TEXAS CIVIL PROCEDURE TRIAL & APPEAL

CASES AND MATERIALS

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EDITION

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TABLE OF CONTENTS

CHAPTER 1.
DISPOSITION WITHOUT TRIAL

CHAPTER 2.
THE JURY TRIAL AND THE SELECTION OF JURORS

CHAPTER 3.
PREPARATION OF THE JURY CHARGE AND RECEIPT OF THE VERDICT

CHAPTER 4.
NO EVIDENCE REVIEW AND TAKING THE CASE AWAY FROM THE JURY

CHAPTER 5.
NON-JURY TRIALS

CHAPTER 6.
PRECLUSION: RES JUDICATA AND COLLATERAL ESTOPPEL

CHAPTER 7.
THE COURT OF APPEALS

CHAPTER 8.
PROCEEDINGS TO THE SUPREME COURT

CHAPTER 9.
ORIGINAL JURISDICTION OF APPELLATE COURTS

APPENDIX

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 suffi-

cient 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.

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 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)

David M. Pruessner, Thomas E. Lauria, Shank, Irwin, Conant, Lipshy, & Casterline, Dallas, for petitioner.

C. Steven Matlock and Fred D. Wilshusen, Jackson, Walker, Winstead, Cantwell & Miller, Michael V. Killough, Michael V. Killough, Inc., Dallas, for respondents.

GONZALEZ, JUSTICE.

This is an appeal from a summary judgment. Suit was brought by Amiya Kumar Goswami to set aside a foreclosure sale and to recover damages for wrongful foreclosure and quantum meruit. The trial court rendered summary judgment in favor of Metropolitan Savings and Loan Association. The court of appeals affirmed the judgment of the trial court. 713 S.W.2d 127. We reverse the judgment of the court of appeals and remand this cause to the trial court.

Mal Yerasi, who is not a party to this cause, owned the King Manor Apartments located in Dallas, Texas. The property was subject to a deed of trust lien in favor of Metropolitan. Some time prior to March 1982, Yerasi filed for protection in California under Chapter 11 of the Bankruptcy Code. On March 24, 1982 the bankruptcy court ordered that Yerasi would be able to keep the property provided that all back payments in the amount of $10,451.30 were paid to Metropolitan by March 29, 1982. The court also ordered that the entire balance secured by the deed of trust be paid to Metropolitan or that the property be repaired to a condition satisfactory to Metropolitan by August 9, 1982. In addition, Yerasi was ordered to comply with all of the provisions of the deed of trust. In the event that any of the conditions set by the bankruptcy court were not satisfied, the automatic stay would be terminated so as to permit foreclosure of Metropolitan's deed of trust.

On May 19, 1982, Yerasi and Goswami signed a "Lease-Option Agreement." The agreement provided that Goswami was to lease and refurbish the property. This agreement also gave him an option to buy the property. Goswami made monthly mortgage payments to Metropolitan and made extensive repairs to the property. Metropolitan subsequently decided that the repairs were not satisfactory and scheduled foreclosure of the property on September 7, 1982. Yerasi petitioned the bankruptcy court for a temporary restraining order to prevent foreclosure of the property. The bankruptcy court denied the application and Yerasi appealed to a bankruptcy appellate panel.

On September 3, 1982, the United States Bankruptcy Appellate Panel of the Ninth Circuit issued a temporary stay through September 8, 1982 "to allow the panel to consider [Yerasi's] emergency motion for stay pending appeal." Notwithstanding the stay order, Metropolitan went ahead with the foreclosure sale on September 7, 1982. The property was purchased by Bob Baylis. Goswami recorded the lease-option agreement thereby creat-

ing a cloud on Baylis' title. On September 9, 1982, the bankruptcy appellate panel denied the emergency motion for stay pending appeal.

Goswami sued Metropolitan to set aside the foreclosure sale and to recover damages for wrongful foreclosure. Goswami later filed an amended petition wherein he sought to recover the monies spent on refurbishing the property on a theory of quantum meruit. Baylis intervened to clear his title.

* * *

Goswami argues that the court of appeals erred in affirming the trial court's summary judgment against his claim for quantum meruit because his summary judgment proof raised a fact issue to defeat the motion. Metropolitan, however, asserts that Goswami's summary judgment evidence cannot be considered because there are no underlying pleadings to support it. The court of appeals held that since the trial court granted summary judgment denying recovery on the wrongful foreclosure claim, the filing of the amended petition was immaterial. 713 S.W.2d at 129. We disagree.

Goswami filed an amended petition alleging unjust enrichment four days before the date of the summary judgment hearing. Metropolitan also asserts that since the record does not show that leave of court was granted to file the amended pleading within seven days of the hearing it should be disregarded.

Rule 63 of the Texas Rules of Civil Procedure provides:

> Parties may amend their pleadings . . . provided, that any amendment offered for filing within seven days of the trial . . . shall be filed only after leave of the judge is obtained, which leave shall be granted by the judge unless there is a showing that such amendments will operate as a surprise of the opposite party.

Accordingly, pleading amendments sought within seven days of the time of trial are to be granted unless there has been a showing of surprise to the opposite party. *Rogers v. Gonzales*, 654 S.W.2d 509, 515 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

A liberal interpretation has been given to Rule 63. Texas courts have held that in the absence of a sufficient showing of surprise by the opposing party, the failure to obtain leave of court when filing a late pleading may be cured by the trial court's action in considering the amended pleading. *Lloyds of London v. Walker*, 716 S.W.2d 99, 103 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *West v. Touchstone*, 620 S.W.2d 687, 689 n. 2 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); *Swinney v. Winters*, 532 S.W.2d 396, 400 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.); *Lucas v. Hayter*, 376 S.W.2d 790 (Tex. Civ. App.—San Antonio, 1964, writ dism'd).

A summary judgment proceeding is a trial within the meaning of Rule 63. *See Leche v. Stautz*, 386 S.W.2d 872 (Tex. Civ. App.—Austin 1965, writ ref'd n.r.e.); *Jones v. Houston Materials Co*., 477 S.W.2d 694, 695 (Tex. Civ. App.—Houston [14th Dist.] 1972, no writ).

The record does not reflect whether leave of court was requested or granted. In addition, the record gives no indication that the trial court refused leave to file nor does it contain a motion to strike the amended petition.

The amended petition is a part of the record that was before the trial court and the trial court's judgment states that all pleadings on file were considered by the court. Since the record is silent of any basis to conclude that the amended petition was not considered by the trial court, and inasmuch as Metropolitan has not shown surprise or prejudice, leave of court is presumed. *Lloyd's of London v. Walker*, 716 S.W.2d at 103; *Swinney v. Winters*, 532 S.W.2d at 400.[1] We therefore conclude that Goswami's claim for quantum meruit was properly before the trial court.

The standards for reviewing summary judgment are well settled. They are as follows:

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

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[1] The presumption which governs amended pleadings under TEX.R.CIV.P. 63 should not be confused with the presumption which governs the filing of opposing affidavits and written responses to a motion for summary judgment under TEX.R.CIV.P. 166a. As we stated in INA of Texas v. Bryant, 686 S.W.2d 614, 615 (Tex. 1985), when nothing appears of record to indicate that the late filing of the written response was with leave of court, it must be presumed that the trial court did not consider the response.

2. In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true.

3. Every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor.

Nixon v. Mr. Property Management, 690 S.W.2d 546, 548-49 (Tex. 1985).

Goswami testified by deposition that he made eleven payments of $2,091 each to Metropolitan or to its attorney, five of these payments were to bring the mortgage current and six were monthly mortgage payments made as they became due. The last payment was cashed after the foreclosure. In addition, he paid $70,000 for repairing and rehabilitating the property and paid over $4,000 for property taxes.

Because fact issues exist as to Goswami's claim for wrongful foreclosure and quantum meruit, the court of appeals erred in affirming the summary judgment. *City of Houston v. Clear Lake Basin Authority*, 589 S.W.2d 671 (Tex. 1979).

The judgment of the court of appeals is reversed and this cause is remanded to the trial court for a trial on its merits.

Note

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.

LEWIS
v.
BLAKE
876 S.W.2d 314
(Tex. 1994)

Dean Gerald Treece, Charles B. Holm, Charles L. Cotton, Houston, for petitioners.
James A. Gieseke, Houston, for respondent.

PER CURIAM.

This case presents two questions of summary judgment procedure. First: 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 prescribed by Rule 166a(c)? Second: does Rule 4 govern the computation of the notice period prescribed by Rule 166a(c)? We answer both questions "yes".

Gary Blake sued his lawyer, Craig Lewis, and the law firm of Fisher Gallagher Perrin & Lewis. Defendants moved for summary judgment, mailing their motion to Blake on June 21, 1991. Hearing was set for July 15. Blake moved for a continuance asserting, in part, that defendants had failed to give the requisite notice. The trial court denied Blake's motion and granted summary judgment for defendants.

Blake's argument regarding notice is this. Rule 166a(c) states in part: "Except on leave of court, with notice to opposing counsel, the motion [for summary judgment] and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing." Rule 21a states in part: "Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or by telephonic document transfer, three days shall be added to the prescribed period." 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 25th day after the day the motion is mailed. That day in this case was July 16. Thus, Blake concludes, it was error for the trial court to deny the motion for continuance. The court of appeals agreed with this argument, reversed the summary judgment, and remanded the case for further proceedings. 866 S.W.2d 687.

Defendants argue that Rule 21a applies only when "a party has the right or is required to do some act within a prescribed period". The only such act for a respondent to a summary judgment motion, defendants contend, is to file a response. Defendants argue that the effect of Rule 21a is to allow a party to respond to a summary judgment motion served by mail on the fourth day before the hearing, rather than the seventh as required by Rule 166a(c). We disagree. Respondent's right under Rule 166a(c) is to have minimum notice of the hearing. Rule 21a extends that minimum notice by three days when the motion is served by mail. Three courts of appeals have reached the contrary conclusion (including another panel of the court of appeals which decided this case). *Cronen v. City of Pasadena*, 835 S.W.2d 206, 208-209 (Tex. App.—Houston [1st Dist.] 1992, no writ); *De Los Santos v. Southwest Texas Methodist Hosp*., 802 S.W.2d 749, 754 (Tex. App.—San Antonio 1990, no writ); *Lynch v. Bank of Dallas*, 746 S.W.2d 24, 25 (Tex. App.—Dallas 1988, writ denied). We disapprove these cases.

Defendants argue, in the alternative, that Rule 4 allows a summary judgment motion to be heard on the 21st day after it is served, or the 24th day if it is served by mail. We agree. Rule 4 states in part:

> In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday.

Rule 4 could not be plainer: it 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, 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. One court of appeals has correctly reached this same conclusion. *Hammonds v. Thomas*, 770 S.W.2d 1, 3 (Tex. App.—Texarkana 1989, no writ). Five cases reach the same conclusion as the court of appeals in this case. *Cronen*, 835 S.W.2d at 208; *De Los Santos*, 802 S.W.2d at 754; *Lynch*, 746 S.W.2d at 25; *Williams v. City of Angleton*, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.); *Gulf Ref. Co. v. A.F.G. Management 34 Ltd*., 605 S.W.2d 346, 349 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). We disapprove these latter cases.

The hearing on defendants' summary judgment motion in this case was held on the 24th day after it was served, as permitted by the rules, and the court of appeals erred in reaching the contrary conclusion. Blake has raised other complaints which the court of appeals did not address. Accordingly, a majority of the Court, without hearing oral argument, reverses the judgment of the court of appeals and remands the case to that court for consideration of Blake's other points of error. TEX. R. APP. P. 170.

Notes

1. *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.

2. *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 nonmovant'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. Cromartie 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.

Note

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.

LIFE INS. CO. OF VIRGINIA
v.
GAR-DAL
570 S.W.2d 378
(Tex. 1978)

Atwell, Cain & Davenport, Mark T. Davenport, Dallas, for petitioner.

Lyne, Klein, French & Womble, Erich F. Klein, Jr., and Ron Edmondson, Stephens & Stephens, Bill J. Stephens, Dallas, for respondents.

BARROW, JUSTICE.

The trial court granted plaintiff, The Life Insurance Company of Virginia, a summary judgment for the deficiency owing after foreclosure of a deed of trust which secured a promissory note executed by defendant, Gar-Dal, Inc., and guaranteed by defendants, O. K. Jones, Ted Hunt, Jr., R. L. McSpedden, Charles C. Shaver, and Paul Hamby. The judgment granted the latter three guarantors indemnity from Jones and Hunt under a written indemnity contract. Only Gar-Dal, Inc., Jones and Hunt appealed. The court of civil appeals held that the summary judgment proof was inadequate and reversed the trial court judgment and remanded the entire cause for a new trial. 557 S.W.2d 565. We reverse the judgment of the court of civil appeals and affirm the judgment of the trial court.

Plaintiff's amended motion for summary judgment is supported by the affidavit of Ronald F. McRoberts, vice-president of plaintiff, which was executed on March 2, 1976, just before the motion for summary judgment was filed. After averring that the affidavit was made from his personal knowledge, he swore that Life of Virginia had acquired the note and deed of trust lien on or about December 3, 1974, and "thereafter has been and is the sole owner and holder of the Note," and that true and correct copies of the note and guaranty agreement were attached to his affidavit. Defendant Jones, individually and as president of Gar-Dal, Inc., replied to the motion for summary judgment but did not deny the execution or validity of the note, nor did he except to the form of plaintiff's motion or the supporting affidavit.

The amended motion for summary judgment was heard on August 26, 1976, and a partial summary judgment was granted. A hearing was set on the remaining fact question of reasonable attorney fees. This hearing was held on October 20, 1976, and a final judgment, which incorporated the partial summary judgment, was

signed on October 21, 1976. This judgment was vacated and a new judgment signed on December 3, 1976, in order to make a correction not material to this appeal.

The court of civil appeals held that plaintiff was not entitled to a summary judgment on the note because the photocopy of the note which was attached to the affidavit of McRoberts was not properly authenticated and further, the affidavit did not state that plaintiff was in possession of the original note. Although neither of these alleged defects were pointed out to the trial court before the partial summary judgment was rendered, or even before the judgment of October 21, 1976, was signed, the court of civil appeals held that since these defects were called to the attention of the trial court in the motion for new trial filed on November 1, 1976, they had not been waived by defendants.

Rule 166-A(e), TEX. R. CIV. P., sets forth the procedure for presenting summary judgment evidence by affidavit and documentary proof. Prior to January 1, 1978, this section provided:[2]

"(e) Form of Affidavits; Further Testimony. 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. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits."

This rule, which has been considered by this Court in several others cases, has resulted in difficulty in resolving the question of what constitutes sufficient documentary summary judgment evidence. *See: Gardner v. Martin*, 162 Tex. 156, 345 S.W.2d 274 (1961); *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230 (Tex. 1962); *Boswell v. Handley*, 397 S.W.2d 213 (Tex. 1965); *Southwestern Fire & Casualty Company v. Larue*, 367 S.W.2d 162 (Tex. 1963); *Perkins v. Crittenden*, 462 S.W.2d 565 (Tex. 1970); *Hidalgo v. Surety Savings and Loan Association*, 462 S.W.2d 540 (Tex. 1971); *Texas Nat. Corp. v. United Systems Internat'l, Inc*., 493 S.W.2d 738 (Tex. 1973). This difficulty has been caused, at least in part, by the reluctance of the parties or counsel to attach the original of valuable instruments to the suit papers. Although we have recognized that attaching the original document would avoid many of the problems encountered in the above cited cases, we have held that Rule 166-A(e), TEX. R. CIV. P., does not require that originals be attached. In *Perkins v. Crittenden, supra*, this Court said: "'(Crittenden) could have discharged (his) burden without producing and introducing the original note, under Rule 166-A(e), by attaching a sworn or certified copy of the note to a Proper affidavit or by serving such copy with an affidavit. *Gardner v. Martin*, (162 Tex. 156, 345 S.W.2d 274 (1961)).' Other cases in point are *Boswell v. Handley*, 397 S.W.2d 213 (Tex.Sup. 1966); and *Mitchell v. Geosonic Corporation*, 431 S.W.2d 958 (Tex. Civ. App. 1968, no writ)."

In this cause plaintiff attached a properly identified photocopy of the note to the affidavit of McRoberts and McRoberts swore before an authorized person that the photocopy was a true and correct copy of the original note. We hold that the photocopy of the note attached to the affidavit under these circumstances was a "sworn copy" within the meaning of Rule 166-A(e) and that, therefore, it was proper summary judgment evidence.

Furthermore, defendants waived their right to complain of the alleged defect in the form of plaintiff's proof by failure to except to the motion for summary judgment or the affidavit accompanying same prior to entry of the judgment. *Youngstown Sheet & Tube Co. v. Penn, supra; Roland v. McCullough*, 561 S.W.2d 207, (Tex. Civ. App. San Antonio 1977, writ ref'd n. r. e.). These alleged defects were matters of form that might easily have been cured if they had been timely pointed out in the response to the motion for summary judgment. Although the trial court still had jurisdiction on November 1, 1976, and thus the discretion to set aside the judgment, it did not abuse its discretion in refusing to do so. We conclude that the better rule is that defects of form are waived if not pointed out to the trial court before summary judgment is rendered. *See: Jones v. McSpedden*, 560 S.W.2d 177 (Tex. Civ. App. Dallas 1977, no writ).

It was also urged by defendants and found by the court of civil appeals that the affidavit of McRoberts is inadequate to support the judgment in that he did not swear that plaintiff was in possession of the note. In *Texas Nat. Corp. v. United Systems Internat'l, Inc., supra*, we said that if a sworn or certified copy, rather than the

[2] The following sentence was added to this section effective January 1, 1978: "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."

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." That case was reversed because the factual statements to support the motion for summary judgment were in the pleadings and not in a sworn motion or affidavit filed in support of the motion. Furthermore, although the original note was not attached to the motion for summary judgment filed by United Systems International, the affiant did not swear that plaintiff was the owner and holder of the note sued upon.

Here, McRoberts swore in his affidavit that plaintiff "is the sole owner and holder" of the note. As defined in TEX. BUS. & COMM. CODE ANN. § 1.201(20), "'Holder' means a person who is in possession of a document of title or an instrument or an investment security drawn, issued or indorsed to him or to his order or to bearer or in blank." Furthermore, as defined in WEBSTER'S NEW COLLEGIATE DICTIONARY, a "holder" is (1) a person that holds; (2) a person in possession of and legally entitled to receive payment of a bill, note or check. Thus, under either legal or lay terms, the affidavit of McRoberts, which was predicated upon sufficient facts to show personal knowledge, evidences that at the time of filing the motion for summary judgment plaintiff was the owner, holder and in possession of the note. This evidence stands uncontroverted by defendants and properly supports the summary judgment on the note.

Defendants urge by a cross-point that the trial court erred in granting the summary judgment because there are genuine issues of material fact raised as to whether all offsets and payments have been credited to the note by plaintiff. Since payment is an affirmative defense, the burden was upon defendants to come forward with summary judgment proof sufficient to raise at least an issue of fact that offsets or payments had not been credited to the note. *Nichols v. Smith*, 507 S.W.2d 518 (Tex. 1974); *Seale v. Nichols*, 505 S.W.2d 251 (Tex. 1974).

The affidavit of defendant Jones avers generally that Gar-Dal, Inc. was not given credit for the value of the leases and revenues from the building which were assigned to plaintiff along with the lien on the building. He does not state that any specific amount was received by plaintiff nor does he name any person who he claims made a payment. In response to this general statement, McRoberts swore unequivocally that no revenues were received from the building by plaintiff prior to foreclosure of the lien.

A similar question was considered in *Smith v. Crockett Production Credit Association*, 372 S.W.2d 956 (Tex. Civ. App. Houston 1963, writ ref'd n. r. e.) wherein the defendant swore in response to plaintiff's motion for a summary judgment on a note that he had not been given credit for all of the offsets and payments that had been made. In rejecting the contention that this response raised a fact issue, the court said: "we are of the view that the plea in appellant Smith's affidavit, there being nothing more, stating that all offsets and credits have not been allowed, is but a conclusion. It should have gone further and specified what such credits and offsets were. If this had been a trial on the merits and the only thing stated by appellant was that all offsets and payments had not been credited, the court would have been required to instruct a verdict against appellant. His testimony in such a trial, that all payments and offsets had not been allowed, without more, would be a pure conclusion. *See Franklin Life Ins. Co. v. Rogers*, 316 S.W.2d 116 (CCA), ref., n. r. e."

We agree with this holding and conclude that the statement in the opposing affidavit of defendant Jones that all offsets and payments had not been credited to the note is a conclusion and is insufficient to raise an issue of fact that plaintiff failed to credit all offsets and payments to the note.

Defendants assert by a second cross-point that if the judgment is reversed as to Gar-Dal, Inc., Jones and Hunt, and the cause remanded as to them, it should be remanded as to all defendants. This point is immaterial in view of our affirmance of the trial court judgment.

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

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 long-time 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 will-

ful 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" under 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 important 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)

Marie R. Yeates, Houston, Robert L. LeBoeuf, Angelton, Gwen J. Samora, Houston, Bebe H. Kivitz, Michael T. Starczewski, Philadelphia, PA, for Petitioner.

Richard S. London, Pete T. Patterson, John L. Barnes, Houston, for Respondents.

JUSTICE BAKER delivered the opinion of the Court in which CHIEF JUSTICE PHILLIPS, JUSTICE ENOCH, JUSTICE OWEN, JUSTICE ABBOTT, JUSTICE HANKINSON, JUSTICE O'NEILL and JUSTICE GONZALES joined.

This summary judgment case involves an alleged latent occupational disease. The sole issue is whether the trial court's case management orders shifted the burden of proof from the movant, Rhone-Poulenc, to the nonmovants, the Steels, in a summary judgment proceeding under Rule 166a(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, we conclude that the orders did not shift the burden from Rhone to the Steels. We also conclude that Rhone's summary judgment evidence did not meet Rule 166a(c)'s burden. Accordingly, we affirm the court of appeals' judgment, albeit for reasons different from those the court of appeals expressed.

I. BACKGROUND

From November 1986 to early 1990, Jeffrey Steel worked at Rhone's Freeport, Texas, rare earths processing facility. At this facility, workers extract rare earth elements from special ores for use in automotive catalytic converters, television picture tubes, and related products. The ores used in the rare earth's separation process contain naturally occurring, low-level radioactive material. During processing, the radioactive material is removed from the ore, drummed, and disposed of under state and federal regulatory requirements. Steel was responsible for filtering out the radioactive material and then drumming the waste. He was also responsible for cleaning the filtration system and storing the residue in sumps after electrical or mechanical failures at Rhone. Every three to four months Steel was responsible for cleaning the sumps, which required him to physically remove the waste in buckets and put it in the drums. Steel asserted that during these activities he was exposed to, splattered with, and sometimes ingested the radioactive waste residue.

On October 6, 1989, a physician diagnosed Steel, at age twenty-eight, with anaplastic oligodendroglioma, a rare form of brain cancer. On September 21, 1992, Steel and his wife, Kenda, sued ninety defendants including Rhone. The Steels claim that Steel's exposure to various substances while working at Rhone caused him to develop brain cancer. Rhone raised the two-year statute of limitations as a defense. The Steels then pleaded the discovery rule and asserted that they did not discover the cause of Steel's injury until September 19, 1990. On this date, Kenda Steel read a newspaper article about companies in Freeport voluntarily agreeing to reduce plant emissions because of pressure from the Environmental Protection Agency. This article referred to "cancer risks" at plants where emission reductions were to take place. Mrs. Steel testified that she first realized that her husband's brain tumor was connected with his work at Rhone when she read the newspaper article.

In March 1993, the Steels filed an amended petition and asserted claims on behalf of their minor son, Gregory Steel, who died from leukemia on June 22, 1991. The Steels claim that while Jeffrey Steel worked at Rhone, he unknowingly and inadvertently brought radioactive residue home on his clothing and shoes. The Steels asserted that Gregory was thus exposed to these hazardous substances and that as a result, Gregory contracted leukemia and died. During the litigation, the trial court issued two agreed case management orders. The trial court issued the first order on January 26, 1993. That order required the Steels to provide to all defendants: (1) an affidavit signed by Jeffrey Steel detailing his exposure to specific chemicals; and (2) an affidavit signed by a qualified medical doctor stating the doctor's medical opinion, based on a reasonable degree of medical probability, that exposure to specific chemicals in the manner described in Jeffrey Steel's affidavit, was, for each chemical, a substantial contributing cause of Steel's brain cancer. The doctor's affidavit was also to provide the basis for that doctor's opinion including reliance, if any, upon specific epidemiological, toxicological, or other medical studies.

On April 28, 1993, the trial court signed a second order, which required: (1) a second affidavit by Jeffrey Steel detailing each exposure to specific chemicals that he believed caused his son, Gregory, to receive exposure to such chemicals; and (2) an affidavit by a qualified medical doctor stating the doctor's medical opinion, based on a reasonable degree of medical probability, that exposure to specific chemicals in the manner described in Jeffrey Steel's second affidavit was, for each chemical, a substantial contributing cause of Gregory Steel's leukemia. The doctor's affidavit was also to provide the basis for that doctor's opinion including reliance, if any, upon specific epidemiological, toxicological, or other medical studies.

In response to the orders, the Steels provided Jeffrey Steel's affidavit, including a list of chemicals to which he was exposed and their origin. Initially, rather than an affidavit, the Steels provided a letter from Dr. Daniel Teitelbaum, a clinical toxicologist, which stated that there was a greater probability than not that the radioactive and organic materials to which Jeffrey Steel was exposed in the course of his work at Rhone were the sole cause or contributed substantially to the cause of Jeffrey Steel's brain tumor and Gregory Steel's leukemia.

In October 1994, all defendants, including Rhone, moved for summary judgment. The defendants asserted as grounds for their motion that the Steels could not prove causation for Jeffrey Steel's brain tumor or Gregory Steel's leukemia and that limitations barred Jeffrey Steel's claims against all defendants. The defendants supported their motion with an affidavit from Stanley M. Pier, Ph.D., an environmental toxicologist, who stated in his affidavit:

> Plaintiffs basically speculate that for some unspecified period of time, Jeffrey and Gregory Steel may have come into contact with a small amount of unknown chemicals, which plaintiffs allege may have caused their diseases, while at the same time selectively ignoring all other factors in cancer causation such as alcohol, tobacco, drugs and diet, for example. Essentially, plaintiffs attempt to take an unknown exposure to unknown quantities of unknown chemicals and opine causation with a reasonable medical certainty. This flaunts all processes of scientific reasoning.
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> * * *
>
> Before a physician/scientist/plaintiff can state that a known carcinogen can cause or has caused a given cancer, the plaintiff/physician/scientist must have a definition of the substance involved and the characteristics of the exposure . . . . Absent chemical or exposure information, no physician/scientist/plaintiff can possibly establish a medical link within a reasonable certainty, between a carcinogenic agent and a particular cancer.

In response to the defendants' motions for summary judgment, the Steels provided Dr. Teitelbaum's affidavit, Kenda Steel's affidavit, and the September 19, 1990 article linking chemicals from work sites to cancer. In February 1995, the trial court granted summary judgment for all defendants except Rhone. The trial court's order stated that limitations barred all the Steels' claims by and through Jeffrey Steel, and that all the Steels' claims by and through Gregory Steel failed for want of medical causation. Rhone again moved for summary judgment asserting that limitations barred the damages claims derivative of Jeffrey Steel's own claims, limitations barred claims for Gregory Steel's death, and there was no competent summary judgment evidence of exposure or causation that raised a fact issue on the cause of Gregory Steel's death. The Steels responded, attaching their original response to the original motion, a second affidavit from Dr. Teitelbaum, and other documents.

Those defendants who had previously received summary judgment moved for severance. The trial court initially granted a severance, but subsequently rescinded the severance order, granted Rhone's motion for summary judgment, and rendered a final judgment disposing of the Steels' claims against all defendants. The judgment stated that the court ruled that limitations barred the Steels' claims against all defendants. The judgment further stated that the Steels waived their right to appeal the earlier judgment against all defendants, except Rhone, and that the appellate time limits had run on those defendants. Consequently, the Steels appealed only their claims against Rhone. In the court of appeals, the Steels asserted that the trial court erred in granting Rhone summary judgment on limitations. The Steels argued that the discovery rule tolled limitations on Jeffrey Steel's claims and a genuine material fact issue existed about the date the Steels discovered their injuries. Rhone argued that Jeffrey Steel's injury was not inherently undiscoverable because he knew of the nature of his injury on October 6, 1989, when he was diagnosed with a brain tumor and knew he had previously worked with chemicals. Therefore, the discovery rule did not apply in that limitations was tolled only until October 6, 1989, at the latest. The court of appeals held that the discovery rule did apply to Jeffrey Steel's injury and that Rhone did not negate the discovery rule by proving as a matter of law when Jeffrey Steel should have discovered the nature

of his actionable injury. The court of appeals concluded that a material fact issue remained about when Jeffrey Steel should have reasonably discovered the nature of his injury. 962 S.W.2d 613, 620.

The Steels also asserted that they raised a material fact issue on the cause of Jeffrey Steel's brain tumor and Gregory Steel's leukemia. Rhone challenged the competency and admissibility of the Steels' affidavits. Rhone asserted that Jeffrey Steel's affidavit was conclusory and inadmissible hearsay and that Dr. Teitelbaum's affidavit was incompetent because it was based on inadmissible hearsay and not personal knowledge. The court of appeals held that Jeffrey Steel's statement that the chemicals and waste contributed to his son's death was not based on his personal knowledge, but was conclusory and, therefore, not competent summary judgment evidence. The court of appeals concluded that Jeffrey Steel's statement about his job responsibilities, the processes and chemicals involved in his job activities, and how radioactive substances came into contact with his skin and clothing were competent summary judgment evidence. The court of appeals also concluded that Dr. Teitelbaum's affidavit was competent summary judgment evidence to controvert Dr. Pier's affidavit. The court of appeals concluded that the Teitelbaum affidavit raised material fact issues about Jeffrey and Gregory Steels' specific exposures to chemicals and the causal connection between those exposures and their deaths. Accordingly, the court of appeals reversed the trial court's summary judgment and remanded the cause for further proceedings.

Rhone petitioned this Court for review, asserting that the case management orders shifted the burden of proof from Rhone as the movant to the Steels as the nonmovants and that the Steels failed to present competent summary judgment evidence to raise a fact issue on limitations and causation. Specifically, Rhone argues that: (1) limitations bars Jeffrey Steel's claims because he admittedly learned of his injury more than two years before the Steels filed suit; (2) the discovery rule does not apply to Jeffrey Steel's claims; (3) even if the discovery rule applies to Jeffrey Steel's claims, those claims are still barred by limitations; and (4) the Steels did not raise a material fact issue about causation on Gregory Steel's leukemia.

II. SUMMARY JUDGMENT

A. BURDEN OF PROOF

Rule 166a provides a method of summarily terminating a case when it clearly appears that only a question of law is involved and that there is no genuine fact issue. *See Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex.1972). The party moving for summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. *See* TEX.R. CIV. P. 166a(c); *Wornick Co. v. Casas*, 856 S.W.2d 732, 733 (Tex.1993); *Nixon v. Mr. Property Mgt. Co*., 690 S.W.2d 546, 548 (Tex.1985); *Calvillo v. Gonzalez*, 922 S.W.2d 928, 929 (Tex.1996). The nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense. *See Oram v. General Am. Oil Co*., 513 S.W.2d 533, 534 (Tex.1974); *Swilley*, 488 S.W.2d at 67-68. The trial court may not grant summary judgment by default because the nonmovant did not respond to the summary judgment motion when the movant's summary judgment proof is legally insufficient. *See City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 678 (Tex.1979). The movant must establish its right to summary judgment on the issues expressly presented to the trial court by conclusively proving all elements of the movant's cause of action or defense as a matter of law. *See Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *City of Houston*, 589 S.W.2d at 678.

A defendant moving for summary judgment on the affirmative defense of limitations has the burden to conclusively establish that defense. *See Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997). When the plaintiff pleads the discovery rule as an exception to limitations, the defendant must negate that exception as well. *See Velsicol*, 956 S.W.2d at 530; *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990); *Woods v. William M. Mercer, Inc*., 769 S.W.2d 515, 518 n. 2. (Tex. 1988).

B. STANDARD OF REVIEW

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. *See City of Houston*, 589 S.W.2d at 678. When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant. *See Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Friendswood Dev. Co. v. McDade & Co*., 926 S.W.2d 280, 282 (Tex. 1996); *Wornick*, 856 S.W.2d at 733. We indulge every reasonable inference and resolve any doubts in the non-

movant's favor. *See Science Spectrum, Inc*., 941 S.W.2d at 911; *Friendswood Dev. Co*., 926 S.W.2d at 282; *Wornick*, 856 S.W.2d at 733; *Nixon*, 690 S.W.2d at 548-49. 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. *See Nixon*, 690 S.W.2d at 548.

III. ANALYSIS

Rhone presents four issues to this Court: (1) whether limitations bars Jeffrey Steel's claims because he admittedly learned of his injury more than two years before the Steels filed suit; (2) whether the discovery rule applies to Jeffrey Steel's claims; (3) if the discovery rule applies to Jeffrey Steel's claims, whether those claims are barred under the discovery rule; and (4) whether the Steels raised a material fact issue about causation on Gregory Steel's leukemia.

