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SUMMARY JUDGMENT: LET THE MOVANT BEWARE

PATRICK K. SHEEHAN*

An extremely able scholar once remarked that “[w]hen the Supreme Court of Texas in 1949 wrote into the Texas practice a provision for summary judgment, it could claim neither the credit nor the blame for innovation.”¹ At the time rule 166-A of the Texas Rules of Civil Procedure was promulgated, summary judgment practice was far from a procedural novelty. Some form of this pretrial procedure had been utilized in England as well as in numerous jurisdictions throughout the United States. Once the potential of the practice was fully realized, most jurisdictions steadily expanded the applicable scope of the summary judgment procedure to embrace a large variety of actions.² With the enactment of rule 56 of the Federal Rules of Civil Procedure in 1938, the motion for summary judgment became an integral part of the federal law. With numerous supporters actively asserting its utility, it seems clear that ample experience warranted the recommendation of a summary judgment rule for use in the courts of Texas.³

Since its inception, rule 166-A has spawned an avalanche of opinions and legal commentary. That such a timeworn procedure could create such controversy and generate so much confusion can be attributed to the fact that uncertainty has been persistently present since rule 166-A was initially formulated. That part of the rule which produces the greatest confusion is section (c) which provides in pertinent part:

(c) 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

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1. McDonald, *Summary Judgments*, 30 TEXAS L. REV. 285 (1952).

2. See Clark & Samenow, *The Summary Judgment*, 38 YALE L.J. 423 (1929). With reference to the granting of a summary judgment, the United States Supreme Court in *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627 (1944) appropriately stated that before a summary judgment should be granted, it must be “quite clear what the truth is.” See also Bauman, *The Evolution of the Summary Judgment Procedure*, 31 IND. L.J. 329 (1956).

3. See Suggs & Stumberg, *Summary Judgment Procedure*, 22 TEXAS L. REV. 433, 440 (1944).

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.*⁴

While it may have been unavoidable, such an abstractly drawn rule was destined to create a significant amount of uncertainty. Frequent questions arising from the rule involve determining what constitutes a material fact, when a party is entitled to a judgment as a matter of law, and finally, what burdens of going forward with the evidence are borne by the respective parties. The answers to such troublesome questions have proven to be elusive. The present article will attempt to analyze recent decisions by the Texas Supreme Court in hopes of reaching practical and functional conclusions which will aid in answering these recurrent questions.

INTRODUCTION

Since January 1, 1968 the Texas Supreme Court has reviewed 97 cases in which the trial court initially granted a motion for summary judgment.⁵ While the supreme court upheld the granting of these motions in 28 cases, it reversed and remanded the cause for trial in 69 of the instances under consideration. Thus, in the past eight years the supreme court has held that summary judgment was improperly granted in approximately 70 percent of the cases it reviewed.

Perhaps of even greater significance is the fact that the Texas courts of civil appeals have also begun to scrutinize more closely the summary judgment practice. In recent years, these intermediary courts have viewed the granting of motions for summary judgment with increasing caution and skepticism. As a result, a substantial number of summary judgments have been reversed and remanded for a complete trial on the

4. TEX. R. CIV. P. 166-A (emphasis added).

5. These statistics are based on a survey conducted by Patrick Sheehan encompassing cases dating from January 1, 1968 to June 1, 1976. This survey deals solely with those cases wherein the trial court initially granted a motion for summary judgment and the Texas Supreme Court granted the writ of error and ultimately reviewed the propriety of such a trial court decision. As a further note, it is firmly established that an appeal may be taken from a trial court order granting a motion for summary judgment, whereas, the overruling of such a motion is interlocutory in character and nonappealable. *Tobin v. Garcia*, 159 Tex. 58, 63, 316 S.W.2d 396, 400 (1958).

