pruitt & Peterson, Fort Worth, Gale Warren, Law Office of Gale Warren, Stephenville, for appellee.

JIM R. WRIGHT, JUSTICE.

The trial court granted appellees' no-evidence motions for summary judgment. Because we find that the trial court properly granted the motions, we affirm.

Background Facts

This case arises from the death of a Boer goat named Pancho. In their second amended original petition, appellants alleged that they were in the business of owning, breeding, and selling goats; that they placed Pancho with the Edwards "at their breeding facility for the purpose of standing him at stud, collecting, storing and selling his semen"; that an employee of the Edwards spoke with and explained to Carter's wife that "Pancho's horns [were] growing into his head, and we need to do something about it"; that Carter consented to what he considered a "tip[ping]" of Pancho's horns; that Pancho was anesthetized at the Dublin Veterinary Clinic and dehorned; that approximately 15 to 20 minutes after the dehorning procedure was completed, Pancho died; that Vet appellees sent tissue samples from Pancho to the Texas Veterinary Medical Diagnostic Laboratory and the tests showed that Pancho died of acute pulmonary congestion and edema; and that Vet appellees then burned Pancho's body without their consent.

Procedural Facts

Appellants sued the Clinic for negligence, breach of contract, and breach of warranty. Appellants also sued the Edwards for violations of the Texas Deceptive Trade Practices Act, TEX. BUS. & COM. CODE ANN. ch. 17 (Vernon 1987 & Pamph.Supp.2000) (DTPA). In response to appellees' no-evidence motions for summary judgment, appellants filed responses which included the affidavits of appellants and their expert witness, Dr. David Fazzino. The Clinic then filed a reply to appellants' responses and asserted objections to appellants' affidavits. The Edwards did not file a reply nor did they assert any objections. The trial court sustained the Clinic's objections to the affidavit of Dr. Fazzino, striking it in its entirety. The court then granted appellees' motions for summary judgment. Appellants filed a motion for new trial which was overruled by operation of law.

Issues on Appeal

Appellants argue that the trial court erred in granting the Clinic's motion for summary judgment because (a) the trial court improperly struck Dr. David Fazzino's affidavit; (b) the Clinic's motion for summary judgment is not supported by any competent summary judgment evidence; (c) genuine issues of material fact existed on appellants' negligence claims; (d) the doctrine of res ipsa loquitur applies herein precluding summary judgment; (e)

appellants were entitled to a spoliation presumption; (f) genuine issues of material fact existed on appellants' breach of contract and implied warranty claims; and (g) appellants were entitled to recover for the loss of income resulting from Pancho's death. In addition, appellants argue that the trial court erred in granting the Edwards' motion for summary judgment because (a) their motion does not comply with TEX. R. CIV. P. 166a(i); (b) the Edwards' motion for summary judgment is not supported by competent summary judgment evidence; (c) a genuine issue of material fact existed on appellants' negligence claims; (d) the doctrine of res ipsa loquitur applies herein precluding summary judgment; (e) appellants were entitled to a spoliation presumption; (f) genuine issues of material fact existed on appellants' breach of contract and implied warranty claims; (g) genuine issues of material fact existed on appellants' DTPA claims; and (h) appellants are entitled to recover for the loss of income resulting from Pancho's death.

No-evidence summary judgments are relatively new to Texas jurisprudence. In 1997, the rule pertaining to summary judgments, TEX. R. CIV. P. 166a, was amended to provide a procedure whereby a party might obtain a summary judgment based upon the proposition that there was no evidence of one or more of the essential elements of a claim or defense relied upon by the opposite party. That rule, Rule 166a(i), provides as follows:

> 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.

Frequently, the cases reviewing no-evidence summary judgments do so as though they were pretrial directed verdicts. Accordingly, the standard of review applied was one in which the court considered the evidence in the light most favorable to the non-movant and disregarded all contrary evidence. *See, e.g., Bosque Asset Corp. v. Greenberg*, 19 S.W.3d 514 Tex. App.—Eastland, 2000); *Grant v. Southwestern Electric Power Company*, 20 S.W.3d 764 (Tex. App.—Texarkana, 2000); *Denton v. Big Spring Hospital Corporation*, 998 S.W.2d 294 (Tex. App.—Eastland 1999 no pet'n); *Moore v. K Mart Corporation*, 981 S.W.2d 266 (Tex. App.—San Antonio 1998, *review denied*); *Jackson v. Fiesta Mart, Inc*., 979 S.W.2d 68 (Tex. App.—Austin 1998, no pet'n); Judge David Hittner and Lynn Liberato, *Summary Judgments in Texas*, 34 HOUS. L .REV. 1303 (1998).

We now believe that the better approach is to review no-evidence motions for summary judgments in the same manner any other Rule 166a summary judgment is reviewed. We see no reason to engage in analogies when we already have in place a standard by which to review motions for summary judgments. In reviewing any Rule 166a summary judgment, we hold that, including a no-evidence summary judgment under that rule, we must accept as true evidence in favor of the non-movant and indulge every reasonable inference and resolve all doubts in favor of the non-movant. *El Chico Corporation v. Poole*, 732 S.W.2d 306 (Tex. 1987). An exercise of this standard would not involve any consideration of any summary judgment evidence offered by the proponent of the motion. Rule 166a(a) and (b) provide that the movant may proceed with or without supporting affidavits. (Emphasis added) To the contrary, Rule 166a(i) provides that "a party without presenting summary judgment evidence may move for summary judgment." (Emphasis added) Therefore, summary judgment evidence proffered by the movant is not to be considered in determining a no-evidence summary judgment. We point out that the Waco Court of Appeals held in *Grimes v. Andrews*, 997 S.W.2d 877 (Tex. App.—Waco 1999, no pet'n), that, in cases where a moving party attaches summary judgment evidence, the review would be conducted as though the motion for summary judgment was a traditional one.

In summary, we hold that, in reviewing a no-evidence summary judgment, we will not consider summary judgment evidence propounded by the movant and that we will accept as true evidence in favor of the non-movant, indulging every reasonable inference and resolving all doubts in favor of the non-movant.

The question then becomes whether the summary judgment evidence presented by the non-movant, when so considered, is some evidence which raises a material issue of fact. The trial court properly granted the no-evidence summary judgment if appellants failed to bring forth more than a mere scintilla of probative evidence to raise a genuine issue of material fact as to an essential element of appellants' claims. Less than a mere scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact, so that the legal effect is that there is no evidence. *Kindred v. Con/Chem, Inc*., 650 S.W.2d 61, 63 (Tex. 1983). More than a mere scintilla of evidence exists when the evidence rises to a level that would enable reason-

able and fair-minded people to differ in their conclusions. *Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706 (Tex. 1997).

We now examine appellants' issues in accordance with these standards.

* * *

Appellants further argue that the Edwards' no-evidence motion for summary judgment did not comply with Rule 166a(i). Specifically, appellants urge that the Edwards' motion was conclusory and, therefore, would not support summary judgment. As evidence of the motion's general and conclusory nature, appellants point to the Edwards' challenge of every element of their DTPA claim, urging that there can be no question of appellants' consumer status. Also, the motion lists a violation of TEX. INS. CODE ANN. art. 21.21 (Vernon 1981 & Supp. 2000) as an element with no evidentiary support, and appellants argue that there is no pleading which possibly suggests a claim under that provision. Appellants further argue that they were not allowed adequate time for discovery.

The Edwards' motion also states, however, that, in order for appellants to prevail in a negligence cause of action, they must establish by evidence of probative force the following elements: (1) a duty owed by the Edwards to appellants; (2) a breach of that duty; and (3) proximate causation resulting in compensable damages to appellants. The motion then states that, "[a]fter adequate time for discovery, [appellants] cannot provide evidence to support any of the aforementioned elements of negligence."

Under Rule 166a(i), a party:

> [M]ay move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or a defense on which an adverse party would have the burden of proof at trial.

Rule 166a(i) "requires the movant to specify the essential element or elements of a claim or defense to which there is no evidence." * * * *Lampasas v. Spring Center, Inc*., 988 S.W.2d 428, 436 (Tex. App.—Houston [14th Dist.] 1999, no pet'n). In *Lampasas*, the movant's no-evidence motion for summary judgment stated that there was no evidence of any duty, breach, or causation. The court held that the motion provided notice to the nonmovant that "he must come forward with some evidence on these challenged elements, or his negligent causes of action would fail." *Lampasas v. Spring Center, Inc*., *supra* at 436. The Edwards' motion meets the requirements of Rule 166a(i).