Rhone concedes that, ordinarily, as the movant for summary judgment on limitations grounds, it would have the burden to prove that the discovery rule does not apply to Jeffrey Steel's claims, or if it does apply, to negate the discovery rule. But Rhone argues that the first agreed case management order shifted the burden of raising a fact issue on limitations and on the discovery rule to the Steels. Rhone contends that this case is not in the posture of a pre-September 1997 summary judgment motion on the causation element, when a defendant must have conclusively negated that element of a plaintiff's cause of action. Additionally, Rhone contends that the second agreed case management order shifted the burden of raising a material fact issue on the causation element to the Steels. Rhone asserts that the burden the Steels assumed is much like the burden every plaintiff now faces when opposing a "no evidence" summary judgment motion under recently amended Texas Rule of Civil Procedure 166a(i). We disagree.

First, Rule 166a(c) governs Rhone's summary judgment motion. *See* TEX. R. CIV. P. 166a(c). Rule 166a(c) clearly requires that Rhone, as the moving party, has the burden to establish that no material fact issue exists and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Calvillo*, 922 S.W.2d at 929. Second, neither of the agreed case management orders facially purports to shift the burden of raising fact issues on limitations, the discovery rule, or causation to the Steels. The Steels only agreed to and the orders only obligated them to provide, on a day certain, the affidavits described above. We conclude that neither case management order served to shift the burden of proof under Rule 166a(c). Accordingly, Rhone has the burden to conclusively establish limitations, conclusively establish that the discovery rule does not apply to Jeffrey Steel's claims, conclusively negate the discovery rule if it does apply, and conclusively establish that there is no causation between Jeffrey Steel's exposure and Gregory Steel's leukemia. *See Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Gibbs v. General Motors Corp*., 450 S.W.2d 827, 828 (Tex. 1970). Consequently, we consider whether Rhone's motion for summary judgment and its supporting summary judgment evidence meets its burden as it pertains to the issues Rhone raises.

In its amended motion for summary judgment, Rhone relied solely on Dr. Pier's affidavit, which Rhone filed in support of its first summary judgment motion. Dr. Pier's affidavit is limited to challenging the competency and admissibility of the Steels' affidavits and Dr. Teitelbaum's opinion letter.

We conclude, as Rhone conceded in oral argument, that Dr. Pier's affidavit does not prove as a matter of law that it was not objectively verifiable that there was a causal link between Jeffrey Steel's brain tumor and his exposure to radioactive materials at Rhone's facility. Consequently, Rhone did not carry its summary judgment burden because its summary judgment evidence did not prove as a matter of law that the discovery rule does not apply in this case.

Because we conclude that Rhone did not conclusively prove that the discovery rule does not apply, we assume, but do not decide, that the discovery rule applies for purposes of determining whether Rhone negated the discovery rule as a matter of law. *See Science Spectrum, Inc*., 941 S.W.2d at 911; *Wornick*, 856 S.W.2d at 733; *Nixon*, 690 S.W.2d at 548-49. The parties assume, for purposes of this appeal, that Jeffrey Steel's brain tumor is a latent occupational disease. We likewise assume, but do not decide, the same fact for purposes of this appeal. Therefore, to sustain its burden of proof, Rhone was required to offer summary judgment evidence to show, as a matter of law, that, before September 19, 1990, the Steels knew or in the exercise of reasonable diligence should have known that Jeffrey Steel's brain tumor was likely work-related. *See Childs v. Haussecker*, 974 S.W.2d 31, 33 (Tex.1998). Rhone offered no such evidence. Consequently, a fact question exists about whether the Steels knew or should have known before September 19, 1990, through the exercise of reasonable diligence, that the

brain tumor was likely work-related. Accordingly, the court of appeals correctly determined that Rhone was not entitled to summary judgment on Jeffrey Steel's claims on limitations grounds.

Finally, Rhone had to negate the causation element on Gregory Steel's leukemia by establishing that no genuine issue of material fact existed about whether Gregory Steel's alleged exposure to the radioactive materials his father brought home caused Gregory to contract leukemia and die from that disease. *See Wornick*, 856 S.W.2d at 733. As Rhone recognizes, Dr. Pier's affidavit does not contain any summary judgment evidence that would establish, as a matter of law, that there is no causal connection between Gregory Steel's leukemia and the radioactive materials Jeffrey Steel carried home from Rhone's Freeport facility. Furthermore, the Steels, as the nonmovants, needed no answer or response to Rhone's motion to contend that Rhone did not carry its summary judgment burden. *See City of Houston*, 589 S.W.2d at 678. Consequently, we conclude that Rhone did not carry its summary judgment burden to disprove causation as a matter of law.

IV. CONCLUSION

We hold that the trial court's case management orders did not shift the Rule 166a(c) summary judgment burden from Rhone, the movant, to the Steels, the nonmovants. We hold that Rhone did not carry its summary judgment burden to prove as a matter of law that limitations barred Jeffrey Steel's claims or that Jeffrey Steel's exposure to radioactive materials at Rhone's Freeport facility did not cause Gregory Steel's leukemia. Accordingly, we affirm the court of appeals' judgment.

JUSTICE HECHT filed a dissenting opinion [opinion omitted].

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

Sue S. Walker, Fort Worth, Christopher N. Forbis, Sewell and Forbis, Decatur, Michael A. Miller, Miller & McCarthy, P.C., Dallas, Thomas M. Michel, David L. Evans, Bourland Kirkman Seidler Evans Jay & Michel, LLP, Fort Worth, April Love Foscue, Dallas, for Petitioner.

Joseph W. Spence, Shannon Gracey Ratliff & Miller, Robert E. Aldrich, Jr., John F. Murphy, Gardner Aldrich & Murphy, LLP, Fort Worth, for Respondent.

JUSTICE O'NEILL delivered the opinion of the Court in which CHIEF JUSTICE PHILLIPS, JUSTICE ENOCH, JUSTICE OWEN, JUSTICE HANKINSON and JUSTICE JEFFERSON joined.

We grant Cimarron Hydrocarbon Corporation's motion for rehearing. We withdraw our opinion and judgment of July 3, 2002, and substitute the following in its place.

In this case, we decide the review standards governing certain pre- and post-summary judgment rulings. Defendants in the underlying case each filed summary-judgment motions to which the plaintiff failed to timely respond. Plaintiff filed a motion for leave to file a late response and a motion to continue the scheduled summary-judgment hearing. The trial court denied plaintiff's motions and granted the defendants summary judgment. Plaintiff then filed a motion for new trial claiming that the trial court abused its discretion in denying plaintiff's pre-summary judgment motions. Alternatively, plaintiff claimed that the equitable standard we established in *Craddock v. Sunshine Bus Lines*, 134 Tex. 388, 133 S.W.2d 124 (1939), to review motions for new trial on default judgments should apply in this context. The trial court denied plaintiff's motion for new trial, but the court of appeals reversed and remanded, holding that *Craddock* applied and that the plaintiff had met that standard. 35 S.W.3d 692, 694.

We hold that *Craddock* does not apply to a motion for new trial filed after summary judgment is granted on a motion to which the nonmovant failed to timely respond when the respondent had notice of the hearing and an opportunity to employ the means our civil procedure rules make available to alter the deadlines Rule 166a imposes. In this case, the rules provided the plaintiff an opportunity to obtain leave to file a late response to the summary-judgment motion. Therefore, the court of appeals erred in applying the equitable *Craddock* standard

to plaintiff's motion for new trial. We further hold that 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 an accident or mistake, and (2) that allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment. Because the plaintiff here did not establish good cause, the trial court did not abuse its discretion in denying plaintiff's motion. Nor did the trial court err in denying plaintiff's motion for new trial on this basis.

Accordingly, we reverse the court of appeals' judgment and remand to that court to allow it to consider points Cimarron raised that it did not previously address.

I

In the underlying lawsuit, Cimarron Hydrocarbons Corp. alleges that the petitioners, Bob E. Carpenter, C.D. Consulting and Operating Co., and C.D. Roustabout Co. (collectively, "Carpenter"), agreed to select, furnish, and install casing in a new oil and gas well in Jack County, Texas. The casing failed as it was being cemented within the well bore, and the well could not be completed. In November 1997, Cimarron sued Carpenter alleging that Carpenter was negligent, violated the Deceptive Trade Practices Act, and breached express and implied warranties.

On March 5, 1999, Cimarron's counsel withdrew. Ten days later, Carpenter moved for summary judgment, and a hearing on the motion was set for April 30th. Cimarron retained new counsel, Robert Aldrich, on April 15th. Aldrich contacted Carpenter's counsel, who agreed to reset the summary-judgment hearing. Aldrich testified (at the hearing on Cimarron's motion for new trial) that, after speaking with Carpenter's counsel, he gave the summary-judgment motion to an associate, John Murphy, to prepare a response and handle the summary-judgment hearing. On April 28th, Aldrich received notice that the summary-judgment hearing had been reset for June 4th, making Cimarron's summary-judgment response due by May 28th. Aldrich testified that he placed the hearing notice in his outbox for his assistant to calendar, but failed to attach a note on it directing her to calendar the hearing for Murphy, as was his usual practice. Aldrich mistakenly assumed that Murphy was aware of the new hearing date and was preparing a response.

Two days before the scheduled hearing, Aldrich was reminded of the hearing date while speaking with an expert he had retained in mid-May. After that conversation, Aldrich asked Murphy for the response he assumed had been filed and discovered that a response had not been prepared. Upon realizing the mistake, Murphy began preparing a response, and Aldrich contacted Carpenter's counsel to inquire whether he would agree to the filing of a late response or a continuance of the hearing. Carpenter's counsel did not agree.

The day of the hearing, Cimarron filed a motion for leave to file an untimely response, with a proposed response attached, and a motion for continuance. The trial court denied both motions and granted Carpenter's motion for summary judgment. Cimarron filed a motion for new trial, claiming that the trial court abused its discretion in denying Cimarron's pre-summary judgment motions and, alternatively, that the summary judgment should be set aside on the equitable grounds articulated in *Craddock*. After conducting an evidentiary hearing, the trial court denied Cimarron's new-trial motion. Applying the *Craddock* standard, the court of appeals reversed the summary judgment. 35 S.W.3d at 696. We granted Carpenter's petition to decide the review standards governing Cimarron's motions.

II

In *Craddock*, we held that a default judgment should be set aside when the defendant establishes that (1) the failure to answer was not intentional or the result of conscious indifference, but the result of an accident or mistake, (2) the motion for new trial sets up a meritorious defense, and (3) granting the motion will occasion no undue delay or otherwise injure the plaintiff. *Craddock*, 133 S.W.2d at 126. Such a rule, we noted, is based upon equitable principles and "prevents an injustice to the defendant without working an injustice on the plaintiff." *Id*. In *Ivy v. Carrell*, 407 S.W.2d 212, 213 (Tex. 1966), we again cited equitable principles and extended *Craddock* to cases in which a party has answered but fails to appear for trial. The present situation, though, differs significantly from the circumstances presented in those cases.

In *Craddock*, the defendant was served with citation, which he forwarded to his insurance agent, who in turn forwarded the citation to the insurance company whose duty it was to defend. Although marked "urgent," the citation was mixed up with other insurance company mail and was not discovered until the day on which the default judgment was rendered. Thus, the defendant did not actually realize its mistake in time to correct it be-

fore the default judgment was rendered. *Craddock*, 133 S.W.2d at 125. Similarly, in *Ivy v. Carrell*, the new trial movant did not learn that the case had been set for trial until after the trial court rendered judgment. 401 S.W.2d 336, 338 (Tex. Civ. App.—Beaumont 1966) (noting that mailed notice of trial setting did not reach defaulting party's attorney), *aff'd*, 407 S.W.2d 212 (Tex. 1966). In both cases, the defaulting party realized its mistake only after judgment, when the only potential relief available was a motion for new trial or to otherwise set aside the judgment.

In this case, Cimarron learned two days before the summary-judgment hearing, well before judgment was rendered, that a timely response to the motion for summary judgment had not been filed. Our summary-judgment rules afford a party in this situation an opportunity to obtain additional time to file a response, either by moving for leave to file a late response or by requesting a continuance of the summary-judgment hearing. *See* TEX.R. CIV. P. 166a(c), 251. Cimarron actually availed itself of these remedies by filing a motion for leave to file a late response and, alternatively, requesting a continuance. That the trial court denied these remedies does not mean that they were not available; rather, the trial court's rulings on Cimarron's pre summary-judgment motions are, like most other trial court rulings, subject to review for an abuse of discretion.

Our purpose in adopting the *Craddock* standard was to alleviate unduly harsh and unjust results at a point in time when the defaulting party has no other remedy available. *See Craddock*, 133 S.W.2d at 126. But when our rules provide the defaulting party a remedy, *Craddock* does not apply. Thus, we hold that *Craddock* does not apply to a motion for new trial filed after judgment has been granted on a summary-judgment motion to which the nonmovant failed to timely respond when the movant had an opportunity to seek a continuance or obtain permission to file a late response. Here, the facts necessary to establish good cause were available from Cimarron's own counsel and his employees two days before the summary-judgment hearing. The facts were all ascertainable without resort to any time-consuming formal discovery processes. Because Cimarron had an opportunity to seek a continuance or leave to file a late response, the court of appeals erred in applying *Craddock*.

Cimarron argues that we should follow those courts of appeals that have applied the *Craddock* standard in the summary-judgment context. . . . In most of those cases, it appears that the summary-judgment nonmovant may not actually have been aware of its mistake before the summary-judgment hearing. *But see Western Waste*, 959 S.W.2d at 331 (applying *Craddock* even though the new-trial movant had "ample time" before judgment was rendered to either respond to the summary-judgment motion or to request additional time to respond). We do not decide today whether *Craddock* should apply when a nonmovant discovers its mistake after the summary-judgment hearing or rendition of judgment. But we disapprove of *Western Waste* and other court of appeals decisions to the extent that they can be read to hold that all of the *Craddock* factors must be met when a nonmovant is aware of its mistake at or before the summary-judgment hearing and thus has an opportunity to apply for relief under our rules.

III

Having determined that *Craddock* does not apply in this case, we must decide whether the trial court abused its discretion in denying Cimarron's motion for leave to file a late response to Carpenter's motion for summary judgment. Rule 166a(c) provides that, except on leave of court, a party resisting summary judgment may file a response "not later than seven days prior to the day of hearing." TEX.R. CIV. P. 166a(c). Our rules further provide that a trial court may permit an act to be done after a period prescribed in other procedural rules upon a showing of "good cause." TEX.R. CIV. P. 5. Carpenter contends that the trial court did not abuse its discretion when it denied Cimarron leave to file an untimely response because Cimarron failed to demonstrate good cause. We agree.

We review a trial court's ruling on a motion for leave to file a late summary-judgment response for an abuse of discretion. *See, e.g., Atkins v. Tinning*, 865 S.W.2d 533, 535 (Tex. App.—Corpus Christi 1993, writ denied) (applying abuse of discretion standard). A trial court abuses its discretion when it acts without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241-42 (Tex. 1985). We have never articulated principles governing the application of "good cause" in this context. But we have addressed "good cause" in similar contexts.

In *Stelly v. Papania*, 927 S.W.2d 620, 621 (Tex. 1996), for example, the defendant filed a motion for summary judgment claiming that he did not own the property on which the plaintiff slipped and fell. Preliminarily, the defendant sought leave to withdraw and amend his prior answer to requests for admissions in which he had

admitted owning the premises. *Id.* at 621. We noted that, in the analogous deemed-admissions context, a party demonstrates good cause to withdraw admissions by showing that its failure to answer was not intentional or the result of conscious indifference, but was accidental or the result of mistake, and that the parties relying on the responses will not be unduly prejudiced. *Id.* at 622. Applying that standard to the defendant's motion to withdraw and amend prior admissions, we emphasized that the civil procedure rules' purpose is to fairly and equitably adjudicate parties' claims, and not to prevent a litigant from presenting his case. *Id.* Because the defendant presented evidence of good cause, we held that the trial court did not abuse its discretion in allowing the defendant to withdraw and amend his answers before the trial court considered the defendant's summary-judgment motion. *Id.*; *see also Wal-Mart Stores, Inc. v. Deggs*, 968 S.W.2d 354, 356-57 (Tex. 1998) (applying same standard to request to withdraw deemed admissions).

On the other hand, in a number of cases interpreting former Rule 215(5) of the Texas Rules of Civil Procedure, we applied a more stringent test. That rule provided that evidence not disclosed in response to proper discovery requests could not be presented at trial unless its proponent demonstrated good cause for its admission. While we did not specifically define "good cause" in that context, we held that an inadvertent failure to supplement responses was insufficient to establish good cause, even if admitting the evidence would not be unfair to the opposing party. *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 672 (Tex. 1990); *E.F. Hutton & Co., Inc. v. Youngblood*, 741 S.W.2d 363, 364 (Tex. 1987). We reasoned that this more stringent test was warranted because "[a] party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory." *Sharp*, 784 S.W.2d at 671.

For several reasons, we believe the "good cause" standard governing the withdrawal of admissions is better fitted to the present context. First, because our rules do not mandate a summary-judgment response, a party that fails to timely file one has breached no legal duty. In contrast, our rules of procedure require litigants to supplement discovery responses. TEX.R. CIV. P. 193.5(a), 195.6. And a party's failure to disclose relevant evidence until the eve of trial may significantly hamper the opposing litigant's trial preparation, a consideration not present here.

Finally, the consequences to a party that inadvertently fails to timely respond to a summary-judgment motion are often similar to those faced by a party that would otherwise be bound by erroneous or deemed admissions. Each faces the very real prospect of summary disposition without regard to the underlying merits. The standard that applies to the withdrawal of admissions fairly balances the parties' interests and furthers the policies our rules are intended to serve. *See* TEX.R. CIV. P. 1; *see also Stelly*, 927 S.W.2d at 622. Accordingly, we hold that a motion for leave to file a late summary-judgment response should be granted when a litigant establishes good cause for failing to timely respond by showing that (1) the failure to respond was not intentional or the result of conscious indifference, but the result of accident or mistake, and (2) allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment.

Applying this standard, we conclude that the trial court did not abuse its discretion in denying Cimarron leave to file a late response. Cimarron's motion offered no explanation for its failure to timely respond, nor was it accompanied by any supporting affidavits or other evidence. The only argument Cimarron's motion presented was that Carpenter would suffer no prejudice if its late filing were permitted. While counsel argued at the hearing on the motion that Cimarron had not timely responded because of a calendaring error, he offered no explanation of the error from which the trial court might determine that an accident or mistake had occurred. It was not until after the hearing that Cimarron investigated and learned the sequence of events that caused the filing deadline to pass. Even assuming that the trial court could consider counsel's unsworn argument under these circumstances in deciding whether Cimarron established good cause to allow a late response, we cannot say that the trial court abused its discretion in denying leave based upon counsel's bare assertion that he had "miscalendared" the summary-judgment hearing. Nor did the trial court err in denying Cimarron's motion for new trial on this basis.

IV

Cimarron asks that we remand this case to the court of appeals to allow it to consider Cimarron's contention that the trial court erred in rendering summary judgment for Carpenter in his individual capacity. The court of appeals did not consider this contention because it concluded that Cimarron was entitled to a new trial under *Craddock*. Accordingly, we reverse the court of appeals' judgment and remand to that court to consider this point. *See* TEX.R.APP. P. 60.2(d).

V

In sum, we hold that 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. We further hold that the *Craddock* standard does not apply to Cimarron's motion for new trial because our rules provided Cimarron an opportunity before judgment was rendered to obtain a continuance or leave to file an untimely response. Accordingly, we reverse the court of appeals' judgment and remand to that court to allow it to consider issues Cimarron raised that it did not previously consider.

JUSTICE SCHNEIDER and JUSTICE SMITH did not participate on rehearing.

JUSTICE HECHT, concurring in the judgment.

I agree with the result the Court reaches, but for different reasons.

The legal issue is this: when must a trial court grant leave to file a late response to a motion for summary judgment. The Court holds that leave must be granted if the losing party proves that the failure to file a timely response was not intentional or the result of conscious indifference, but was due to accident or mistake. I would give the trial court more discretion to deny leave unless the failure to timely file is reasonably explained. Here, no such explanation was given.

The Court concludes, and I agree, that a party is not entitled to leave to file a late response if it satisfies the three requirements of *Craddock v. Sunshine Bus Lines* for obtaining a new trial after a default judgment. *Craddock* states:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident; provided the motion for a new trial sets up a meritorious defense and is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

The explanation the Court gives for not applying *Craddock* in this case is that the rules of procedure provided Cimarron a reasonable opportunity to obtain leave to file a late response. But surely the rules of procedure provide every party a reasonable opportunity to obtain leave to respond late. Parties may not avail themselves of that opportunity, but the rules always provide it. The reason the *Craddock* standards should not apply is that the failure to timely answer a petition and the failure to timely respond to a motion for summary judgment are very different situations, as the facts of this case summarized below show.

Further, while the Court states that it will not apply *Craddock*, in fact it does exactly that: it uses the same "fault" or "good cause" standard that *Craddock* does. The dispute between the parties in this case is not over whether the "meritorious defense" requirement of *Craddock* can be imposed or modified. The dispute is over whether Cimarron's counsel gave the trial court enough of a reason to obtain leave to respond late. The Court states that it will not look to *Craddock* for guidance and then applies the standard of that case, word for word.

The result in this case does not seem close to me. Carpenter's motions for summary judgment had been on file for eleven weeks before the hearing, and Carpenter's counsel had agreed to one postponement requested by Cimarron. Cimarron's motion for leave to file a late response, filed the day of the hearing, gave no reason for Cimarron's failure to file a timely response. At the hearing, the only explanation Cimarron's counsel offered was that he "had mis-calendared this setting". He did not elaborate or offer any evidence. The trial court was well within its discretion to deny leave. Counsel's later explanation, offered in support of the motion for new trial, came too late.

Whether a different standard should apply in other circumstances after summary judgment I would leave for a case in which the implications have been briefed—or better still, for the rules process.

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 have been four opinions of this Court in recent years which show the development of the law before us: In *Southwestern Fire & Casualty Co. v. LaRue*, 367 S.W.2d 162 (Tex. 1963), a copy of the note was attached to the Pleadings. The original of the note was not attached to the motion for summary judgment or an affidavit attached to the motion. No exception was made of this in the trial court, and no point was assigned thereon in the court of civil appeals. That court's opinion erroneously stated that 'the note itself was attached to (the) plaintiff's petition.' Our opinion stated, in effect, that this method of procedure by the plaintiff was not good practice, but it did not present fundamental error. The court, therefore, did not reach the problems discussed in the dissents. There were two dissenting opinions. The dissent of three justices (Calvert, joined by Walker and Hamilton) pointed out that in the face of a general denial, merely attaching a copy of the note to the pleadings did not prove that the plaintiff was the owner and holder of the note. The original of the note carries with it evidence of possession and ownership. A copy does not. The dissent stated that the plaintiff 'could have

discharged its burden without producing and introducing the original note, under Rule 166--A(e), by attaching a sworn or certified copy of the note to a proper affidavit or by serving such a copy with the affidavit.' 367 S.W.2d at 166. Justice Griffin filed a separate one-line dissent on the ground that 'the note, or a copy admissible as evidence in accordance with legal rules, was not attached to an affidavit supporting the motion for summary judgment.'

* * *

The next opinion was *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230 (Tex. 1963). There the supporting document was attached to a Pleading (not the motion for summary judgment or affidavit). An affidavit referred to the pleadings and the document. No objection or exception was made in the trial court to the fact that the supporting proof was not attached to the motion or to an affidavit attached to the motion. This point was made for the first time on appeal. The opinion of the court was that the affidavits 'were subject to exception . . . because . . . verified or certified copies . . . were not attached to or served with the Johnson affidavit.' The court observed, however, that there was no possibility that anyone was misled or deceived. The holding was that exceptions to the deficiencies should have been made, if there was any doubt in the matter, in the trial court; and '(w)e hold that objections of this kind may not be raised for the first time on appeal. . . .'

Then came *Perkins v. Crittenden*, 462 S.W.2d 565 (Tex. 1970). There again a Copy of the promissory note sued upon was attached to the Petition. The plaintiff moved for summary judgment with a supporting statement that the person making the statement had read the petition, and that it was true and correct. The statement, however, was not sworn to as an affidavit; it was simply acknowledged as a deed is acknowledged. It was held that it was error to enter the summary judgment. The court in the Perkins case again pointed out the desirability of attaching the original of the note because possession is at least evidence of present ownership of the note. And, again, the court pointed out that Rule 166--A(e) could be complied with 'by attaching a sworn or certified copy of the note to a proper affidavit.'

Finally, there is *Hidalgo v. Surety Savings & Loan Association*, 462 S.W.2d 540 (Tex. 1971). The main summary judgment problem there was whether the plaintiff was a holder in due course of the promissory note sued upon. The defendant had filed a general denial, and pleas of fraud in the inducement, and of failure of consideration. The Pleadings of the plaintiff were sworn to. They set out that the plaintiff was a holder in due course and other matters. The defendant filed affidavits in opposition to the motion for summary judgment. The plaintiff moved for summary judgment on the matter sworn to in its Petition aided by the affidavits of the defendant. The holding was that it was error to grant the plaintiff's motion for summary judgment. The reasoning was that matters sworn to in the Pleadings are not summary judgment proof. A motion for summary judgment must be supported by its own summary judgment proofs unless the case is one properly decided on pleadings alone. 'Pleadings simply outline the issues; they are not evidence, even for summary judgment purposes.' 462 S.W.2d at 543. 'On balance, we are convinced that orderly judicial administration will be better served in the long run if we refuse to regard pleadings, even if sworn, as summary judgment evidence.' 462 S.W.2d at 545. And, since there was no summary judgment proof supporting the element of 'holder in due course,' the defendant was entitled to her trial on failure of consideration to support the note sued upon. It was error to enter summary judgment against her. Two justices concurred in the result in Hidalgo. They agreed that the statements in the Pleadings about holder in due course were mere conclusions and were not adequate summary judgment proof. They were of the opinion, however, that facts sworn to in pleadings should be treated as any other affidavits filed in the case. The holding is otherwise.

In the light of the above cases, 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 attached 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)

Karen A. Lerner, Houston, for petitioner.
Frederick B. Wulff, Sr., Kurt Schwarz, Elizabeth Hosch, Dallas, for respondents.

GONZALEZ, JUSTICE.

A workers' compensation claimant filed suit against an adjusting firm and a claims adjuster employed by the firm, alleging, among other things, breach of the duty of good faith and fair dealing. The trial court rendered a summary judgment in favor of the defendants. The court of appeals reversed and remanded, holding that an adjusting firm owes the same duty of good faith and fair dealing as an insurance carrier. 833 S.W.2d 545. We disagree. The non-delegable duty of good faith and fair dealing is owed by an insurance carrier to its insureds due to the nature of the contract between them giving rise to a "special relationship." An insurance carrier, not its agents and contractors providing claims handling services, is liable to the insured for actions by the agents or contractors that breach the duty of good faith and fair dealing owed by the carrier to the insured. For the following reasons, we reverse the judgment of the court of appeals.

FACTS

Rosa Natividad was injured twice within a year while in the course of her employment with Revco D.S., Inc. She filed a workers' compensation claim for each injury. Both claims were settled. On February 24, 1989, Natividad filed suit alleging various causes of action arising from the handling of her workers' compensation claims by Revco, National Union Fire Insurance Company of Pittsburgh, AIG Risk Management, Alexsis, Inc., and William Steen. National Union was Revco's workers' compensation carrier. National Union contracted to have AIG provide all the services under the policy. AIG contracted with Alexsis, Inc. for claims adjusting services under the policy. William Steen, a claims adjuster, was an employee of Alexsis, Inc. Natividad settled with National Union, AIG, and Revco, and dismissed them from the suit. Natividad's Fifth Amended Petition asserted the following causes of action against Alexsis, Inc. and Steen: 1) breach of the duty of good faith and fair dealing; 2) fraud; 3) economic duress, oppression and outrage; 4) negligent infliction of emotional distress; and, 5) extreme and outrageous conduct which caused severe emotional distress as set forth in Section 46 of the SECOND RESTATEMENT OF TORTS.

Alexsis, Inc. and Steen moved for summary judgment on the grounds that they did not owe a duty of good faith and fair dealing to Natividad and that Natividad could not recover for her emotional distress. The trial court rendered a take-nothing summary judgment in favor of the defendants.

The court of appeals reversed the summary judgment in part. Although there were no pleadings and evidence to support the theory, the court of appeals held that Natividad was a third-party beneficiary of a contract between Alexsis, Inc. and National Union, and that Alexsis, Inc. owed Natividad a duty of good faith and fair dealing. However, the court of appeals held that Steen did not owe a duty of good faith and fair dealing because

"[h]e did not issue an insurance policy and did not contract with the carrier . . . to provide any adjusting services." The court of appeals upheld summary judgment favoring Alexsis, Inc. and Steen as to Natividad's allegations of fraud, and of economic duress, oppression and outrage, but remanded Natividad's causes of action for negligent and intentional infliction of emotional distress.

On appeal to this Court, Natividad argues that the court of appeals erred in holding that Steen did not owe Natividad a duty of good faith and fair dealing. By cross-application, Alexsis, Inc. and Steen argue that because the duty of good faith and fair dealing must be based on a contract between the parties, neither Alexsis, Inc. nor Steen owed Natividad this duty. Alexsis, Inc. and Steen also argue that the uncontroverted affidavit testimony of Steen was sufficient to support summary judgment on the claims for negligent and intentional infliction of emotional distress, and that summary judgment of Natividad's claim of intentional infliction of emotional distress was otherwise proper because they negated other elements of her claim.

DUTY OF GOOD FAITH AND FAIR DEALING

* * *

In the present case, there is no special relationship between Natividad and either Alexsis, Inc. or Steen. Natividad is not a party to a contract with Alexsis, Inc. or Steen. Natividad's contractual privity is only with her employer and National Union. Natividad is owed a duty of good faith and fair dealing from National Union. This duty is non-delegable. When the insurance carrier has contracted with agents or contractors for the performance of claims handling services, the carrier remains liable for actions by those agents or contractors that breach the duty of good faith and fair dealing owed to the insured by the carrier. Natividad was entitled to and did recover from National Union for actions by its employees, agents or contractors that breached the duty of good faith and fair dealing owed to Natividad by National Union. Alexsis, Inc. and Steen, because they were not parties to a contract with Natividad giving rise to a "special relationship," owed Natividad no duty of good faith and fair dealing. Thus, the court of appeals was correct in affirming the trial court's summary judgment as to Natividad's claim for breach of the duty of good faith and fair dealing against Steen. The court of appeals erred, however, in reversing the trial court's summary judgment as to Natividad's claim for breach of the duty of good faith and fair dealing against Alexsis, Inc.

EMOTIONAL DISTRESS

The trial court granted a motion for summary judgment by Alexsis, Inc. and Steen on Natividad's claims for negligent and intentional infliction of emotional distress. The motion came after special exceptions filed by Alexsis, Inc. and Steen, alleging that Natividad's pleadings were factually and legally insufficient. The court of appeals reversed the judgment of the trial court as to the claims for emotional distress. Subsequent to the court of appeals decision, this court in *Boyles v. Kerr*, 855 S.W.2d 593, 594 (Tex. 1993), held that in Texas, there is no tort of negligent infliction of emotional distress. In *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 (Tex. 1993), we recognized the tort of intentional infliction of emotional distress, and adopted the elements set forth in Section 46 of the SECOND RESTATEMENT OF TORTS. The court of appeals thus erred in reversing the trial court's summary judgment that Natividad take nothing on her claim for negligent infliction of emotional distress against Alexsis, Inc. and Steen. As to the tort of intentional infliction of emotional distress, affidavits were attached to the Motion for Summary Judgment stating that Steen had no intention of causing Natividad any emotional distress. The trial court granted summary judgment against Natividad's claim for emotional distress, but the court of appeals reversed the judgment stating that Steen's supporting affidavit "will not support a summary judgment where he is a party to the suit with a vital interest in its outcome." 833 S.W.2d at 549 (*citing Spoljaric v. Percival Tours, Inc*., 708 S.W.2d 432 (Tex. 1986)). Alexsis, Inc. and Steen argue to this Court that summary judgment is proper because Natividad's live pleadings did not allege any "extreme and outrageous" conduct by either Alexsis, Inc. or Steen. Additionally, Alexsis, Inc. and Steen argue that the court of appeals erred in holding that Steen's affidavit that he did not intend to cause Natividad emotional distress does not support summary judgment.

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. *Texas Dept. of Corrections v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974); TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS § 3.07[2] (1992); David Hittner and Lynne Liberato, *Summary Judgments In Texas*, 35 S. TEX. L. REV. 9, 25 (1994). 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. *See Aranda*, 748 S.W.2d at 213. The reviewing court will affirm the summary judgment only if the pleadings are legally insufficient.