merits.⁶ At first glance, this statistical review leads one to conclude that the appellate courts of this state have been slowly, but effectively, writing summary judgment practice out of existence. A searching analysis of the cases, however, dispels such a cursory conclusion. In reality these courts, through their rulings, have been attempting to clear away the cobwebs of confusion that have been inexorably spun around the summary judgment practice. Of course, it may seem a relatively simple matter to state in abstract terms the circumstances in which a trial court may properly grant a summary judgment capable of withstanding appellate scrutiny.⁷ The higher courts certainly realize that the application of abstract principles to a particular case calls for careful contemplation and individual analysis by the trial judge. This is especially true when intangible elements enter into the judge's final evaluation. The appellate judges are aware that an element of human judgment is present and that absolute precision and exactitude is impossible.⁸ Nevertheless, Texas courts tenaciously cling to the historical principle that the right to a trial should be jealously safeguarded—a protective outlook that has obviously colored their decisions.

While the summary judgment procedure was intended to be malleable enough to be applicable to a variety of situations, such a practice was never intended to become an "all-embracing panacea which would sweep our trial dockets clean of over-age litigation."⁹ What might appear to be a trend toward a stricter interpretation of rule 166-A is in reality only a recognition of principles which have been inherent in summary judgment practice since its inception. Thus, Texas appellate tribunals are not seeking to erase the motion for summary judgment from existence, but are merely trying to place the rationale for the procedure in its proper perspective. Such worthy intentions have led our courts to announce specific, definitive rulings attempting to convert an abstractly drawn rule into a more practical and concrete form of procedure. This resolute process of illumination and redefinition of the applicable regulations has ultimately resulted in a more highly technical and intelligible summary judgment practice. Therefore, it is contended

6. Conversely, a 1961 survey revealed that Texas appellate courts affirmed the granting of approximately 60 percent of the motions for summary judgment upon which they passed. Further, only one-fifth of those cases were reversed and remanded due to the existence of a fact issue. See McDonald, *The Effective Use of Summary Judgment*, 15 Sw. L.J. 365, 374 (1961).

7. See McDonald, *Summary Judgments*, 30 TEXAS L. REV. 285, 287 (1952).

8. *Id.* at 287.

9. McDonald, *The Effective Use of Summary Judgment*, 15 Sw. L.J. 365, 367 (1961); see *In re Estate of Price*, 375 S.W.2d 900, 904 (Tex. 1964).

that a review of some of the more significant Texas Supreme Court decisions will reveal that uncertainty need no longer be the hallmark of summary judgment practice.¹⁰

PURPOSES AND OBJECTIVES OF RULE 166-A

The primary purpose of the summary judgment pretrial inquiry is to ascertain whether or not there are any litigable issues of fact. At this premature stage of the proceedings it must be determined whether or not a trial on the merits is required. On the other hand, another established objective of the summary judgment practice is to avoid needless trials and delays and thereby expedite the administration of justice.¹¹ Therefore, the underlying purpose of the summary judgment remedy is to separate what is formal or pretended from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial.¹² Consequently, upon the filing of a motion for summary judgment the problem becomes one of fairly balancing all of the seemingly conflicting policy considerations.¹³

While the outlined objectives are certainly laudable, a sometimes conveniently overlooked effect of the granting of a motion for summary judgment is that the application of the summary judgment remedy deprives the party against whom judgment is granted of a trial on the merits. It has been said that "[a]n expeditious disposition of cases is a cardinal virtue of the administration of justice, but it is not more important than one's fundamental right to his full day in court."¹⁴ In 1952, in *Gulbenkian v. Penn*,¹⁵ the Texas Supreme Court stated that the purpose of rule 166-A was the "elimination of patently unmeritorious

10. See *Cook v. Brundidge, Fountain, Elliott & Churchill*, 533 S.W.2d 751 (Tex. 1976). In *Murphy v. Lower Neches Valley Authority*, 529 S.W.2d 816, 818-19 (Tex. Civ. App.—Beaumont 1975), *rev'd*, 536 S.W.2d 561 (Tex. 1976), the court of civil appeals seems to have reached its decision to reverse the summary judgment granted to the defendant because of an overabundance of caution.