We also hold that there has been more than "adequate time for discovery" in this case. Pancho died on July 5, 1995, and the lawsuit was filed on July 7, 1997. Appellants did not begin discovery as to the Edwards until September 10, 1998. Appellants filed a motion for continuance on October 28, 1998, for the purpose of conducting discovery, and the trial court granted their motion. Dr. Fazzino's affidavit was taken on December 1, 1998. The summary judgment proceeding was held on January 6, 1999, approximately 18 months after the suit was filed, and approximately three and one-half years after Pancho's death. Appellants' argument is overruled.

Appellants also insist that both the Clinic's and the Edwards' no-evidence motions for summary judgment are not supported by competent summary judgment evidence. Rule 166a(i) does not permit summary judgment proof from the movants. Because appellants failed to produce summary judgment evidence raising a genuine issue of material fact on their negligence claim, we overrule appellants' first three contentions.

* * *

Appellants argue that genuine issues of material fact existed on appellants' breach of contract and implied warranty claims against both the Clinic and the Edwards. Appellants' second amended original petition alleges that each appellee: [F]ailed to perform the work for which the [appellee] was engaged by [appellants] in a good and workmanlike manner, thereby materially breaching their contract with [appellants] and resulting in their damages as set forth below.

The damages claimed by appellants include the value of Pancho and the loss of income generated by Pancho. In their motions for no-evidence summary judgment, the Clinic and the Edwards asserted that appellants had no evidence of the existence of a contractual duty and breach of that duty.

Although the principles of contract and tort causes of action are well settled, the distinction between the two is not always clear. We must look to the substance of the cause of action and not the manner in which it is pleaded. *Jim Walter Homes, Inc. v. Reed*, 711 S.W.2d 617, 617-18 (Tex. 1986).

The acts of a party may breach duties in tort or contract alone or simultaneously in both. The nature of the injury suffered usually determines the existence of a cause of action in tort. Tort obligations are generally "obligations that are imposed by law—apart from and independent of promises made and therefore apart from the manifested intention of the parties—to avoid injury to others." *Clary Corporation v. Smith*, 949 S.W.2d 452, 463 (Tex. App.—Fort Worth 1997, *pet'n den'd*), *quoting Southwestern Bell Telephone Company v. DeLanney*, 809 S.W.2d 493, 494 (Tex. 1991). If appellees' conduct would give rise to liability independent of whether a contract existed between the parties, then appellants' claim sounds in tort. *Clary Corporation v. Smith, supra*. The duty that appellants alleged the Clinic and the Edwards breached in this case was one imposed by law, not contract. If appellees had breached this duty, their "breach would give rise to liability independent of whether a contract existed between [appellants] and [appellees]." *Clary Corporation v. Smith, supra* at 463. We hold appellants' claim sounds in tort, not contract.

Moreover, without an express agreement in the record, we decline to recognize an implied warranty for veterinarian services. *See Dennis v. Allison*, 698 S.W.2d 94 (Tex.1985) (declining to recognize an implied warranty in connection with medical services when a patient was sexually assaulted and beaten by her psychiatrist); *Downing v. Gully, supra* (adopting the standard applied to physicians and surgeons in medical malpractice cases in a veterinary negligence case). Having already discussed appellants' negligence claims, appellants' argument is overruled.

* * *

Appellants contend that the trial court erred in granting the Edwards' motion for summary judgment on their DTPA claim. Appellants assert that the Edwards "represented themselves as a reputable and established service company which was capable of caring for Pancho and standing him at stud, collecting, storing and selling his semen, and providing reproductive services." Appellants argue that, since Pancho died while in the Edwards' custody and care, they were not capable of caring for Pancho as represented. In addition, appellants state that evidence existed that the Edwards "took an unconscionable course of action." We disagree.

In reviewing the record before us, we have found no evidence of any false, misleading, or deceptive act or practice enumerated in Section 17.46 of the DTPA. We have also been unable to find any evidence of unconscionability. Section 17.45(5) defines an unconscionable action or course of action as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."

The Edwards provided routine boarding and care for Pancho at their breeding facility. Appellants offer no evidence that the Edwards were incompetent in providing genetic services or routine boarding and care. Additionally, appellants offer no evidence of any representation made by the Edwards which encompasses the performance of veterinary care, surgical treatment, or postoperative treatment. The Edwards informed Hight of the problem with Pancho's horns after almost one year of caring for him, and there is evidence in the record that Pancho's horns were growing into the back of his neck. This information was not false, misleading, or deceptive and does not constitute an unconscionable action by the Edwards. Appellants' final contention is overruled.

The judgment of the trial court is affirmed.

Note

Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193 (Tex. 2002): A respondent to a motion under TEX. R. CIV. P. 166A (i) need not marshal evidence, but may point out evidence that raises a fact issue on the challenged elements. Here, whether plaintiffs adequately pointed out evidence relating to challenged elements of the conspiracy cause of action is a close question. But, the summary judgment response [detailed in the opinion] met the minimum requirements of Rule 166a(i).

BINUR
v.
JACOBO
135 S.W.3d 646
(Tex. 2004)

JUSTICE OWEN delivered the opinion of the Court.

The issues in this medical malpractice suit have narrowed as the case has proceeded. Although the plaintiff Donna Jacobo originally asserted a number of counts of negligence against the defendant Nir Binur, a physician, Jacobo has since confined her complaints to her contention that Binur failed to obtain her informed consent to the surgical removal of both her breasts. She contends that Binur told her that she would definitely develop breast cancer and that this was the reason she consented to a prophylactic bilateral mastectomy.

After a trial in which a jury was unable to agree on a verdict and a mistrial was declared, the trial court granted summary judgment in Binur's favor. Jacobo appealed, and a divided court of appeals reversed and remanded, concluding that fact issues exist. We hold that although Jacobo might have pursued a claim against Binur for negligence in reaching his prognosis, an erroneous prognosis that is the basis for recommending surgery cannot be the basis of a cause of action for lack of informed consent. Because informed consent is the only claim Jacobo has pursued, we reverse the court of appeals' judgment and render judgment for Binur.

The summary judgment record includes affidavits, excerpts from testimony adduced at trial, and documentary evidence. The record reflects that fourteen years before Donna Jacobo underwent the mastectomy at issue in this case, she had a lump removed from her breast that proved to be benign, and that she had another benign lump removed seven years later. In the summer before her mastectomy, her mother died of breast cancer. Three months after her mother's death, Donna Jacobo detected another lump in her breast. She consulted her primary care physician, who examined her and ordered a mammogram. Jacobo's breasts had fibrocystic tissue, which made it more difficult to interpret the mammogram. Jacobo's physician referred her to a general surgeon, Dr. John Schmidt. Schmidt reviewed Jacobo's mammogram, and she told him about her prior lumpectomies, her mother's death, and the fact that her maternal grandmother had survived breast cancer.

After this initial consultation, Dr. Schmidt reported in a note to Jacobo's primary care physician that Schmidt's diagnosis was: "(1) Probable fibrocystic disease (2) Very [underscored three times] strong risk of developing breast ca[ncer]." Schmidt's recommended treatment was: "(1) Re-examine in 3 mos. (2) Strongly [underscored twice] consider referral to plastic surgeon for possible sub[cutaneous] mastectomy & implants." Donna Jacobo's affidavit states that at her initial consultation with Dr. Schmidt, he recommended a bilateral mastectomy, but she "decided against the proposed surgical removal of my breasts." She explained, "I felt that this was a rather extreme mode of treatment for preventing a disease that I did not have—especially in light of the fact that my previous lumps had been benign."

Dr. Schmidt referred Jacobo to Binur, a plastic surgeon. Binur, like Schmidt, recommended that Jacobo undergo a mastectomy. Jacobo's affidavit states, "When I questioned Dr. Binur about my risk of developing breast cancer, he told me that it wasn't a question of *if* I required it, but more of a question of *when* it would happen. Essentially, he told me that it was a certainty that I would develop the disease." Binur disputes that he told Jacobo that it was certain she would develop breast cancer, but in our review, we accept all that Jacobo said as true.