In the present case, Alexsis, Inc. and Steen filed special exceptions to Natividad's pleadings alleging factual and legal insufficiency. The trial court ordered Natividad to file an amended petition to address the deficiencies in her pleadings specially excepted to by Alexsis, Inc. and Steen. In response, Natividad filed her Fifth Amended Petition. Summary judgment is therefore proper if no fact issue exists as to whether the conduct of Alexsis, Inc. and Steen was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Twyman*, 855 S.W.2d at 621 (*quoting* RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1965)). "It is for the court to determine in the first instance whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery." *Wornick Co v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993) (*quoting* RESTATEMENT (SECOND) OF TORTS § 46, cmt. h). In this case, Natividad has not pleaded sufficient facts concerning the conduct of Alexsis, Inc. and Steen to proceed beyond the summary judgment stage.

Natividad relies on the following allegations to support her claim of outrageous conduct: her benefit checks were delayed and, when issued, were drawn on an out-of-state bank; defendants gave her the "runaround" when she and her lawyer attempted to inquire about the payments, putting her on "hold" and fabricating excuses of lost files and computer malfunctions; and she was treated rudely. These allegations, taken as true, may constitute bad faith, giving rise to a cause of action against the insurer. They cannot, however, reasonably be regarded as so extreme as to "go beyond all possible bounds of decency." *See* RESTATEMENT (SECOND) OF TORTS § 46, cmt. d. Rude behavior does not equate to outrageousness, and behavior is not outrageous simply because it may be tortious. *Id.* If the conduct involved here can be considered outrageous for the purposes of creating liability for the tort of intentional infliction of emotional distress, then it appears that any instance of insurance bad faith will also raise a fact issue on intentional infliction of emotional distress. Courts in other jurisdictions have properly rejected this approach. *See, e.g., Wooley v. Shewbart*, 569 So.2d 712, 717 (Ala. 1990) (allegation that compensation carrier denied benefits for no reason shortly before insured's surgery does not state a claim of outrageous conduct); *Farley v. CNA Ins. Co*., 576 So.2d 158, 160 (Ala. 1991) (evidence that compensation carrier gave claimant the "runaround" and did not timely pay her bills did not establish claim for outrageous conduct); *Davis v. Gulf Life Ins. Co*., 502 So.2d 1012 (Fla.Dist.Ct.App. 1987) (insurer's arbitrary refusal to pay a valid claim does not constitute outrageous conduct); *Roberts v. Auto-Owners Ins. Co*., 422 Mich. 594, 374 N.W.2d 905, 911 (1985) (insurer's failure to facilitate filing of claim and denial of valid benefits claim was not outrageous); *Hajciar v. Crawford & Co*., 142 Mich.App. 632, 369 N.W.2d 860, 864 (1985) (insurer's termination of benefits in order to coerce a lump sum settlement was not extreme and outrageous for purposes of the intentional infliction tort); *Reamsnyder v. Jaskolski*, 10 Ohio St.3d 150, 462 N.E.2d 392, 394 (1984) (insurer's pressuring of insured to accept settlement offer, along with threats of premature termination of benefits, was not outrageous).

It does not appear that any jurisdiction has recognized the element of outrageous conduct as satisfied on allegations as slender as those of Natividad. Accordingly, we reverse the judgment of the court of appeals and render judgment that Natividad take nothing on her claim for intentional infliction of emotional distress. Our disposition of this issue makes it unnecessary to reach the issue of whether Steen's affidavit supports summary judgment.

CONCLUSION

There is no need to extend the duty of good faith and fair dealing owed by insurance carriers to their insureds to include agents or contractors of the insurance carrier. Insurance carriers are liable for actions of their agents or contractors that breach the duty of good faith and fair dealing. We reverse the judgment of the court of appeals and render judgment that Rosa Natividad take nothing in her suit against defendants Alexsis, Inc. and William Steen.

GAMMAGE, JUSTICE, joined by HIGHTOWER, DOGGETT and SPECTOR, JUSTICES, concurring in part and dissenting in part from the opinion and concurring in part and dissenting in part from the judgment [opinion omitted].

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 evi-

dence 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*

CELOTEX CORPORATION
v.
CATRETT
477 U.S. 317, 106 S.Ct. 2548
(1986)

Leland S. Van Koten argued the cause for petitioner. With him on the briefs were H. Emslie Parks and Drake C. Zaharris.

Paul March Smith argued the cause for respondent. With him on the brief were Joseph N. Onek, Joel I. Klein, James F. Green, and Peter T. Enslein.

Stephen M. Shapiro, Robert L. Stern, William H. Crabtree, Edward P. Good, and Paul M. Bator filed a brief for the Motor Vehicle Manufacturers Association et al. as amici curiae urging reversal.

JUSTICE REHNQUIST delivered the opinion of the Court.

The United States District Court for the District of Columbia granted the motion of petitioner Celotex Corporation for summary judgment against respondent Catrett because the latter was unable to produce evidence in support of her allegation in her wrongful-death complaint that the decedent had been exposed to petitioner's asbestos products. A divided panel of the Court of Appeals for the District of Columbia Circuit reversed, how-

ever, holding that petitioner's failure to support its motion with evidence tending to negate such exposure precluded the entry of summary judgment in its favor. *Catrett v. Johns-Manville Sales Corp*., 244 U.S.App.D.C. 160, 756 F.2d 181 (1985). This view conflicted with that of the Third Circuit *in In re Japanese Electronic Products*, 723 F.2d 238 (1983), rev'd on other grounds sub nom. *Matsushita Electric Industrial Co. v. Zenith Radio Corp*., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). We granted certiorari to resolve the conflict, 474 U.S. 944, 106 S.Ct. 342, 88 L.Ed.2d 285 (1985), and now reverse the decision of the District of Columbia Circuit.

Respondent commenced this lawsuit in September 1980, alleging that the death in 1979 of her husband, Louis H. Catrett, resulted from his exposure to products containing asbestos manufactured or distributed by 15 named corporations. Respondent's complaint sounded in negligence, breach of warranty, and strict liability. Two of the defendants filed motions challenging the District Court's in personam jurisdiction, and the remaining 13, including petitioner, filed motions for summary judgment. Petitioner's motion, which was first filed in September 1981, argued that summary judgment was proper because respondent had "failed to produce evidence that any [Celotex] product . . . was the proximate cause of the injuries alleged within the jurisdictional limits of [the District] Court." In particular, petitioner noted that respondent had failed to identify, in answering interrogatories specifically requesting such information, any witnesses who could testify about the decedent's exposure to petitioner's asbestos products. In response to petitioner's summary judgment motion, respondent then produced three documents which she claimed "demonstrate that there is a genuine material factual dispute" as to whether the decedent had ever been exposed to petitioner's asbestos products. The three documents included a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company to respondent's attorney, all tending to establish that the decedent had been exposed to petitioner's asbestos products in Chicago during 1970-1971. Petitioner, in turn, argued that the three documents were inadmissible hearsay and thus could not be considered in opposition to the summary judgment motion.

In July 1982, almost two years after the commencement of the lawsuit, the District Court granted all of the motions filed by the various defendants. The court explained that it was granting petitioner's summary judgment motion because "there [was] no showing that the plaintiff was exposed to the defendant Celotex's product in the District of Columbia or elsewhere within the statutory period." App. 217. Respondent appealed only the grant of summary judgment in favor of petitioner, and a divided panel of the District of Columbia Circuit reversed. The majority of the Court of Appeals held that petitioner's summary judgment motion was rendered "fatally defective" by the fact that petitioner "made no effort to adduce any evidence, in the form of affidavits or otherwise, to support its motion." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original). According to the majority, Rule 56(e) of the Federal Rules of Civil Procedure,[3] and this Court's decision in *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970), establish that "the party opposing the motion for summary judgment bears the burden of responding only after the moving party has met its burden of coming forward with proof of the absence of any genuine issues of material fact." 244 U.S.App.D.C., at 163, 756 F.2d, at 184 (emphasis in original; footnote omitted). The majority therefore declined to consider petitioner's argument that none of the evidence produced by respondent in opposition to the motion for summary judgment would have been admissible at trial. *Ibid.* The dissenting judge argued that "[t]he majority errs in supposing that a party seeking summary judgment must always make an affirmative evidentiary showing, even in cases where there is not a triable, factual dispute." *Id*., at 167, 756 F.2d, at 188 (BORK, J., dissenting). Ac-

[3] Rule 56(e) provides:

> "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. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

cording to the dissenting judge, the majority's decision "undermines the traditional authority of trial judges to grant summary judgment in meritless cases." *Id*., at 166, 756 F.2d, at 187.

We think that the position taken by the majority of the Court of Appeals is inconsistent with the standard for summary judgment set forth in Rule 56(c) of the Federal Rules of Civil Procedure.[4] Under Rule 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, 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. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . ." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. But unlike the Court of Appeals, we find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the opponent's claim. On the contrary, Rule 56(c), which refers to "the affidavits, if any" (emphasis added), suggests the absence of such a requirement. And if there were any doubt about the meaning of Rule 56(c) in this regard, such doubt is clearly removed by Rules 56(a) and (b), which provide that claimants and defendants, respectively, may move for summary judgment "with or without supporting affidavits" (emphasis added). The import of these subsections is that, regardless of whether the moving party accompanies its summary judgment motion with affidavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied. One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose.

Respondent argues, however, that Rule 56(e), by its terms, places on the nonmoving party the burden of coming forward with rebuttal affidavits, or other specified kinds of materials, only in response to a motion for summary judgment "made and supported as provided in this rule." According to respondent's argument, since petitioner did not "support" its motion with affidavits, summary judgment was improper in this case. But as we have already explained, a motion for summary judgment may be made pursuant to Rule 56 "with or without supporting affidavits." In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her

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[4] Rule 56(c) provides:

> "The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. 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 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.

The Court of Appeals in this case felt itself constrained, however, by language in our decision in *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). There we held that summary judgment had been improperly entered in favor of the defendant restaurant in an action brought under 42 U.S.C. § 1983. In the course of its opinion, the *Adickes* Court said that "both the commentary on and the background of the 1963 amendment conclusively show that it was not intended to modify the burden of the moving party . . . to show initially the absence of a genuine issue concerning any material fact." *Id*., at 159, 90 S.Ct., at 1609. We think that this statement is accurate in a literal sense, since we fully agree with the *Adickes* Court that the 1963 amendment to Rule 56(e) was not designed to modify the burden of making the showing generally required by Rule 56(c). It also appears to us that, on the basis of the showing before the Court in *Adickes*, the motion for summary judgment in that case should have been denied. But we do not think the *Adickes* language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, as we have explained, the burden on the moving party may be discharged by "showing"—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case.

The last two sentences of Rule 56(e) were added, as this Court indicated in *Adickes*, to disapprove a line of cases allowing a party opposing summary judgment to resist a properly made motion by reference only to its pleadings. While the *Adickes* Court was undoubtedly correct in concluding that these two sentences were not intended to reduce the burden of the moving party, it is also obvious that they were not adopted to add to that burden. Yet that is exactly the result which the reasoning of the Court of Appeals would produce; in effect, an amendment to Rule 56(e) designed to facilitate the granting of motions for summary judgment would be interpreted to make it more difficult to grant such motions. Nothing in the two sentences themselves requires this result, for the reasons we have previously indicated, and we now put to rest any inference that they do so.

Our conclusion is bolstered by the fact that district courts are widely acknowledged to possess the power to enter summary judgments sua sponte, so long as the losing party was on notice that she had to come forward with all of her evidence. *See* 244 U.S.App.D.C., at 167-168, 756 F.2d, at 189 (BORK, J., dissenting); 10A C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 2720, pp. 28-29 (1983). It would surely defy common sense to hold that the District Court could have entered summary judgment sua sponte in favor of petitioner in the instant case, but that petitioner's filing of a motion requesting such a disposition precluded the District Court from ordering it.

Respondent commenced this action in September 1980, and petitioner's motion was filed in September 1981. The parties had conducted discovery, and no serious claim can be made that respondent was in any sense "railroaded" by a premature motion for summary judgment. Any potential problem with such premature motions can be adequately dealt with under Rule 56(f),[5] which allows a summary judgment motion to be denied, or the hearing on the motion to be continued, if the nonmoving party has not had an opportunity to make full discovery.

In this Court, respondent's brief and oral argument have been devoted as much to the proposition that an adequate showing of exposure to petitioner's asbestos products was made as to the proposition that no such showing should have been required. But the Court of Appeals declined to address either the adequacy of the showing made by respondent in opposition to petitioner's motion for summary judgment, or the question whether such a showing, if reduced to admissible evidence, would be sufficient to carry respondent's burden of proof at trial. We think the Court of Appeals with its superior knowledge of local law is better suited than we are to make these determinations in the first instance.

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[5] Rule 56(f) provides:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

The Federal Rules of Civil Procedure have for almost 50 years authorized motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact. Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." FED. RULE CIV. PROC. 1; *see* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 467 (1984). Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment. Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

The judgment of the Court of Appeals is accordingly reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring [opinion omitted].

JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and JUSTICE BLACKMUN join, dissenting [opinion omitted].

JUSTICE STEVENS, dissenting [opinion omitted].

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 reasonable 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 non-movant 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.

JOHNSON
v.
BREWER & PRITCHARD, P.C.
73 S.W.3d 193
(Tex. 2002)

JUSTICE OWEN delivered the opinion of the Court in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE ENOCH, JUSTICE BAKER, JUSTICE HANKINSON, JUSTICE JEFFERSON and JUSTICE RODRIGUEZ joined.

The primary issue in this case is when an associate of a law firm may refer a matter to another firm or lawyer without breaching a fiduciary duty to his or her employer. Brewer & Pritchard, P.C. sued its former associate and another lawyer with whom that associate formed a partnership, asserting causes of action for breach of fiduciary duty, actual and constructive fraud, conversion, and negligence.

The trial court granted summary judgment in favor of the former associate and his partner on all claims. The court of appeals reversed in part, remanding the breach of fiduciary duty and constructive fraud causes of action against both defendants.

We hold that an associate owes a fiduciary duty to his or her employer not to personally profit or realize any financial or other gain or advantage from referring a matter to another law firm or lawyer, absent the employer's agreement otherwise. Although our reasoning differs from the court of appeals', we affirm that court's judgment.

I

James Chang and Nick Johnson, the defendants in this case, filed a motion for summary judgment pursuant to Rule 166a(c) as to certain causes of action or elements thereof and pursuant to Rule 166a(i) as to others. Although some of the facts are disputed, we consider the record in a light most favorable to Brewer & Pritchard, who was the nonmovant. We accept the summary judgment evidence offered by Brewer & Pritchard, the nonmovant, as true in determining if there is a genuine issue of material fact.

Brewer & Pritchard employed James Chang as an associate. His practice was devoted to corporate securities and other corporate transactional matters. One of Chang's close personal friends was Henry King. They had been members of the same fraternal organization during their college years and had been friends for eleven years before the events that gave rise to this suit took place.

In April 1995, while Chang was employed by Brewer & Pritchard, he and Henry King were together on a ski vacation when King's father Herbert King and several members of a delegation from China were severely injured in a helicopter crash that occurred near Flower Mound, Texas. Chang returned home two days later and talked to two members of Brewer & Pritchard about the possibility that the firm might be retained to represent the crash victims. Chang asserted that because Henry King's father and Chang's mother were friends, and because of Chang's ties to the Chinese community, he could "control the case and could 'sign up' the crash victims." Chang said that he expected Brewer & Pritchard "would make a lot of money handling the case." One of the Brewer & Pritchard partners, Patrick Gaas, discussed with Chang how to structure a contingent fee agreement and issues that could arise. Gaas explained to Chang the possibility of referring the case to another firm and how to structure a referral fee agreement. Gaas mentioned the names of several prominent personal injuries lawyers to whom the case might be referred. Chang asserted that he was in the best position to consummate an agreement with the crash victims. Chang likewise told the other partner with whom he discussed this matter, Thomas Pritchard, that the case was "a significant business opportunity for our firm." Chang asked Pritchard if he would be available to travel to Denton, Texas, if needed, to which Pritchard responded that he would assist in any way that he could. Chang did not tell either Gaas or Pritchard that Henry King was a personal friend, that Chang considered Herbert King to be his "surrogate father," or that Chang intended to assist King as a family friend without payment.

Chang scheduled meetings for Henry King with several personal injury lawyers and firms. Chang accompanied King at all of those meetings. One of the attorneys they consulted was Nick Johnson, a close friend of Chang's since they had been in law school together. Henry King and Johnson were also friends. They had become acquainted six or seven years earlier through Chang.

Chang billed to Brewer & Pritchard's business development file faxes to and from Henry King, Nick Johnson, and another personal injury lawyer in Houston. Chang also billed to the same file long distance telephone calls to the hospital where Henry King's father was being treated and to the hotel where the King family was staying, and Chang billed shipping charges on a package from Henry King to the same file.

Five days after the crash, Henry King signed a contingent fee agreement with Nick Johnson during or shortly after a meeting at which Chang was present. Johnson told King at that meeting that he would "flip" the case to the firm of Jamail & Kolius. The next day, Johnson consummated an agreement with Jamail & Kolius, referring the matter for fifty-percent of the net fee. Jamail & Kolius had been among the several firms and lawyers with whom Chang and King had previously met. Joe Jamail and Johnson subsequently met with other victims of the crash who were hospitalized in Fort Worth, and Jamail and Johnson were retained to represent them as well as the survivors of a victim who was killed in the crash. All the claimants other than the King family were citizens of China, and suit was filed in federal court. There is evidence that Johnson actively participated as co-counsel with the Jamail & Kolius firm in representing the Kings and the other crash victims in that suit.

When Chang was asked by Brewer & Pritchard how he was progressing in reaching an agreement with the crash victims, he said that the firm "had lost out" and that the Jamail firm had been retained. He disclaimed any knowledge of how that firm had procured the representation.

Chang left Brewer & Pritchard about two months after the crash occurred to work for another firm that had a corporate securities practice. The King family's personal injury suit was settled a little more than a year after that, in October 1996, and Nick Johnson received a $3,000,000 fee. It is unclear from the record whether that fee was solely referable to the Kings' claims or whether it also included a fee from the other crash victims who were citizens of China. About a year later, at the end of 1997, Chang left the firm with which he had been working and formed a partnership with Nick Johnson.

Brewer & Pritchard first sued Johnson and Chang in October 1996, when the helicopter crash suit was settled, which, as noted above, was about a year before Johnson and Chang became law partners. Brewer & Pritchard contended Chang had breached a fiduciary duty that he owed to Brewer & Pritchard and that Johnson had knowingly assisted Chang in committing that breach. Specifically, Brewer & Pritchard alleged that Chang directly or indirectly profited by receiving or arranging to receive all or part of Johnson's referral fee. Brewer & Pritchard sought actual and exemplary damages. When Brewer & Pritchard's case was set for trial and after Johnson and Chang had filed a motion for summary judgment addressing all claims, Brewer & Pritchard filed a notice of non-suit. On the same day that the notice of non-suit was filed, Brewer & Pritchard filed a second, identical suit. Johnson and Chang filed a motion for summary judgment in that case, which the trial court granted.

Brewer & Pritchard appealed. The court of appeals held that fact questions remained as to whether Chang had breached a fiduciary duty and whether Johnson had knowingly assisted Chang. It accordingly reversed the trial court's judgment in part, and remanded the breach of fiduciary duty and constructive trust claims. The court of appeals otherwise affirmed the trial court's judgment.

We granted Johnson's and Chang's petition for review and Brewer & Pritchard's conditional petition for review. For the reasons discussed below, we affirm the court of appeals' judgment, although the basis for our judgment differs from the court of appeals'. We turn first to Johnson's and Chang's petition for review and the breach of fiduciary duty cause of action.

* * *

. . . We hold only that an associate may participate in referring a client or potential client to a lawyer or firm other than his or her employer without violating a fiduciary duty to that employer as long as the associate receives no benefit, compensation, or other gain as a result of the referral. However, an associate owes a fiduciary duty not to accept or agree to accept profit, gain, or any benefit from referring or participating in the referral of a client or potential client to a lawyer or firm other than the associate's employer. With these premises in mind, we turn to the summary judgment record.

III

Johnson and Chang moved for summary judgment on only one ground with respect to the claim that Chang owed and breached a fiduciary duty. That ground was that Chang was an at-will employee of Brewer &

Pritchard and "did not owe the law firm or any of its principals any fiduciary obligation" (emphasis added). As we have just said, Chang did owe a fiduciary duty not to profit or gain from assisting Henry King in retaining counsel other than Brewer & Pritchard. Johnson and Chang were not entitled to summary judgment on the basis that they urged.

The court of appeals correctly observed that Johnson and Chang did not move for summary judgment on the basis that the evidence conclusively established no breach of fiduciary duty. Nor did Johnson and Chang move for summary judgment under Rule 166a(i) on the basis of no evidence of breach.

As we discuss in detail in sections VI(B) and VII below, Johnson and Chang asserted in their summary judgment motion that the conspiracy and conversion claims failed because there is no evidence in the summary judgment record that Chang accepted or has agreed to accept any compensation for his role in referring the King family to Nick Johnson or his role in the subsequent referral to the Jamail & Kolius firm. But Johnson and Chang did not make these same arguments in connection with the breach of fiduciary duty claim. Thus, Johnson and Chang were not entitled to summary judgment on the basis of no breach of fiduciary duty because they did not include that ground in their motion. A court cannot grant summary judgment on grounds that were not presented. Accordingly, the trial court erred in granting summary judgment on the breach of fiduciary claim, and the court of appeals properly remanded that claim.

IV

Brewer & Pritchard alleged that Johnson and Chang were "liable to Brewer & Pritchard for their acts, omissions and concealment which involved a breach of the legal duties owing to Brewer & Pritchard, as well as a breach of trust and confidence," and that "such conduct" constituted "constructive fraud." This claim is derivative, at least in part, of the breach of fiduciary claim. Johnson and Chang moved for summary judgment on the "constructive fraud" claim solely on the basis that neither Chang nor Johnson owed Brewer & Pritchard a fiduciary duty.

For the same reasons that the trial court erred in granting summary judgment on the breach of fiduciary duty claim, it should not have granted summary judgment on the constructive fraud claim.

* * *

VI

Brewer & Pritchard alleged that Nick Johnson conspired with Chang to accomplish an unlawful purpose. The Brewer & Pritchard firm asserted that Johnson was a conduit through which Chang shared in a referral fee from Jamail & Kolius. Johnson and Chang moved for summary judgment on this claim on the basis, among others, that there was no evidence that any unlawful purpose had been accomplished and that they were therefore entitled to summary judgment under Rule 166a(i).

The trial court granted the motion for summary judgment. The court of appeals affirmed without reaching the merits of the conspiracy claim. The court of appeals reasoned that Brewer & Pritchard's response to the no evidence motion for summary judgment did not tie facts in the record to the specific elements of the conspiracy claim. Brewer & Pritchard challenges the disposition of the conspiracy claim in its petition for review. We first consider whether Brewer & Pritchard's response to the no evidence motion for summary judgment met the requirement of Rule 166a(i) that evidence must be produced "raising a genuine issue of material fact."

The court of appeals held that Brewer & Pritchard's response to the motion for summary judgment failed to point out evidence "as it related to the challenged elements of the causes of action," including the conspiracy claim. The court observed that the response "globally stated facts to support its conclusions as it sees them and cited to the record in support of those facts, [but] made no effort to connect any of the facts to the challenged elements of the causes of action." The court concluded that it was "not required to search the record without guidance from [Brewer & Pritchard] to determine whether it has produced evidence raising a genuine issue of material fact on the elements challenged by [Johnson and Chang]."

While Brewer & Pritchard's response might have been more specific in addressing the elements of its conspiracy claim, the response was not wholly inadequate under Rule 166a(i). That rule provides:

> (i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or

> more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

This Court's comment to Rule 166a explains that a respondent to a motion under paragraph (i) need not marshal evidence, but may point out evidence that raises a fact issue on the challenged elements:

> This comment is intended to inform the construction and application of the rule . . . . To defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice. A motion under paragraph (i) is subject to sanctions provided by existing law (TEX. CIV. PRAC. & REM. CODE §§ 9.001-10.006) and rules (TEX. R. CIV. P. 13).

Brewer & Pritchard's response to the motion for summary judgment was divided into several sections by a number of headings and sub-headings. None of these headings identified the conspiracy claim by a specific reference to that claim. A large part of the response was devoted to a recitation of facts in the record, and one of the sub-headings in the "Facts" section is "Settlement and Referral Fee—Immediate 'Loss of the Money.' " Within this subsection, Brewer & Pritchard detailed evidence that it says indicates that Chang benefited from Johnson's fee agreement with Henry King. After identifying this evidence, Brewer & Pritchard asserted in a single sentence, "[t]hese facts clearly evidence a sloppy but, thus far effective scheme to funnel half of the referral funds through Johnson and Lasco and then, back to Chang."

Another section of the response is entitled "There are Genuine Issues of Material Fact that Preclude the Granting of Summary Judgment." Within a subsection of this part of the response, Brewer & Pritchard states that "B & P's claims of conspiracy, conversion, actual and constructive fraud, and negligence, are all based on Chang's breach of his fiduciary duty to B & P." Brewer & Pritchard then sets forth argument and authorities in support of its position that Chang owed a fiduciary duty. Within that discussion is Brewer & Pritchard's contention that third parties are also liable if they "knowingly aided and assisted in the breach of the fiduciary duty." In succeeding paragraphs, Brewer & Pritchard points to facts that it contends establish a fiduciary duty and breach of that duty.

Whether Brewer & Pritchard adequately pointed out evidence relating to challenged elements of the conspiracy cause of action is a close question. But we conclude that the summary judgment response met the minimum requirements of Rule 166a(i). Accordingly, the court of appeals could not affirm the trial court's judgment on the conspiracy claim because of a lack of specificity of the summary judgment response.

The court of appeals erred in failing to consider the merits of Brewer & Pritchard's contention that it raised fact issues on the conspiracy claim. Rendition of judgment for Johnson and Chang on the conspiracy claim was nevertheless correct because, as we consider below, Brewer & Pritchard did not raise a material fact question on an essential element of that claim, which is that an unlawful purpose was accomplished.

The unlawful purpose that Brewer & Pritchard contend was accomplished by a conspiracy between Johnson and Chang was Chang's breach of a fiduciary duty. In determining if there was legally sufficient evidence to raise a fact question in response to Johnson and Chang's no evidence motion for summary judgment on this issue, we consider the evidence in the light most favorable to Brewer & Pritchard, the nonmovant. There is, however, no summary judgment evidence of breach. There is no evidence that Chang profited or gained an advantage in any way from assisting Henry King in retaining Nick Johnson or Jamail & Kolius.

The helicopter crash occurred on April 1, 1995. Henry King signed a contingent fee agreement with Nick Johnson on April 6. It was during this five- day period that Chang had discussions with Gaas and Pritchard, partners at Brewer & Pritchard, about reaching a fee agreement with the King family on behalf of that firm.

During this same time, Chang scheduled consultations for Henry King with Nick Johnson, Jamail & Kolius, and several other personal injury lawyers and firms who had been suggested by Gaas. Chang accompanied King to each of the meetings. The day after Henry King signed a fee agreement with Nick Johnson, Jamail & Kolius wrote a letter to Johnson agreeing to accept a referral of the case with one-half the net fee to be paid to Johnson. Johnson and Chang had been friends since law school, and phone records confirm that Johnson called Chang at Brewer & Pritchard several times during the week that these agreements were reached. Nevertheless, Johnson denied knowing that Chang worked for Brewer & Pritchard when the discussions with Henry King and Jamail &

Kolius were underway. Although a jury would be free to disbelieve Johnson, this evidence does not establish that Chang personally profited from his role in finding counsel for Henry King.

Within roughly the same time frame, Johnson was also retained to represent individuals unrelated to the Kings who were injured or had family members injured in the helicopter crash. Johnson consummated a referral agreement with Jamail & Kolius regarding those claims on April 19. Brewer & Pritchard do not assert and there is no evidence that Chang played any part in bringing about Johnson's agreement with these individuals or the referral agreement with the Jamail firm.

Chang left the Brewer & Pritchard firm about two months later, on June 15. He went to the firm of Adams & Reese along with and at the request of a partner at Brewer & Pritchard with whom Chang had also worked when they had both previously been at Winstead, Sechrest & Minick. While Chang was at Adams & Reese, during the fall of 1996, the Kings' personal injury claims in the suit over the crash were settled, along with the claims of Chinese nationals that Johnson and the Jamail firm also represented in connection with the crash. Chang was present at a hearing regarding the settlements. Brewer & Pritchard point to this as some evidence that Chang had a financial interest in the King case. However, the uncontradicted testimony in the record before us is that at the trial court's request and with the approval of his then-employer Adams & Reese, Chang accompanied Johnson to the People's Republic of China as an interpreter to translate into Chinese the terms of the settlement agreement and read it to several claimants. The trial court directed Chang to file an affidavit to confirm that he had personally met with the claimants and had explained the settlement in their language. Chang did not appear as counsel, and Johnson paid the expenses Chang incurred in making the trip to China. Chang and Johnson both testified that Chang received no other compensation.

Johnson was paid a referral fee of approximately $3,000,000 in October 1996. Chang left Adams & Reese a little more than a year later, at the end of 1997. He and Johnson then formed a partnership. There is testimony in the record from Johnson, Chang, and Henry King that Chang has never received any fee or compensation in connection with the helicopter crash, other than payment of expenses for the trip to China. Henry King and Johnson both testified that they have never agreed to or promised to pay Chang any type of fee or other compensation in connection with the crash and do not intend to do so. Chang has testified that he has no expectation of ever receiving any fee or payment in connection with the crash. Brewer & Pritchard does not contend and indeed concedes that Jamail & Kolius had no agreement with Chang, directly or otherwise, to share any fee with him or to pay him any other compensation.

Brewer & Pritchard have not adduced any direct evidence that Chang has profited from the Kings' suit. The firm contends, however, that a jury could infer from evidence of payments that Johnson made to a company called Lasco Oil & Gas that Chang received remuneration. We disagree. Brewer & Pritchard rely on the fact that Johnson wrote two checks to Lasco totaling $1,490,000 in early December 1996, and that about two weeks later, Johnson wrote another check to Lasco in the amount of $650,000. Brewer & Pritchard says that these transactions are highly suspicious, particularly since Johnson's 1996 tax return reflects a $1,651,115 loss for an investment in oil and gas exploration and production. Brewer & Pritchard also contends, without explaining why it is "suspicious," that there is evidence that Nick Johnson's brother is connected to Lasco.

Brewer & Pritchard further points out that Lasco is a client of Johnson and Chang's law firm. But Brewer & Pritchard fail to demonstrate how any of this is evidence that Chang received part of Johnson's referral fee in the King suit. There is no evidence of the amount of fees that Lasco has paid to Johnson and Chang, much less evidence that those fees were excessive or part of a sham transaction.

Brewer & Pritchard note that Chang asserted the attorney-client privilege when questioned about Lasco in his deposition. But the firm did not move to compel or seek any other relief in the trial court on this score. The firm does not and cannot now complain on appeal that it was entitled to further discovery about Lasco's dealings with Johnson or Chang.

Finally, Brewer & Pritchard rely on the affidavit of a woman who met Chang when she worked as a summer associate at the Brewer & Pritchard firm in 1995, which was a few months after the helicopter crash. The affidavit recites that the summer associate had a personal friendship with Chang before he left the employment of Brewer & Pritchard, and that she had "a couple of dinner dates" with him after he left that firm to join Adams & Reese. The affidavit says that, "[d]uring personal conversations with Chang, he bragged to me that he had something working outside of his employment which was going to make him so rich that he would probably be

able to retire within a year." This does not constitute evidence that Chang received remuneration in connection with the Kings' claims. A jury could only speculate that the "something working outside [Chang's] employment" was related to the Kings' personal injury claims. As we have said on more than one occasion, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." Similarly, the affidavit does not indicate when the statement attributed to Chang was made and thus whose employment Chang was "outside of," Brewer & Pritchard's or Adams & Reese's.

Discovery had been conducted when the trial court heard the motion for summary judgment. Brewer & Pritchard had asked for and received Johnson's bank records and tax returns, some of which are part of the summary judgment evidence. Brewer & Pritchard has failed to come forward with evidence that Chang has received or that there is an agreement that he will receive a fee or other compensation directly or indirectly from the Kings' suit or the claims of the Chinese citizens. Nor is there any evidence that fees from Johnson and Chang's partnership have been disproportionately distributed to Chang or that the partnership was otherwise used to funnel funds to Chang. Brewer & Pritchard does not contend in this Court that it needed additional time for discovery, nor does it contend in this Court that Johnson or Chang failed to comply with any discovery request. While the circumstances of this case certainly give rise to suspicions regarding Chang's conduct, suspicion does not raise a question of fact. Brewer & Pritchard failed to meet its burden of proof. Accordingly, the trial court did not err in granting summary judgment for Johnson and King on the conspiracy claim.

Johnson and Chang moved for summary judgment on Brewer & Pritchard's remaining claims, which were conversion, actual fraud, and negligence. With regard to the conversion claim, Johnson and Chang asserted that the summary judgment proof established that Chang did not receive any portion of the referral fee. Alternatively, they asserted that there was no evidence that Chang received any part of the fee in the helicopter crash case. As discussed above, Brewer & Pritchard failed to raise a fact question on this issue. The trial court did not err in granting summary judgment for Johnson and Chang on the conversion claim.