11. *Board of Pub. Instruction v. Meredith*, 119 F.2d 712, 713 (5th Cir. 1941); 73 AM. JUR. 2d *Summary Judgment* § 1 (1974).

12. *Richard v. Credit Suisse*, 152 N.E. 110, 111 (N.Y. 1926). In *Whitaker v. Coleman*, 115 F.2d 305 (5th Cir. 1940), the court stated that "[s]ummary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial . . ." *Id.* at 307.

13. See 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.26.2 (1971).

14. *Avrick v. Rockmont Envelope Co.*, 155 F.2d 568, 573 (10th Cir. 1946); see *Hunt v. Pick*, 240 F.2d 782, 784-85 (10th Cir. 1957); *Carantzas v. Iowa Mut. Ins. Co.*, 235 F.2d 193, 195 (5th Cir. 1956); *In re Estate of Price*, 375 S.W.2d 900, 904 (Tex. 1964).

15. 151 Tex. 412, 252 S.W.2d 929 (1952).

claims or untenable defenses . . .’” and that it was not “‘intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact.’”¹⁶ The key phrases, “patently unmeritorious claims” and “untenable defenses,” clearly signalled that it was the intendment of the law that the summary judgment be viewed as a harsh and drastic procedure and that strict compliance with regulations governing the practice would be required.¹⁷ Rule 166-A had not been in existence long when it became readily apparent that the summary judgment remedy was to be cautiously and temperately applied and that the resisting party would be granted considerable indulgence.¹⁸

MOVANTS AND THEIR SPECIFIC BURDENS

Soon after the adoption of the summary judgment rule, a significant number of general guidelines were formulated to direct and govern summary judgment proceedings. As a general rule, the burden is placed upon the movant for summary judgment to comply with the terms of the rule and all doubts are resolved against him.¹⁹ The movant must sufficiently demonstrate that there are no genuine issues as to any material fact and that he is entitled to judgment as a matter of law.²⁰ Finally, the party opposing the summary judgment is not required to prove his right to prevail in the trial upon the merits.²¹ Thus, the proof offered by the movant should establish his claim or defense with a high

16. *Id.* at 416, 252 S.W.2d at 931, citing *Kaufman v. Blackman*, 239 S.W.2d 422, 428 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.); see *Richards v. Allen*, 402 S.W.2d 158, 160 (Tex. 1966).

17. *Tobin v. Garcia*, 159 Tex. 58, 63, 316 S.W.2d 396, 400 (1958); see *Boswell v. Handley*, 397 S.W.2d 213, 216 (Tex. 1965); *Gardner v. Martin*, 162 Tex. 156, 159, 345 S.W.2d 274, 276 (1961). But, in *Womack v. Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233, 237 (1956), the court stated that if the extrinsic evidence demonstrated that there was a genuine issue of material fact, a failure of the pleading to allege the basis of the defense would be disregarded. In *Malooly Bro's., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970), the court stated that if it affirmatively appeared from the record that there was no material fact issue upon which the outcome of the litigation depended, a summary judgment would be affirmed notwithstanding that it was insupportable on the grounds stated in the motion or in the non-movant's points of error.

18. *Gaines v. Hamman*, 163 Tex. 618, 625, 358 S.W.2d 557, 561-62 (1962); see *Harrington v. Young Men's Christian Ass'n*, 452 S.W.2d 423, 425 (Tex. 1970).

19. See *Tigner v. First Nat'l Bank*, 153 Tex. 69, 74, 264 S.W.2d 85, 87 (1954); 4 R. McDONALD, TEXAS CIVIL PRACTICE § 17.26.2 (1971).