After meeting with Binur, Jacobo returned to see Dr. Schmidt and told him that she had decided to proceed with the surgery. Before surgery, Jacobo signed a written consent form that identified both Schmidt and Binur in the blank for "PHYSICIAN'S/SURGEON'S NAME." She consented to a "Bilateral simple mastectomy, tissue expanders." All parties and experts agree that two distinct procedures were performed on Jacobo during this surgery. The first was the bilateral mastectomy, and the second was partial breast reconstruction with the insertion of tissue expanders. It is also undisputed that Dr. Schmidt performed the mastectomy with the assistance of Binur, although the extent of Binur's participation and the legal duty he owed to Jacobo as a result is disputed. Binur performed the reconstruction procedure, which is no longer at issue in this case.

Binur continued to treat Jacobo after this initial surgery, and she alleged that as a result, she experienced pain, deformity, and other ill-effects. We will not detail her further treatment by Binur since it is no longer part

of Jacobo's claim. We note only that Binur performed three more surgical procedures and that Jacobo then consulted other surgeons and had three additional surgical procedures to remedy Binur's alleged negligence in reconstructing her breasts.

Jacobo sued Schmidt and Binur. The trial court granted summary judgment in Schmidt's favor and severed the suit against him. The remaining claims against Binur proceeded to a jury trial. Both Binur and Schmidt, as well as experts for Jacobo and Binur, testified. Before the case was submitted to the jury, Jacobo waived her claims against Binur pertaining to his treatment of her after the mastectomy and her claim that Binur was negligent in performing the reconstruction procedure when the mastectomy was performed. The only claims she pursued were those related to Binur's role in the mastectomy. As noted above, at the conclusion of the evidence, the jury was unable to reach a verdict, and the trial court declared a mistrial.

Binur then moved for summary judgment under Texas Rules of Civil Procedure 166a(b) and 166a(i). Binur contended that as a matter of law he was not negligent and that he owed no duty to Jacobo to obtain her informed consent for the mastectomy. He also contended that if he owed a duty, informed consent was properly obtained. Finally, he contended that any failure to obtain informed consent was not a proximate cause of injury or damages to Jacobo. The trial court granted this motion, reciting in the judgment that: 1) Binur was not negligent as a matter of law; 2) he had no duty to obtain informed consent for the mastectomy; 3) informed consent to the mastectomy was properly obtained; and 4) any alleged act or omission of Binur was not a proximate cause of any injury or damages to Jacobo.

Jacobo appealed, arguing that the information Binur had given her "was not medically accurate" and had caused her to consent to surgery for "a disease that she did not have." She contended that because Binur "played a primary role in the pre-operative, information-giving, consent obtaining portion of the surgery," he had a duty to properly inform her and obtain her informed consent. Jacobo's briefing also focused on the extent of Binur's participation as Schmidt's assistant during the mastectomy. She argued that Binur was a "co-surgeon" and therefore that he, as well as Schmidt, was required to obtain informed consent, which he had not done. At the conclusion of her brief, Jacobo suggested to the court of appeals that its holding should be as follows: "An assistant surgeon has the duty of obtaining a patient's informed consent only when the surgeon has an established doctor-patient relationship with the patient and voluntarily injects himself into the process by prescribing, recommending and/or performing the procedure."

The court of appeals concluded that although the duty to obtain a patient's informed consent does not extend to an assistant surgeon, there was conflicting summary judgment evidence "about whether Dr. Binur was an operating surgeon during the mastectomy with a direct obligation to the patient or a doctor whose only role was to assist during the procedure." The court of appeals also concluded that there was evidence that Binur breached a duty to obtain informed consent because "Dr. Binur essentially told [Jacobo] that there was no risk that the mastectomy was unnecessary because it was a certainty that she would develop breast cancer." Therefore, the court determined that a fact question existed on whether "Dr. Binur failed to disclose the risk that the mastectomy might have been unnecessary." With regard to proximate cause, the court of appeals concluded that based on Jacobo's affidavit, there was a fact question of "whether a reasonable person would have refused the mastectomy had she been accurately informed of the risk that the procedure might be unnecessary."

Before we turn to the substantive issues raised by this appeal, we first address the court of appeals' decision that it would treat Binur's summary judgment motion as presenting only a motion under Rule 166a(b) and that it would disregard his "no evidence" contentions, brought under Rule 166a(i), because Binur presented summary judgment evidence.

Texas Rule of Civil Procedure 166a does not prohibit a party from combining in a single motion a request for summary judgment that utilizes the procedures under either subsection (a) or (b), with a request for summary judgment that utilizes subsection (i) and asserts that there is "no evidence of one or more essential elements of a claim or defense." The fact that evidence may be attached to a motion that proceeds under subsection (a) or (b) does not foreclose a party from also asserting that there is no evidence with regard to a particular element. Similarly, if a motion brought solely under subsection (i) attaches evidence, that evidence should not be considered unless it creates a fact question, but such a motion should not be disregarded or treated as a motion under subsection (a) or (b). We disapprove of decisions that hold or imply that, if a party attaches evidence to a motion for summary judgment, any request for summary judgment under Rule 166a(i) will be disregarded.

Some Texas courts have declared that when a party seeks summary judgment under subsection (a) or (b), and also under subsection (i), the better practice is to file two separate motions, or at least to include headings that clearly delineate and segregate the part of a motion relying on subsection (a) or (b) from the part that relies on subsection (i). We agree that using headings to clearly delineate the basis for summary judgment under subsection (a) or (b) from the basis for summary judgment under subsection (i) would be helpful to the bench and bar, but the rule does not require it. If a motion clearly sets forth its grounds and otherwise meets Rule 166a's requirements, it is sufficient. Here, Binur's motion for summary judgment asserted that there was no evidence of proximate cause. The court of appeals erred in concluding that this ground could be disregarded because evidence was attached to the motion.

* * *

We hold that the trial court did not err in granting summary judgment. We therefore reverse the judgment of the court of appeals and render judgment for Binur. We do not reach or consider any of the court of appeals' determinations regarding assisting and "operating" surgeons or the duty to obtain informed consent because of our disposition of other issues raised by the parties.

Notes

1. In *Hight* the court recognizes a disagreement about the standard of review. The Texas Supreme Court has resolved any conflict in *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742 (Tex. 2003). In addressing this issue the court stated:

> "Because King Ranch's summary judgment motion was, in part, a no-evidence motion, we consider the evidence in the light most favorable to the non-movant. *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 208 (Tex. 2002). A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *See, e.g., Valero Mktg. & Supply Co. v. Kalama Int'l*, 51 S.W.3d 345, 350 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Blackburn v. Columbia Med. Ctr. Of Arlington Subsidiary*, 58 S.W.3d 263, 270 (Tex. App.—Fort Worth 2001, pet. denied); *Mansfield v. C.F. Bent Tree Apartment, L.P.*, 37 S.W.3d 145, 149 (Tex. App.—Austin 2001, no pet.); *Espalin v. Children's Med. Ctr.*, 27 S.W.3d 675, 683 (Tex. App.—Dallas 2000, no pet.); *Barraza v. Eureka Co.*, 25 S.W.3d 225, 231 (Tex. App.—El Paso 2000, pet. denied); *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied).
>
> Accordingly, we review the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). "A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Id.* (*citing* Robert W. Calvert, "*No Evidence*" and "*Insufficient Evidence*" Points of Error, 38 TEX. L.REV. 361, 362-63 (1960)). Thus, a no-evidence summary judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. TEX.R. CIV. P. 166a(i); *Wal-Mart*, 92 S.W.3d at 506. Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983). More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Merrell Dow Pharms.*, 953 S.W.2d at 711. With this standard in mind, we turn to the claims made and the evidence adduced in this case."

2. In *Moore v. K Mart Corporation,* 981 S.W.2d 266 (Tex. App.—San Antonio 1998, review denied) the court discussed the meanings of the terms material fact and genuine as they are used in Rule 166a(i) as follows:

> Having set forth the standard we must apply in reviewing a no-evidence summary judgment, we must further understand the meaning of the terms "genuine" and "material fact," as they are used in rule

166a(i). For clarification of these terms, we turn to federal law. *See* Judge David Hittner and Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, 20 ADVANCED CIVIL TRIAL COURSE D, D-5 (1997).

Materiality is a criterion for categorizing factual disputes in relation to the legal elements of the claim. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The materiality determination rests on the substantive law, and only those facts identified by the substantive law to be critical are considered material. *See id*. Stated differently, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id*.