With regard to the fraud claim, Johnson and Chang asserted that there was no evidence of any of the elements of that cause of action, including reliance on a misrepresentation by Chang. Although Brewer & Pritchard responded that Chang "lied to B & P when he said that he had no idea how Mr. Jamail got the case," and pointed to other alleged misrepresentations, the summary judgment response was silent as to how Brewer & Pritchard relied to its detriment on these misrepresentations. Summary judgment on the fraud claim was appropriate.

Johnson and Chang moved for summary judgment on the negligence claim on the ground, among others, that there was no evidence of damages proximately caused by any negligence. Brewer & Pritchard's response failed to show how the firm was damaged, even assuming that Chang's actions amounted to negligence. The firm did not point to any summary judgment evidence that but for Chang's negligence, Henry King or the Chinese citizens would have retained Chang or Brewer & Pritchard in connection with the helicopter crash. We accordingly affirm the judgment of the court of appeals on the negligence claim.

* * *

Although our reasoning differs from that of the court of appeals, we affirm the court of appeals' judgment reversing and remanding the breach of fiduciary duty and constructive fraud claims to the trial court and affirming the trial court's judgment in favor of Johnson and Chang on all of Brewer & Pritchard's remaining claims. Further proceedings in the trial court shall be consistent with this opinion.

JUSTICE O'NEILL did not participate in the decision.

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 pur-

sued 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 motions or general no-evidence challenges to an opponent's case. Paragraph (i) does not apply to ordinary motions for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law. To defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice. A motion under paragraph (i) is subject to sanctions provided by existing law (TEX. CIV. PRAC. & REM. CODE 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)

James E. Simmons, Simmons & Lawrence, John H. Thomisee, Jr., Henry S. Platts, Chalker Bair, Houston, for Respondent in No. 99-0406.

James F. Tyson, Houston, Jerry D. Conner, Conner & Dreyer, Houston, for Petitioner in No. 99-0461.

Ben A. Baring, Paul J. McConnell, III, DeLange Hudspeth McConnell & Tibbetts, Houston for Respondent in No, 99-0461.

JUSTICE HECHT delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE OWEN, JUSTICE ABBOTT, and JUSTICE O'NEILL joined.

In these two consolidated cases we revisit the persistent problem of determining when a judgment rendered without a conventional trial on the merits is final for purposes of appeal. We consider only cases in which one final and appealable judgment can be rendered and not cases, like some probate and receivership proceedings, in which multiple judgments final for purposes of appeal can be rendered on certain discrete issues. And we consider a judgment's finality only for purposes of appeal and not for other purposes, such as issue and claim preclusion. In *Mafrige v. Ross*, we held that a summary judgment is final if it contains language purporting to dispose of all claims and parties. We gave as one example of such language what we have called a "Mother Hubbard" clause—a recitation that all relief not expressly granted is denied. Since then, the routine inclusion of this general statement in otherwise plainly interlocutory orders and its ambiguity in many contexts have rendered it inapt for determining finality when there has not been a conventional trial. We no longer believe that a Mother Hubbard clause in an order or in a judgment issued without a full trial can be taken to indicate finality. We therefore hold that 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 the two cases before us, the court of appeals concluded that judgments that do not meet this test were final and dismissed the appeals as having been untimely perfected. We reverse and remand for consideration of the merits of the appeals.

I

Lehmann v. Har-Con Corp.

Douglas and Virginia Lehmann sued the University of St. Thomas and Har-Con Corp. in the district court in Harris County to recover damages for injuries Douglas suffered in a construction accident. The University cross-claimed against Har-Con for indemnity. The Lehmanns settled with Har-Con and executed a release, agreeing in part to indemnify Har-Con against certain claims which had been or could be asserted by or through them. Virginia then filed an amended petition on behalf of her minor son against both defendants, claiming damages for loss of parental consortium because of his father's injuries. In response, Har-Con filed a counterclaim against Virginia and a third-party petition against Douglas, seeking indemnity from them under the terms of their prior release.

The Lehmanns and Har-Con all moved for summary judgment on Har-Con's indemnity claims. The district court denied the Lehmanns' motion and granted Har-Con's motion. The court's order granting Har Con's motion stated in full:

[caption]

ORDER

On this 12 day of March, 1998 came on to be considered the Motion for Summary Judgment of HAR-CON CORPORATION. After considering the motion, the response, the summary judgment evidence and the argument of counsel, the Court is of the opinion that the motion should be in all things granted. It is therefore,

ORDERED, ADJUDGED AND DECREED that the Motion for Summary Judgment by HAR-CON CORPORATION be and it is hereby GRANTED.

All relief not expressly granted herein is denied.

Signed this the 12 day of March, 1998
s/_____
JUDGE PRESIDING
[s/ Attorneys for Har-Con Corporation]

The order did not reference Virginia's claims on behalf of her son against Har-Con, although it would appear that Har Con's summary judgment on its indemnity claim would effectively bar recovery for Virginia's son. The order also did not reference Virginia's son's claims against the University, which would not appear to be affected by Har-Con's summary judgment. The order contained a "Mother Hubbard" clause stating that "[a]ll relief not expressly granted herein is denied."

The district clerk advised the Lehmanns by postcard that an interlocutory summary judgment order had issued. The record does not reflect whether the parties received a copy of the actual order after it was signed. The Lehmanns tell us that the practice of the district clerk in Harris County is not to send copies of orders to the parties but to give parties notice by postcard when orders are signed. The notice does not completely describe the content of the order.

The Lehmanns appear to have believed that the summary judgment order was interlocutory because they moved to sever it and Har-Con's claims into a separate action, ostensibly to make the summary judgment final. The court granted the motion to sever on the twenty-fifth day after the summary judgment order was signed. Twenty-eight days after the severance order was signed, the Lehmanns noticed their appeal from the summary judgment order.

If the summary judgment was not final until the severance order was signed, then the Lehmanns' appeal was timely. But the court of appeals held that the summary judgment order was final when it issued because of the Mother Hubbard clause and that the order was not modified by the severance so as to restart the time for perfecting appeal. Because the Lehmanns did not perfect appeal within thirty days of the signing of the order as prescribed by the rules of appellate procedure, the court dismissed the appeal for want of jurisdiction. In holding that the summary judgment order was final, the court followed our decision in Mafrige, although the court expressed concerns that the inclusion of a Mother Hubbard clause in an otherwise plainly interlocutory order should not make the order final.

We granted the Lehmanns' petition for review and consolidated it for argument and decision with *Harris v. Harbour Title Co*.

Harris v. Harbour Title Co.

Melvin and Helena Harris sued five defendants—Greenfield Financial Corp. and Larry J. Greenfield ("the Greenfield defendants"), Tim Rice and Rice Development, Inc. ("the Rice defendants"), and Harbour Title Co.—in the district court in Harris County on breach-of-contract and tort claims arising from a conveyance of real property. The court granted an interlocutory default judgment against Tim Rice on liability only, leaving for later a determination of the damages to be assessed against him. The Harrises nonsuited their claims against the Greenfield defendants. The fifth defendant, Harbour Title Co., moved for summary judgment, which the court granted with the following order:

[caption]
Order Granting Harbour Title Company's
Motion for Summary Judgment

On August 28, 1998, came on to be heard the Motion for Summary Judgment of one of the defendants, Harbour Title Company, and the Court having considered the Motion, together with any response, and the supplemental briefing filed by the parties to date is of the opinion that said Motion is with merit and should be granted. It is therefore

ORDERED that defendant Harbour Title Company's Motion for Summary Judgment is in all things granted; it is further

ORDERED that the Plaintiffs, Melvin G. Harris and Helena M. Harris take nothing as to any of their claims against Harbour Title Company.

All relief requested and not herein granted is denied.

SIGNED this 15 day of October 1998.
s/_____
JUDGE PRESIDING
APPROVED AND ENTRY REQUESTED:
[s/ Attorneys for Harbour Title Company]

Although the order did not reference the Harrises' pending claims against the Rice defendants, it nevertheless contained a Mother Hubbard clause stating that "[a]ll relief requested and not herein granted is denied."

The Harrises assert that they received notice of the order by a postcard that described the order as an interlocutory summary judgment, but the postcard is not in our record. The record does not reflect whether the parties obtained a copy of the order after it was signed. It appears that the district clerk followed her usual procedure of notifying the parties by postcard in lieu of providing copies of the order.

The district court apparently did not consider the summary judgment order to be final; forty-six days after it was signed, the court generated a form order setting the case for trial the next year. The Harrises, too, appear to have believed the summary judgment to be interlocutory; two weeks after the order issued setting the case for trial, the Harrises obtained what was captioned a "Final Default Judgment" against the Rice defendants. Twenty-five days later the Harrises noticed their appeal from Harbour Title's summary judgment.

If Harbour Title's summary judgment did not dispose of the Harrises' claims against the Rice defendants, and the default judgment against those defendants was the final order in the case, then the Harrises' appeal was timely. But following *Mafrige*, as it had done in Lehmann, the court of appeals concluded that the summary judgment order was final and therefore dismissed the appeal as not having been timely perfected. We granted the Harrises' petition for review and consolidated it with Lehmann for argument and decision.

II

A

Though its origins are obscure and its rationale has varied over time, the general rule, with a few mostly statutory exceptions, is that an appeal may be taken only from a final judgment. A judgment is final for purposes of appeal if it disposes of all pending parties and claims in the record, except as necessary to carry out the decree. (An order that does not dispose of all pending parties and claims may also be final for purposes of appeal in some instances, such as orders that resolve certain discrete issues in some probate and receiverships cases, but we exclude those cases from consideration here. Nor do we consider when a judgment may be final for purposes other than appeal, such as claim and issue preclusion.) Because the law does not require that a final judgment be in any particular form, whether a judicial decree is a final judgment must be determined from its language and the record in the case. Since timely perfecting appeal (as well as filing certain post-judgment motions and requests) hangs on a party's making this determination correctly, certainty is crucial.

From the beginning, however, certainty in determining whether a judgment is final has proved elusive. What has vexed courts in this State and elsewhere is this: must a final judgment dispose of all parties and claims specifically, or may it do so by general language or even by inference? If a specific disposition of each party and claim is strictly required, a judgment apparently intended by the parties and the trial court to be final and appealable may not be. An appeal from such a judgment must be dismissed or at least abated, resulting in delay and a waste of the courts' and the parties' resources. More importantly, if a judgment intended to be final did not meet the strict requirements, then the case would remain open, allowing the possibility of further proceed-

ings and appeal years later. On the other hand, if a judgment may dispose of all parties and claims by general language or inference, a party or trial court may think that a judgment is interlocutory, only to be told later by the appellate court after the time for appeal has passed that the judgment was final. A party who is uncertain whether a judgment is final must err on the side of appealing or risk losing the right to appeal.

* * *

In 1966, we reaffirmed [our previous decisions] in *North East Independent School District v. Aldridge*. The school district sued Aldridge for breach of contract, and he asserted in his defense that he had contracted only as an agent for his principal. He also brought a third-party action against his principal, alleging that the principal was responsible for any damages to which the school district might be entitled. The trial court granted a partial summary judgment holding Aldridge personally liable to the district and directed that the case proceed to trial to determine the amount of damages to be awarded. The parties then stipulated to the amount of damages, and the trial court rendered judgment for the district against Aldridge based on the stipulation. The judgment did not mention Aldridge's third-party action against his principal. The court of civil appeals dismissed Aldridge's appeal, holding that the trial court's judgment was not final. We held that the judgment against Aldridge disposed of the third-party action and was final for purposes of appeal. After reviewing the courts' historical difficulties in making finality determinations, we stated the following rule for determining, in most instances, whether judgments in which parties and issues made by the pleadings are not disposed of in express language are, nevertheless, final for appeal purposes. When a judgment, not intrinsically interlocutory in character, is rendered and entered in a case regularly set for conventional trial on the merits, no order for a separate trial of issues having been entered . . . , 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.

We added: "Of course, the problem [of determining whether judgments are final] 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." Inclusion of a catch-all statement—which we later denominated a "Mother Hubbard" clause—would make clear that a post-trial judgment on the merits, presumed to have disposed of all claims, did indeed do so.

B

The presumption that a judgment rendered after a conventional trial on the merits is final and appealable has proved fairly workable for nearly a century, but we have never thought that it could be applied in other circumstances, as we first explained nearly sixty years ago. In *Davis v. McCray Refrigerator Sales Corp*., the plaintiff sued for the unpaid balance of the purchase price of a refrigerator, and the defendant counterclaimed for cancellation of the debt and for damages for payments already made and lost merchandise due to improper refrigeration. The defendant also filed a plea in abatement on the grounds that the plaintiff was a foreign corporation not licensed to do business in Texas and therefore not entitled to sue in state court. The trial court deferred ruling on the defendant's plea until after the case was tried on the merits. After the jury returned a verdict, the trial court rendered judgment both that the plaintiff's claim be dismissed and that the plaintiff take nothing. The only basis the trial court had for dismissal was the defendant's plea in abatement, while the only basis for rendering a take-nothing judgment was plaintiff's failure of proof at trial. The judgment did not mention the defendant's counterclaim. The court of civil appeals rejected the defendant's argument that the judgment was interlocutory and reversed and rendered judgment for the plaintiff. This Court reversed and dismissed the appeal. Citing *Trammell*, the Court acknowledged that while a final judgment need not expressly dispose of each issue so long as other provisions of the judgment necessarily imply that the unmentioned issues have been disposed of, a dismissal of the plaintiff's suit did not necessarily imply a disposal of the defendant's cross-action. The Court explained:

> [I]f the court had intended to merely sustain the plea in abatement and dismiss plaintiff's suit, and had intended to retain the defendant's cross-action for further consideration, it would have entered the very judgment that was entered in this case. The mere failure of the judgment to refer to defendant's cross-action was not sufficient in itself to raise an inference that it was thereby intended to dispose of the cross-action.

Although the judgment did not "merely" sustain the plea in abatement but also decreed that the plaintiff take nothing, the inclusion of the dismissal in the judgment as the first basis for decision was enough to make *Trammell's* presumptive finality rule inapplicable.

Davis may have departed too far from *Trammell*. The trial court's decree following a jury trial on the merits that the plaintiff take nothing without mention of the defendant's counterclaim should perhaps have been presumed to deny all relief, despite the alternative ruling that the plaintiff's claim should be dismissed. But regardless of Davis 's unusual circumstances, the case makes the point, which we expressly acknowledged in *Aldridge*, that "[i]t will not be presumed that a judgment dismissing a plaintiff's suit on nonsuit, plea to the jurisdiction, plea in abatement, for want of prosecution, etc., also disposed of the issues in an independent cross-action."

We have since held that "etc." includes default judgments and summary judgments. The reason for not applying a presumption in any of these circumstances is that the ordinary expectation that supports the presumption that a judgment rendered after a conventional trial on the merits will comprehend all claims simply does not exist when some form of judgment is rendered without such a trial. On the contrary, it is quite possible, perhaps even probable these days in cases involving multiple parties and claims, that any judgment rendered prior to a full-blown trial is intended to dispose of only part of the case. Accordingly, 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. A judgment that actually disposes of every remaining issue in a case is not interlocutory merely because it recites that it is partial or refers to only some of the parties or claims. Thus, if a court has dismissed all of the claims in a case but one, an order determining the last claim is final. This is settled law in Texas, and while there have been proposals to change it by rule, proposals that are currently pending consideration by this Court's Advisory Committee, we are not inclined to depart from it here. 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. It is not enough, of course, that the order or judgment merely use the word "final". The intent to finally dispose of the case must be unequivocally expressed in the words of the order itself. But if that intent is clear from the order, then the order is final and appealable, even though the record does not provide an adequate basis for rendition of judgment. So, for example, if a defendant moves for summary judgment on only one of four 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. A judgment that grants more relief than a party is entitled to is subject to reversal, but it is not, for that reason alone, interlocutory.

* * *

We attempted to clarify matters in *Mafrige v. Ross*. [866 S.W.2d 590 (Tex. 1993)] There, two plaintiffs sued some twelve defendants for malicious prosecution, slander, libel, conspiracy, and negligence. No party other than the plaintiffs asserted any claims. The defendants, some individually and some in groups, filed a total of eight summary judgment motions, some directed against one of the plaintiffs and some against both. Only one motion addressed both of the plaintiffs and all of the claims asserted; even together, the other seven motions did not address both plaintiffs and all claims. The trial court granted all eight motions with eight separate orders, one for each motion. Each order stated that the plaintiff or plaintiffs, depending on whether the motion had been directed at one or both, were to take nothing against the movant or movants. Thus, taken together, the eight orders provided that both of the plaintiffs were to take nothing against all of the defendants. On the plaintiffs' appeal, however, the court of appeals held that there was not a final judgment because most of the defendants had not moved for summary judgment on all claims by both plaintiffs and thus were not entitled to a final judgment, and the "take nothing" language of the orders did not make them final. The court also held that if the orders had contained Mother Hubbard clauses they would have been final under this Court's precedents, although the court of appeals did not agree that that would have been the proper result.

We reversed, holding that the "take nothing" language in the eight summary judgment orders disposed of all claims asserted by both plaintiffs against each of the defendants and thus constituted a final judgment. We then explained:

> If a summary judgment order appears to be final, as evidenced by the inclusion of language purporting to dispose of all claims or parties, the judgment should be treated as final for purposes of appeal. If the judgment grants more relief than requested, it should be reversed and remanded, but not dismissed. We think this rule to be practical in application and effect; litigants should be able to recognize a judgment which on its face purports to be final, and courts should be able to treat such a judgment as final for purposes of appeal.

As examples of "language purporting to dispose of all claims or parties," we gave not only the "take nothing" language of the orders before us, and the statement that summary judgment is granted as to all claims asserted, but also the standard Mother Hubbard clause-that all relief not expressly granted is denied. . . .

The ambiguity has persisted in our decisions. In *Martinez v. Humble Sand & Gravel, Inc*., we held that the inclusion of a Mother Hubbard clause in an order did not necessarily make it final. There, some but not all of the defendants moved for summary judgment, and the trial court granted the motions, dismissing the plaintiff's cause of action against "those Defendants", but also ordering that summary judgment was proper "as to all remaining Defendants", thereby suggesting that the court intended to render a final summary judgment. However, the trial court subsequently severed the summary judgment by order inviting other defendants to move on the same grounds. Although this order contained a Mother Hubbard clause, we held that judgment had not been rendered for the non-moving defendants.

But in *Bandera Electric Cooperative, Inc. v. Gilchrist*, we held that a Mother Hubbard clause in a summary judgment made it final. There the plaintiff moved for summary judgment on its claims without mentioning the defendant's counterclaims. The defendant did not move for summary judgment. The trial court granted the plaintiff's motion by order that included a Mother Hubbard clause. We concluded that the order was final, albeit erroneous. We attempted to explain that our ruling was consistent with Martinez because the conflict in the orders involved in that case showed that they were not final even though "a Mother Hubbard clause . . . would have created a final and appealable judgment". Besides its obvious inadequacy in explaining the result in *Martinez*, this explanation suggested that a Mother Hubbard clause would by itself make any summary judgment final, contrary to our holding in *Teer*.

Determining the significance of omitting a Mother Hubbard clause in an order has been no easier. In *Park Place Hosp. v. Estate of Milo*, we suggested that the absence of a Mother Hubbard clause indicated that a summary judgment was intended to be interlocutory. . . .

Finality "must be resolved by a determination of the intention of the court as gathered from the language of the decree and the record as a whole, aided on occasion by the conduct of the parties." 5 RAY W. MCDONALD, TEXAS CIVIL PRACTICE § 27:4[a], at 7 (John S. Covell, ed., 1992 ed.); *see Ferguson v. Ferguson*, 161 Tex. 184, 338 S.W.2d 945, 947 (1960). In the circumstances described here, we think the district court intended to render a final, appealable judgment . . . . Neither the parties nor the court of appeals have suggested that the judgment was not final.

The judgment did not include a Mother Hubbard clause, but we did not find its omission significant. We reached a similar conclusion in *Inglish v. Union State Bank*.

In sum, our opinions have not been entirely consistent on whether the inclusion or omission of a Mother Hubbard clause does or does not indicate that a summary judgment is final for purposes of appeal. This ambivalence has resulted in considerable confusion in the courts of appeals.

III

A

Much confusion can be dispelled by holding, as we now do, that the inclusion of a Mother Hubbard clause—by which we mean the statement, "all relief not granted is denied", or essentially those words—does not indicate that a judgment rendered without a conventional trial is final for purposes of appeal. We overrule *Mafrige* to the extent it states otherwise. If there has been a full trial on the merits either to the bench or before a jury, the language indicates the court's intention to finally dispose of the entire matter, assuming that a separate or bifurcated trial is not ordered. But in an order on an interlocutory motion, such as a motion for partial summary judgment, the language is ambiguous. It may mean 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. The clause 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. For whatever reason, the standard Mother Hubbard clause is used in interlocutory orders so frequently that it cannot be taken as any indication of finality.

As we have already explained, an order can be a final judgment for appeal purposes even though it does not purport to be if it actually disposes of all claims still pending in the case. Thus, an order that grants a motion for partial summary judgment is final if in fact it disposes of the only remaining issue and party in the case, even if the order does not say that it is final, indeed, even if it says it is not final. (Again, we do not consider here the various kinds of cases in which there may be more than one final judgment for purposes of appeal.) Also, an order can be final and appealable when it should not be. For example, an order granting a motion for summary judgment that addressed all of the plaintiff's claims when it was filed but did not address claims timely added by amendment after the motion was filed may state unequivocally that final judgment is rendered that the plaintiff take nothing by his suit. Granting more relief than the movant is entitled to makes the order reversible, but not interlocutory.

While the present problems in determining whether an order is a final judgment should be lessened significantly by denying the standard Mother Hubbard clause of any indicia of finality in any order not issued after a conventional trial, the difficulty in determining what does make an order final and appealable remains. One solution would be stricter requirements for the form of a final judgment. . . .

In the past we have tried to ensure that the right to appeal is not lost by an overly technical application of the law. Fundamentally, this principle should guide in determining whether an order is final. Simplicity and certainty in appellate procedure are nowhere more important than in determining the time for perfecting appeal. From the cases we have reviewed here, we conclude that when there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties. An order that adjudicates only the plaintiff's claims against the defendant does not adjudicate a counterclaim, cross-claim, or third party claim, nor does an order adjudicating claims like the latter dispose of the plaintiff's claims. An order that disposes of claims by only one of multiple plaintiffs or against one of multiple defendants does not adjudicate claims by or against other parties. An order does not dispose of all claims and all parties merely because it is entitled "final", or because the word "final" appears elsewhere in the order, or even because it awards costs. Nor does an order completely dispose of a case merely because it states that it is appealable, since even interlocutory orders may sometimes be appealable. Rather, there must be some other clear indication that the trial court intended the order to completely dispose of the entire case. Language that the plaintiff take nothing by his claims in the case, or that the case is dismissed, shows finality if there are no other claims by other parties; but language that "plaintiff take nothing by his claims against X" when there is more than one defendant or other parties in the case does not indicate finality.

To determine whether an order disposes of all pending claims and parties, it may of course be necessary for the appellate court to look to the record in the case. Thus, in the example just given, if the record reveals that there is only one plaintiff and only one defendant, X, the order is final, but if the record reveals the existence of parties or claims not mentioned in the order, the order is not final. On the other hand, 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. The record may help illumine whether an order is made final by its own language, so that an order that all parties appear to have treated as final may be final despite some vagueness in the order itself, while an order that some party should not reasonably have regarded as final may not be final despite language that might indicate otherwise.

One may argue after *Aldridge* and *Mafrige* that it is perilous to suggest any particular language that will make a judgment final and appealable because that language can then be inserted in orders intended to be interlocutory. But to leave in doubt the degree of clarity required for finality creates its own problems. The Mother Hubbard clause proved to give no indication of finality not just because it found its way into every kind of order, but because it was inherently ambiguous, as we have explained. A statement like, "This judgment finally disposes of all parties and all claims and is appealable," would leave no doubt about the court's intention. An order must be read in light of the importance of preserving a party's right to appeal. If the appellate court is uncertain about the intent of the order, it can abate the appeal to permit clarification by the trial court. But if the language of the order is clear and unequivocal, it must be given effect despite any other indications that one or more par-

ties did not intend for the judgment to be final. An express adjudication of all parties and claims in a case is not interlocutory merely because the record does not afford a legal basis for the adjudication. In those circumstances, the order must be appealed and reversed.

B

Nothing in the order in Lehmann indicates that it is a final judgment, and it did not dispose of all pending claims and parties. The order in Harris states that plaintiffs take nothing as to "one of the defendants," but that language does not suggest that all of the plaintiffs' claims were denied. As the order recites and as the record demonstrates, the defendant named in the order was not the only defendant remaining in the case. Thus, we conclude that a final and appealable judgment was not rendered in either case.

We are concerned that in neither case were the non-movants provided a copy of the court's signed order but were merely sent notice by postcard that an order had been signed. The Rules of Civil Procedure do not require clerks to send all parties copies of all orders, only final orders. Nevertheless, the practice of courts in some counties is to require that a party seeking an order provide copies and addressed, postage-paid envelopes for all other parties. The Court's Advisory Committee should consider whether the rules should require that all parties be given copies of all orders signed in a case.

IV

We must respond briefly to the concurring opinion. It would hold that no "type of conclusory finality language can ever be read to grant more relief than requested by the parties." This goes too far. The legitimate problem with Mother Hubbard clauses, which we failed to appreciate in *Mafrige*, is that they are ambiguous: one cannot be sure whether the denial of all relief other than what has been expressly granted is limited to relief requested in a motion or extends to all relief requested in the litigation. But it is a long way from the now well-established fact that Mother Hubbard clauses can understandably be misread to the concurring opinion's conclusion that clear language should be given no meaning. We require certainty for finality, but we cannot say that certainty is impossible.

* * *

For the reasons we have explained, the judgments of the court of appeals in these cases are reversed, and the cases are remanded to that court for further proceedings.

JUSTICE BAKER filed a concurring opinion in which JUSTICE ENOCH joined, except for Part IV and the discussion of *Inglish* and *Bandera*, and in which JUSTICE HANKINSON joined, except Part IV.

* * *

V. CONCLUSION

In Texas, the test for determining summary judgment finality has always been whether the judgment disposes of all parties and all issues raised in the pleadings. In *Mafrige* we created a legal fiction to simplify the process of determining finality. But *Mafrige* created more problems than it solved. It is beyond me why the Court insists on struggling through pages and pages of history about presumptions, magic language, and Mother Hubbard clauses instead of squarely considering the problems *Mafrige* caused and providing a solution. Its willingness to cling to this legal fiction, while refusing to recognize that our rulemaking in *Mafrige* and its progeny was not the correct solution, will only create more problems.

I concur in the judgment in these cases. But, because the Court declines to overrule *Mafrige*, *Inglish*, and *Bandera*, and await our promulgation of a rule governing summary judgment finality, I do not concur in its reasoning.

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.

BANDERA ELECTRIC COOPERATIVE, INC.
v.
GILCHRIST
946 S.W.2d 336
(Tex. 1997)

James A. Rindfuss, San Antonio, for petitioner.
Earle Cobb, Jr., San Antonio, for respondent.

PER CURIAM.

This case concerns the proper appellate disposition of a summary judgment that purports to be final but grants more relief than the movant requested. The trial court's judgment contained a Mother Hubbard clause that professed to dispose of the plaintiff's claims and the defendant's counterclaims, even though the plaintiff's motion for summary judgment did not address the counterclaims. Concluding that the trial court erred by granting summary judgment on the unaddressed counterclaims, a divided court of appeals reversed and remanded the entire case to the trial court. 924 S.W.2d 388. We hold that the court of appeals should have considered the merits of the appeal. If the summary judgment in favor of the plaintiff on its claims was proper, the court of appeals should affirm the judgment of the trial court in part, reverse in part since only a partial summary judgment should have been rendered, and remand the case to the trial court for further proceedings.

Robert Gilchrist provided cable-television services to the citizens of Concan, Texas. On July 10, 1990, he entered into a contract with Bandera Electric Cooperative, Inc. that allowed him to string cable on Bandera's

poles. The contract was to remain "in effect until terminated by either party hereto at the end of one (1) year from the date hereof or thereafter upon the giving of written notice to the other party not less than six (6) months prior to the date of termination."

On June 11, 1992, Bandera notified Gilchrist that it was terminating the contract on December 11, 1992. In late 1993, after Gilchrist did not remove his cable from Bandera's poles, Bandera sued him for breach of contract, seeking unpaid rent, injunctive relief, and attorney's fees. Gilchrist asserted several affirmative defenses as well as counterclaims for breach of contract and DTPA and antitrust violations. Bandera moved for summary judgment on its claims against Gilchrist. However, Bandera's motion contained no mention of Gilchrist's counterclaims.

The trial court rendered summary judgment in Bandera's favor for the unpaid rent and attorney's fees. Because the order contained a Mother Hubbard clause denying all other relief, it also purported to dispose of Gilchrist's counterclaims.

Sitting en banc and relying on *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993), the court of appeals correctly determined that the trial court erroneously included Gilchrist's counterclaims in the summary judgment order. 924 S.W.2d at 390-91. The court then reversed and remanded the entire case to the trial court so that it could make the judgment "final and appealable by proper severance or the disposal of all remaining issues and parties." *Id.* at 394. In a concurring and dissenting opinion, three justices argued that the judgment should not have been reversed in its entirety, but only "insofar as it disposes of Gilchrist's counterclaims." *Id*. at 396 (DUNCAN, J., concurring & dissenting).

In its application for writ of error to this Court, Bandera concedes that because it failed to address Gilchrist's counterclaims in its motion for summary judgment, the trial court erred in disposing of them. Nevertheless, Bandera argues that the court of appeals erred in reversing the entire judgment. Bandera contends that the court of appeals should have affirmed in part and reversed in part, upholding the judgment as it applied to Bandera's claims, and reversing and remanding the judgment as it applied to Gilchrist's counterclaims.

Courts of appeals have reached differing results when a partial summary judgment should have been entered but the judgment purports to be final. *See City of Garland v. Booth*, 895 S.W.2d 766, 771 (Tex. App.—Dallas 1995, writ denied)(reversing and remanding only unaddressed claims); *Ross v. Arkwright Mut. Ins. Co*., 892 S.W.2d 119, 134 (Tex. App.—Houston [14th Dist.] 1994, no writ)(same); *Posey v. Southwestern Bell Yellow Pages, Inc*., 878 S.W.2d 275, 281 (Tex. App.—Corpus Christi 1994, no writ)(same); *Welch v. McDougal*, 876 S.W.2d 218, 226 (Tex. App.—Amarillo 1994, writ denied)(same). *But see Rose v. Kober Fin. Corp*., 874 S.W.2d 358, 362 (Tex. App.—Houston [14th Dist.] 1994, no writ)(reversing and remanding entire case).

In *Mafrige*, this Court concluded that 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. *Mafrige*, 866 S.W2d at 590. While we recognized that a summary judgement order that does not dispose of all issues and all parties is generally interlocutory and not appealable in the absence of a severance, we held that a summary judgment order with Mother Hubbard language should be treated as final for purposes of appeal. *Id.* at 591-92. Reversing and remanding the whole case when a summary judgment order grants more relief than requested would place the parties in the same position as dismissing the appeal, the very procedure rejected by *Mafrige*. Moreover, by not reversing the entire judgment, we avoid the needless relitigation of decided issues and thus promote judicial economy. The correct procedure is that followed by the court of appeals on remand in the *Mafrige* case. *See Ross v. Arkwright Mut. Ins. Co*., 892 S.W.2d 119, 134 (Tex. App.—Houston [14th Dist.] 1994, no writ).

Accordingly, pursuant to Rule 170 of the Texas Rules of Appellate Procedure, this Court, without hearing oral argument, reverses the judgment of the court of appeals and remands the case to the court of appeals for further proceedings consistent with this opinion.

Note

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.

Notes

1. Texas Property Code: Residential Construction Liability Act: Chapter 27.

§ 27.004. Notice and Offer of Settlement.

(a) In a claim not subject to Subtitle D, Title 16, before the 60th day preceding the date a claimant seeking from a contractor damages or other relief arising from a construction defect initiates an action, the claimant shall give written notice by certified mail, return receipt requested, to the contractor, at the contractor's last known address, specifying in reasonable detail the construction defects that are the subject of the complaint. On the request of the contractor, the claimant shall provide to the contractor any evidence that depicts the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect, including expert reports, photographs, and videotapes, if that evidence would be discoverable under Rule 192, Texas Rules of Civil Procedure. During the 35-day period after the date the contractor receives the notice, and on the contractor's written request, the contractor shall be given a reasonable opportunity to inspect and have inspected the property that is the subject of the complaint to determine the nature and cause of the defect and the nature and extent of repairs necessary to remedy the defect. The contractor may take reasonable steps to document the defect. In a claim subject to Subtitle D, Title 16, a contractor is entitled to make an offer of repair in accordance with Subsection (b). A claimant is not required to give written notice to a contractor under this subsection in a claim subject to Subtitle D, Title 16.