20. *Mitchell v. Baker Hotel, Inc.*, 528 S.W.2d 577, 578 (Tex. 1975); see *Odom v. Insurance Co. of Pa.*, 455 S.W.2d 195, 198 (Tex. 1970). By its decision in *Tigner v. First Nat'l Bank*, 153 Tex. 69, 74, 264 S.W.2d 85, 87 (1954), the court brought Texas into harmony with numerous federal summary judgment holdings. See also *Bauman, Summary Judgment: The Texas Experience*, 31 TEXAS L. REV. 866 (1953).

21. *Rio Bravo Oil Co. v. Hunt Petroleum Corp.*, 455 S.W.2d 722, 728 (Tex. 1970).

degree of probability as the court will review the evidence with an extremely critical eye.

Trial lawyers are often indoctrinated with the belief that it is the plaintiff who has the burden of proving the elements of his cause of action. Because of this belief, the burden of proof to be borne by the movant for summary judgment has probably created more confusion than any other aspect of this pretrial procedure. In *Gibbs v. General Motors Corp.*,²² the court exposed a basic fallacy frequently found in the approach of some Texas courts in rendering or affirming a summary judgment in favor of a *defendant*. The court stated:

In such cases, the question on appeal, as well as in the trial court, is *not* whether the summary judgment proof *raises fact issues* with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary judgment proof *establishes as a matter of law that there is no genuine issue of fact* as to one or more of the essential elements of the plaintiff's cause of action.²³

Thus, a defendant moving for a summary judgment assumes the burden of showing as a matter of law that the plaintiff had no cause of action against him.²⁴ In *Gibbs*, the supreme court made it unmistakably clear that the provisions of rule 166-A were equally applicable to the moving party regardless of whether he was the plaintiff *or* the defendant.²⁵

Some years later, in *Swilley v. Hughes*,²⁶ the court pronounced that "when the movant's evidence only serves to raise a fact issue, the opponent of the motion need not offer contradictory proof."²⁷ The court accurately reasoned that in summary judgment practice the opponent's silence never improves the quality of the movant's evidence. The court stated it could not hold that the opponent of the motion must appear and object to the movant's proof when that proof merely raised a fact issue.²⁸ The court's reasoning is certainly rational as a summary

22. 450 S.W.2d 827 (Tex. 1970).

23. *Id.* at 828.

24. *Gaddis v. Smith*, 417 S.W.2d 577, 582 (Tex. 1967). *See also* *Abbott Laboratories v. Gravis*, 470 S.W.2d 639, 643 (Tex. 1971); *Parrott v. Garcia*, 436 S.W.2d 897, 899 (Tex. 1969); *Gravis v. Physicians & Surgeons Hosp.*, 427 S.W.2d 310, 312 (Tex. 1968); *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965); *Smith v. Bolin*, 153 Tex. 486, 488, 271 S.W.2d 93, 94 (1954).

25. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 828 (Tex. 1970); *see* *Lokey v. Texas Methodist Foundation*, 479 S.W.2d 260, 265 (Tex. 1972).

26. 488 S.W.2d 64 (Tex. 1972).

27. *Id.* at 67; *see* *Torres v. Western Cas. & Sur. Co.*, 457 S.W.2d 50, 52 (Tex. 1970).

28. *Swilley v. Hughes*, 488 S.W.2d 64, 68 (Tex. 1972).

judgment should never be granted because of default by the opponent, but only upon the merit of the summary judgment proof.

In a number of the cases discussed earlier, the supreme court sought to create general guidelines applicable to all summary judgment proceedings. In addition, the court has also attempted to specifically differentiate the burden to be shouldered in summary judgment cases from that to be borne in situations involving an instructed verdict.²⁹ When the plaintiff is the movant for either a summary judgment or a directed verdict, the burdens are very similar.³⁰ On the other hand, when the defendant is the movant for either motion, the burden becomes critically different. When the defendant moves for a directed verdict, it is the duty of the plaintiff-opponent to show that the evidence supporting his allegations raise a genuine and controlling fact issue which should be submitted to a jury. If the plaintiff fails in this task, the defendant-movant receives his directed verdict. On motion for summary judgment, however, the burden of coming forward with the evidence falls entirely on the defendant-movant.³¹ Therefore, while the burden of proof is always on the movant seeking a summary judgment, such is not always the case where one pursues a directed verdict.