A material fact issue is genuine if the evidence is such that a reasonable jury could find the fact in favor of the non-moving party. *Anderson*, 477 U.S. at 249, 106 S.Ct. 2505; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). If the evidence simply shows that some metaphysical doubt as to the fact exists, or if the evidence is not significantly probative, the material fact issue is not "genuine." *Anderson*, 477 U.S. at 250-51, 106 S.Ct. 2505.

3. For additional guidance in this area *see* David F. Johnson, "*The No Evidence Motion for Summary Judgment in Texas*", 52, BAYLOR L. REV. 929 (2000); Sarah B. Duncan*, "No-Evidence Motions for Summary Judgment: Harmonizing Rule 166A(1) and Its Comment*", 41 S. TEX. L. REV. 873 (2000).

4. In *Dow Chemical Company v. Francis*, 46 S.W.3d 237 (Tex. 2001) the Court made the following observations concerning a no evidence motion for summary judgment:

A fraud cause of action requires: (1) a material misrepresentation, (2) that was either known to be false when made or was asserted without knowledge of its truth, (3) which was intended to be acted upon, (4) which was relied upon, and (5) which caused injury. *Formosa Plastics Corp. U.S.A. v. Presidio Eng'rs and Contractors, Inc*., 960 S.W.2d 41, 47 (Tex.1998). The trial court rendered summary judgment on the fraud claim without specifying the grounds. Because Dow and Hegyesi filed a no-evidence summary-judgment motion challenging each of these elements, if Francis failed to raise a "genuine issue of material fact" about any of these elements, the summary judgment for Dow and Hegyesi should stand. TEX. R. CIV. P. 166a(i). Here, the court of appeals reversed the summary judgment after determining that Francis raised a fact issue concerning a material misrepresentation, but failed to consider Dow and Hegyesi's alternative ground for summary judgment—that Francis presented no evidence of damages. "When a trial court's order granting summary judgment does not specify the ground or grounds relied on for its ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious." *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex.1989). We therefore conclude that the court of appeals erred in not considering this alternative ground.

5. *Misc. Docket No. 97-9139*, Aug. 15, 1997, Tex.S.Ct. (PER CURIAM Opinion)(Dissenting Opinion by JUSTICE SPECTOR; Dissenting Opinion by JUSTICE BAKER). LWS 3433 (pp. 11).

"1. Rule 166a of the Texas Rules of Civil Procedure, amended by Order in Misc. Docket No. 97-9067, dated April 16, 1997, 60 Tex. Bar. J. 534 (June 1997), with only the comment changed to reflect public comments received, is attached; 2. The amendments take effect September 1, 1997, and apply to all motions for summary judgment filed on or after that date; 3. *The comment appended to these changes, unlike other notes and comments in the rules, is intended to inform the construction and application of the rule*; and, 4. The Clerk is directed to file an original of this order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the TEXAS BAR JOURNAL."

"Comment to 1997 change: This comment is intended to inform the construction and application of the rule. Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory mo-

tions 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 sections 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)."

JUSTICE SPECTOR dissents, adopting JUSTICE BAKER'S dissent, and adding "I write separately, however, because, unlike JUSTICE BAKER, I do not agree with the basic concept underlying Rule 166a(i). . . ." She anticipates an increase in discovery and a serious risk that meritorious lawsuits will be summarily dismissed.

JUSTICE BAKER dissents: "I agree with the basic concept of a no evidence motion for summary judgment. However, * * * I am concerned that the Court ignores its own Supreme Court Advisory Committee's recommendations and promulgates a rule of its own choosing. In doing so, the Court eliminates the balance, fairness and safeguards the Committee's recommendations provide. Consequently, I respectfully dissent."

6. *Wal Mart Stores, Inc. v. Rodriguez***,** 92 S.W.3d 502 (Tex. 2002): "*Wal-Mart Stores, Inc. v. Rodriguez*: In reviewing a no-evidence summary judgment, we examine the record in the light most favorable to the nonmovant, looking to see if Rodriguez presented more than a scintilla of evidence raising a genuine issue of material fact on the element of willful detention."

7. *Fort Worth Osteopathic Hospital, Inc. v. Reese*, 148 S.W.3d 94 (Tex. 2004): To succeed in a motion for summary judgment under Rule 166a(c), a movant must establish that there is no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether there is a disputed issue of material fact, every doubt must be resolved in favor of the nonmovant and evidence favorable to the nonmovant must be taken as true. Under Rule 166a(i), a movant must establish that "[a]fter adequate time for discovery . . . 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." To defeat a Rule 166a(i) summary judgment motion, the nonmovant must produce summary judgment evidence raising a genuine issue of material fact. A genuine issue of material fact exists if the nonmovant produces more than a scintilla of evidence establishing the existence of the challenged element.

8. In *Mack Trucks, Inc. v. Tamez*, --- S.W.3d ----, 2006 WL 3040534 (Tex.): A summary judgment motion pursuant to TEX. R. CIV. P. 166a(i) is essentially a motion for a pretrial directed verdict. Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion. The evidence presented by the motion and response is reviewed in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.

9. *Timpte Industries, Inc. v. Gish*, 286 S.W.3d 306 (Tex. 2009): A trial court cannot grant a summary judgment motion on grounds not presented in the motion. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; TEX.R.CIV.P.166a(i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case. The underlying purpose of this requirement is to provide the opposing party with adequate information for opposing the motion, and to define the issues for the purpose of summary judgment. This purpose may be analogized to that of the "fair notice" pleading requirements of TEX R.CIV. P. 45(b) and 47(a).

3. *Appeals from Summary Judgments*

Note

North East ISD v. Aldridge, 400 S.W.2d 893 (Tex. 1966): When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for a conventional trial on the merits, no order for a separate trial of issues having been entered pursuant to R 174. . ., 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." However, it will not be presumed that a judgment dismissing a plaintiff's suit on non suit, plea to the jurisdiction, plea in abatement, for want of prosecution, etc., also disposed of the issues in an independent cross-action.

The problem can be eliminated entirely by a careful drafting of judgments to conform to the pleadings or by inclusion in judgments of a simple statement that all relief not expressly granted is denied. [Such a statement, "that all relief not expressly granted is denied, is referred to as a "Mother Hubbard Clause."]

LEHMANN
v.
HAR-CON CORPORATION
39 S.W.3d 191
(Tex. 2001)

In *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993), the Supreme Court held that a summary judgment is final if it contains language purporting to dispose of all claims and parties. Held: The inclusion of a Mother Hubbard clause—"all relief not granted is denied", or essentially those words—does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal. *Mafrige* is overruled to the extent it states otherwise.

In cases in which only one final and appealable judgment can be rendered, a judgment issued without a conventional trial is final for purposes of appeal if, and only if, either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties. In making this determination, the Court does not consider cases where more than one final and appealable judgment can be rendered, as in probate and receivership proceedings. Nor does it consider a judgment's finality for purposes other than appeal, such as issue and claim preclusion.

The finality of the judgment must be determined without the benefit of any presumption. A judgment that finally disposes of all remaining parties and claims, based on the record in the case, is final, regardless of its language.

The language of an order or judgment cannot make it interlocutory when, in fact, on the record, it is a final disposition of the case. But the language of an order or judgment can make it final, even though it should have been interlocutory, if that language expressly disposes of all claims and all parties. The intent to finally dispose of the case must be unequivocally expressed in the words of the order itself.

Note

Farm Bureau Cty Mut. Ins. Co. v. Rogers, 455 S.W.3d 161 (Tex. 2015): In this declaratory-judgment action involving insurance coverage, the court of appeals held that the trial court's order denying the insurer's summary-judgment motion is not final because the insured did not file a cross-motion for summary judgment. The issue is whether a trial court's order issued without a full trial and containing a "Mother Hubbard" clause—that is, a statement that relief not expressly granted is denied—is final for appeal purposes. The Supreme Court HOLDS that the order is not final, but because it did not resolve the parties' competing attorney fees requests.