(b) Not later than the 15th day after the date of a final, unappealable determination of a dispute under Subtitle D, Title 16, if applicable, or not later than the 45th day after the date the contractor receives the notice under this section, if Subtitle D, Title 16, does not apply, the contractor may make a written offer of settlement to the claimant. The offer must be sent to the claimant at the claimant's last known address or to the claimant's attorney by certified mail, return receipt requested. The offer may include either an agreement by the contractor to repair or to have repaired by an independent contractor partially or totally at the contractor's expense or at a reduced rate to the claimant any construction defect described in the notice and shall describe in reasonable detail the kind of repairs which will be made. The repairs shall be made not later than the 45th day after the date the contractor receives written notice of acceptance of the settlement offer, unless completion is delayed by the claimant or by other events beyond the control of the contractor. If a contractor makes a written offer of settlement that the claimant considers to be unreasonable:

(1) on or before the 25th day after the date the claimant receives the offer, the claimant shall advise the contractor in writing and in reasonable detail of the reasons why the claimant considers the offer unreasonable; and

(2) not later than the 10th day after the date the contractor receives notice under Subdivision (1), the contractor may make a supplemental written offer of settlement to the claimant by sending the offer to the claimant or the claimant's attorney.

(c) If compliance with Subtitle D, Title 16, or the giving of the notice under Subsections (a) and (b) within the period prescribed by those subsections is impracticable because of the necessity of initiating an action at an earlier date to prevent expiration of the statute of limitations or if the complaint is asserted as a counterclaim, compliance with Subtitle D, Title 16, or the notice is not required. However, the action or counterclaim shall specify in reasonable detail each construction defect that is the subject of the complaint. If Subtitle D, Title 16, applies to the complaint, simultaneously with the filing of an action by a claimant, the claimant must submit a request under Section 428.001. If Subtitle D, Title 16, does not apply, the inspection provided for by Subsection (a) may be made not later than the 75th day after the date of service of the suit, request for arbitration, or counterclaim on the contractor, and the offer provided for by Subsection (b) may be made not later than the 15th day after the date the state-sponsored inspection and dispute resolution process is completed, if Subtitle D, Title 16, applies, or not later than the 60th day after the date of service, if Subtitle D, Title 16, does not apply. If, while an action subject to this chapter is pending, the statute of limitations for the cause of action would have expired and it is determined that the provisions of Subsection (a) were not properly followed, the action shall be abated to allow compliance with Subsections (a) and (b).

(d) The court or arbitration tribunal shall dismiss an action governed by this chapter if Subsection (c) does not apply and the court or tribunal, after a hearing, finds that the contractor is entitled to dismissal because the claimant failed to comply with the requirements of Subtitle D, Title 16, if applicable, failed to provide the notice or failed to give the contractor a reasonable opportunity to inspect the property as required by Subsection (a), or failed to follow the procedures specified by Subsection (b). An action is automatically dismissed without the order of the court or tribunal beginning on the 11th day after the date a motion to dismiss is filed if the motion:

(1) is verified and alleges that the person against whom the action is pending did not receive the written notice required by Subsection (a), the person against whom the action is pending was not given a reasonable opportunity to inspect the property as required by Subsection (a), or the claimant failed to follow the procedures specified by Subsection (b) or Subtitle D, Title 16; and

(2) is not controverted by an affidavit filed by the claimant before the 11th day after the date on which the motion to dismiss is filed.

(e) If a claimant rejects a reasonable offer made under Subsection (b) or does not permit the contractor or independent contractor a reasonable opportunity to inspect or repair the defect pursuant to an accepted offer of settlement, the claimant:

(1) may not recover an amount in excess of:

(A) the fair market value of the contractor's last offer of settlement under Subsection (b); or

(B) the amount of a reasonable monetary settlement or purchase offer made under Subsection (n); and

(2) may recover only the amount of reasonable and necessary costs and attorney's fees as prescribed by Rule 1.04, Texas Disciplinary Rules of Professional Conduct, incurred before the offer was rejected or considered rejected.

(f) If a contractor fails to make a reasonable offer under Subsection (b), the limitations on damages provided for in Subsection (e) shall not apply.

(g) Except as provided by Subsection (e), in an action subject to this chapter the claimant may recover only the following economic damages proximately caused by a construction defect:

(1) the reasonable cost of repairs necessary to cure any construction defect;

(2) the reasonable and necessary cost for the replacement or repair of any damaged goods in the residence;

(3) reasonable and necessary engineering and consulting fees;

(4) the reasonable expenses of temporary housing reasonably necessary during the repair period;

(5) the reduction in current market value, if any, after the construction defect is repaired if the construction defect is a structural failure; and

(6) reasonable and necessary attorney's fees.

(h) A homeowner and a contractor may agree in writing to extend any time period described in this chapter.

(i) An offer of settlement made under this section that is not accepted before the 25th day after the date the offer is received by the claimant is considered rejected.

(j) An affidavit certifying rejection of a settlement offer under this section may be filed with the court or arbitration tribunal. The trier of fact shall determine the reasonableness of a final offer of settlement made under this section.

(k) A contractor who makes or provides for repairs under this section is entitled to take reasonable steps to document the repair and to have it inspected.

(l) If Subtitle D, Title 16, applies to the claim and the contractor's offer of repair is accepted by the claimant, the contractor, on completion of the repairs and at the contractor's expense, shall engage the third-party inspector who provided the recommendation regarding the construction defect involved in the claim to inspect the repairs and determine whether the residence, as repaired, complies with the applicable limited statutory warranty and building and performance standards adopted by the commission. The contractor is entitled to a reasonable period not to exceed 15 days to address minor cosmetic items that are necessary to fully complete the repairs. The determination of the third-party inspector of whether the repairs comply with the applicable limited statutory warranty and building and performance standards adopted by the commission establishes a rebuttable presumption on that issue. A party seeking to dispute, vacate, or overcome that presumption must establish by clear and convincing evidence that the determination is inconsistent with the applicable limited statutory warranty and building and performance standards.

(m) Notwithstanding Subsections (a), (b), and (c), a contractor who receives written notice of a construction defect resulting from work performed by the contractor or an agent, employee, or subcontractor of the contractor and creating an imminent threat to the health or safety of the inhabitants of the residence shall take reasonable steps to cure the defect as soon as practicable. If the contractor fails to cure the defect in a reasonable time, the owner of the residence may have the defect cured and may recover from the contractor the reasonable cost of the repairs plus attorney's fees and costs in addition to any other damages recoverable under any law not inconsistent with the provisions of this chapter.

(n) This section does not preclude a contractor from making a monetary settlement offer or an offer to purchase the residence.

(o) A notice and response letter prescribed by this chapter must be sent by certified mail, return receipt requested, to the last known address of the recipient. If previously disclosed in writing that the recipient of a notice or response letter is represented by an attorney, the letter shall be sent to the recipient's attorney in accordance with Rule 21a, Texas Rules of Civil Procedure.

(p) If the contractor provides written notice of a claim for damages arising from a construction defect to a subcontractor, the contractor retains all rights of contribution from the subcontractor if the contractor settles the claim with the claimant.

(q) If a contractor refuses to initiate repairs under an accepted offer made under this section, the limitations on damages provided for in this section shall not apply.

2. Texas Civil Practice and Remedies Code: Personal Injury to Certain Persons: Chapter 139.

§ 139.001. Definitions

In this chapter:

(1) "Claimant" means a person described by Section 139.002 (1) or (2) who makes a claim to which this chapter applies.

(2) "Incapacitated person" has the meaning assigned by Section 601, Texas Probate Code.

§ 139.002. Scope of Chapter

This chapter applies only to a suit on a claim for damages arising from personal injury:

(1) to an incapacitated person; or

(2) in which the personal injury has resulted in the substantial disablement of the injured person.

§ 139.101. Written Offer Required

An offer of structured settlement made after a suit to which this chapter applies has been filed must be:

(1) made in writing; and

(2) presented to the attorney for the claimant.

§ 139.102. Presentation to Claimant

(a) As soon as practicable after receiving the offer under Section 139.101, but not later than any expiration date that may accompany the quotation that outlines the terms of the structured settlement offered, the attorney receiving the offer shall present the offer to the claimant or the claimant's personal representative.

(b) To the extent reasonably necessary to permit the claimant or the claimant's personal representative to make an informed decision regarding the acceptance or rejection of a proposed structured settlement, the attorney shall advise the claimant or the claimant's personal representative with respect to:

(1) the terms, conditions, and other attributes of the proposed structured settlement; and

(2) the appropriateness of the structured settlement under the circumstances.

3. Texas Business and Commerce Code: Deceptive Trade Practices: Chapter 17.

§ 17.5051. Mediation

(a) A party may, not later than the 90th day after the date of service of a pleading in which relief under this subchapter is sought, file a motion to compel mediation of the dispute in the manner provided by this section.

(b) The court shall, not later than the 30th day after the date a motion under this section is filed, sign an order setting the time and place of the mediation.

(c) If the parties do not agree on a mediator, the court shall appoint the mediator.

(d) Mediation shall be held within 30 days after the date the order is signed, unless the parties agree otherwise or the court determines that additional time, not to exceed an additional 30 days, is warranted.

(e) Except as agreed to by all parties who have appeared in the action, each party who has appeared shall participate in the mediation and, except as provided by Subsection (f), shall share the mediation fee.

(f) A party may not compel mediation under this section if the amount of economic damages claimed is less than $15,000, unless the party seeking to compel mediation agrees to pay the costs of the mediation.

(g) Except as provided in this section, Section 154.023, Civil Practice and Remedies Code, and Subchapters C and D, Chapter 154, Civil Practice and Remedies Code, apply to the appointment of a mediator and to the mediation process provided by this section.

(h) This section does not apply to an action brought by the attorney general under Section 17.47.

§ 17.5052. Offers of Settlement

(a) A person who receives notice under Section 17.505 may tender an offer of settlement at any time during the period beginning on the date the notice is received and ending on the 60th day after that date.

(b) If a mediation under Section 17.5051 is not conducted, the person may tender an offer of settlement at any time during the period beginning on the date an original answer is filed and ending on the 90th day after that date.

(c) If a mediation under Section 17.5051 is conducted, a person against whom a claim under this subchapter is pending may tender an offer of settlement during the period beginning on the day after the date that the mediation ends and ending on the 20th day after that date.

(d) An offer of settlement tendered by a person against whom a claim under this subchapter is pending must include an offer to pay the following amounts of money, separately stated:

(1) an amount of money or other consideration, reduced to its cash value, as settlement of the consumer's claim for damages; and

(2) an amount of money to compensate the consumer for the consumer's reasonable and necessary attorneys' fees incurred as of the date of the offer.

(e) Unless both parts of an offer of settlement required under Subsection (d) are accepted by the consumer not later than the 30th day after the date the offer is made, the offer is rejected.

(f) A settlement offer tendered by a person against whom a claim under this subchapter is pending that complies with this section and that has been rejected by the consumer may be filed with the court with an affidavit certifying its rejection.

(g) If the court finds that the amount tendered in the settlement offer for damages under Subsection (d)(1) is the same as, substantially the same as, or more than the damages found by the trier of fact, the consumer may not recover as damages any amount in excess of the lesser of:

(1) the amount of damages tendered in the settlement offer; or

(2) the amount of damages found by the trier of fact.

(h) If the court makes the finding described by Subsection (g), the court shall determine reasonable and necessary attorneys' fees to compensate the consumer for attorneys' fees incurred before the date and time of the rejected settlement offer. If the court finds that the amount tendered in the settlement offer to compensate the consumer for attorneys' fees under Subsection (d)(2) is the same as, substantially the same as, or more than the amount of reasonable and necessary attorneys' fees incurred by the consumer as of the date of the offer, the consumer may not recover attorneys' fees greater than the amount of fees tendered in the settlement offer.

(i) If the court finds that the offering party could not perform the offer at the time the offer was made or that the offering party substantially misrepresented the cash value of the offer, Subsections (g) and (h) do not apply.

(j) If Subsection (g) does not apply, the court shall award as damages the amount of economic damages and damages for mental anguish found by the trier of fact, subject to Sections 17.50 and 17.501. If Subsection (h) does not apply, the court shall award attorneys' fees as provided by Section 17.50(d).

(k) An offer of settlement is not an admission of engaging in an unlawful act or practice or liability under this subchapter. Except as otherwise provided by this section, an offer or a rejection of an offer may not be offered in evidence at trial for any purpose.

4. Texas Insurance Code: Class Actions by Attorney General or Class Actions by Private Individual: Chapter 541.

§ 541.251. Class Action Authorized

(a) If a member of the insurance buying public has been damaged by an unlawful method, act, or practice defined in Subchapter B as an unlawful deceptive trade practice, the department may request the attorney general to bring a class action or the individual damaged may bring an action on the individual's own behalf and on behalf of others similarly situated to recover damages and obtain relief as provided by this subchapter.

(b) A class action may not be maintained under this subchapter if the department and attorney general have initiated an action under Subchapter G or an action under that subchapter has resulted in a final determination regarding the same act or practice and the same defendant in the action under this subchapter.

§ 541.263. Effect of Settlement Offer

(a) Damages may not be awarded to a class under this subchapter if, not later than the 30th day after the date the intended defendant receives notice under Section 541.255, the intended defendant provides to the plaintiff by certified or registered mail, return receipt requested, a written settlement offer.

(b) The settlement offer must include:

(1) a statement that all persons similarly situated have been adequately identified or a reasonable effort to identify those persons has been made;

(2) a description of the class identified and the method used to identify that class;

(3) a statement that all persons identified have been notified that, on request, the intended defendant will provide relief to those persons and all others similarly situated;

(4) a complete explanation of the relief being afforded;

(5) a copy of the notice or communication the intended defendant is providing to the members of the class;

(6) a statement that the relief being afforded the consumer has been or, if the offer is accepted by the consumer, will be given within a stated reasonable time; and

(7) a statement that the practice complained of has ceased.

(c) Except as provided by Subsection (d), an attempt to comply with this section by a person receiving a demand is:

(1) an offer to compromise;

(2) not admissible as evidence; and

(3) not an admission of engaging in an unlawful act or practice.

(d) A defendant may introduce evidence of compliance or an attempt to comply with this section for the purpose of:

(1) establishing good faith; or

(2) showing compliance with this section.

§ 541.151. Private Action for Damages Authorized

A person who sustains actual damages may bring an action against another person for those damages caused by the other person engaging in an act or practice:

(1) defined by Subchapter B to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance; or

(2) specifically enumerated in Section 17.46(b), Business & Commerce Code, as an unlawful deceptive trade practice if the person bringing the action shows that the person relied on the act or practice to the person's detriment.

§ 541.152. Damages, Attorney's Fees, and Other Relief

(a) A plaintiff who prevails in an action under this subchapter may obtain:

(1) the amount of actual damages, plus court costs and reasonable and necessary attorney's fees;

(2) an order enjoining the act or failure to act complained of; or

(3) any other relief the court determines is proper.

(b) On a finding by the trier of fact that the defendant knowingly committed the act complained of, the trier of fact may award an amount not to exceed three times the amount of actual damages.

§ 541.156. Settlement Offer

(a) A person who receives notice provided under Section 541.154 may make a settlement offer during a period beginning on the date notice under Section 541.154 is received and ending on the 60th day after that date.

(b) In addition to the period described by Subsection (a), the person may make a settlement offer during a period:

(1) if mediation is not conducted under Section 541.161, beginning on the date an original answer is filed in the action and ending on the 90th day after that date; or

(2) if mediation is conducted under Section 541.161, beginning on the day after the date the mediation ends and ending on the 20th day after that date.

§ 541.157. Contents of Settlement Offer

A settlement offer made by a person against whom a claim under this subchapter is pending must include an offer to pay the following amounts, separately stated:

(1) an amount of money or other consideration, reduced to its cash value, as settlement of the claim for damages; and

(2) an amount of money to compensate the claimant for the claimant's reasonable and necessary attorney's fees incurred as of the date of the offer.

§ 541.158. Rejection of Settlement Offer

(a) A settlement offer is rejected unless both parts of the offer required under Section 541.157 are accepted by the claimant not later than the 30th day after the date the offer is made.

(b) A settlement offer made by a person against whom a claim under this subchapter is pending that complies with this subchapter and is rejected by the claimant may be filed with the court accompanied by an affidavit certifying the offer's rejection.

§ 541.159. Limit on Recovery after Settlement Offer

(a) If the court finds that the amount stated in the settlement offer for damages under Section 541.157(1) is the same as, substantially the same as, or more than the amount of damages found by the trier of fact, the claimant may not recover as damages any amount in excess of the lesser of:

(1) the amount of damages stated in the offer; or

(2) the amount of damages found by the trier of fact.

(b) If the court makes the finding described by Subsection (a), the court shall determine reasonable and necessary attorney's fees to compensate the claimant for attorney's fees incurred before the date and time the rejected settlement offer was made. If the court finds that the amount stated in the offer for attorney's fees under Section 541.157(2) is the same as, substantially the same as, or more than the amount of reasonable and necessary attorney's fees incurred by the claimant as of the date of the offer, the claimant may not recover any amount of attorney's fees in excess of the amount of fees stated in the offer.

(c) This section does not apply if the court finds that the offering party:

(1) could not perform the offer at the time the offer was made; or

(2) substantially misrepresented the cash value of the offer.

(d) The court shall award:

(1) damages as required by Section 541.152 if Subsection (a) does not apply; and

(2) attorney's fees as required by Section 541.152 if Subsection (b) does not apply.

§ 541.160. Effect of Settlement Offer

A settlement offer is not an admission of engaging in an act or practice defined by Subchapter B to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

§ 541.161. Mediation

(a) A party may, not later than the 90th day after the date a pleading seeking relief under this subchapter is served, file a motion to compel mediation of the dispute in the manner provided by this section.

(b) The court shall, not later than the 30th day after the date a motion under this section is filed, sign an order setting the time and place of the mediation.

(c) The court shall appoint a mediator if the parties do not agree on a mediator.

(d) The mediation must be held not later than the 30th day after the date the order is signed, unless:

(1) the parties agree otherwise; or

(2) the court determines that additional time not to exceed 30 days is warranted.

(e) Each party who has appeared in the action, except as agreed to by all parties who have appeared, shall:
(1) participate in the mediation; and
(2) except as provided by Subsection (f), share the mediation fee.

(f) A party may not compel mediation under this section if the amount of actual damages claimed is less than $15,000 unless the party seeking to compel mediation agrees to pay the costs of the mediation.

(g) Except as provided by this section, the following apply to the appointment of a mediator and the mediation process provided by this section:
(1) Section 154.023, Civil Practice and Remedies Code; and
(2) Subchapters C and D, Chapter 154, Civil Practice and Remedies Code.

5. Texas Finance Code: Prejudgment Interest in Wrongful Death, Personal Injury, or Property Damage Case: Chapter 304.101

§ 304.101. Applicability of Subchapter

This subchapter applies only to a wrongful death, personal injury, or property damage case of a court of this state.

§ 304.102. Prejudgment Interest Required in Certain Cases

A judgment in a wrongful death, personal injury, or property damage case earns prejudgment interest.

§ 304.103. Prejudgment Interest Rate for Wrongful Death, Personal Injury, or Property Damage Case

The prejudgment interest rate is equal to the postjudgment interest rate applicable at the time of judgment.

§ 304.104. Accrual of Prejudgment Interest

Except as provided by Section 304.105 or 304.108, prejudgment interest accrues on the amount of a judgment during the period beginning on the earlier of the 180th day after the date the defendant receives written notice of a claim or the date the suit is filed and ending on the day preceding the date judgment is rendered. Prejudgment interest is computed as simple interest and does not compound.

§ 304.1045. Future Damages

Prejudgment interest may not be assessed or recovered on an award of future damages.

§ 304.105. Effect of Settlement Offer on Accrual of Prejudgment Interest

(a) If judgment for a claimant is equal to or less than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the judgment during the period that the offer may be accepted.

(b) If judgment for a claimant is more than the amount of a settlement offer of the defendant, prejudgment interest does not accrue on the amount of the settlement offer during the period that the offer may be accepted.

§ 304.106. Settlement Offer Requirements to Prevent Prejudgment Interest Accrual

To prevent the accrual of prejudgment interest under this subchapter, a settlement offer must be in writing and delivered to the claimant or the claimant's attorney or representative.

§ 304.107. Value of Settlement Offer for Computing Prejudgment Interest

If a settlement offer does not provide for cash payment at the time of settlement, the amount of the settlement offer for the purpose of computing prejudgment interest is the cost or fair market value of the settlement offer at the time it is made.

CHAPTER 2.
THE JURY TRIAL AND THE SELECTION OF JURORS

1. *Right to Trial by Jury*

Notes

1. Article I, Section 15 of the Texas Constitution provides:

The right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency. Provided, that the Legislature may provide for the temporary commitment, for observation and/or treatment, of mentally ill persons not charged with a criminal offense, for a period of time not to exceed ninety (90) days, by order of the County Court without the necessity of a trial by jury.

2. Article V. Section 10 of the Texas Constitution provides:

In the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury; but no jury shall be empanelled in any civil case unless demanded by a party to the case, and a jury fee be paid by the party demanding a jury, for such sum, and with such exceptions as may be prescribed by the Legislature.

TEXAS
v.
CREDIT BUREAU OF LAREDO
530 S.W.2d 288
(Tex. 1975)

John Hill, Atty. Gen., Joe K. Longley, Asst. Atty. Gen., Austin, for petitioner.

Stone & Stone, Emerson Stone, Jr., Jacksonville, Salmanson & Smith, Allen E. Smith, Austin, for respondent.

POPE, JUSTICE.

The question presented is whether the Texas Constitution gives a right to trial by jury in this suit for civil penalties brought pursuant to the Texas Deceptive Trade Practices Act. TEX. REV. CIV. STAT. ANN. art. 5069, § 10.01 Et seq. (1971). The trial court denied the defendants' request for a jury and after trial rendered judgment against defendants, Miller and Credit Bureau, for civil penalties in the amount of $35,000. The court of civil appeals reversed the judgment of the trial court and remanded the cause for a jury trial. 515 S.W.2d 706. We affirm the judgment of the court of civil appeals.

On April 11, 1972, the State of Texas brought an action against Edward Miller, individually and d/b/a Credit Bureau of Laredo, Inc. to enjoin certain allegedly deceptive practices conducted in violation of article 5069, section 10.02. Credit Bureau was sending to a number of debtors notices which simulated legal process and official action by public officials. The notice forms were styled 'Certificate of Assignment,' 'Preliminary Law Suit Listing for Civil Court,' 'Notice to Appeal,' 'Notice of Impending Execution,' and 'Seven Day Official Notification.' The suit was resolved on April 20, 1972, by an agreed injunction, the terms of which prohibited Miller and Credit Bureau from continuing the deceptive collection practices.

Credit Bureau thereafter made some changes in its debt collection forms, but the State believed that the revised forms were still deceptive and in violation of the injunction. On the trial of this case, the evidence revealed that Credit Bureau was continuing to mail forms which the injunction apparently was designed to prohibit. After the injunction was issued, Credit Bureau ordered 13,500 'Seven Day Notifications'; 6,000 'Notices of Impending Law Suit'; 5,000 'Preparatory Listings For Civil Court'; and 5,000 'Final Notices Before Suit.' On March 8, 1973, the State filed its petition for civil penalties against Credit Bureau in the same court that had issued the injunction. The State sought assessment of penalties of $10,000 for each of seven separate violations. Credit Bureau answered and requested a jury. The trial court denied the jury request, conducted a trial, and ren-

dered judgment that the injunction had been violated, in each of the seven instances, assessing civil penalties of $35,000 against Miller and Credit Bureau, jointly and severally.

* * *

Whether the defendants were entitled to a jury requires our first deciding the nature of this suit. The State urges that its right to recover penalties is occasioned by Credit Bureau's violation of an injunction and that the action is one for civil contempt in which there is no right to trial by jury. It is our opinion that the penalty section of the Deceptive Trade Practices Act, article 5069, section 10.08 shows that the suit is one for civil penalties and not contempt. * * * We must next determine whether an action to enforce civil penalties under the Deceptive Trade Practices Act is one to which the right to a trial by jury attaches. Since the Act is silent about the right to a jury, we must determine whether the Texas Constitution fixes the right. The Texas Constitution contains two separate provisions regarding the right of trial by jury. The first is Article I, Section 15, found in the Bill of Rights of the Constitution; the second is Article V, Section 10, contained in the Judiciary Article.

Bill of Rights Jury Article

Article I, Section 15, contains a jury provision similar to that found in the United States Constitution and every other state constitution. It states simply that 'the right of trial by jury shall remain inviolate . . . .' In our opinion the Bill of Rights Article preserved the right to a trial by jury in a suit for the collection of civil penalties. It is well-established that the Bill of Rights provision continues the right to a jury in all actions where that right existed at the time the Constitution was adopted. *White v. White*, 108 Tex. 570, 196 S.W. 508 (1917); *Hatten v. City of Houston*, 373 S.W.2d 525 (Tex. Civ. App. 1963, writ ref'd n.r.e.); *Hickman v. Smith*, 238 S.W.2d 838 (Tex. Civ. App. 1951, writ ref'd). This interpretation is uniformly given to similar provisions in other jurisdictions. 47 AM. JUR. 2D, Jury § 29 at 649 (1969).

Texas, by successive constitutions both as a Republic and as a State, has protected the right to a trial by jury in those cases where a jury would have been proper at common law. TEX. CONST. art. I, § 15 (1876); TEX. CONST. art. I, § 12 (1868); TEX. CONST. art. I, § 12 (1866); TEX. CONST. art. I, § 12 (1861); TEX. CONST. art. I, § 12 (1845); Const. of the Republic of Texas, Declaration of Rights, #9 (1836); *See White v. White, supra*; *Grigsby v. Reib*, 105 Tex. 597, 153 S.W. 1124 (1913); *Cockrill v. Cox*, 65 Tex. 669 (1886); 47 AM. JUR. 2D, Jury § 17 (1969).

At common law, suits for civil penalties were tried as actions for debt, and actions for debt were triable before a jury. 47 AM. JUR. 2D, Jury §§ 17, 36 (1969); 1 CHITTY, PLEADINGS 263 (3d ed. 1819); 50 C.J.S. JURIES § 10 (1947); 3 WENDELL'S BLACKSTONE'S COMMENTARIES 161-162 (1847). In *Hepner v. United States*, 213 U.S. 103, 29 S.Ct. 474, 53 L.Ed. 720 (1909), the United States brought suit to recover the penalty provided for the violation of the Alien Immigration Act. The court reviewed and cited a number of precedents holding that actions for penalties are recoverable in civil actions and held 'the defendant was, of course, entitled to have a jury summoned in this case.' *United States v. Hindman*, 179 F.Supp. 926 (D.N.J. 1960), held that the defendants were entitled to a jury in a suit brought against them by the United States for civil penalties for violation of the Federal Trade Commission Act, a statute very similar to the Texas Deceptive Trade Practices Act, article 5069, section 10.01 Et seq. *See also*, *Damsky v. Zavatt*, 289 F.2d 46 (2d Cir. 1961); *Connolly v. United States*, 149 F.2d 666 (9th Cir. 1945); *Atchison, Topeka & Santa Fe Ry. v. United States*, 178 F. 12 (8th Cir. 1910); *United States v. Friedland*, 94 F.Supp. 721 (D.Conn. 1950); *United States v. Jepson*, 90 F.Supp. 983 (D.N.J. 1950); 5 MOORE'S FEDERAL PRACTICE, § 38.31(1), 232-233 (2d ed. 1974). The right to a trial by jury is not limited to the precise form of action in which civil penalties were enforceable at common law. The right exists when 'the action involves rights and remedies of the sort typically enforced in an action at law.' *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974); 5 MOORE'S FEDERAL PRACTICE, § 38.11(7), 128 (2d ed. 1974).

Judiciary Jury Article

We also hold that Article V, Section 10, of the Constitution extends the right to a jury to Credit Bureau in this case. Some decisions have mistakenly treated the Bill of Rights and the Judiciary Articles as identical in meaning, that is, as protecting the right of trial by jury only as it existed at common law or by statutes in effect at the time of the adoption of the Constitution. *Hickman v. Smith*, 238 S.W.2d 838 (Tex. Civ. App. 1951, writ ref'd).

In *Cockrill v. Cox*, 65 Tex. 669 (1886), the court correctly wrote that the present Judiciary Article protecting the right to a jury was added by the Constitution of 1845 because the Bill of Rights Article contained in the Con-

stitution of the Republic did not extend to causes in equity. TEX. CONST. art. IV, § 16 (1845). In other words, the Judiciary Article was intended to broaden the right to a jury afforded by Article I, Section 15. *Tolle v. Tolle*, 101 Tex. 33, 104 S.W. 1049, 1050 (1907); *Hatten v. City of Houston*, 373 S.W.2d 525, 531-535 (Tex. Civ. App. 1963, writ ref'd n.r.e.); *Walsh v. Spencer*, 275 S.W.2d 220 (Tex. Civ. App. 1955, no writ). Subsequent constitutions extended the right to a jury to 'all cases of law or equity.' TEX. CONST. art. V, § 16 (1868); TEX. CONST. art. IV, § 20 (1866); TEX. CONST. art. IV, § 16 (1861); TEX. CONST. art. IV, § 16 (1845). It was the present Constitution of 1876 which changed the words of the earlier constitutions from 'all cases of law or equity' to its present form, 'trial of all causes.'

The term 'cause' is defined in BLACK, LAW DICTIONARY (4th ed. 1951), as 'a suit, litigation, or action. Any question, civil or criminal, litigated or contested before a court of justice.' The United States Supreme Court in *Ex parte Milligan*, 71 U.S. 2, 112, 18 L.Ed. 281 (1866), stated that in any legal sense, 'action,' 'suit' and 'cause' are convertible terms. The court then defined the terms to mean any legal process which a party institutes to obtain his demand or by which he seeks his right. This broad meaning of the word, 'cause,' comports with the interpretation given by other courts and legal writers in the period when our present Constitution was drafted. *See also, Fish v. Farwell*, 160 Ill. 236, 43 N.E. 367 (1895); *Gibson v. Sidney*, 50 Neb. 12, 69 N.W. 314 (1896); *Baltimore & O.R. Co. v. Larwill*, 83 Ohio St. 108, 93 N.E. 619 (1910); ABBOTT, DICTIONARY OF TERMS & PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 193 (1879); BOUVIERS, LAW DICTIONARY 211 (1859); 1 C.J., ACTIONS § 26(c) (1914); 1 RULING CASE LAW, ACTIONS § 3 (1914).

Special circumstances justify our former holdings that not all adversary proceedings qualify as a 'cause' under the Judiciary Article. These cases have been isolated upon a case-by-case determination. Harris, *Jury Trial in Civil Cases—A Problem in Constitutional Interpretation*, 7 SW. L.J. 1, 7-13 (1953); 7 TEX. L. REV. 663 (1928). They include such proceedings as civil contempt proceedings, *Ex parte Allison*, 99 Tex. 455, 90 S.W. 870 (1906); *Crow v. State*, 24 Tex. 12 (1859); *Johnson v. State*, 267 S.W. 1057, 1062 (Tex. Civ. App. 1925, writ ref'd); election contests, *Hammond v. Ashe*, 103 Tex. 503, 131 S.W. 539 (1910); habeas corpus proceedings for the custody of minor children, *Burckhalter v. Conyer*, 9 S.W.2d 1029 (Tex. Com. App. 1928, jdgmt adopted); *Pittman v. Byars*, 112 S.W. 102 (Tex. Civ. App. 1908, no writ); suit for removal of a sheriff, *Davis v. State*, 35 Tex. 118 (1872); appeals in administrative proceedings, *State v. De Silva*, 105 Tex. 95, 145 S.W. 330 (1912); *Texas Liquor Control Board v. Jones*, 112 S.W.2d 227 (Tex. Civ. App. 1937, no writ), and others. In each of the above instances, there is some special reason that a jury has been held unsuitable, but no sound reason exists for the denial of a jury in this case. We hold that Credit Bureau was entitled to a trial by jury to determine whether it committed the violations of the injunction with which it was charged, and if so to determine the amount of civil penalties which should be assessed against it.

* * * We affirm the judgment of the court of civil appeals which reversed the judgment of the trial court and remanded the cause to the trial court.

Notes

1. The Supreme Court has held that there is no constitutional right to trial by jury under Article I, section 15 of the Texas Constitution before the imposition of mandatory disciplinary sanctions against an attorney for conviction of an intentional crime, so long as the disbarred attorney's conviction was obtained in a court of competent jurisdiction by constitutionally adequate procedures. *See In re Humphreys*, 880 S.W.2d 402 (Tex. 1994). In that case the Court noted:

> Trial by jury cannot be claimed in an inquiry that is non-judicial in its character, or with respect to proceedings before an administrative board." *Middleton v. Texas Power & Light Co*., 108 Tex. 96, 185 S.W. 556, 561-62 (1916). Even if the right to a jury is denied before an administrative agency, the dispositive question is whether a trial *de novo* and the corresponding right to a jury trial is constitutionally required upon judicial review of the agency's decision. *See Cockrill v. Cox*, 65 Tex. 669, 674 (1886) ("The right of jury trial remains inviolate, though denied in the court of first instance [in civil cases], if the right to appeal and the jury trial on appeal are secured.") (bracketed language in original).