While the supreme court has acknowledged the similarity between the two types of motions, recent decisions indicate that although the analogy is useful, "[t]he situations are not the same."³² In discussing the duty of the non-moving plaintiff in a summary judgment proceeding, the court in *Torres v. Western Casualty & Surety Co.*³³ stated:

If the plaintiff rested his case at the trial with no more evidence behind him than is contained in the record on this judgment, he would suffer a directed verdict because of his failure to carry his burden of proof on good cause. He had no such burden on defendant's motion for summary judgment. When defendant filed this motion it had to meet the plaintiff's case as pleaded.³⁴

Remember that the motion for a directed verdict is urged at a point in the trial where the movant's showing has been subjected to review by cross-examination and to illumination by demeanor evidence.³⁵ Ob-

29. *Glenn v. Prestegord*, 456 S.W.2d 901, 903 (Tex. 1970).

30. *Valley Stockyards Co. v. Kinsel*, 369 S.W.2d 19, 20 (Tex. 1963); *Killough v. Hinds*, 161 Tex. 178, 182, 338 S.W.2d 707, 710 (1960).

31. See Comment, *The Burden of Coming Forward with Evidence on a Motion for Summary Judgment*, 8 HOUS. L. REV. 514, 516 (1971).

32. *Torres v. Western Cas. & Sur. Co.*, 457 S.W.2d 50, 52 (Tex. 1970).

33. 457 S.W.2d 50 (Tex. 1970).

34. *Id.* at 52. The court correctly realized that analogy is not identity.

35. *McDonald*, *The Effective Use of Summary Judgment*, 15 SW. L.J. 365, 376 (1961).

viously, this is not the case at the time a pretrial motion for summary judgment is initially propounded. At times, the issues may be such that only after a complete trial may it affirmatively be determined that there was never any decisive fact issue. Thus, the Texas Supreme Court has effectively revealed that substantial differences exist in the make-up of these two procedural vehicles. With respect to the summary judgment procedure, it is now certain that the reviewing court will narrowly focus its attention on the movant's evidence. In most instances, if the evidence forwarded by the movant is not sufficient to support a summary judgment, the sufficiency of the opponent's evidence apparently becomes irrelevant. Because of the increasingly complex nature of the law, however, substantial confusion has remained as to the proper placement of the burden of proof when the defendant raises an affirmative defense.

AFFIRMATIVE DEFENSES

Defendant-Movant

In seeking to guide attorneys through this area of confusion, the supreme court has analyzed the burden to be borne by a *defendant* who seeks a summary judgment on the strength of an affirmative defense which is available to him.³⁶ In *Swilley v. Hughes*,³⁷ the court was faced with a suit on a promissory note in which the defendant-makers had been granted a summary judgment on the basis of an affirmative defense. The supreme court held that the granting of the motion was improper since the defendants had not shown, as a matter of law, that there was no consideration for the note sued on or that the agreed consideration had failed. Thus, the court firmly established that in such situations the burden is on the defendant-movant to conclusively prove all of the essential elements of his affirmative defense.³⁸ Later, in *Oram v. General American Oil Co.*,³⁹ the defendant-movants relied upon the statute of limitations as an affirmative defense to bar the plaintiff's cause of action. The supreme court held that the non-movant plaintiff was under absolutely no duty to respond to the defendants' summary judgment motion since the defendants had failed to conclusively establish their affirmative defense.⁴⁰

36. See *Gulf, C. & S.F. Ry. v. McBride*, 159 Tex. 442, 454, 322 S.W.2d 492, 500 (1958).

37. 488 S.W.2d 64 (Tex. 1972).