In *Lehmann*, we held that "a judgment issued without a conventional trial is final for purposes of appeal if and only if either [1] it actually disposes of all claims and parties then before the court, regardless of its language,

or [2] it states with unmistakable clarity that it is a final judgment as to all claims and all parties." *Lehmann*, 39 S.W.3d at 192-93. We explained that "[a]n order does not dispose of all claims and all parties merely because it is entitled 'final', or because the word 'final' appears elsewhere in the order, *or even because it awards costs*." *Id.* at 205 (emphasis added). "Rather, there must be some other clear indication that the trial court intended the order to completely dispose of the entire case." *Id.* Attempting to resolve decades of confusion, we held that "the inclusion of a Mother Hubbard clause—by which we mean the statement, 'all relief not granted is denied', or essentially those words—does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal." *Id.* at 203-04. Mother Hubbard clauses are problematic because they are open to interpretation. *Id.* at 204. Sometimes a Mother Hubbard clause "mean[s] only that the relief requested *in the motion*—not all the relief requested by anyone in the case—and not granted by the order is denied," and sometimes it "may also have no intended meaning at all, having been inserted for no other reason than that it appears in a form book or resides on a word processor." *Id*. We thus rejected the notion that a Mother Hubbard clause gives "any indicia of finality in any order not issued after a conventional trial." *Id.*

After *Lehmann*, we confirmed that the disposition of a claim for court costs does not dispose of a claim for attorney's fees, even when doing so would also dispose of all parties and claims. *See McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001). In *McNally*, the defendants filed a motion for summary judgment but failed to request summary judgment on their counterclaim for attorney's fees. Although the trial court's order granted the motion and taxed court costs against the plaintiff, we concluded that "[n]othing in the trial court's judgment, other than its award of costs to the defendants, suggests that it intended to deny the defendants' claim for attorney fees. The award of costs, by itself, does not make the judgment final." *Id.* Consistent with our statement in *Lehmann*, we held that the resolution of a claim for court costs did not dispose of a claim for attorney's fees and did not serve as an indicium of finality. *See id.*; *Lehmann*, 39 S.W.3d at 205.

RITZELL
v.
ESPECHE
87 S.W.3d 536
(Tex. 2002)

Jeffrey Robert Matthews, Toby C. Easley, Matthews Easley & Miller, P.C., Houston, Gary W. Chaney, Hempstead, for petitioner.

Joseph John Hroch, Spencer & Associates, P.C., Houston, for respondent.

PER CURIAM.

The court of appeals concluded that the summary judgment appealed from was interlocutory and dismissed the appeal. 65 S.W.3d 226. We disagree and therefore reverse and remand to the court of appeals for further proceedings.

Petitioner William Ritzell and respondent Maureen Espeche allowed their divorce proceedings to terminate while they attempted to reconcile, but when that failed, new proceedings were instituted and the parties were divorced. In the first case, the parties had a written agreement that divided their property and obligated Ritzell to support Espeche's son Jonathan, but that agreement was not incorporated into the divorce decree in the second case.

In the present case, Espeche sued Ritzell for breach of the agreement. Ritzell answered that the signature on the agreement was not his, that Espeche's claims were barred by res judicata, and that Espeche had failed to join Jonathan as a necessary party. Ritzell moved for summary judgment on all Espeche's claims. Six days before the hearing on the motion, Espeche filed amended pleadings asserting for the first time claims on behalf of Jonathan, a minor, as his next friend. Three days before the hearing Ritzell moved for leave to amend his summary judgment motion to address Jonathan's claims. His motion for leave contained an amended summary judgment motion addressing those claims.

At the hearing, the trial court did not expressly grant or deny Espeche leave to amend her pleadings. *See* TEX. R. CIV. P. 63 (requiring leave of court for amendments to pleadings filed within seven days of trial). The

court made a docket notation granting Ritzell leave to amend his motion for summary judgment but never signed an order to that effect. *See id*; TEX. R. CIV. P. 166a(c) (requiring leave of court for summary judgment motions to be filed within twenty-one days of the hearing). The court granted summary judgment as follows:

FINAL SUMMARY JUDGMENT

ON NOVEMBER 4, 1999, the Motion for Summary Judgment of William A. Ritzell, Defendant, was heard on oral arguments and submission. The Court, being of the opinion that Defendant is entitled to Judgment as a matter of law, grants the Defendant's Motion for Summary Judgment.

It is therefore, ORDERED, ADJUDGED AND DECREED, that Plaintiff, Maureen Espeche, Individually and as Next Friend of Jonathan Espeche, a minor, take nothing by reason of her suit in this cause, and that Defendant, William A. Ritzell, recover from Plaintiff all taxable costs herein expended by Defendant.

It is further ORDERED, ADJUDGED AND DECREED that any relief requested by either party in this suit that is not expressly granted is hereby denied.

Espeche appealed, arguing in part that summary judgment on Jonathan's claims was error because Ritzell's original motion for summary judgment did not address them and the trial court did not properly grant him leave to amend. The court of appeals agreed that Ritzell did not have leave to amend his summary judgment motion but concluded, not that the trial court erred in dismissing Jonathan's claims, but that the summary judgment was interlocutory. Specifically, the court stated:

> Because Ritzell's amended motion for summary judgment addressing Jonathan Espeche's claim was not properly before the trial court, summary judgment could not be granted on that claim. Thus, the final summary judgment does not dispose of all claims.
>
> 65 S.W.3d at 232.

In *Lehmann v. Har-Con Corp*., we stated that "an order that expressly disposes of the entire case is not interlocutory merely because the record fails to show an adequate motion or other legal basis for the disposition." 39 S.W.3d 191, 206 (Tex. 2001). "Language that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties . . . ." *Id*. at 205. The trial court's order in the present case meets this test. It expressly ordered that Espeche take nothing, individually and as Jonathan's next friend. Whether the trial court erred in adjudicating Jonathan's claims we do not consider; we hold only that the trial court was unequivocally clear that those claims were adjudicated, and therefore the summary judgment was final.

Accordingly, we grant Ritzell's petition for review and, without hearing oral argument, reverse the judgment of the court of appeals and remand the case to that court for further proceedings. *See* TEX.R.APP. P. 59.1.

Notes

1. *Jacobs v. Satterwhite*, 65 S.W.3d 653 (Tex. 2001): In this action for professional negligence and for breach of contract, D moved for summary judgment only on the professional negligence claim. P responded that he was asserting only a breach of contract claim. The trial court entered summary judgment, without stating the grounds. P appealed the summary judgment on the ground that his sole cause of action against D was the breach of contract claim, which was not addressed in the motion for summary judgment. Held: Reversed and remanded as to the contract claim. If a defendant moves for summary judgment on only one of multiple claims asserted by the plaintiff, but the trial court renders judgment that the plaintiff take nothing on all claims asserted, the judgment is final-erroneous, but final. Here, the trial court's judgment was a final judgment encompassing both the breach-of-contract and the professional negligence claims; but because the breach-of-contract claim was not addressed in D's motion, summary judgment on that claim was erroneous. P did not assign error on appeal concerning the negligence claim, and thus waived that claim.

2. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742 (Tex. 2003): The Chapman heirs assert that after granting King Ranch's summary judgment motion, a subsequent order granting summary judgment to other defendants effectively "ungranted" the first motion because the second order contained a "Mother Hubbard" clause. The Court reject this contention noting that there was not indication that the trial court intended to set aside the first order, and the later judgment does not automatically set aside an earlier interlocutory judgment.

3. *In the Interest of S.M.R., et al*, 434 S.W.3d 576 (Tex. 2014): A trial court's "approval of a settlement does not necessarily constitute rendition of judgment," because rendition of judgment requires a "present act" to "decide the issues." When parties dictate a settlement agreement on the record (creating an enforceable agreement under Rule 11), and the trial court approves it on the record, such a settlement agreement does not constitute an agreed judgment, unless the words used by the trial court ... clearly indicate the intent to render judgment at the time the words are expressed."

Note

1. *Bandera Electric Cooperative, Inc. v. Gilchrist*, 946 S.W.2d 336 (Tex. 1997): "The inclusion of Mother Hubbard language or its equivalent in an order granting summary judgment makes an otherwise partial summary judgment final for appellate purposes. In those situations where the summary judgment order grants more relief than requested, it is not proper for the court to reverse and remand the entire case as such would cause needless relitigation of decided issues." In such a situation, the court should reverse and remand that portion of the case for which relief was not sought in the motion for summary judgments and perform its ordinary review of the granting of the relief sought in the motion for summary judgment.

2. *Argonaut Insurance Co. v. Baker,* 87 S.W.3d 526 (Tex. 2002): "When both parties move for summary judgment and one motion is granted and one denied, the appellate court should determine all questions presented and render the judgment that the trial court should have rendered. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). Here, both parties rely on statutory provisions to support their entitlement to summary judgment. In general, matters of statutory construction are questions of law."