2. Furthermore, the Supreme Court in *Texas Ass'n Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440 (Tex. 1993), held that Article I, section 15 of our Constitution does not give the right to a jury trial in appeals from administrative adjudications under the Texas environmental statutes regulating air and water quality. The issue

of whether there was a right to trial by jury in such cases under Article V, section 10 of the Constitution, was not raised by the parties. The Court noted:

> In *Credit Bureau*, we concluded that a suit for civil penalties for violation of an injunction issued pursuant to the Texas Deceptive Trade Practices Act was analogous to the common law action for debt, tried to a jury at the time our constitution was adopted. 530 S.W.2d at 293. Thus, we held that the right to a jury trial for that action remained inviolate. . . . [however] we conclude that these [administrative] agencies' assessments of environmental penalties are not actions, or analogous actions, to those tried to a jury at the time the constitution of 1876 was adopted. To hold that these environmental statutes and regulations promulgated in the late 1960s merely parrot common law and statutory rights triable to a jury in 1876 would turn a blind eye to the emergence of the modern administrative state and its profound impact on our legal and social order. In the late 19th century, ours was primarily a sparsely-populated agrarian society. By contrast, concentrated industrial activity and its by-products, including the wide-spread emission of pollutants, with their resulting potential for significant damage to our natural resources are phenomena of relatively recent origin. In response to such phenomena, regulatory schemes, such as those challenged here, were designed to balance mounting environmental concerns with our state's economic vitality. In 1876 no governmental schemes akin to these existed. Thus, we conclude that the contested proceedings are not analogous to any action tried to a jury in 1876. Accordingly, we hold that no right to a jury trial attaches to appeals from administrative adjudications under the environmental statutes and regulations at issue here.

3. *DiGiuseppe v. Lawler,*--- S.W.3d ----, 52 Tex. Sup. Ct. J. 29, 2008 WL 4605951 (Tex. 2008): When contested fact issues must be resolved before a court can determine the expediency, necessity, or propriety of equitable relief, a party is entitled to have a jury resolve the disputed fact issues.

2. *Waiver of the Right to a Jury Trial*

a. *Jury Fee and Demand*

Read Rule 216 Texas Rules of Civil Procedure.

HUDDLE
v.
HUDDLE
696 S.W.2d 895
(Tex. 1985)

Jay Floyd, Austin, for petitioner.
H.J. Bernard, Houston, for respondent.

PER CURIAM.

This is an appeal from a probate court order. Our question is whether the probate court erred in denying a request for a jury trial. The court of appeals held the denial was in error. 687 S.W.2d 58 (Tex. App.—Houston [14th Dist.] 1985). We hold the trial court did not abuse its discretion and reverse the judgment of the court of appeals.

This cause was set for trial for July 13, 1983. The jury fee had been paid on June 30 but the jury request was not made until July 12. The trial court denied the jury request because the request was not made earlier. A motion for a continuance was not made following the denial of the jury request.

Rule 216, TEX. R. CIV. P., provides that the demand for a jury be made and the necessary fee paid "on or before appearance day or, if thereafter, a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than ten days in advance." The court of appeals held the time limitations contained in Rule 216 apply only to the time that the jury fee must be deposited with the clerk. 687 S.W.2d at 60. We disagree. The time limitations apply with equal force to the application for jury trial and the payment of the jury fee. In

Texas Oil & Gas Corporation v. Vela, 429 S.W.2d 866 (Tex. 1968), this court held that a demand for a jury trial made ten days in advance of the date set for trial of the cause on the non-jury docket is not necessarily timely as a matter of law. 249 S.W.2d at 877.

The judgment of the court of appeals conflicts with Rule 216, TEX. R. CIV. P., and this court's opinion in *Vela*. Accordingly, we grant Jack A. Huddle's motion for rehearing, grant the application for writ of error and, without hearing oral argument, reverse the judgment of the court of appeals and remand the cause to that court for consideration of Lois Huddle's remaining points of error. TEX. R. CIV. P. 483.

Note

1. TEX. GOV'T. CODE § 51.604. Jury Fee provides:

(a) The district clerk shall collect a $30 jury fee for each civil case in which a person applies for a jury trial. The clerk of a county court or statutory county court shall collect a $22 jury fee for each civil case in which a person applies for a jury trial. The clerk shall note the payment of the fee on the court's docket.

(b) The fee required by this section must be paid by the person applying for a jury trial not later than the 10th day before the jury trial is scheduled to begin.

(c) The fee required by this section includes the jury fee required by Rule 216, Texas Rules of Civil Procedure, and any other jury fee allowed by law or rule.

2. In *Universal Printing Co., Inc. v. Premier Victorian Homes, Inc*, 73 S.W.3d 283 (Tex. App.—Houston [1st Dist.], 2001) pet. denied, the court address the apparent conflict between the preceding statute and rule 216 in the following language:

The homeowners assert section 51.604 and rule 216 conflict, and that a statute prevails over a rule. However, we conclude the statute and rule are not inconsistent; instead, they supplement one another. Based on a plain reading of the statute and rule, rule 216 requires that a $10 jury fee be paid "not less than thirty days in advance" before "the date set for trial." Section 51.604, on the other hand, addresses additional revenue-enhancing or administrative-type fees that a district clerk shall charge in relation to the jury fee, and states those additional fees must be paid "no later than the 10th day before the jury trial is scheduled to begin." Sub-section (c) specifically states that the $30 jury fee *includes the [$10] jury fee required by rule 216.* Section 51.604 increases revenue to the clerk's office, but does not supplant the 30-day deadline imposed by rule 216.

We note that the $30 fee provision of section 51.604, sub-section (a), is separate from the 10-day deadline provision, sub-section (b). Also, sub-section (c) harmonizes the statutory fee and rule 216 fee by prohibiting the clerk from charging a $30 section 51.604 fee *and* a $10 rule 216 fee. Thus, to ensure a jury here, the homeowners were required to pay as follows: at least $10 as the jury fee, no later than 30 days before trial was set (pursuant to rule 216); and the remaining $20, no later than 10 days before trial was scheduled (pursuant to section 51.604). Because, as the trial court implicitly found, the homeowners did not pay rule 216's $10 jury fee 30 days in advance of trial, they did not timely pay the jury fee.

HALSELL
v.
DEHOYOS
810 S.W.2d 371
(Tex. 1991)

Craig L. Austin, Jim B. Halsell, San Antonio, for petitioner.
Evelyn M. Martinez, San Antonio, for respondents.

PER CURIAM.

In this cause, we consider whether the continuance of a trial setting affects the timeliness of a jury request. The court of appeals held that it does not, and therefore upheld the trial court's denial of Petitioner's jury request. We disagree, and therefore reverse.

Esther and George Dehoyos brought this suit against Jim B. Halsell for wrongful eviction and conversion. On the Dehoyoses' motion, the trial court set the case on the non-jury docket for final trial on the merits on September 8, 1989. Halsell filed a jury request, and paid the proper fee, on August 15, 1989.

The trial court called the case as scheduled on September 8, 1989. Thereafter, by order of September 14, 1989, the court struck Halsell's request for a jury trial on the ground that it was not timely filed. By the same order, however, the court also reset the case on the non-jury docket for final trial on the merits on October 13, 1989.

Under our rules, a request for a jury trial must be filed "a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance." TEX. R. CIV. P. 216. A request in advance of the thirty-day deadline is presumed to have been made a reasonable time before trial. *See Wittie v. Skees*, 786 S.W.2d 464, 466 (Tex. App.—Houston [14th Dist.] 1990, writ denied). The adverse party may rebut that presumption by showing that the granting of a jury trial would operate to injure the adverse party, disrupt the court's docket, or impede the ordinary handling of the court's business. *Id.*

At the time the trial court struck Halsell's request for a jury trial, the request was timely as to the October 13, 1989, trial setting. The record contains no indication that the granting of the jury trial would have injured the Dehoyoses or caused undue disruption to the trial court. Thus, the untimely jury demand became timely when the trial court reset the case for October 13. The trial court therefore erred in denying Halsell's request for a jury trial.

A refusal to grant a jury trial is harmless error only if the record shows that no material issues of fact exist and an instructed verdict would have been justified. *See Olson v. Texas Commerce Bank*, 715 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.). Here, the record reflects the existence of several material fact issues: chiefly, whether the Dehoyoses abandoned their apartment, and the extent of the Dehoyoses' damages.

We conclude that the trial court's refusal to grant a jury trial amounted to harmful error. We therefore grant Petitioner's application for writ of error and pursuant to Texas Rule of Appellate Procedure 170, without hearing oral argument, a majority of the court reverses the judgment of the court of appeals and remands this cause to the trial court for a jury trial.

CORNYN, J., not sitting.

Note

JUSTICE O'CONNOR has written in *Whiteford v. Baugher,* 818 S.W.2d 423, 425 (Tex. App.—Houston [1st Dist] 1991, writ denied):

> "Before *Halsell*, many decisions of the courts of appeals held that if a party made a request for a jury more than 30 days before trial, but after the case was certified for trial on the non-jury docket, the request was not timely, and the party was not entitled to a jury trial. Since *Halsell*, a request for a jury trial that is made 30 days before the trial is timely, even if it is made after the case is certified for trial. If the case is re-set, the final trial date is the one that controls the 30 day deadline."

MERCEDES-BENZ CREDIT CORPORATION
v.
RHYNE
925 S.W.2d 664
(Tex. 1996)

Karen L. Watkins, Shannon H. Ratliff, Jeff Bohm, Austin, Rebecca A. Leigh, Mitchell J. Buchman, Houston, Richard Kelley, for Petitioner.

Raymond L. Thomas, Francisco J. Rodriguez, McAllen, Luther H. Soules, II, Vincent Lee Marable, Wharton, Robinson C. Ramsey, Sara S. Murray, San Antonio, James P. Wallace, Austin, for Respondents.

SPECTOR, JUSTICE.

In this case of first impression, we consider whether a trial court abuses its discretion by denying a jury trial to a litigant who had relied on the court's order issued a year before the trial date setting the case on the jury docket. The court of appeals affirmed the trial court's denial. *See* _____ S.W.2d _____, _____. We hold that the trial court abused its discretion, and we therefore reverse the judgment of the court of appeals and remand the case to the trial court.

I

This case arose when the Mercedes-Benz Credit Corporation repossessed two trucks from Norman A. Rhyne, sold them, and then sued Rhyne for the deficiency between the sale price and the money it said Rhyne owed on the trucks. Rhyne counterclaimed for violations of the Deceptive Trade Practices Act, wrongful repossession, usury, conversion, and breach of contract. After a bench trial, the court rendered judgment that Mercedes take nothing on its deficiency claim. It also rendered judgment that Rhyne take the following: $1.95 million in actual damages; $1.95 million in enhanced DTPA damages or, in the alternative, exemplary damages; and attorney's fees. The court of appeals affirmed, holding in part that the trial court did not abuse its discretion by denying Mercedes a jury trial. *See id.* at _____. We granted the application for writ of error to consider points of error concerning breach of the peace, wrongful repossession, waiver, default, written assurance of performance, unconscionability, conversion, and the legal sufficiency of the damage award. Because we dispose of this case on the jury trial question, we do not reach the merits of those issues, and the Court neither approves nor disapproves of the opinion of the court of appeals.

II

Mercedes argues that the trial court abused its discretion by denying it a jury trial. The record reveals that Rhyne filed a request for a jury trial but never paid the jury fee. On February 19, 1991, the trial court signed an order declaring that "[i]t is hereby ORDERED that the above entitled and numbered cause is set for trial on the merits before a jury on February 3, 1992." Order Setting Trial at 1, *Mercedes-Benz Credit Corp. v. Rhyne* (No. C-3175-89-A) (emphasis added). Thereafter, the trial court never modified or withdrew its order setting the case for trial before a jury. Neither party, however, had paid the jury fee. On Friday, January 31, 1992, the final business day before the trial setting, Mercedes discovered that Rhyne had never paid the jury fee and that he no longer wanted a jury. Mercedes then made its own jury demand and paid the $10 jury fee the next business day. On that day, the trial court on whose jury docket the case had been set transferred the case to a new court. Four

days later, the new trial court held a pretrial hearing, denied Mercedes's jury request, and proceeded with a bench trial.

The United States and Texas Constitutions guarantee the right to trial by jury. *See* U.S. CONST. art. III, § 2; TEX. CONST. art. I, § 15. We review the trial court's denial of a jury demand for an abuse of discretion. *See State v. Wood Oil Distrib. Inc*., 751 S.W.2d 863, 865 (Tex. 1988). In conducting an abuse of discretion review, we examine the entire record. *See Simon v. York Crane & Rigging Co*., 739 S.W.2d 793, 795 (Tex. 1987). We only find an abuse of discretion when the trial court's decision is arbitrary, unreasonable, and without reference to guiding principles. *See Downer v. Aquamarine Operators, Inc*., 701 S.W.2d 238, 241-41 (Tex. 1985), *cert. denied*, 476 U.S. 1159, 106 S.Ct. 2279, 90 L.Ed.2d 721 (1986).

Mercedes argues that two sets of events lead to the conclusion that the trial court abused its discretion by denying Mercedes's request for a jury trial. First, Mercedes contends that Rhyne's conduct during the pretrial stage of the litigation created the reasonable expectation that Rhyne had paid the jury fee. Rhyne had expressed his intent to have issues resolved by a "panel of [his] peers" in interrogatory responses filed within thirty days of the trial setting, and he also emphasized his intent to try his counterclaims to a jury in correspondence he sent to Mercedes before trial. We do not, however, believe that Rhyne's conduct controls the outcome of this case. Only when a party demands a jury and pays the fee can the opposing party rely on those actions. *See* TEX. R. CIV. P. 220. In such a case, the trial court may not remove the case from the jury docket over the objections of the opposing party. *See* TEX. R. CIV. P. 216, 220. Mercedes could not rely on Rhyne's actions because Rhyne never paid his jury fee.

Second, Mercedes argues that the trial court abused its discretion by disregarding its own order setting the case on the jury docket for a jury trial. Rule 216 of the Texas Rules of Civil Procedure, which provides the requirements for a party to assure its right to a jury trial, normally furnishes the guidelines under which a trial court must act. That rule calls upon parties to make a jury request and pay the jury fee "a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance." TEX. R. CIV. P. 216(a) (emphasis added). In this case, neither party paid the jury fee more than thirty days before the trial setting. But Rule 216 does not speak to this case, in which the trial court set the case on the jury docket and issued an order announcing that it had done so. A trial court clerk, not the court itself, usually performs the ministerial duty of placing a case on the jury docket. *See* O'CONNOR'S TEXAS RULES CIVIL TRIALS 352 (1996) ("Generally, the court does not enter an order on a request for a jury trial."). When the trial court took the uncommon step of signing the order setting the case for a jury trial, the court was not free to later ignore that order.

We agree with Mercedes that the trial court's disregard of its own order in this case was arbitrary and capricious and therefore an abuse of discretion. The trial court issued a written order a year before trial stating that the case would be tried before a jury. The trial court's order remained unmodified and unchallenged throughout all of the pretrial proceedings. In such a situation, Mercedes was entitled, as a matter of law, to rely on the trial court's order setting the case for a jury trial. For the trial court to vacate or change its order, it must have given the parties a reasonable time to comply with Rule 216 requirements for making a jury demand and paying the fee.

Rhyne relies on *Higginbotham v. Collateral Protection, Incorporated*, 859 S.W.2d 487 (Tex. App.—Houston [1st Dist.] 1993, writ denied), for support, but that case is distinguishable for two reasons. First, the trial court in *Higginbotham* signed an order "that did not identify the trial as a jury trial, but merely said that the case was set preferentially." *Id*. at 488 (citation omitted). Second, the court of appeals in *Higginbotham*, although holding that the trial court did not abuse its discretion in denying the jury request, also held that because of "mistakes on the part of the court and its personnel" the trial court did abuse its discretion by denying a motion for continuance that immediately followed the jury request. *Id*. at 489. As the dissent pointed out, the majority's decision to hold that the trial court abused its discretion on the continuance motion was no different than a decision that the trial court abused its discretion on the jury trial question. *See id*. at 491 (SMITH, J., dissenting) ("Appellants' motion for a continuance primarily addresses the topic of why they are entitled to a jury trial rather than why a continuance should be granted.").

Because we hold that the trial court's denial of Mercedes's request for a jury trial was an abuse of discretion, we next determine whether the court's error was harmful and requires reversal. The wrongful denial of a jury trial is harmful when the case contains material fact questions. *See Halsell v. Dehoyos*, 810 S.W.2d 371,

372 (Tex. 1991). The dispute between Rhyne and Mercedes is replete with material fact questions. Therefore, the denial of the jury trial was harmful error and requires reversal.

III

We hold that the trial court abused its discretion and committed harmful error by ignoring its own order and denying Mercedes a jury trial. We therefore reverse the judgment of the court of appeals and remand this case to the trial court for a new trial before a jury.

In re The PRUDENTIAL INSURANCE CO. OF AMERICA

148 S.W.3d 124
(Tex. 2004)

Gino John Rossini, John A. Mackintosh Jr., G. Luke Ashley and Camille Knight, Thompson & Knight, L.L.P., Dallas, for Relators.

Luke Madole, Russell F. Nelms, Dena Jean Denooyer, Carrington Coleman Sloman & Blumenthal, Dallas, for Respondents.

JUSTICE HECHT delivered the opinion of the Court, in which JUSTICE OWEN, JUSTICE SMITH, JUSTICE WAINWRIGHT, and JUSTICE BRISTER joined.

The parties to a commercial lease agreed to waive trial by jury in any future lawsuit involving the lease, but when the tenant and its guarantors later sued for rescission and damages, they nevertheless demanded a jury trial. The trial court denied the landlord's motion to quash the demand. In this original proceeding, the landlord petitions for mandamus relief directing the trial court to enforce the parties' contractual jury waiver. We conditionally grant relief.

I

Francesco Secchi, a native of Italy, and his wife Jane, a native of England, moved to Dallas in 1981, where they have lived ever since and have become naturalized citizens. The Secchis have been in the restaurant business since 1983, and they (or entities controlled by them) own and operate two Dallas restaurants, Ferrari's and Il Grano. In October 2000, a limited partnership the Secchis controlled, Italian Cowboy Partners, Ltd., leased space in a Dallas shopping center for another restaurant. The lease agreement was the product of six months' active negotiations with the landlord, The Prudential Insurance Co. of America, and its agent, Four Partners L.L.C. doing business as Prizm Partners (collectively, "Prudential"). The Secchis had negotiated at least two other leases over the years, and they and their lawyer successfully insisted on a number of changes in Prudential's proposals. Offers went back and forth, and the agreement went through seven drafts. Francesco, whose formal education extended only to about the eighth grade, did not read the lease but left that to Jane, whose educational background was similar but whose English was better. Jane went over the agreement with their attorney but focused on the economic terms. When the Secchis and Prudential finally reached an understanding, Francesco signed the lease as manager of the partnership's general partner, Secchi, L.L.C. Prudential insisted that the Secchis personally guarantee the lease, and that agreement was also negotiated and changed by the Secchis before they signed it.

The lease contains the following paragraph:

> **Counterclaim and Jury Trial**. In the event that the Landlord commences any summary proceeding or action for nonpayment of rent or other charges provided for in this Lease, Tenant shall not interpose any counterclaim of any nature or description in any such proceeding or action. Tenant and Landlord both waive a trial by jury of any or all issues arising in any action or proceeding between the parties hereto or their successors, under or connected with this Lease, or any of its provisions.

Prudential did not specifically point out this provision to the Secchis, and Jane testified that she never noticed it. She also testified that notwithstanding the clear meaning of the second sentence, she never intended to waive a jury trial in any future litigation. The guaranty agreement does not contain a similar waiver but does state that the Secchis agree to guarantee the tenant's "full and timely performance and observance of all the covenants, terms, conditions, provisions, and agreements" in the lease, and in the event of the tenant's default, to "faithfully perform and fulfill all of such terms, covenants, conditions, provisions, and agreements".

Some nine months after the lease was executed, the Secchis and their limited partnership (collectively, "ICP") sued Prudential in statutory county court, claiming in part that it was impossible to do business on the premises because of a persistent odor of sewage. Prudential counterclaimed for amounts allegedly due under the lease and guaranty. When the trial court notified the parties that a date for non-jury trial had been set, ICP filed a jury demand and paid the jury fee, as required by Rule 216 of the Texas Rules of Civil Procedure. The court then notified the parties that a date for jury trial had been set. Prudential moved to quash the jury demand, based on the waiver in the lease. ICP responded that contractual jury waivers in general, and the waiver in the lease in particular, are unenforceable. * * *

After a hearing, the court denied the motion in a brief order without explanation. Prudential petitioned the court of appeals for mandamus relief, which that court denied with a short memorandum opinion, 2002 WL 1608233, explaining only that "the relators have not shown themselves entitled to the relief requested." Prudential then petitioned for relief from this Court, and we agreed to hear argument. * * *

II

As a rule, parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy. ICP argues that a contractual jury waiver does both. We consider each of ICP's arguments, first with respect to all such waivers, and then with respect to the waiver in this case.

A

We need not dwell on ICP's argument that contractual jury waivers violate various provisions of the Texas Constitution, an argument the trial court did not endorse. The five provisions ICP cites guarantee various personal rights—trial by jury, access to the courts, due course of law, and the Bill of Rights in general. The provisions say nothing about whether and under what conditions such rights can be waived. For the most part, personal rights can be waived, at least under certain conditions. ICP concedes that the right to trial by jury can be waived by failure to comply with the procedures prescribed by Rule 216. Nothing in the constitutional provisions themselves suggests that parties are powerless to waive trial by jury under any other circumstances, before or after suit is filed.

ICP argues that Rule 216 prescribes the only way in which trial by jury can be waived, but it plainly does not. Rule 216 states that "[n]o jury trial shall be had in any civil suit, unless" a timely demand is made and jury fee paid. By the rule's express language, those conditions are prerequisites to a jury trial, not guarantees of one.

ICP's principal argument, and the one accepted by the trial court, is that an agreement to waive trial by jury is contrary to the public policy expressed in the constitutional provisions and Rule 216. This is so, ICP contends, because to allow such waivers gives parties the power to alter the fundamental nature of the civil justice system by private agreement. But parties already have power to agree to important aspects of how prospective disputes will be resolved. They can, with some restrictions, agree that the law of a certain jurisdiction will apply, designate the forum in which future litigation will be conducted, and waive in personam jurisdiction, a requirement of due process. Furthermore, parties can agree to opt out of the civil justice system altogether and submit future disputes to arbitration. State and federal law not only permit but favor arbitration agreements. ICP argues that while it does not offend public policy for parties to agree to a private dispute resolution method like arbitration, an agreement to waive trial by jury is different because it purports to manipulate the prescribed public justice system. We are not persuaded. Public policy that permits parties to waive trial altogether surely does not forbid waiver of trial by jury.

ICP argues that contractual jury waivers are no different from cognovit or confession-of-judgment clauses by which a debtor agrees in the event of default on an obligation to waive notice of suit and to authorize the lender or its designee to confess judgment, which have long been outlawed in Texas. In *Worsham v. Stevens*, we held that a statute passed after such an agreement had been made nevertheless prevented its enforcement, operating not to impair the parties' contract but to deprive the creditor of a remedy previously available. *Worsham* stands for the unsurprising proposition that the Legislature is not obliged to continue a remedy in effect merely because parties have contracted for it. No statute forbids contractual waivers of the right to trial by jury.

ICP argues that trial by jury affords such fundamental private and public benefits that it cannot be waived by agreement. We certainly agree with ICP that juries in civil cases provide an important public participation in the civil justice system. But as ICP acknowledges, trial by jury can be waived and often is, and we do not see

why waiver by agreement is more harmful to public interests than waiver simply because no party requests a jury. ICP argues that parties are more likely to trust the fairness of a jury verdict. But we think that parties who agree to trial before a judge have already indicated by their choice that they prefer judicial resolution of the dispute.

ICP argues that if contractual jury waivers are permitted, some parties will attempt to take unfair advantage of others, using bargaining position, sophistication, or other leverage to extract waivers from the reluctant or unwitting. We agree, of course, that agreements made in such circumstances cannot be enforced. As we have said in another context, a waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences. We echo the United States Supreme Court's admonition that "[w]aivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." Under those conditions, however, a party's right to trial by jury is afforded the same protections as other constitutional rights.

Furthermore, if parties are willing to agree to a non-jury trial, we think it preferable to enforce that agreement rather than leave them with arbitration as their only enforceable option. By agreeing to arbitration, parties waive not only their right to trial by jury but their right to appeal, whereas by agreeing to waive only the former right, they take advantage of the reduced expense and delay of a bench trial, avoid the expense of arbitration, and retain their right to appeal. The parties obtain dispute resolution of their own choosing in a manner already afforded to litigants in their courts. Their rights, and the orderly development of the law, are further protected by appeal. And even if the option appeals only to a few, some of the tide away from the civil justice system to alternate dispute resolution is stemmed.

Finally, we note that nearly every state court that has considered the issue has held that parties may agree to waive their right to trial by jury in certain future disputes, including the supreme courts in Alabama, Connecticut, Missouri, Nevada, and Rhode Island. The same is true of federal courts. One Texas court of appeals has also reached this conclusion. Only one state supreme court, the Supreme Court of Georgia, has reached a contrary conclusion. We believe this overwhelming weight of authority is correct.

B

ICP argues that even if some contractual jury waivers are enforceable, for three reasons the one in this case is not.

First, ICP contends, and the trial court found, that ICP's assent to a commercial lease that included a sentence waiving trial by jury does not satisfy the high standard that a waiver of constitutional rights must be voluntary, knowing, and intelligent, with full awareness of the legal consequences because—

> the sentence was in the 53rd paragraph of a 67-paragraph document, 7 pages before the signature page;
>
> the paragraph was misleadingly captioned "Jury Trial" instead of "Jury Waiver";
>
> the bargaining power of Prudential, with "assets exceeding a quarter of a trillion dollars", greatly exceeded that of the Secchis, "neither of whom were educated beyond the 8th grade, [and who] are immigrants to the United States who operate two local restaurants"; and
>
> the Secchis did not read the jury waiver, were not told that it was included, and did not bargain for it.

The Secchis admitted, however, that they had negotiated commercial leases before, that they had previously been represented by counsel, that they had legal counsel in their negotiations with Prudential, that Jane went over this lease with their lawyer, and that they negotiated a number of changes with Prudential over a period of six months. Based on these facts, all of which are undisputed, we conclude that ICP's waiver of trial by jury was knowing and voluntary as a matter of law. The waiver was crystal clear, and ICP does not contend otherwise. While it came toward the end of a long document, it was not printed in small type or hidden in lengthy text. The paragraph was captioned in bold type, and though "jury waiver" might have been clearer than "jury trial", we do not agree that the caption could reasonably have diverted the Secchis' attention or misled them into thinking that the provision meant the opposite of what it clearly said. Assuming that a jury waiver provision must be conspicuous, an issue we need not decide here, this one was. Although the Secchis did not read the paragraph, they are charged with knowledge of all of the lease provisions absent some claim that they were

tricked into agreeing to them, which they do not assert. In sum, we conclude that the Secchis' waiver was knowing and voluntary.

Next, ICP alleges that it was fraudulently induced to execute the lease due to Prudential's concealment of the fact that the premises suffered a recurring odor of sewage. It would be anomalous, ICP argues, to conclude that it was entitled to rescission and yet enforce the jury waiver the lease contains. Accordingly, ICP argues, a jury waiver should not be enforced when it is part of an agreement that is alleged to have been fraudulently induced.

Any provision relating to the resolution of future disputes, included as part of a larger agreement, would rarely be enforced if the provision could be avoided by a general allegation of fraud directed at the entire agreement. The purpose of such provisions—to control resolution of future disputes—would be almost entirely defeated if the assertion of fraud common to such disputes were enough to bar enforcement. The United States Supreme Court has explained that arbitration and forum-selection clauses should be enforced, even if they are part of an agreement alleged to have been fraudulently induced, as long as the specific clauses were not themselves the product of fraud or coercion. We have applied the same rule in the context of arbitration. The Supreme Court of Connecticut has taken the same approach to contractual jury waivers. We agree that the rule should be the same for all similar dispute resolution agreements.

Prudential and the Secchis agreed that any disputes that might arise between them should be resolved without a jury. They did not except disputes over whether the lease was fraudulently induced. The Secchis do not argue that the jury waiver itself was fraudulently induced. Accordingly, their claim for rescission does not preclude enforcement of the jury waiver.

Finally, the Secchis argue that because the jury waiver is contained in the lease only and not in their guaranty, it cannot be enforced against them. Prudential argues that the jury waiver is incorporated into the guaranty by the Secchis' promise in the latter to "faithfully perform and fulfill all of [the] terms, covenants, conditions, provisions, and agreements" of the lease in the event of the partnership's default. We agree with Prudential. We have said before that "an unsigned paper may be incorporated by reference in the paper signed by the person sought to be charged. The language used is not important provided the document signed . . . plainly refers to another writing." Furthermore, agreements executed at the same time, with the same purpose, and as part of the same transaction, are construed together. Applying these rules, and construing the guaranty's express terms, we conclude that the guaranty incorporated the jury waiver in the lease. We note that at least two other supreme courts have reached the same conclusion in similar circumstances.

Having concluded that the parties' contractual jury waiver is enforceable, we turn to whether Prudential is entitled to relief by mandamus. Prudential must meet two requirements. One is to show that the trial court clearly abused its discretion. We have concluded as a matter of law that Prudential was entitled to enforcement of the jury waiver. Since "[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts", even when the law is unsettled, the trial court's refusal to enforce the jury waiver was a clear abuse of discretion. Thus, Prudential has met the first requirement.

The other requirement Prudential must meet is to show that it has no adequate remedy by appeal. The operative word, "adequate", has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is "adequate" when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for deter-

mining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy's principal virtue. Thus, we wrote in *Walker v. Packer* that "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ." While this is certainly true, the word "merely" carries heavy freight. In *In re E.I. duPont de Nemours & Co.,* we concluded that defending the claims of more than 8,000 plaintiffs in litigation that would last for years was not *mere* expense and delay, and that mandamus review of the denial of duPont's special appearance was justified, even though duPont could eventually appeal and did not appear to be in any danger of succumbing to the burden of the litigation. In *Travelers Indemnity Co. v. Mayfield,* we granted mandamus review of an order requiring a carrier to pay the plaintiff's attorney fees as incurred in a compensation case, even though the carrier could have appealed from the final judgment and won recovery for the amounts paid, because the order not only cost the carrier money but "radically skew[ed] the procedural dynamics of the case" by requiring the defendant to fund the plaintiff's prosecution of her claims. In *In re Masonite Corp.,* the trial court on its own motion and without any authority whatever, split two cases into sixteen and transferred venue of fourteen of them to other counties. We held that the defendants were not required to wait until appeal to complain.

Walker does not require us to turn a blind eye to blatant injustice nor does it mandate that we be an accomplice to sixteen trials that will amount to little more than a fiction. Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.

These cases, among a great many others that could be cited, serve to illustrate that whether an appellate remedy is "adequate" so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules.

Nor is the consideration whether to grant mandamus review confined to private concerns. No one suggested in *Masonite* that any individual party would suffer more by waiting to complain on appeal of the venue order than would any other party complaining of any other venue order in any other case. Two factors drove our decision in *Masonite*: the complete lack of authority for the trial court's order, and the impact on the legal system. We simply could not justify putting the civil justice system itself to the trouble of grinding through proceedings that were certain to be "little more than a fiction." The trial court's ruling in *Travelers* was novel but might easily have become a repeated error. Either way, the error was clear enough, and correction simple enough, that mandamus review was appropriate.

Prudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals. The unavailability of mandamus relief increases the pressure for expanded interlocutory appeals. For example, when this Court refused to review venue decisions by mandamus, the Legislature responded by authorizing mandamus review of all decisions involving mandatory venue provisions. When we held that the denial of a special appearance would ordinarily not warrant mandamus review, the Legislature responded by creating an interlocutory appeal from the denial of a special appearance. When questions arose concerning the availability of mandamus to review the sufficiency of expert reports required in medical malpractice cases, the Legislature responded by creating an interlocutory appeal from the denial of dismissals of such cases for insufficient expert reports. Interlocutory appeals lie as of right and must be decided on the merits, increasing the burden on the appellate system. "Mandamus," on the other hand, "is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles." As a selective procedure, mandamus can correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal. Appellate courts must be mindful, however, that the benefits of mandamus review are easily lost by overuse.

The issue before us in the present case-whether a pre-suit waiver of trial by jury is enforceable-fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur (it has already arisen in another case in the court of appeals, also on petition for mandamus). It eludes answer by appeal. In no real sense can the trial court's denial of Prudential's contractual right to have the Secchis waive a jury ever be rectified on appeal. If Prudential were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. If Prudential suffered judgment on an unfavorable verdict, Prudential could not obtain reversal for the incorrect denial of its contractual right "unless the court of appeals concludes that the error complained of . . . probably caused the rendition of an improper judgment." Even if Prudential could somehow obtain reversal based on the

denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.

For this latter reason, we have granted mandamus relief for the trial court's wrongful refusal to compel arbitration. In *Jack B. Anglin Co. v. Tipps,* we stated that even if the refusal were eventually corrected on appeal, the party seeking arbitration "would be deprived of the benefits of the arbitration clause it contracted for, and the purpose of providing a rapid, inexpensive alternative to traditional litigation would be defeated." This is at least as true, perhaps more so, when the benefit denied is a non-jury trial.