38. *Id.* at 67.

39. 513 S.W.2d 533 (Tex. 1974) (per curiam).

40. *Id.* at 534.

Plaintiff-Movant

In many instances it is the *plaintiff* who has established his unequivocal right to a summary judgment while the defendant has presented no summary judgment proof concerning an affirmative defense he has alleged. In cases of this nature, Texas courts have held that in order to avoid summary judgment in favor of the plaintiff, it is the defendant's burden to raise an issue of fact with respect to his affirmative defense.⁴¹ The probable explanation for this exception to the general summary judgment rules is that all knowledge and evidence relative to the affirmative defense is likely to be in the possession of the defendant resisting the motion; it is, therefore, an almost impossible task for the plaintiff-movant to show the nonexistence of a genuine affirmative defense plead by the defendant.

PLEAS IN AVOIDANCE

In "*Moore*" *Burger, Inc. v. Phillips Petroleum Co.*,⁴² the non-movant plaintiff attempted to assert the defensive plea of promissory estoppel in order to avoid the granting of a summary judgment sought by the defendant. The defendant had previously established its affirmative defense of the Statute of Frauds as a matter of law and the question arose as to whether the burden was to be placed on the defendant-movant to negative all of the elements of the plaintiff's avoidance plea. The court concluded that in a situation where the summary judgment evidence established an affirmative defense as a matter of law, the defendant-movant would not have the burden to negative the plaintiff's defensive plea.⁴³ The court stated that the burden was on the plaintiff, if it wished to avoid the granting of a summary judgment against it, to adduce evidence raising a fact issue concerning its promissory estoppel defense.⁴⁴ Upon rehearing in 1974, the supreme court in *Nichols v. Smith*⁴⁵ reviewed a malpractice action in which an avoidance plea had been asserted by the plaintiff. The court noted that the record revealed the defendant's defense of the statute of limitations had been established as a matter of law. Nevertheless, the plaintiff attempted to prevent

41. See *Hudnall v. Tyler Bank & Trust Co.*, 458 S.W.2d 183, 185 (Tex. 1970); *Kuper v. Schmidt*, 161 Tex. 189, 193, 338 S.W.2d 948, 951 (1960).

42. 492 S.W.2d 934 (Tex. 1972).

43. *Id.* at 936-37.

44. *Id.* at 936-37.

45. 507 S.W.2d 518 (Tex. 1974).

having the defendant's motion for summary judgment granted by pleading fraudulent concealment as an avoidance defense. The court held that the burden was on the plaintiff to come forward with proof sufficient to raise an issue of fact with respect to fraudulent concealment. Since the plaintiff failed to discharge this burden, the court concluded that the plaintiff's mere allegations of fraudulent concealment could not defeat the physician's right to summary judgment.⁴⁶

The decisions of *Nichols* and "*Moore*" *Burger* are well reasoned and based upon ample authority.⁴⁷ If it had been held that the defendant-movant relying on an affirmative defense must disprove the plaintiff's case as pleaded, the consequences would be alarming because in most instances, the movant's burden could not be discharged.⁴⁸ For instance, the defendant in *Nichols* could not disprove the plaintiff's allegations of fraudulent concealment even though the plaintiff could not raise a fact issue with respect to his own avoidance plea. Thus, the case would have gone to trial even though the defendant had established his affirmative defense as a matter of law, and the plaintiff had no evidence available to use in avoiding the affirmative defense. Certainly the avowed purpose of eliminating unmeritorious claims is furthered by virtue of such rulings.⁴⁹

CHALLENGES TO LIMITATIONS

The increasing intricacy and rigidity of the summary judgment procedure is amply illustrated by *Zale Corp. v. Rosenbaum*.⁵⁰ Plaintiff sued

46. *Id.* at 521; see *Seale v. Nichols*, 505 S.W.2d 251, 254 (Tex. 1974); *Farley v. Prudential Ins. Co.*, 480 S.W.2d 176, 178 (Tex. 1972); *Hudnall v. Tyler Bank & Trust Co.*, 458 S.W.2d 183, 189 (Tex. 1970). In *Nichols v. Smith*, 507 S.W.2d 518 (Tex. 1974) the court concluded that the case was quite similar to the "*Moore*" *Burger, Inc.* case and also reaffirmed the soundness of the *Torres* decision. *Id.* at 521.