4. *Offer of Settlement*

Revised Rule 167 of the Texas Rules of Civil Procedure provides:

167. OFFER OF SETTLEMENT; AWARD OF LITIGATION COSTS

167.1. Generally. Certain litigation costs may be awarded against a party who rejects an offer made substantially in accordance with this rule to settle a claim for monetary damages—including a counterclaim, cross-claim, or third-party claim—except in:

(a) a class action;
(b) a shareholder's derivative action;
(c) an action by or against the State, a unit of state government, or a political subdivision of the State;
(d) an action brought under the Family Code;
(e) an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code; or
(f) an action filed in a justice of the peace court or small claims court.

167.2. Settlement Offer.

(a) Defendant's declaration a prerequisite; deadline. A settlement offer under this rule may not be made until a defendant—a party against whom a claim for monetary damages is made—files a declaration invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.

(b) Requirements of an offer. A settlement offer must:

(1) be in writing;

(2) state that it is made under Rule 167 and Chapter 42 of the Texas Civil Practice and Remedies Code;

(3) identify the party or parties making the offer and the party or parties to whom the offer is made;

(4) state the terms by which all monetary claims—including any attorney fees, interest, and costs that would be recoverable up to the time of the offer—between the offeror or offerors on the one hand and the offeree or offerees on the other may be settled;

(5) state a deadline—no sooner than 14 days after the offer is served—by which the offer must be accepted;

(6) be served on all parties to whom the offer is made.

(c) Conditions of offer. An offer may be made subject to reasonable conditions, including the execution of appropriate releases, indemnities, and other documents. An offeree may object to a condition by written notice served on the offeror before the deadline stated in the offer. A condition to which no such objection is made is presumed to have been reasonable. Rejection of an offer made subject to a condition determined by the trial court to have been unreasonable cannot be the basis for an award of litigation costs under this rule.

(d) Non-monetary and excepted claims not included. An offer must not include non-monetary claims and other claims to which this rule does not apply.

(e) Time limitations. An offer may not be made:

(1) before a defendant's declaration is filed;

(2) within 60 days after the appearance in the case of the offeror or offeree, whichever is later;

(3) within 14 days before the date the case is set for a conventional trial on the merits, except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.

(f) Successive offers. A party may make an offer after having made or rejected a prior offer. A rejection of an offer is subject to imposition of litigation costs under this rule only if the offer is more favorable to the offeree than any prior offer.

167.3. Withdrawal, Acceptance, and Rejection of Offer.

(a) Withdrawal of offer. An offer can be withdrawn before it is accepted. Withdrawal is effective when written notice of the withdrawal is served on the offeree. Once an unaccepted offer has been withdrawn, it cannot be accepted or be the basis for awarding litigation costs under this rule.

(b) Acceptance of offer. An offer that has not been withdrawn can be accepted only by written notice served on the offeror by the deadline stated in the offer. When an offer is accepted, the offeror or offeree may file the offer and acceptance and may move the court to enforce the settlement.

(c) Rejection of offer. An offer that is not withdrawn or accepted is rejected. An offer may also be rejected by written notice served on the offeror by the deadline stated in the offer.

(d) Objection to offer made before an offeror's joinder or designation of responsible third party. An offer made before an offeror joins another party or designates a responsible third party may not be the basis for awarding litigation costs under this rule against an offeree who files an objection to the offer within 15 days after service of the offeror's pleading or designation.

167.4. Awarding Litigation Costs.

(a) Generally. If a settlement offer made under this rule is rejected, and the judgment to be awarded on the monetary claims covered by the offer is significantly less favorable to the offeree than was the offer, the court must award the offeror litigation costs against the offeree from the time the offer was rejected to the time of judgment.

(b) "Significantly less favorable" defined. A judgment award on monetary claims is significantly less favorable than an offer to settle those claims if:

(1) the offeree is a claimant and the judgment would be less than 80 percent of the offer; or

(2) the offeree is a defendant and the judgment would be more than 120 percent of the offer.

(c) Litigation costs. Litigation costs are the expenditures actually made and the obligations actually incurred—directly in relation to the claims covered by a settlement offer under this rule—for the following:

(1) court costs;

(2) reasonable fees for not more than two testifying expert witnesses; and

(3) reasonable attorney fees.

(d) Limits on litigation costs. The litigation costs that may be awarded under this rule must not exceed the following amount:

(1) the sum of the non-economic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment; minus

(2) the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.

(e) No double recovery permitted. A party who is entitled to recover attorney fees and costs under another law may not recover those same attorney fees and costs as litigation costs under this rule.

(f) Limitation on attorney fees and costs recovered by a party against whom litigation costs are awarded. A party against whom litigation costs are awarded may not recover attorney fees and costs under another law incurred after the date the party rejected the settlement offer made the basis of the award.

(g) Litigation costs to be awarded to defendant as a setoff. Litigation costs awarded to a defendant must be made a setoff to the claimant's judgment against the defendant.

167.5. Procedures.

(a) Modification of time limits. On motion, and for good cause shown, the court may—by written order made before commencement of trial on the merits—modify the time limits for filing a declaration under Rule 167.2(a) or for making an offer.

(b) Discovery permitted. On motion, and for good cause shown, a party against whom litigation costs are to be awarded may conduct discovery to ascertain the reasonableness of the costs requested. If the court determines the costs to be reasonable, it must order the party requesting discovery to pay all attorney fees and expenses incurred by other parties in responding to such discovery.

(c) Hearing required. The court must, upon request, conduct a hearing on a request for an award of litigation costs, at which the affected parties may present evidence.

167.6. Evidence Not Admissible. Evidence relating to an offer made under this rule is not admissible except for purposes of enforcing a settlement agreement or obtaining litigation costs. The provisions of this rule may not be made known to the jury by any means.

167.7. Other Settlement Offers Not Affected. This rule does not apply to any offer made in a mediation or arbitration proceeding. A settlement offer not made under this rule, or made in an action to which this rule does not apply, cannot be the basis for awarding litigation costs under this rule. This rule does not limit or affect a party's right to make a settlement offer that does not comply with this rule, or in an action to which this rule does not apply.

Note

Amedisys, Inc. v. Kingwood Home Health Care, LLC, 437 S.W.3d 507 (Tex. 2014): The settlement offer was made under Rule 167, which allows for recovery of litigation costs if the offer is more favorable than ultimate judgment. Plaintiff accepted the offer; Defendant contended that acceptance was ineffective because it omitted a material term and refused to pay. Held: The effectiveness of settlement was to be examined under common-law, not Rule 167. In this case, it is found, as a matter of law, that Plaintiff accepted the offer, despite variation in language regarding potential claims.

In re COMPLETERX, LTD.
366 S.W.3d 318
(Tex. App.—Tyler, 2012, orig. proceeding)

Katherine L.I. Hacker, Jonathan J. Ross, Susman Godfrey LLP, Houston, Suyash Agrawal, Susman Godfrey LLP, New York, NY, for Relator.

Rex A. Nichols, Jr., Nichols & Nichols P.C., Longview, for Real Party in Interest.

WORTHEN, CHIEF JUSTICE.

Good Shepherd Hospital sued Relator, CompleteRx, Ltd., for an accounting. CompleteRx made an offer of settlement to Good Shepherd pursuant to Texas Rule of Civil Procedure 167. On Good Shepherd's motion, the trial court entered an order modifying the deadline for Good Shepherd to respond to the offer.

In this original mandamus proceeding, CompleteRx challenges the trial court's December 8, 2011 order modifying the deadline for responding to the offer. We agree with CompleteRx that the trial court clearly abused its discretion in rendering the order. We also agree that CompleteRx does not have an adequate remedy at law. Accordingly, we conditionally grant the requested mandamus relief.

FACTUAL AND PROCEDURAL BACKGROUND

Between October 1, 2005, and March 1, 2010, Good Shepherd and CompleteRx had a pharmacy management agreement whereby CompleteRx managed Good Shepherd's pharmacy. During that time, CompleteRx administered prescription drugs to patients and then billed Good Shepherd for those drugs. Following termination of the agreement, Good Shepherd audited the sale of prescription drugs for a one year period and determined that

CompleteRx had substantially overcharged it. Good Shepherd extrapolated the amount of the overcharges over the period of the agreement and concluded that the total overcharges by CompleteRx could be "hundreds of thousands of dollars." On January 19, 2011, Good Shepherd sued CompleteRx for an accounting. The parties agree that the statute of limitations has run for any overcharges from the inception of the agreement through January 18, 2007.