Only if a contractual waiver of trial by jury is enforced in the trial court can its propriety effectively be reviewed on appeal. The denial of trial by jury is harmless error only if there are no material fact issues to submit to a jury. But the denial of trial by jury is also reviewable by mandamus. A sentence in our opinion in *General Motors Corp. v. Gayle* suggests that this is not true, but we granted mandamus in that case to correct the trial court's denial of a jury trial, and we cited without disapproval three courts of appeals that we said "ha[d] reviewed jury trial orders by mandamus." To afford relief for the denial of a jury trial both by mandamus and by appeal, and to deny relief by either means for the refusal to enforce a jury waiver, unacceptably contorts review of the issue. Mandamus relief in a situation like this, in Professor Charles Alan Wright's words, "provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders."

Finally, we note that other courts have granted mandamus relief to enforce contractual jury waivers, including the only other Texas court to have addressed the issue. We are not aware of a published decision denying such relief.

The dissent argues that Prudential has an adequate remedy by appeal because it can "seek damages directly from the breaching party as in any other contract case." But a separate lawsuit is simply not an *appellate* remedy. Even if it were, Prudential could not vindicate its contractual rights by a suit for damages if it won the lease-dispute case. In that situation, Prudential could not appeal from a favorable judgment and could not collaterally attack in a separate suit the trial court's refusal to enforce the jury waiver. To deny Prudential enforcement of the jury waiver by mandamus is to deny it any remedy at all. The dissent cannot point to any authority that would allow the suit for damages it hypothesizes or consider it a viable alternative to mandamus relief.

* * *

For these reasons, we direct respondent, the Honorable Sally Montgomery, to vacate her order of June 6, 2003, and the prior order of June 19, 2002, to grant Prudential's motion to quash the jury demand and payment of jury fee, and to return the case to the nonjury docket. We are confident she will promptly comply. Our writ will issue only if she does not.

b. ***Failure to Appear for Trial***

Read Rules 220 and 243 Texas Rules of Civil Procedure.

BRADLEY MOTORS
v.
MACKEY
878 S.W.2d 140
(Tex. 1994)

Ronald D. Nickum, Amarillo, for petitioner.
Laurence Alan Bransgrove, Amarillo, for respondent.

PER CURIAM.

This is a suit brought under the Texas Deceptive Trade Practices—Consumer Protection Act by Bradley Motors against David Mackey. Bradley Motors claimed that Mackey misrepresented his intentions to transfer title of a "trade-in" automobile. Mackey filed an answer as well as a counterclaim. Mackey also requested a trial by jury and paid the required jury fee. When the case was called for trial as scheduled, Bradley Motors announced ready for trial, but neither Mackey nor his counsel appeared. Bradley Motors waived trial by jury, presented testimony and exhibits to the court, and made a record. The trial court rendered judgment for Bradley Motors on its unliquidated damages claims, including actual damages and attorney's fees. The court also ordered that Mackey take nothing on his counterclaim. Holding that Mackey had not waived his right to a jury trial on the issue of damages, the court of appeals reversed the trial court judgment. 871 S.W.2d 243. We reverse the judgment of the court of appeals.

The primary question presented is whether Mackey, who had filed an answer and properly requested a jury trial, waived his right to a jury trial on Bradley Motors' unliquidated damages claim by not appearing for trial. Since Mackey had answered but failed to appear for trial, the judgment in this case was a post-answer default judgment. In such a situation, a trial court may not render judgment on the pleadings and the plaintiff is required to offer evidence and prove all aspects of his case. *See Stoner v. Thompson*, 578 S.W.2d 679 (Tex. 1979). The issue here is whether the trial court erred in hearing evidence of Bradley Motors' unliquidated damages and rendering a judgment. The two rules which are relevant are TEX. R. CIV. P. 243 and TEX. R. CIV. P. 220. Rule 243, which deals with default judgments, states: If the cause of action is unliquidated or be not proved by an instrument in writing, the court shall hear evidence as to damages and shall render judgment therefor, unless the defendant shall demand and be entitled to a trial by jury in which case the judgment by default shall be noted, a writ of inquiry awarded, and the cause entered on the jury docket. TEX. R. CIV. P. 243. Rule 220, which deals with withdrawing a case from a jury docket, states: When any party has paid the fee for a jury trial, he shall not be permitted to withdraw the cause from the jury docket over the objection of the parties adversely interested. If so permitted, the court in its discretion may by an order permit him to withdraw also his jury fee deposit. Failure of a party to appear for trial shall be deemed a waiver by him of the right to trial by jury. TEX. R. CIV. P. 220 (emphasis added). We have found no court of appeals decision other than the present one that has addressed this issue and held that a party who has properly requested a jury trial but fails to appear at trial has not waived the right to a jury trial on unliquidated damages. *See, e.g., Hanners v. State Bar of Texas*, 860 S.W.2d 903, 911 (Tex. App.—Dallas 1993, no writ) (*citing Moldanado v. Puente*, 694 S.W.2d 86, 89 (Tex. App.—San Antonio 1985, no writ)); *Chavco Investment Co., Inc. v. Pybus*, 613 S.W.2d 806, 809 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); *Lopez v. Soliz*, 619 S.W.2d 12, 13 (Tex. Civ. App.—Corpus Christi 1981, no writ); *Hall v. C-F Employees Credit Union*, 536 S.W.2d 266, 267 (Tex. Civ. App.—Texarkana 1976, no writ); *Chandler v. Chandler*, 536 S.W.2d 260, 262 (Tex. Civ. App.—Corpus Christi 1976, error dism'd); *Crabbe v. Hord*, 536 S.W.2d 409, 415 (Tex. Civ. App.—Fort Worth 1976, writ ref'd n.r.e.); *Carruth v. Shelter Air Systems, Inc*., 531 S.W.2d 913, 915 (Tex. Civ. App.—Houston [1st Dist.] 1975, no writ). We agree that Rule 220 controls Rule 243, so that a party who fails to appear at trial after filing an answer waives the right to a jury trial.

Pursuant to TEX. R. APP. P. 170, a majority of this court grants petitioner's application for writ of error and, without hearing oral argument, reverses the judgment of remand by the court of appeals on the issue of damages.

We agree with the court of appeals, however, that the trial court erred by granting more relief than was requested by Bradley Motors in its petition, a conclusion Bradley Motors does not challenge in this Court. Therefore, we reform the trial court judgment to reduce the actual damages to $500.00, to delete the declaratory judgment that the contract between Mackey and Bradley Motors was binding, to delete the validation of the assignment of a retail installment sales contract by Bradley Motors, to delete the declaration that no grounds exist to rescind the contract between Mackey and Bradley Motors, and to delete the order that the State of Texas (a non-party) reissue title to an identified automobile. All other provisions remain as in the trial court judgment. As reformed, we render judgment in accordance with the trial court judgment.

3. *Setting Case for Trial and Notice of Setting*

Read Rule 21a, 245 & 246 TRCP.

NORMAN COMMUNICATIONS, INC.
v.
TEXAS EASTMAN COMPANY
956 S.W.2d 68
(Tex. App.—Tyler,1997), *rev'd on other grounds*
955 S.W.2d 269 (Tex. 1997)

Ron Adkison, Henderson, for appellant.
Lauren B. Smith, Longview, for appellee.

RAMEY, Chief Justice.

This writ of error appeal attacks a post-answer default judgment against the Defendant below, Norman Communications ("Norman"). The dispute arose out of a purchase order by the Plaintiff, Texas Eastman Company, a Division of Eastman Chemical Company ("Eastman"), for 25 two-way radios from Champion Electronics Supply, Inc. ("Champion"), which radios Eastman alleges were not "intrinsically safe" as per the order. Eastman claims that these radios were obtained by Champion, the retailer, from Norman, the dealer, which had acquired them from Maxon Electronics Corporation of America ("Maxon"), the manufacturer.

Suit was filed by Eastman against the three parties, Champion, Maxon and Norman, in March 1994, for damages in delivering non-conforming goods pursuant to the Texas Uniform Commercial Code. All Defendants timely answered the suit. Norman and its counsel, however, did not attend the trial of the case on July 5, 1995; only Eastman and Maxon appeared. After a bench trial, the court entered judgment for Eastman against Maxon and Norman, jointly and severally; at that time, Champion, the third Defendant was out of business, in bankruptcy and subsequently non-suited.

In its Petition for Writ of Error, Norman and its counsel have sworn and consistently urged that they had no notice that the trial had been set until that counsel received a telefax concerning the case from Maxon's attorney fifty-four days after the hearing, on August 28, 1995. On that same day, Eastman severed its claim against Norman from the Maxon cause of action, and on August 30, Norman for the first time received a copy of the trial court's judgment dated July 21, 1995. Immediately thereafter, on September 1, this Petition for Writ of Error was filed by Norman. We will affirm the trial court's judgment against Norman in the context of this writ of error appeal.

The law is well established that strict compliance with statutes or rules governing the service of process is required to support default judgments. *Wilson v. Dunn*, 800 S.W.2d 833, 836 (Tex. 1990); *Whitney v. L. & L. Realty Corporation*, 500 S.W.2d 94 (Tex. 1973). The usual presumptions of a judgment's validity are not indulged in a writ of error proceeding. *McKanna v. Edgar*, 388 S.W.2d 927, 929-30 (Tex. 1965). A writ of error appeal constitutes a direct attack on a default judgment. *Pace Sports, Inc. v. Davis Brothers Publishing Co. Inc.*, 514 S.W.2d 247 (Tex. 1974).

Resolution of this dispute is determined by the four established requisites of an appeal by writ of error, which require that the Appellant: (1) bring the petition within six months after the judgment was signed,

TEX.CIV.PRAC. & REM.CODE Ann. § 51.013 (Vernon 1986); TEX.R.APP.P. 45; (2) be a party to the suit, TEX.R.APP.P. 45; (3) not have participated in the actual trial, *Id.*; and (4) present a record wherein the error complained of is apparent on its face. *Brown v. McLennan County Children's Protective Servs*., 627 S.W.2d 390, 392 (Tex. 1982). Norman has undisputedly satisfied the first three requirements; only the fourth element is contested here.

The overriding issue in our review of the fourth requirement is whether the prevailing party in the trial court has the burden of demonstrating from the record that the defaulting party had notice of the trial setting, or whether a record silent as to any notice of the setting fails to demonstrate apparent error in the record. An Appellant seeking to demonstrate error apparent on the face of the record in a case involving the absence of notice bears a heavy burden because it is likely that the record will be barren of affirmative proof of the error asserted. *Langdale v. Villamil*, 813 S.W.2d 187, 189 (Tex. App.—Houston [14th Dist.] 1991, no writ). Interpretation of this fourth requirement has spawned relatively prolific litigation. For example, a 1990 Corpus Christi Court of Appeals opinion denied a writ of error appeal where the record was wholly silent as to the provision of notice of the setting to the defaulting party. *Prihoda v. Marek*, 797 S.W.2d 170 (Tex. App.—Corpus Christi 1990, writ denied). But a June 1991 Fourteenth Court of Appeals opinion specifically disagreed with *Prihoda*, holding that although the record before it was silent as to whether notice of the setting was given to *Langdale*, error in the record was demonstrated because the court accepted as true the Appellant's uncontroverted claim in his brief that he had not received notice. *Langdale*, 813 S.W.2d at 191.

In the same month, June 1991, a supreme court opinion spoke directly to the proper treatment of the fourth requirement of a writ of error appeal. *General Electric Co. v. Falcon Ridge Apts., Joint Venture*, 811 S.W.2d 942, 944 (Tex. 1991). The intermediate court of appeals had held that although the record was silent on whether notice of the setting had been given as required by the rules, where the complaining party asserted without contradiction that notice was not given, error was construed to be apparent from the record and the fourth element of a writ of error appeal was satisfied. The supreme court disagreed, reversed and held that where there was nothing in the record suggesting that notice of setting was either given or omitted, apparent error in the record was not shown and the writ of error failed. *Falcon Ridge*, 811 S.W.2d at 943-44. In their subsequent petition for writ of error, the Plaintiffs in *Falcon Ridge* denied receiving any notice of intention to dismiss and attached affidavits supporting its lack of notice, as was done in the instant case.

The supreme court further stated that it had long been the rule "that evidence not before the trial court prior to final judgment" may not be considered. *Id*, at 944. Norman's denial of notice of setting and its supporting affidavits in the Petition for Writ of Error, not having been presented for ruling in the lower court, were not available to establish apparent error in the record in this type of appeal. *Id*. The supreme court explained that where extrinsic evidence is required to show error in the record, the appropriate remedy is by motion for new trial or by bill of review. *Id*.

We agree with JUSTICE MIRABAL's suggestion that it would be an improvement if the Texas Rules of Civil Procedure are amended to require clerks to affirmatively enter in the court files proof that they have actually sent notices of settings to all litigants. *Falcon Ridge*, 795 S.W.2d at 23. The supreme court agrees that a rule amendment requiring such notice to be shown on the face of the record would be preferable to "disturbing well-established limitations on the scope of writ of error review." (Emphasis ours.) *Falcon Ridge*, 811 S.W.2d at 944 n. 1.

In reviewing the record in the instant case, we examine the Transcript which contains the pleadings, the court's orders, the parties' motions, two notices of non-suit and the Petition for Writ of Error. One additional document in the Transcript is entitled, "Update Trial List for Week of July 3, 1995," which listed the subject case along with seventy-two other civil suits set for trial that week. The Transcript is silent as to notice of the trial setting to Norman.

Additionally, we take judicial notice of the local rules of the trial court as part of the record. *Langdale*, 813 S.W.2d at 190. At all material times, the Gregg County civil courts have operated under the Amended Local Court Rules For Trial Settings And Docket Management Of Cases On File In The Office Of The District Clerk Of Gregg County, Texas ("Local Rules"), which were approved by the supreme court and apparently satisfy Rules 245 and 21a of the Texas Rules of Civil Procedure. The Local Rules required no notation in the record by the clerk that notice of setting was given to Defendants, such as Norman.

Finally, "the record" here includes a Statement of Facts of the July 5 bench trial hearing. *DSC Finance Corporation v. Moffitt*, 815 S.W.2d 551 (Tex. 1991). At this hearing, Eastman called three witnesses: James W. Watts, Jr., an Eastman construction manager, Leslie Shaw, an engineer for Eastman who served as chairman of the committee that tested the intrinsic safety of the radios, and Loren Smith, Eastman's counsel who testified about attorneys' fees only. No testimony was elicited at the hearing concerning notice to Norman of the trial setting.

Our review of the record of the trial discloses nothing that "affirmatively indicates that notice was given nor any notation to establish that notice was omitted." *Falcon Ridge*, 811 S.W.2d at 943. When the record is silent as to provision of notice of the trial court setting, no reversible error is apparent from the face of the record. *Id*, at 944.

* * *

Finally, Norman martials a series of cases for the proposition that procedural due process requires reasonable notice of a setting and that after Norman entered its appearance in this cause due process entitled it to notice of the setting. *Armstrong v. Manzo*, 380 U.S. 545, 550, 85 S.Ct. 1187, 1190, 14 L.Ed.2d 62 (1965); *Peralta v. Heights Medical Center, Inc*., 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988); *LBL Oil Co. v. International Power Services, Inc.*, 777 S.W.2d 390, 391 (Tex. 1989); *Chow v. Dole*, 677 S.W.2d 220, 221 (Tex. App.—Houston [1st Dist.] 1984, no writ); *Mexia I.S.D. v. City of Mexia*, 134 Tex. 95, 133 S.W.2d 118 (1939); *Anderson v. Anderson*, 698 S.W.2d 397, 399 (Tex. App.—Houston [14th Dist.] 1985, writ dism'd); *Wilson v. Industrial Leasing Corp*., 689 S.W.2d 496 (Tex. App.—Houston [1st Dist.]1985, no writ). This is a fundamental principle of the law. We are sensitive to a litigant's constitutional right to be present and participate in its case. Here, however, we are asked to review a default judgment in the context of a specific appellate vehicle. The confining requirements of a writ of error appeal are established in Texas, and it has successfully withstood the due process attacks. *Falcon Ridge* teaches that if a defaulted party is unduly burdened by writ of error parameters, an alternative remedy by bill of review is available and by which extrinsic evidence may be presented. *Falcon Ridge*, 811 S.W.2d at 944. As noted, the briefs reveal that a petition for bill of review is also pending here, and Norman has not asserted that this alternative appellate procedure is unavailable or unduly burdensome. *Id*. Therefore, as *Falcon Ridge* held, we do not encroach upon the traditional role of the trial court. *Id.*

We hold that under the limiting requisites of a writ of error appeal, no reversible error is disclosed on the face of the record here.

* * *

Notes

1. The Texas Supreme Court reversed this case on other grounds, but held that the court of appeals correctly found that *Norman* did not show error on the face of the record on its claim that it had no notice of the trial setting that led to the default judgment against it. *Norman Communications v. Texas Eastman Co*., 955 S.W.2d 269 (Tex. 1997).

2. In *Stum v. Stum*, 845 S.W.2d 407 (Tex. App.—Ft. Worth 1992, no writ) the first notice of a trial setting received was an unsigned order setting the case for trial sent to the appellants' attorney of record by telephonic document transfer shortly before his withdrawal. The court noted that a photocopy of this unsigned order, sent by letter to appellants by their withdrawn attorney, was in writing and was given more than forty-five days before trial. Thus, the court concluded that this first notice met the time requirements of rule 245. The court also noted that this first notice was also properly served on appellants as it was sent to their attorney of record by telephonic document transfer pursuant to Rule 21a of the Texas Rules of Civil Procedure. In discussing the issue of notice the court stated:

> Appellants argue that they believed that this order, because it was unsigned, was a mere proposal. However, the letter accompanying the order informed them that if there were no objections, the order would be entered, and it was entered twelve days later. Further, their attorney positively testified that he passed the information on to them before he withdrew from representing them.
>
> The Texas Supreme Court has held that a copy of a letter merely requesting a trial setting, sent to a pro se litigant, is sufficient notice of the trial setting. *Mansfield State Bank v. Cohn*, 573 S.W.2d 181,

185 (Tex. 1978). This copied request, meeting the county's local rules and the state's procedural rules, put the litigant on notice that "trial may be on that requested date." *Id.* at 184-85. Thus, the court found that the letter was sufficient notice of the trial setting. *Id.* at 185.

In our case, the order setting the case for trial, albeit unsigned, is at least as much notice as a letter of request, especially considering the letter informing appellants that the order would be entered. This and appellee's attorney's confirmation of the setting at the motion to compel hearing should have alleviated any doubt appellants retained as to when they were going to trial. Further, appellants testified that they complied with the substance of the temporary injunction order in which the court set the case for trial. This discredits their assertion that they believed the order was a mere proposal. Finally, appellant Cynthia Stum's telephone conversation with the court before the trial met the local rule's de minimis requirement that appellants be informed that they need to appear for the trial set for that day.

Not only did appellants receive as much notice as the litigants in *Mansfield*, they received notice that met the due process requirements that appellants have notice of the trial setting. Since *Peralta*, the Texas Supreme Court has twice held that when the record establishes that a litigant "had no actual or constructive notice" of a trial setting, a motion for new trial should be granted pursuant to *Peralta*. *Lopez v. Lopez*, 757 S.W.2d 721, 723 (Tex. 1988) (per curiam); *LBL Oil Co. v. International Power Servs*., 777 S.W.2d 390, 391 (Tex. 1989) (per curiam). The converse of this rule is that when the record establishes that a litigant had actual or constructive notice, *Peralta* does not require the granting of a new trial. In this case, the record reflects that appellants had actual or constructive notice of the trial setting; thus, *Peralta* does not require the granting of a new trial.

3. In *Bruneio v. Bruneio*, 890 S.W.2d 150 (Tex. App.—Corpus Christ 1994, no writ) the court addressed the interrelationship between Rules 245 and 246. The court stated:

Although Maria concedes that Anthony never received notice of the trial setting, she points to the relevant Texas Rules of Civil Procedure governing notice of trial settings as showing that Anthony waived his right to notice by not properly requesting it. Texas Rule of Civil Procedure 245 provides that: The court may set contested cases on written request of any party, or on the court's own motion, with reasonable notice of not less than forty-five days to the parties of a first setting for trial, or by agreement of the parties; provided, however, that when a case previously has been set for trial, the Court may reset said contested case to a later date on any reasonable notice to the parties or by agreement of the parties. * * * Texas Rule of Civil Procedure 246 provides that: The clerk shall keep a record in his office of all cases set for trial, and it shall be his duty to inform any non-resident attorney of the date of setting of any case upon request by mail from such attorney, accompanied by a return envelope properly addressed and stamped. Failure of the clerk to furnish such information on proper request shall be sufficient ground for continuance or for a new trial when it appears to the court that such failure has prevented the attorney from preparing or presenting his claim or defense. Maria argues that Rule 246 is the operative rule requiring that Anthony first have provided a proper request and a stamped return-addressed envelope to the clerk in order to be entitled to receive notice of the trial setting. We disagree.

We note that Rule 246 does not define what it means by a "non-resident attorney"—a non-resident of the state, non-resident of the county, or non-resident of the city in which the courthouse is located? *See Armentrout v. Murdock*, 779 S.W.2d 119, 123 (Tex. App.—Houston [1st Dist.] 1989, no writ) ("non-resident" as applying to Houston, Harris County, attorneys who appeared in a lawsuit in neighboring Galveston County). Accordingly, we believe that the term "non-resident" was intended not so much as a limiting or defining term as merely a descriptive term for those attorneys who may be expected to request mailed notice. This interpretation would be consistent with the idea that Rule 246 does not change or qualify the requirements of Rule 245 concerning due process notice to the parties, but that it merely provides an additional vehicle for notice to any of the various attorneys who may be working on the case and want direct notification of its setting. Under the provisions of Rule 246, non-resident counsel thus has a more direct means of keeping up with the status of the case rather than relying entirely on the attorney in charge to keep him informed or constantly checking with the clerk to determine whether the case has been set. Accordingly, Rule 246 should not be read to qualify the notice requirements of Rule 245, but to expand the requirements of notice to include non-resident attorneys

who would not otherwise be entitled to direct notification of the setting under Rule 245 as the attorney in charge.

4. ***Continuance***

Read Rules 251-254 Texas Rules of Civil Procedure.

FRITSCH
v.
J. M. ENGLISH TRUCK LINE, INC.
151 Tex. 168, 246 S.W.2d 856
(1952)

Morris, Underwood & Oldham, Houston, Graves, Dougherty & Greenhill, Austin, for petitioner.
Dyess & Dyess, Houston, for respondent.

CALVERT, Justice.

The only question in this case decided by the Court of Civil Appeals and argued in this Court is this: Did the trial court abuse its discretion in overruling defendant's motion for continuance? The Court of Civil Appeals has held that it did and on that ground alone has reversed the trial court's judgment for plaintiff, which judgment was based upon a jury's answers to special issues, and has remanded the cause for retrial. 243 S.W.2d 464.

The application for writ of error by a single point of error challenges the correctness of the ruling of the Court of Civil Appeals. Defendant has not favored us with an answer or reply to the application. In oral argument, advanced on the submission of the cause, defendant's counsel not only contended that the Court of Civil Appeals had ruled correctly on the continuance question but contended also, for the first time, that this Court has no jurisdiction of the case and therefore should not have granted the application in the first instance. In the application for writ of error jurisdiction of this Court was said to attach under section 2 of Article 1728, V.A.C.S., in that the holding of the Court of Civil Appeals in this case was in conflict on a question of law with prior holdings of this Court and of other Courts of Civil Appeals. Two of the cases with which the holdings here was said to be in conflict so as to confer jurisdiction upon this Court, and with which we think it is conflict, are *Hensley's Adm'rs v. Lytle*, 5 Tex. 497, 55 Am.Dec. 741 and *Campbell v. McCoy*, 3 Tex. Civ. App. 298, 23 S.W.2d 34 (no writ history).

The witness whose absence was made the basis of the motion for continuance was one O. E. Greenhaw, who was not an officer nor an employee of the defendant, and, so far as the record reflects, was in no way connected with nor obligated to the defendant. Plaintiff does not contend that the testimony of this witness was not material to the defendant's case; he contends only that the defendant did not establish the use of such diligence to procure the attendance of the witness nor to obtain his testimony as to require the granting of the motion for continuance. To properly evaluate the rival contentions of the parties on this issue it becomes necessary to review the sequence of events leading up to the filing of the motion for continuance.

Plaintiff's suit was one for damages for personal injuries alleged by him to have been received on November 8, 1947. His suit was filed on November 3, 1949, almost two years later.

The record reflects, largely through an unchallenged pleading sworn to by plaintiff's counsel and controverting the defendant's motion for new trial, that at plaintiff's request the case had been set for trial on November 20, 1950, at which time plaintiff announced ready for trial but the defendant announced that it was not ready; that the parties then joined in a motion requesting that the case be passed and be given a preferential setting for the week of December 11th, which motion was granted; that on Friday, December 8th, the docket of those cases set for the week of the 11th was called for the purpose of determining which cases would be ready for trial, and on such call both parties to this cause announced ready without qualification; that accordingly the case was listed as the 15th case on the docket ready for trial when reached by any of the district courts of Harris County during the following week; that when the case was reached for trial on Tuesday morning, December 12th, defendant filed its motion to withdraw its announcement of ready and for continuance based on the absence of Greenhaw and two other witnesses, which motion was overruled by the presiding judge on the ground that de-

fendant had failed to use diligence in procuring the attendance of the witnesses. Two of the witnesses later appeared and testified on the trial and any right to a continuance by virtue of their absence went out of the case. Rule 252, T.R.C.P., formerly Article 2168 of the statutes, reads as follows: 'If the ground of such application be the want of testimony, the party applying therefor shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence, and the cause of failure, if known; that such testimony cannot be procured from any other source; and, if it be for the absence of a witness, he shall state the name and residence of the witness, and what he expects to prove by him; and also state that the continuance is not sought for delay only, but that justice may be done; provided that, on a first application for a continuance, it shall not be necessary to show that the absent testimony cannot be procured from any other source.'

From the very language of the rule it will be noted that the only difference between a first and a subsequent motion is that the first motion is not required 'to show that the absent testimony cannot be procured from any other source.' This fact is brought into much sharper focus by a review of the history of Rule 252. * * * In matters not therefore whether the motion in this case be regarded as a first or a second motion; the requirement of the rule that there be a showing of diligence to procure the testimony applies to the one as well as to the other. The rule requires that the party seeking the continuance make affidavit 'that he has used due diligence to procure such testimony, stating such diligence,' and Rule 251, T.R.C.P., directs that a continuance shall not be granted 'except for sufficient cause'. Of course the absence of a material witness is 'sufficient cause', but only if proper diligence has been used to procure the testimony of the witness.

Defendant's motion was in substantial compliance with the requirements of Rule 252, and contained an allegation that each of the three witnesses was out of the county but that each was expected back in the county by Friday, December 15th. When Greenhaw failed to appear by noon of Thursday the 14th the Court recessed the trial until the morning of the 15th to give defendant additional time to obtain the presence of the witness.

With respect to the witness Greenhaw, the motion set out, in the words of the Rule, that the defendant had used due diligence to procure the testimony of said witness, and by way of stating such diligence as required by the Rule, set out that on December 6th the witness had 'orally agreed to appear as a witness in behalf of the defendant' when called, and that counsel relied upon this promise, but, as an added precaution had a subpoena issued for him on December 7th. The motion further alleged that the witness was out of the county and unavailable.

There is nothing in the rules on continuance requiring the granting of a first motion merely because it is in statutory form and is not controverted by affidavit of the opposite party. Surely it will not be gainsaid that a trial court, in determining the existence of diligence, may examine the allegations of diligence contained in the motion in the light of the record before it. Moreover, a trial court will not be required to grant a motion for continuance, at the risk of committing error in overruling it, when the allegations in the motion examined in the light of the record show beyond cavil a complete lack of diligence as measured by other rules regulating procedure in the trial of cases.

In addition to the sworn allegations of the motion for continuance, the trial judge in this case had before him a record showing that the suit grew out of an injury which occurred three years before; that the suit was filed more than a year before; that the case had been set for trial some two weeks before, at which time it had been passed on the joint motion of the parties and had been given a preferential setting with the definite understanding that the parties would get ready for trial; that four days before presenting his motion the defendant had made a definite and unqualified announcement of ready for trial; that no subpoena for the witness had been issued by the clerk and placed in the hands of the sheriff until December 7th and that no effort had been made to take the deposition of the witness. Except for the statement that the witness had orally agreed to appear as a witness when called, the motion did not seek to excuse the failure of defendant to place the witness under subpoena for the November 20th setting, nor to excuse the failure to place him under subpoena for the December 11th preferential setting promptly upon the making thereof, nor to excuse the failure to take his deposition at some time prior to the November setting or thereafter and prior to the December setting as provided for in Rule 186, T.R.C.P.

Rules 176 et seq., authorizing the placing of witnesses residing in the county of suit under subpoena to compel their attendance until discharged by the court or the party summoning them and Rules 186 et seq. authorizing the taking of depositions, if utilized, offer parties to civil suits ready and fairly certain means of procur-

ing the testimony of resident witnesses. More than that, if resorted to with promptitude and pursued with diligence, they offer parties absolute protection against being forced to trial by arbitrary and unreasonable action of a trial court without the benefit of the testimony of material witnesses. If parties choose to forego their rights under these rules and resort to other and less effective and less certain means of procuring the testimony of material witnesses they must be held to do so at their own risk and with foreknowledge that they may be put to trial without the benefit of the testimony. * * *

The case of *Hensley's Adm'rs v. Lytle* is squarely in point. In that case the motion for continuance, to quote from the opinion, was 'founded on an affidavit of the absence of a material witness, who had not been subpoenaed, but who, the affidavit stated, lived so near the court-house that he could be called in at any time, and who was known by the affiant to be willing and determined, if practicable, to attend the trial, but who had left the state since the last term of the court with the intention and expectation of returning in time to be in attendance at the trial, but had been unavoidably detained abroad.' The motion was overruled by the trial court. In an opinion by Justice Wheeler, this court said: 'It (the affidavit) admits the witness had not been subpoenaed, but seeks to excuse the non-observance of this ordinary diligence by setting forth the circumstances which had induced the belief on the part of the affiant that the witness would be present at the trial. The facts stated, however, in our opinion do not constitute that diligence which the law requires. It has provided parties with the process of the court by subpoena, and in case of its non-observance, attachment to enforce the attendance of witnesses; and where a party has omitted to employ the means provided by the law when practicable, the omission will in general be fatal to his application. If he elects to employ other means than those provided by law, it will be at his peril. Accordingly, it is held that where a party neglects to subpoena a witness and relies on his promise to attend, his non-attendance will not be a cause of continuance.' The court recognized certain exceptions to the rule which are not material here.

That the defendant in this case at the eleventh hour asked the issuance of a subpoena which could not be served because the witness had left the county, can not be in ease of his want of diligence nor alter his position for the better. * * * Testimony taken on the motion for new trial showed that the written statement of the witness had been taken a year before the filing of the suit and two years before the subpoena was issued. The materiality of the testimony of the witness had long been known to the defendant. The trial court did not abuse its discretion in overruling defendant's motion for continuance.

The judgment of the Court of Civil Appeals is reversed. From defendant's brief in the Court of Civil Appeals it appears that he had before that court thirty-two points of error, thirty-one of which the court, in its opinion, states it had not considered. Among the thirty-one points are at least fifteen of which this court has no jurisdiction since they assert that the answers of the jury to certain issues are so contrary to the greater weight and preponderance of the testimony as to be clearly wrong. Accordingly, we remand the cause to the Court of Civil Appeals for further consideration consistent with this opinion. *Wood v. Kane Boiler Works*, Tex. Sup., 238 S.W.2d 172; *Ritchie v. American Surety Co*., 145 Tex. 422, 198 S.W.2d 85.

VILLEGAS
v.
CARTER
711 S.W.2d 624
(Tex. 1986)

Jose Montes, Jr., El Paso, for petitioner.
Edwards, Belk, Hunter and Kerr, J. Crawford Kerr, El Paso, for respondents.

SPEARS, JUSTICE.

This case involves the trial court's discretion to deny a motion for continuance after allowing the attorney to withdraw two days before trial. As a result of the denial, the petitioner Villegas appeared pro se and prosecuted his case unsuccessfully. In an unpublished opinion, the court of appeals affirmed the judgment. We reverse the court of appeals judgment and remand to the trial court for a new trial.

In June, 1982, Jaime Lara Villegas bought a home in El Paso from Wilmot and Alicia Carter. Villegas assumed a first lien and executed a second lien for approximately $38,000. He defaulted in July 1983, and the

Carters accelerated the note. Villegas and the Carters then worked out an agreement, with Villegas executing a new note for $47,000 that included accrued interest, expenses, and a higher interest rate. In January 1984, the Carters' trustee informed Villegas that he owed $1,350 in delinquent payments. Villegas paid the Carters $5,000 on March 2nd to cure the default, pay the attorney's fees, and provide a credit on future payments. On April 9th the Carters' trustee posted the property for foreclosure. On June 5th, the trustee sold the property at public auction back to the Carters.