47. Note, 6 TEX. TECH. L. REV. 301, 307 (1974). In *Nichols*, the court cleared up some of the confusion left by the decision rendered in "*Moore*" *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934 (Tex. 1972). There initially seemed to be a conflict between "*Moore*" *Burger*, *Torres v. Western Cas. & Sur. Co.*, 457 S.W.2d 50 (Tex. 1970) and *Farley v. Prudential Ins. Co.*, 480 S.W.2d 176 (Tex. 1972), but *Nichols* resolved any uncertainties in favor of "*Moore*" *Burger* and it is submitted that *Farley* and *Torres* are distinguishable. The court in *Nichols* construed the *Torres* decision to state that "good cause" for delay in filing a workmen's compensation claim was not a plea in confession and avoidance of an affirmative defense. *Nichols v. Smith*, 507 S.W.2d 518, 521 (Tex. 1974). The *Farley* decision involved a situation where the movant was not a defendant and did not rely on an affirmative defense; therefore, it is not in conflict with *Nichols*. See *Farley v. Prudential Ins. Co.*, 480 S.W.2d 176 (Tex. 1972); Note, 6 TEX. TECH. L. REV. 301, 307 (1974).

48. Note, 6 TEX. TECH. L. REV. 301, 307 n.58 (1974); see *Stafford v. Wilkinson*, 157 Tex. 483, 488-89, 304 S.W.2d 364, 367-68 (1957).

49. Note, 6 TEX. TECH. L. REV. 301, 307-08 (1974).

50. 520 S.W.2d 889 (Tex. 1975) (per curiam).

defendants for substantial flood damage caused by the alleged negligent construction of a building. Defendants denied liability and asserted the two-year statute of limitations as an affirmative defense. The plaintiff sought to avoid the limitations defense by pleading that it had exercised diligence in procuring issuance and service of citation, and that limitations had been suspended as a result of the defendants' absence from the state. The trial court granted the defendants' motion for summary judgment and the court of civil appeals affirmed.⁵¹ In reversing the summary judgment in favor of the defendants the Texas Supreme Court stated:

When summary judgment is sought on the basis that limitations have expired, it is the movant's burden to conclusively establish the bar of limitations. . . *Where the non-movant interposes a suspension statute, such as Article 5537, or pleads diligence in requesting issuance of citation, the limitation defense is not conclusively established until the movant meets his burden of negating the applicability of these issues.*⁵²

The court noted that their earlier decision of *Oram v. General American Oil Co.*⁵³ recognized a critical distinction between pleas asserted by the non-movant which challenged the existence of limitations as opposed to pleas which did not challenge the limitations defense but were, in reality, affirmative defenses in the nature of confession and avoidance.⁵⁴ The court ultimately placed the burden of proof on the defendant-movant in *Rosenbaum*, stating that the plaintiff's plea merely challenged the existence of limitations.⁵⁵ It must be realized that the burden of proof we speak of in a summary judgment proceeding is not proof by a preponderance of the evidence, but proof as a matter of law. Once the significance of this statement is understood, many misconceptions should immediately disappear. In summary, the Texas Supreme Court has affirmatively revealed the proper placement of the burden in the outlined instances. The failure to understand the respective duties of the parties involved will inevitably lead to the perpetuation of unacceptable results never intended by the summary judgment procedure.