After filing an answer and counterclaim, CompleteRx audited its financial records pertaining to the agreement between the two entities from January 1, 2008, through February 28, 2010. From this audit, CompleteRx determined that on the $37.2 million in transactions during this period, it had overcharged Good Shepherd approximately $37,000.00. CompleteRx shared these results with Good Shepherd.

On October 21, 2011, Good Shepherd filed a motion to appoint an auditor pursuant to Texas Rule of Civil Procedure 172. Six days later, at a hearing on Good Shepherd's motion, CompleteRx agreed to have the court appoint an auditor. However, counsel for Good Shepherd and CompleteRx disagreed about whether the auditor's fee should be taxed against the losing party if the case did not settle. On November 8, the trial court notified the parties of its appointment of Robert Bailes of Tyler as auditor. On November 11, CompleteRx filed a declaration invoking Texas Rule of Civil Procedure 167 and Chapter 42 of the Texas Civil Practice and Remedies Code. On November 15, pursuant to Rule 167 and Chapter 42, CompleteRx offered to settle the case for $70,000.00. The offer specified that Good Shepherd must accept it no later than 5:00 p.m. on December 1, 2011.

Good Shepherd responded by filing a motion for modification of time limits on the same day the offer was made asking the court to delay the deadline for responding to CompleteRx's Rule 167 offer until after the auditor had submitted his final report. CompleteRx opposed the motion. Following a hearing on November 22, 2011, the trial court signed an order granting Good Shepherd's motion. The order provided that "Rule 167 shall not be effectively invoked or an offer made until such time as the agreed auditor files his final report," or alternatively, that Good Shepherd would have until fourteen days following the filing of the auditor's final report to respond to CompleteRx's offer of settlement. CompleteRx then filed this mandamus proceeding and a motion for temporary relief. We granted the motion and stayed the trial court's order pending our disposition in this proceeding.

AVAILABILITY OF MANDAMUS

To be entitled to mandamus relief, CompleteRx must meet two requirements. First, it must show that the trial court clearly abused its discretion. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 135 (Tex. 2004) (orig. proceeding). Second, it must show that it has no adequate remedy by appeal. *Id.* at 135-36.

A trial court abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. *In re Cerberus Capital Mgmt., L.P.,* 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding). The test for abuse of discretion is whether the court acted without reference to any guiding rules and principles. *Downer v. Aquamarine Operators, Inc.,* 701 S.W.2d 238, 241-42 (Tex. 1985). (orig. proceeding). The reviewing court may not substitute its judgment for that of the trial court on matters within the trial court's discretion. *See Walker v. Packer,* 827 S.W.2d 833, 839-40 (Tex. 1992) (orig. proceeding). The trial court's ruling should be set aside only if it was arbitrary or unreasonable. *See Cire v. Cummings,* 134 S.W.3d 835, 839 (Tex. 2004).

Review of a trial court's determination of the legal principles controlling its ruling is much less deferential. *Walker,* 827 S.W.2d at 840. A trial court has no discretion in determining what the law is or applying the law to the facts. *Id.* Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion. *Id.*

Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of the costs and benefits of appellate review. *See In re McAllen Med. Ctr., Inc.,* 275 S.W.3d 458, 464 (Tex. 2008) (orig. proceeding). As this balance depends heavily on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories. *Id.* Appeal is not an adequate remedy when the trial court's abuse of discretion thwarts legislative intent for speedier resolution of lawsuits. *See In re United Servs. Auto Ass'n,* 307 S.W.3d 299, 314 (Tex. 2010) (orig. proceeding).

HISTORY OF RULE 167

In 2003, our legislature determined that our state faced "a general environment of excessive litigation." House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 4, 78th Leg., R.S., at 1 (2003) [hereinafter *Analysis*].

Reformers in the legislature argued that the civil justice system should provide appropriate incentives to litigants to avoid unnecessary expense and shorten the time lawsuits stay in the system. *Part Two: Detailed Analysis of the Civil Justice Reforms,* 36 TEX. TECH L.REV. 51, 66 (2005) [hereinafter *Reforms*]. They also contended that some lawsuits unnecessarily involved lengthy discovery and pretrial maneuvering because one or both parties failed to realistically evaluate the lawsuit early in the litigation process to determine the possibility of settlement. *Id.*

One legislative solution to this crisis was to reduce the cost of litigation through cost shifting of litigation costs in some cases. *Analysis, supra,* at 1. To accomplish this, the legislature adopted an offer of settlement statute as part of H.B. 4, which includes the following provisions:

> (a) If a settlement offer is made and rejected and the judgment to be rendered will be significantly less favorable to the rejecting party than was the settlement offer, the offering party shall recover litigation costs from the rejecting party.
>
> (b) A judgment will be significantly less favorable to the rejecting party than is the settlement offer if:
>
> (1) the rejecting party is a claimant and the award will be less than 80 percent of the rejected offer; or
>
> (2) the rejecting party is a defendant and the award will be more than 120 percent of the rejected offer.
>
> (c) The litigation costs that may be recovered by the offering party under this section are limited to those litigation costs incurred by the offering party after the date the rejecting party rejected the settlement offer.

TEX. PRAC. & REM. ANN.CODE ANN. § 42.004(a)-(c) (West Supp. 2011).

The offer of settlement statute was designed to provide an incentive for litigants to make and accept reasonable settlement offers early. *Reforms, supra,* at 66; *see also* Professor Elaine Carlson, *Offer of Settlement,* STATE BAR OF TEX. LITIGATION SECTION REPORT 6 (Fall 2003) (stating that Chapter 42 of the Texas Civil Practice and Remedies Code "provides for shifting of certain 'litigation costs' when an offer to settle is rejected and the ultimate judgment is less favorable to the offeree"). Fee shifting is common in a majority of our states and has been a part of federal practice since 1938 under Federal Rule of Civil Procedure 68. Carlson, *supra,* at 6.

When the legislature created this offer of settlement mechanism, it also directed the Texas Supreme Court to promulgate rules providing the procedural details for its implementation. Specifically, the legislature directed as follows:

> (a) The supreme court shall promulgate rules implementing this chapter. The rules must be limited to settlement offers made under this chapter. The rules must be in effect on January 1, 2004.
>
> (b) The rules promulgated by the supreme court must provide:
>
> (1) the date by which a defendant or defendants must file the declaration required by Section 42.002(c);
>
> (2) the date before which a party may not make a settlement offer;
>
> (3) the date after which a party may not make a settlement offer; and
>
> (4) procedures for;
>
> (A) making an initial settlement offer;
>
> (B) making successive settlement offers;
>
> (C) withdrawing a settlement offer;
>
> (D) accepting a settlement offer;
>
> (E) rejecting a settlement offer; and
>
> (F) modifying the deadline for making, withdrawing, accepting, or rejecting a settlement offer.

TEX. CIV. PRAC. & REM.CODE ANN. § 42.005(a)-(b) (West 2008). In response, the supreme court, through its advisory committee, worked on a proposed offer of judgment/settlement rule for one and one-half years before adopting Texas Rule of Civil Procedure 167 prior to the January 1, 2004 deadline set by the legislature. *See* Carlson, *supra,* at 6. Texas Rule of Civil Procedure 167.2(a) specifies how the settlement offer provision is to be invoked:

> (a) *Defendant's declaration a prerequisite; deadline.* A settlement offer under this rule may not be made until a defendant—a party against whom a claim for monetary damages is made—files a declaration invoking this rule. When a defendant files such a declaration, an offer or offers may be made under this rule to settle only those claims by and against that defendant. The declaration must be filed no later than 45 days before the case is set for conventional trial on the merits.

TEX.R. CIV. P. 167.2(a).

The supreme court also placed the following time limitations on when the offer can be made:

> (e) *Time limitations.* An offer may not be made:
> (1) before a defendant's declaration is filed;
> (2) within 60 days after the appearance in the case of the offeror or offeree, whichever is later;
> (3) within 14 days before the date the case is set for a conventional trial on the merits, except that an offer may be made within that period if it is in response to, and within seven days of, a prior offer.

TEX.R. CIV. P. 167.2(e). But the supreme court specified that only two of these time limitations can be modified by the trial court:

> (a) *Modification of time limits.* On motion, and for good cause shown, the court may—by written order made before commencement of trial on the merits—modify the time limits for filing a declaration under rule 167.2(a) or for making an offer.