Villegas filed suit in county court on June 25, 1984, alleging that: (1) the second promissory note was void for usury; (2) the sale was for an inordinately low amount; (3) he had not received notice of the foreclosure sale; and (4) there were other irregularities in the public sale of the property. He was represented by Paula Thomas and Miguel Cervantes. The court set the cause for trial on October 25, 1984. On October 3rd, Thomas moved to withdraw as counsel, and the motion was granted that day. Cervantes moved to withdraw as counsel on October 5th, alleging irreconcilable differences. The court granted his motion to withdraw on October 23rd.

Two days later, Villegas appeared for trial without an attorney and told the court that he wanted time to get an attorney; that he first learned about Cervantes' attempt to withdraw only six days before at his deposition; that Cervantes would not turn over his file and important evidence to him although Cervantes had not presented him with a bill; that he wanted to hire a new attorney, Jose Montez, Jr., but that Montez would not take the case until he could see the file, look over the facts, and determine the fee; and that Montez had called Cervantes to obtain the file but that Cervantes would not return his call.

The court refused Villegas' request for a continuance to obtain an attorney and his papers. The case was then tried to the court. The court denied Villegas' claim and awarded the Carters restitution of their property and a deficiency judgment of $19,700.

TEX. R. CIV. P. Rule 253 provides:

> [A]bsence of counsel will not be good cause for a continuance or postponement of the cause when called for trial, except it be allowed in the discretion of the court, upon cause shown or upon matters within the knowledge or information of judge to be stated on the record.

The granting or denial of a motion for continuance is within the trial court's sound discretion. *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984); *Hernandez v. Heldenfels*, 374 S.W.2d 196, 202 (Tex. 1963). The trial court's action will not be disturbed unless the record discloses a clear abuse of discretion. When the ground for the continuance is the withdrawal of counsel, movants must show that the failure to be represented at trial was not due to their own fault or negligence. *State v. Crank*, 666 S.W.2d at 94. Generally, when movants fail to comply with TEX. R. CIV. P. 251's requirement that the motion for continuance be "supported by affidavit," we presume that the trial court did not abuse its discretion in denying the motion. *Garcia v. Tex. Emp. Ins. Ass'n*, 622 S.W.2d 626, 630 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.). It would be unrealistic, however, to apply this presumption to lay movants who without fault have their attorney withdrawn. *Robinson v. Risinger*, 548 S.W.2d 762, 765 (Tex. Civ. App.—Tyler, 1977, writ ref'd n.r.e.).

The right to counsel is a valuable right; its unwarranted denial is reversible error. *See State v. Crank*, 666 S.W.2d at 94; *Stefanov v. Ceips*, 395 S.W.2d 663, 665 (Tex. Civ. App.—Amarillo, 1965, no writ). Therefore, when a trial court allows an attorney to voluntarily withdraw, it must give the party time to secure new counsel and time for the new counsel to investigate the case and prepare for trial. *Lowe v. City of Arlington*, 453 S.W.2d 379, 382 (Tex. Civ. App.—Fort Worth 1970, writ ref'd n.r.e.); *Stefanov v. Ceips*, 395 S.W.2d at 665; *Leija v. Concha*, 39 S.W.2d 948, 950 (Tex. Civ. App.—El Paso 1931, no writ). *See Robinson v. Risinger*, 548 S.W.2d 762 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). Before a trial court allows an attorney to withdraw, it should see that the attorney has complied with the Code of Professional Responsibility: [A] lawyer should not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules. Supreme Court of Texas, Rules Governing the State Bar of Texas art. XII, s 8 (Code of Professional Responsibility) DR 2-110(A)(2); *Smith v. State*, 490 S.W.2d 902, 909-910 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.).

In this case, the trial court abused its discretion because the evidence shows that Villegas was not negligent or at fault in causing his attorney's withdrawal. The court granted Villegas' attorney's motion to voluntarily

withdraw two days before trial—too short a time for Villegas to find a new attorney and for that new attorney to investigate the case and prepare for trial. In addition, Villegas could not obtain a new attorney or present his case because the former attorney refused to turn over Villegas' files with his papers and evidence. The attorney did not give Villegas time to employ new counsel or deliver to Villegas the papers and property to which Villegas was entitled. In short, Villegas' attorney did not take reasonable steps to avoid foreseeable prejudice to the client.

The trial court should either have denied the attorney's motion to withdraw or granted the party's motion for continuance; it did neither. Therefore, we reverse the court of appeals judgment and remand for a new trial.

Note

Brown v. Gage, 519 S.W.2d 190 (Tex. App.—Ft Worth 1975, no writ). If the use of due diligence is not alleged, the application is not "statutory" [in compliance with the Rule] even though the facts stated may show diligence. But, it is also not enough to allege that diligence was used, the party must also set out the diligence that has been used. Mere conclusions are not enough.

HUMPHREY
v.
AHLSCHLAGER

778 S.W.2d 480
(Tex. App.—Dallas 1989, no writ)

David Wills, Dallas, for appellant.
Leighton Aiken, James A. Pikl, Dallas, for appellee.

THOMAS, JUSTICE.

This is an appeal from a judgment entered against appellant, Allen E. Humphrey. In a single point of error, Humphrey contends that the trial court abused its discretion in overruling his fourth motion for continuance. We disagree and affirm the trial court's judgment.

FACTUAL BACKGROUND

Energy Fuel Corporation of America (EFCA), an original defendant in this cause of action, executed a promissory note payable to appellee, Walter W. Ahlschlager, Jr. At the same time, Humphrey, president of EFCA, executed a personal guaranty in favor of Ahlschlager. After EFCA failed to make three consecutive payments on the note, a default letter was sent to EFCA and Humphrey. On February 10, 1984, Ahlschlager filed this action against EFCA and Humphrey.

The original trial date was May 6, 1985. A motion for continuance, urged by EFCA, was granted on May 3, 1985, because new counsel had been hired. On September 30, 1986, Humphrey's oral deposition was taken. In November 1986, EFCA was nonsuited because it had filed for bankruptcy.

A. Humphrey's First Motion For Continuance

On June 15, 1987, the parties were again scheduled for trial. On that date, Humphrey's counsel presented an oral motion for continuance. The basis for the motion was that Humphrey had suffered a heart attack within the twenty-four hour period preceding the trial date. Humphrey's unopposed motion was granted by the trial court.

B. Humphrey's Second Motion For Continuance

By agreement of the parties, the trial court preferentially set the case for trial on December 7, 1987. Humphrey filed his second motion for continuance on December 1, 1987, requesting a six-month delay and alleging that he was still suffering from a severe heart condition which rendered him unable to attend the trial.

Ahlschlager protested the second motion for continuance, citing repeated delays caused by Humphrey. Ahlschlager requested that the court grant a continuance only upon the conditions that: (1) Humphrey be ordered to submit to an independent physical examination; (2) both parties be provided a copy of the examining

doctor's findings; and (3) the parties be required to submit a recommendation to the court regarding a new trial date. The trial court granted Humphrey's second motion for continuance with an order essentially meeting all of Ahlschlager's conditions. The record does not include the results of the independent physical examination by Dr. Charles L. Harris. However, presumably based upon these findings, the matter was specially set for May 31, 1988.

C. Humphrey's Third Motion For Continuance

Fourteen days prior to trial, Humphrey filed his third motion for continuance, reiterating his severe heart problems together with a new physical complaint. This motion was unopposed by Ahlschlager. An order was entered by the trial court granting the motion with the stipulation that a second physical examination of Humphrey was to be performed. Dr. Harris filed a letter with the court, which neither affirmatively stated that Humphrey was able to attend trial nor that he was unable to attend trial. It merely concluded that it "appears that the patient has developed a new medical problem that will require further evaluation by a neurologist." At the end of June 1988, the trial court set the case for trial on October 17, 1988.

D. Humphrey's Fourth Motion For Continuance

On October 11, 1988, Humphrey filed his fourth motion for continuance containing the same basic reiterations of his health problems. This motion was supplemented by a lengthy affidavit from Humphrey, as well as letters from Humphrey's cardiologist and neurologist. Both physicians were of the opinion that Humphrey's condition was unchanged and, therefore, he was not well enough to participate in a trial.

This fourth motion was vigorously opposed by Ahlschlager. Attached to Ahlschlager's response was an excerpt from Humphrey's deposition. This excerpt demonstrated that Humphrey admitted that he had no personal knowledge concerning certain offsets claimed as affirmative defenses in his second and third amended original answers, but that other persons had knowledge of the facts supporting the offsets. Further, Ahlschlager supplemented his response with records from Humphrey's country club which indicated that Humphrey had regularly played golf at the club from December 1985 through, at least, May 1988.

After considering the motion, response, and oral arguments, the trial court overruled Humphrey's fourth motion for continuance. By agreement, the jury request was withdrawn. Before the start of trial, Humphrey's counsel withdrew, pursuant to Humphrey's specific instructions. Following the judgment in favor of Ahlschlager, Humphrey filed this appeal.

DENIAL OF FOURTH MOTION FOR CONTINUANCE

In a single point of error, Humphrey asserts that the trial court abused its discretion in overruling his fourth motion for continuance because he was "unable to appear, personally or by deposition, to present his defenses." Each written motion contained the following language: [Humphrey] is the principal witness to the transactions out of which this litigation has arisen and is the only potential witness who has personal knowledge of the circumstances of the transactions that constitute the subject matter of this litigation. [Humphrey's] testimony at trial will relate to the affirmative defenses asserted in Defendant's First Amended Original Answer filed June 1, 1987. Such testimony cannot be otherwise procured and has not been heretofore reduced to writing.

Accompanying all of Humphrey's written motions for continuance were affidavits or letters from his treating physicians, as well as Humphrey's personal affidavits, detailing his physical complaints. No mention was made in any of Humphrey's motions or affidavits regarding the existence of his deposition of September 30, 1986, or its alleged incompleteness. Further, no specific facts were set forth in the motions or affidavits as to the details of the testimony Humphrey would present at trial.

A. Standard of Review

The granting of a continuance rests within the sound discretion of the trial court. *Hernandez v. Heldenfels*, 374 S.W.2d 196, 202 (Tex. 1963). Mere absence of a party does not automatically entitle him to a continuance. *Erback v. Donald*, 170 S.W.2d 289, 291 (Tex. Civ. App.—Fort Worth, writ ref'd w.o.m.). Also, the motion should contain some prognosis as to when or if the witness will ever be able to testify. *Jones v. John's Community Hosp*., 624 S.W.2d 330, 332 (Tex. App.—Waco 1981, no writ).

The requisites for an application for continuance are set forth in rule 252 of the Texas Rules of Civil Procedure, which states, in part, "If the ground of such application be the want of testimony, the party applying there-

for shall make affidavit that such testimony is material, showing the materiality thereof, and that he has used due diligence to procure such testimony, stating such diligence . . . ."

B. Due Diligence

When a motion for continuance is based upon the absence of a party, there must be a showing of diligence in attempting to obtain the required testimony. The due diligence requirement in procuring a witness's testimony has been considered by a number of courts when a motion for continuance has been based upon the illness of a witness. In *Shannon v. Marchbanks*, 35 Tex. Civ. App. 615, 80 S.W. 860 (1904, writ ref'd), the trial court refused to grant the defendant's motion for continuance, although it was shown by affidavit that she was old and feeble in mind and body. In upholding the trial court's ruling, the court of appeals reasoned that the defendant had been ill since the inception of the suit and that proper diligence had not been exercised to obtain her testimony by deposition. The defendant's deposition had been taken previously, but a complete copy was not in the record. Therefore, the court of appeals also held that, without the entire deposition, it could not determine whether the defendant testified fully. *Shannon*, 80 S.W. at 862; *see also A.E. Swift & Sons, Concrete Contractors, Inc. v. Sam Sanders, Inc.*, 405 S.W.2d 402, 403 (Tex. Civ. App.—Amarillo 1966, no writ); *J.C. Penney Co. v. Duran*, 479 S.W.2d 374, 380 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

C. Materiality of Testimony

Further, there is a necessity to show by affidavit the materiality of the testimony to be offered by the absent witness. In *Wilson Fin. Co. v. State*, 342 S.W.2d 117, 121 (Tex. Civ. App.—Austin 1961, writ ref'd n.r.e.), the trial court overruled the defendants' motion for continuance based upon the illness of one of their witnesses. The motion alleged that the testimony of the absent witness was material because he was the manager of the business of one of the defendants and was the only person having complete knowledge of the operation of the business during the time involved in the suit. However, the motion did not state what was expected to be proved by the witness. In sustaining the trial court's decision, the court of appeals held that the motion did not meet the requirements of rule 252 and further stated: [The motion] does not say what testimony the witness would give, how it is material or that it is admissible . . . . We think the trial court was not called on to make an independent examination of the answer to speculate as to the materiality and admissibility of evidence that might be relevant to the alleged affirmative defenses. The allegations of the motion were not sufficient to enable the trial court to determine the materiality of the absent witnesses' testimony, nor to permit the opposing party to admit its truth and thereby prevent a delay of the trial. *Wilson*, 342 S.W.2d at 121; *see also Marsh v. Williams*, 154 S.W.2d 201, 203 (Tex. Civ. App.—Beaumont 1941, writ ref'd w.o.m.); *Berry v. Berry*, 257 S.W.2d 780 (Tex. Civ. App.—Eastland 1953, no writ).

Our case appears to be factually and legally on point with *Connor v. Wright*, 737 S.W.2d 42 (Tex. App.—San Antonio 1987, no writ). The defendant in *Connor*, suffering from iritis and hypertensive cardiovascular disease, filed three motions for continuance based upon her illness. These motions were supported by affidavits from her treating physician stating that she was physically unable to testify either by deposition or in court. The motions also stated that the defendant was the only witness with personal knowledge of the circumstances and transactions giving rise to the lawsuit, and that her testimony was required for trial and could not be obtained from any other source. In affirming the trial court's decision to overrule the third motion for continuance, the *Connor* court concentrated on the failure of defendant's counsel to set forth the proposed testimony he intended to elicit from his client, or to set forth any facts as to the due diligence used in attempting to obtain her deposition. Further, there was no averment as to when the defendant would be able to testify.

Humphrey's fourth motion for continuance has the same deficiencies as those enumerated in *Connor*. There is no evidence in our record to show that Humphrey's counsel made any attempts to have his client deposed in an informal, nonstressful setting. Humphrey argues in his motion for continuance that his illness made it impossible for him to appear at trial or to be subjected to a deposition. This position is basically corroborated by the affidavits of his treating physicians. However, in light of the evidence presented indicating that Humphrey was well enough to regularly play golf during much of the pendency of this suit, we cannot say that the trial court abused its discretion in overruling Humphrey's motion. It may have legitimately appeared to the trial court that he could have also been deposed without negative consequences.

We further note that Humphrey made no averment in his fourth motion for continuance to suggest that his deposition testimony was incomplete with regard to his affirmative defenses, except for the standard statement

that his testimony could not be otherwise procured and had not yet been reduced to writing. The motion likewise does not meet the materiality requirement of rule 252. The language is overly broad and does not set forth one specific fact about which Humphrey would testify to at trial. Humphrey's affidavit attached to his motion was equally lacking in specifics. In addition, it appears from his deposition that Humphrey was not the only potential witness who had personal knowledge of the circumstances of the transactions surrounding this litigation. Finally, Humphrey failed to set forth any specific time period within which he could be expected to be able to testify, as required by *Shannon* and *Jones*. Humphrey's motion merely requests a six-month continuance, after which his condition would be reevaluated and another trial date set.

To support his contention, Humphrey relies upon *Burke v. Scott*, 410 S.W.2d 826 (Tex. Civ. App.—Austin, 1967, writ ref'd n.r.e.), where the court of appeals held that the trial judge abused his discretion in denying defendant's motion for continuance when the defendant and his key witness were both too ill to attend trial. We find important differences between the facts in *Burke* and the facts before us. First, an attempt was made to depose the defendant in *Burke*, even though he was seriously ill and bedridden. Second, Burke's motion set out the facts to which he and his key witness would testify at trial. Lastly, the motion in *Burke* set forth specific time periods within which the court could expect the defendant to be available for trial and his witness to have recovered enough to be deposed.

We hold that the trial court did not abuse its discretion in denying Humphrey's fourth motion for continuance and overrule the sole point of error. The trial court's judgment is affirmed.

Notes

1. In *Reyna v. Reyna*, 738 S.W.2d 772(Tex. App.—Austin 1987, no writ), the court in discussing the availability of a continuance following an announcement of ready noted:

> Generally, a motion for continuance must be filed before an unconditional announcement of "ready" since such an announcement waives the right to seek subsequently a delay based upon any facts which are, or with proper diligence should have been, known at the time. *See* 3 MCDONALD, TEXAS CIVIL PRACTICE s 10.29, at 82 (rev. ed. 1970); *see also Cameron County Water Improvement Dist. No. 1 v. Cameron County Water Improvement Dist. No. 15*, 134 S.W.2d 491 (Tex. Civ. App. 1939, no writ); *Wood v. Fulton Property Co*., 92 S.W.2d 549 (Tex. Civ. App. 1936, no writ). This general rule is, of course, subject to exception when an unforeseeable event arises through no fault of the movant. *See, e.g., McAden v. Soil Improvement Corporation*, 394 S.W.2d 662 (Tex. Civ. App. 1965, no writ) (counsel absent because of service in the U.S. Army). However, this exception does not apply here because appellant's attorney had at least ten days notice of each trial setting, *see* TEX. R. CIV. P. ANN. 245 (1976), but failed to take any of the necessary steps to avoid a conflict (e.g., withdrawing his unconditional announcement of "ready," seeking a continuance from the court in Harris County, or retaining local counsel to try the case should a conflict arise). We conclude the trial court's denial of the continuance was consistent with the applicable rules of law.

2. The legislature has codified the availability of the right to continuance for its own members. Section 30.003 of the Texas Civil Practices and Remedies Code Provides:

> (a) This section applies to any criminal or civil suit, including matters of probate, and to any matters ancillary to the suit that require action by or the attendance of an attorney, including appeals but excluding temporary restraining orders.
>
> (b) Except as provided by Subsections (c) and (c-1), at any time within 30 days of a date when the legislature is to be in session, at any time during a legislative session, or when the legislature sits as a constitutional convention, the court on application shall continue a case in which a party applying for the continuance or the attorney for that party is a member or member-elect of the legislature and will be or is attending a legislative session. The court shall continue the case until 30 days after the date on which the legislature adjourns.
>
> (c) Except as provided by Subsection (c-1), if the attorney for a party to the case is a member or member-elect of the legislature who was employed on or after the 30th day before the date on which the suit is set for trial, the continuance is discretionary with the court.

(c-1) If the attorney for a party to any criminal case is a member or member-elect of the legislature who was employed on or after the 15th day before the date on which the suit is set for trial, the continuance is discretionary with the court.

(d) The party seeking the continuance must file with the court an affidavit stating the grounds for the continuance. The affidavit is proof of the necessity for a continuance. The affidavit need not be corroborated.

(e) If the member of the legislature is an attorney for a party, the affidavit must contain a declaration that it is the attorney's intention to participate actively in the preparation or presentation of the case and that the attorney has not taken the case for the purpose of obtaining a continuance under this section.

(f) The continuance provided by Subsection (b) is one of right and may not be charged against the party receiving it on any subsequent application for continuance.

(g) If the attorney for a party seeking a continuance under this section is a member or member-elect of the legislature, the attorney shall file a copy of the application for a continuance with the Texas Ethics Commission. The copy must be sent to the commission not later than the third business day after the date on which the attorney files the application with the court.

3. Rule 254 of the Texas Rules of Civil Procedures states:

In all civil actions, including matters of probate, and in all matters ancillary to such suits which require action by or the attendance of an attorney, including appeals but excluding temporary restraining orders, at any time within thirty days of a date when the legislature is to be in session, or at any time the legislature is in session, or when the legislature sits as a Constitutional Convention, it shall be mandatory that the court continue the cause if it shall appear to the court, by affidavit, that any party applying for continuance, or any attorney for any party to the cause, is a member of either branch of the legislature, and will be or is in actual attendance on a session of the same. If the member of the legislature is an attorney for a party to the cause, his affidavit shall contain a declaration that it is his intention to participate actively in the preparation and/or presentation of the case. Where a party to any cause, or an attorney for any party to a cause, is a member of the legislature, his affidavit need not be corroborated. On the filing of such affidavit, the court shall continue the cause until thirty days after adjournment of the legislature and the affidavit shall be proof of the necessity for the continuance, and the continuance shall be deemed one of right and shall not be charged against the movant upon any subsequent application for continuance. The right to a continuance shall be mandatory, except only where the attorney was employed within ten days of the date the suit is set for trial, the right to continuance shall be discretionary.

In re FORD MOTOR COMPANY

165 S.W.3d 315
(Tex 2005)

Michael W. Eady, Thompson, Coe, Cousins & Irons, L.L.P., Jose Santiago Solis, Harlingen, Craig A. Morgan, Austin, and Jaime A. Saenz, Rodriguez, Colvin Chaney & Saenz, L.L.P., Brownsville, for Relator.

Michael Matthew Guerra, Mikal C. Watts, John Gregory Escamilla, Watts Law Firm, L.L.P., McAllen, Thomas O. Matlock Jr., College Station, TX, for Real Party.

J. Michael Myers, Ball & Weed, P.C., San Antonio, for other.

PER CURIAM.

On May 28, 2004, Robin Fuentes, her husband, and her two children were involved in a car accident. Fuentes suffered serious injuries that rendered her a quadriplegic. Less than three months later, the Fuentes family sued Ford Motor Company, Goodyear Tire & Rubber Company, and the tire repair shop that installed tires on the pick-up truck for damages arising from an alleged tire failure that caused the truck to roll over. The case was set for trial to commence on May 16, 2005, less than nine months after it was filed. On April 1, 2005, Ford filed a motion for legislative continuance under Section 30.003 of the Texas Civil Practice and Remedies Code. On

April 21, 2005, the trial court held a hearing on the motion. Four days later, the trial court denied the motion and set the case for trial on May 31, 2005. The court of appeals denied Ford's petition for writ of mandamus, and on May 13, 2005, Ford filed its petition with this Court.

To be entitled to mandamus relief, Ford must show that the trial court committed a clear abuse of discretion and that it has no adequate remedy by appeal. *In re Prudential Ins. Co. of Am*., 148 S.W.3d 124, 135-36 (Tex. 2004); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992). 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. *Walker*, 827 S.W.2d at 839, 840 (*quoting Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985)). Although this Court has acknowledged that the second requirement for mandamus relief "has no comprehensive definition," we have explained that determining whether a party has an adequate remedy by appeal requires a "careful balance of jurisprudential considerations" that "implicate both public and private interests." *In re Prudential*, 148 S.W.3d at 136. "When the benefits [of mandamus review] outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate." *Id*.

Section 30.003 of the Texas Civil Practice and Remedies Code provides that a court shall grant a motion for continuance if an attorney representing a party is a member of the legislature and will be attending a legislative session. . . . The statute provides that when a lawyer-legislator is retained more than thirty days before the date a civil case is set for trial, a trial court lacks discretion to deny a properly requested motion for legislative continuance. *Id*. § 30.003(b), (c); *see also Waites v. Sondock*, 561 S.W.2d 772, 776 (Tex. 1977); *Collier v. Poe*, 732 S.W.2d 332, 343, 346 (Tex. Crim. App.—1987) (analyzing previous version of statute).

In *Waites v. Sondock*, this Court recognized a constitutional limitation on the mandatory nature of the legislative continuance. 561 S.W.2d at 776. In *Waites*, a mother initiated a contempt proceeding to compel her former husband to comply with a child support order. *Id*. at 772. The husband's lawyer filed a motion for legislative continuance with supporting affidavit, which the mother opposed. She argued that the child support payments were "critical to her ability to feed and support her children." *Id*. at 774. This Court held that requiring mandatory continuances when the party opposing the continuance "faces irreparable harm from the delay in enforcing existing rights" violates the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Sections 13 (open courts) and 19 (due process) of the Texas Constitution. *Id*. at 773. However, the Court emphasized the limited nature of its holding: "a legislative continuance is mandatory except in those cases in which the party opposing the continuance alleges that a substantial existing right will be defeated or abridged by delay." *Id*. at 776. When a party opposes a legislative continuance in such circumstances, the trial court must conduct a hearing on the allegations and deny the motion if the allegations are shown to be meritorious. *Id*. Subsequently, the Court of Criminal Appeals and several lower courts of appeals have addressed the scope of the *Waites* exception to mandatory legislative continuances, but we have not. *See, e.g., Collier*, 732 S.W.2d at 344 (holding that the *Waites* exception cannot be invoked by the prosecutor in a criminal proceeding); *In re Starr Produce Co*., 988 S.W.2d 808, 811-12 (Tex. App.—San Antonio 1999, orig. proceeding) (holding that loss of attorney's services because of his inability to continue representation through the new trial date did not create the type of irreparable harm described in *Waites*); *Amoco Prod. Co. v. Salyer*, 814 S.W.2d 211, 213 (Tex. App.—Corpus Christi 1991, orig. proceeding) (holding that the harm caused by lost business opportunities did not "rise to the level of a due process violation"); *Condovest Corp. v. John Street Builders, Inc.*, 662 S.W.2d 138, 141 (Tex. App.—Austin 1983, no writ) (concluding that inability to convey title to real property was "clearly a substantial right" protected by the *Waites* exception).

Ford's motion for a legislative continuance meets the requirements of the statute. Representative Jim Solis's affidavit states that he is a member of the Texas House of Representatives, that the session extends from January 11, 2005 through May 31, 2005, and that he will be attending the legislative session. *See* TEX. CIV. PRAC. & REM.CODE § 30.003(d), (e). Solis also stated that he represents Ford and intends to participate actively in the preparation and presentation of the case. *See id.* Finally, the affidavit also declares that Solis did not take this case for the purpose of obtaining a continuance under Section 30.003 of the Texas Civil Practice & Remedies Code. *See id.* Because Ford's motion was filed more than thirty days before the scheduled trial date and met the statutory requirements, the trial court was without discretion to deny the motion unless Fuentes established her entitlement to an exception. *See id*. § 30.003(b), (c), (f); *Waites*, 561 S.W.2d at 776.

Fuentes opposed the motion, essentially contending that because her participation in a comprehensive rehabilitation services program with the Texas Department of Assistive and Rehabilitation Services will conclude

soon, any continuance will prevent access to needed medical care. Fuentes argues that she has an "existing right to rehabilitation and medical care" that constitutes a "substantial existing right" under our decision in *Waites*. Additionally, Fuentes argues that granting the continuance in this case violates her rights to access the court system. To support these contentions, Fuentes attached the affidavits of her husband, Robert Fuentes, and Dr. Joe Gonzales.

Robert Fuentes's affidavit explains that his wife has been a quadriplegic since the accident and requires constant medical attention and therapy. He also states that he and his wife recently received a letter from the Texas Department of Assistive and Rehabilitative Services explaining that the temporary funding provided for her treatment will soon expire. The letter is attached to the affidavit. Finally, Robert Fuentes explains that he is not qualified to provide the treatment that his wife requires. He does not indicate when the current funding ends, whether other funding arrangements have been made, or whether other funding sources are available.

In his affidavit, Dr. Gonzales states that he is familiar with the condition of Fuentes and the current funding source of her medical treatment. He explains that "prompt, consistent, and continued rehabilitation is essential to maximize recovery for persons with spinal injuries." He further opines that "if [Fuentes] discontinues her treatment, which will happen in the near future unless she obtains additional funding, she will be permanently and irrevocably harmed." He does not indicate specifically when the current funding ends or whether additional funding has been obtained.

In this case, the trial court made nine specific findings in its order denying Ford's motion for legislative continuance, apparently based on the exception this Court described in *Waites*:

> I. Ford Motor Company retained Representative Jim Solis on or about April 1, 2005, approximately 45 days before the May 16, 2005 trial, and he has averred that he intends to play a substantial role in the case and that he is not appearing for the purpose of delay.
>
> II. Ford Motor Company moved for a continuance on the same date Rep. Solis appeared in this case.
>
> III. Robin Fuentes sustained disabling back injuries in the incident made the basis of this suit, which injuries require access to round the clock medical care and rehabilitative therapy.
>
> IV. Robin Fuentes presently has a right and access to medical and rehabilitative services to aid in the treatment for, and rehabilitation from, her injuries.
>
> V. Robin Fuentes also has Due Process rights under the United States and Texas constitutions, and she has a right to seek redress for her injuries pursuant to Texas Constitution Art. I, Section 13.
>
> VI. Robin Fuentes' access to such medical treatment and rehabilitative therapy will be jeopardized should this case be continued from its present trial setting.
>
> VII. Robin Fuentes will be irreparably harmed if her access to medical care and rehabilitative therapy is discontinued.
>
> VIII. Robin Fuentes' constitutional right to redress and to Due Process will be violated if the Court grant [sic] a continuance based on Rep. Jim Solis' legislative service.
>
> IX. The Court has considered the contents of the court's file, including the affidavit of Robert Fuentes, the affidavit of Dr. Joe Gonzales, and correspondence from the Texas Department of Assistive and Rehabilitative Services.

Fuentes claims that the *Waites* exception applies because she has a right to "access to medical and rehabilitative services to aid in the treatment for, and rehabilitation from, her injuries." But she does not have a right to have Ford pay for those services unless or until mandate to that effect issues after trial, judgment, and possible appeals. Although we sympathize with the disabling injuries from which Fuentes suffers, relief from a mandatory legislative continuance requires a higher showing than the record in this case makes. She has no substantial existing right to access to medical care that is enforceable against Ford. Her claims against Ford arise from alleged defects of a pick-up truck, not for improperly denying her access to medical care. If she succeeds in obtaining a favorable final judgment against Ford, then she will have an existing right that could be subject to the *Waites* exception. Until then, she has a right to access the court system to pursue her claims against Ford. *See Sax v. Votteler*, 648 S.W.2d 661, 665-66 (Tex. 1983). Continuing this case, which has been pending only a few months, in accordance with the Legislature's "determination that the interests of the people of the State will be

best served by the attendance of legislator-attorneys at legislative sessions" does not violate the due process clause of the Fourteenth Amendment of the United States Constitution or Article I, Sections 13 (open courts) and 19 (due process) of the Texas Constitution. *Waites v. Sondock*, 561 S.W.2d 772, 774 (Tex. 1977). Because the constitutional exception in *Waites* does not apply, the trial court had no discretion to deny the motion for continuance.

We recognize that some tension exists between Article II, Section 1 of the Texas Constitution, which divides the powers of the government into three distinct branches, and a legislative enactment that makes mandatory what is typically left to judicial discretion. *Gov't Servs. Ins. Underwriters v. Jones*, 368 S.W.2d 560, 564-67 (Tex. 1963). But the tension is not all on one side. Given the relative infrequency of legislative sessions in Texas and the key roles played by members who are attorneys, a serious constitutional crisis could arise if a court in a remote part of the state could force a legislator to trial the moment a legislative session ends, as the trial court planned to do here. Enforcing legislative continuances is also consistent with the constitutional protection afforded legislators to attend legislative sessions. Except in cases of treason, felony, or breach of the peace, the Texas Constitution itself protects legislators from arrest while traveling to or attending such sessions. Tex. Const. art. III, § 14. As that provision shows, the legislative privilege is not absolute, but trial courts construing the *Waites* exception must require a higher showing of impairment of an opposing party's constitutional rights than the trial court did here.

As our sister court summarized, a mandatory legislative continuance "usually serves a dual purpose of encouraging good men and women to sacrifice their time in the interest of good government and of protecting a party to a law suit whose attorney may be serving in the Legislature." *Collier v. Poe*, 732 S.W.2d 332, 334 (Tex. Crim. App.—1987). Without such a device, a lawyer-legislator could be forced to decide between fulfilling the duty owed to a client and the duty owed to constituents to participate in a legislative session. The consequences of that decision—possibly nonparticipation in a legislative session—could not be remedied on appeal. To give full effect to the Legislature's policy decision regarding legislative continuances, we conclude that a party has no adequate remedy by appeal when a trial court abuses its discretion by denying a motion for legislative continuance. *See In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 136-37 (Tex. 2004).

Pursuant to Texas Rule of Appellate Procedure 52.8(c), we issue this opinion without hearing oral argument and conditionally grant a writ of mandamus directing the 139th Judicial District Court of Hidalgo County, Texas, to grant the motion for legislative continuance. That writ will issue only if the district court fails to act in accordance with this opinion.

5. ***Jury Selection***

a. ***Qualifications and Exemptions***

1. Section 62.102 of the Texas Government Code provides:

A person is disqualified to serve as a petit juror unless he:
(1) is at least 18 years of age;
(2) is a citizen of this state and of the county in which he is to serve as a juror;
(3) is qualified under the constitution and laws to vote in the county in which he is to serve as a juror;
(4) is of sound mind and good moral character;
(5) is able to read and write;
(6) has not served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court;
(7) has not been convicted of a felony; and
(8) is not under indictment or other legal accusation of misdemeanor or felony theft or any other felony.

2. Section 62.106 of the Texas Government Code provides:

(a) A person qualified to serve as a petit juror may establish an exemption from jury service if the person:
(1) is over 70 years of age;
(2) has legal custody of a child younger than 10 years of age and the person's service on the jury requires leaving the child without adequate supervision;