TEX.R. CIV. P. 167.5(a).

Notably, the statute requires that the rule provide a procedure for "modifying the deadline for making, withdrawing, accepting or rejecting a settlement offer." *Reforms, supra,* at 75 (citing TEX. CIV. PRAC. & REM.CODE ANN. § 42.005(b)(4)(F)). However, Texas Rule of Civil Procedure 167.2(a)—the implementing rule—only provides a procedure for modifying the deadline for the defendant's filing of the initial declaration and for "making" an offer. *Id.* at 75-76 (citing TEX.R. CIV. P. 167.2(a)). "The rule seems to omit an associated mechanism for 'withdrawing, accepting or rejecting a settlement offer.' " *Id.* at 76.

ABUSE OF DISCRETION

CompleteRx contends that the trial court had no authority to modify the time limit for Good Shepherd to respond to the settlement offer and clearly abused its discretion by doing so.

When construing rules of procedure, we apply the same rules of construction that govern the interpretation of statutes. *In re Christus Spohn Hosp. Kleberg,* 222 S.W.3d 434, 437 (Tex. 007) (orig. proceeding). When a rule of procedure is clear and unambiguous, we construe the rule's language according to its plain or literal meaning. *Id.* Rule 167.5(a) clearly states that the trial court can modify the time limits for the defendant to file a declaration under Rule 167.2(a) or for making an offer of settlement. *See* TEX.R. CIV. P. 167.5(a). The rule makes no provision for the trial court to modify any other time limits in the offer of settlement statute. *See id.*

Good Shepherd concedes that Rule 167.5 does not explicitly refer to an extension of the deadline for responding to offers. It contends, however, that the legislature intended for the offeree be able to modify the deadline for accepting or rejecting a settlement offer. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 42.005(b)(4)(F) (West 2008) (rules promulgated by supreme court implementing Texas Civil Practice and Remedies Code Chapter 42 to include procedure for "modifying, the deadline for making, withdrawing, accepting, or rejecting a settlement offer"). Therefore, Good Shepherd argues that we must harmonize Texas Rule of Civil Procedure 167.5(a) with Texas Civil Practice and Remedies Code Section 42.005(b)(4)(F).

It is well established that when a conflict arises between a statute and a rule of procedure, we must harmonize the statute and the rule if possible. *See La Sara Grain Co. v. First Nat'l Bank of Mercedes,* 673 S.W.2d 558, 565 (Tex. 1984) (holding that courts are to construe statutes so as to harmonize with other relevant laws, if possible"). Ultimately, however, the statute prevails unless the rule has been adopted subsequent to the statute and repeals the statute as provided by Texas Government Code Section 22.004. *Jackson v. State Office of Admin. Hearings,* 351 S.W.3d 290, 298 (Tex. 2011). But this case does not involve a conflict between a procedural statute and a procedural rule. *Cf. M.R.R. v. State,* 903 S.W.2d 49, 52 (Tex. App.—San Antonio 1995, no pet.) (harmonizing statute and rule where statute required appellate court to consider statement of facts and rule of

procedure prohibited court from considering late statement of facts absent timely motion for extension). Instead, it is a legislative directive to the supreme court.

The legislature specifically authorized the supreme court to promulgate procedural rules to implement Chapter 42 of the civil practice and remedies code. *See* TEX. CIV. PRAC. & REM.CODE ANN. § 42.005(a), (b)(4); *see also* TEX. GOV'T CODE ANN. § 22.004(a) (West Supp. 2011). Good Shepherd urges that the supreme court did not fully comply with Section 42.005 and that reading Rule 167 and Section 42.005 together will comply with the legislature's intent. However, the rules of construction do not authorize us to, in effect, modify the rule so that it addresses modification of the deadline for accepting or rejecting an offer. *See Christus Spohn,* 222 S.W.3d at 437 (requiring construction of unambiguous procedural rule according to its plain or literal meaning).

Good Shepherd also contends that even if we consider only the express language of Rule 167, we must uphold the trial court's order. Specifically, the trial court's order provides, in part, that "Rule 167 shall not be effectively invoked or an offer made until such time as the agreed auditor files his final report." This order was signed approximately one month after CompleteRx filed its declaration invoking Rule 167. Good Shepherd points out that Rule 167 permits a trial court to modify the deadline for effective invocation of Rule 167 and the making of an initial offer. Therefore, it contends, the trial court acted within its authority in modifying the deadline for invoking Rule 167, even though that modification effectively extended the time for Good Shepherd to respond to the offer. It is true that Rule 167 authorizes the trial court to modify the time limits for filing a declaration under Rule 167.2. However, we see nothing in the rule that permits a trial court to modify that time limit as to defendant that has filed a declaration.

Rule 167.5(a) is clear as to which time limits the trial court has the authority to modify in the offer of settlement statute. There is no authorization for the trial court to extend the time limit for an offeree to accept or reject a settlement offer. Nor is there any authorization for to relax the mandates of the rule would be tantamount to amending established rules of procedure. *Metro Dairy Queen Stores v. Dominguez,* 883 S.W.2d 322, 324 (Tex. App.—El Paso 1994, no pet.). This rulemaking power is invested solely in the Supreme Court of Texas. *Id.; see also* TEX. GOV'T CODE ANN. § 22.004(a)-(b) (supreme court has full rulemaking power in practice and procedure in civil actions; rules and amendments remain in effect "unless and until disapproved by the legislature"). Accordingly, we hold the trial court clearly abused its discretion when it granted Good Shepherd's motion for modification of time limits.

INADEQUATE REMEDY BY APPEAL

CompleteRx was entitled to invoke the Texas offer of settlement statute (Chapter 42) and Texas Rule of Civil Procedure 167. Therefore, it was entitled to shift the cost of the court-appointed auditor to Good Shepherd if settlement was not reached as outlined in the statute and the rule.

Two criteria should be met in order for a defendant to put any significant pressure, or risk, on the plaintiff by invoking Rule 167. Cliff Harrison, "*Texas Hold 'Em: Offer of Settlement Under Rule 167: Putting More Chips on the Table, Earlier in the Game*" 70 TEX. B.J. 936, 938 (2007). First, the case should be one of reasonably clear liability, such that the plaintiff has a good chance of recovering something at trial. *Id.* Second, the settlement offer should be reasonable, or, if anything, slightly more than reasonable." *Id.* After all, the higher the offer, the easier it should be for the defense to obtain a judgment of less than eighty percent of the offer, if rejected. *Id.*

Here, CompleteRx performed an internal audit of transactions occurring during the final twenty-six months of the agreement. The audit showed that CompleteRx had overcharged Good Shepherd $37,000.00 out of $37.2 million dollars in transactions over this twenty-six month period. Because approximately one year of the agreement was not addressed in its audit, CompleteRx made an offer of $70,000.00 to Good Shepherd to settle the case. This shifted the risk to Good Shepherd as contemplated under Chapter 42 and Rule 167. The trial court's order permitting Good Shepherd to delay its acceptance or rejection of CompleteRx's offer of settlement until after the court-appointed auditor completed his work took away the benefit of the statute for CompleteRx, i.e., requiring Good Shepherd to pay the entire cost of the court-appointed auditor if its own audit was correct. Because CompleteRx has no other way to take advantage of the statute, the trial court's order thwarted the legislature's intent. Accordingly, we hold that remedy by appeal is inadequate.

DISPOSITION

Having concluded that the trial court clearly abused its discretion by granting Good Shepherd's motion to modify the time limit to respond to CompleteRx's offer of settlement and that CompleteRx does not have an adequate remedy at law, we ***conditionally grant mandamus relief***. We trust that the trial court will promptly vacate its order granting Good Shepherd's motion for modification of time limits pursuant to Texas Rule of Civil Procedure 167.5 signed December 8, 2011. The writ will issue only if the trial court fails to comply with the court's opinion and order ***within ten days*** after the date of the opinion and order. The trial court shall furnish this court, within the time for compliance with the court's opinion and order, a certified copy of its order evidencing such compliance. Our stay of the trial court's order is lifted.

Note

Note Investment Group, Inc. v. Associates First Capital Corp., ___ S.W.3d ___ , 2015 WL 5604682 (Tex. App.—Beaumont 2015, no pet.): A Rule 167 settlement offer may include unplead claims.