51. *Zale Corp. v. Rosenbaum*, 517 S.W.2d 440 (Tex. Civ. App.—El Paso 1974), *rev'd per curiam*, 520 S.W.2d 889 (Tex. 1975).

52. *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex. 1975) (per curiam) (emphasis added).

53. 513 S.W.2d 533 (Tex. 1974) (per curiam).

54. *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex. 1975) (per curiam).

55. *Id.* at 891.

PROCEDURAL AND EVIDENTIARY GUIDELINES

In recent years the Texas Supreme Court has reviewed in detail an expansive variety of situations involving the summary judgment remedy in which questions surfaced concerning procedural and evidentiary matters. In 1971 the supreme court held in *Hidalgo v. Surety Savings & Loan Association*,⁵⁶ that pleadings, even though verified, simply outlined the issues and did not constitute evidence for summary judgment purposes.⁵⁷ The majority of the court believed that the orderly administration of justice would be better served in the long run if they refused to "regard pleadings, even if sworn, as constituting summary judgment evidence."⁵⁸ Chief Justice Calvert concluded by noting that if they allowed verified pleadings to serve as summary judgment evidence, the court would be constantly confronted with problems concerning whether there was an adequate showing that the person making the oath was personally acquainted with the facts and competent to testify to the facts alleged.⁵⁹

Numerous cases have involved the propriety of granting a motion for summary judgment when based in part upon testimony contained in depositions and affidavits. Since neither the affidavit nor the deposition is a perfectly acceptable substitute for a live witness, the courts have been strict in enforcement of the applicable regulations. With reference to the affidavit, it is settled that it must consist of statements made by one who has personal knowledge of the facts, and it may not be based upon hearsay, nor rest upon mere conclusions.⁶⁰ Thus, in ruling upon a motion for summary judgment, only testimony having probative force will be considered.⁶¹ This result is reached because rule 166-A requires

56. 462 S.W.2d 540 (Tex. 1971).

57. *Id.* at 545.

58. *Id.* at 545.

59. *Id.* at 545. However, the court did not intend that a summary judgment could never be rendered on the pleadings when authorized to be so done. The court said that an example would occur:

When [the] suit is on a sworn account under Rule 185 . . . and the account is not denied under oath as therein provided, or when the plaintiff's petition fails to state a legal claim or cause of action. In such cases summary judgment does not rest on proof supplied by pleading, sworn or unsworn, but on deficiencies in the opposing pleading.

Id. at 543 n.1; see *Texas Nat'l Corp. v. United Sys. Int'l Inc.*, 493 S.W.2d 738, 741 (Tex. 1973).

60. *E.g.*, *Hidalgo v. Surety Sav. & Loan Ass'n*, 487 S.W.2d 702, 703 (Tex. 1972); see *Associates Discount Corp. v. Rattan Chevrolet, Inc.*, 462 S.W.2d 546, 550 (Tex. 1970); *Snow v. Bond*, 438 S.W.2d 549, 551 (Tex. 1969); *Gracey v. West*, 422 S.W.2d 913, 916 (Tex. 1968); *Box v. Bates*, 162 Tex. 184, 188, 346 S.W.2d 317, 319 (1961).

61. *McCrary v. City of Odessa*, 482 S.W.2d 151, 152 (Tex. 1972); *Box v. Bates*, 162 Tex. 184, 188, 346 S.W.2d 317, 319 (1961).

that the affidavits set forth such facts as would be admissible in evidence.⁶² In *Gaines v. Hamman*,⁶³ the court announced that “[i]f conflicting inferences may be drawn from the deposition and from the affidavit of the same party, a fact issue is presented”⁶⁴ In *Gaines*, the court reasoned that there was “no basis for giving controlling effect to a deposition as compared to an affidavit” even though the deposition was more detailed.⁶⁵ Finally, if the summary judgment motion involves the credibility of the affiants or deponents, the weight of the evidence, or a mere ground of inference, the motion will not be granted.⁶⁶ Since the prevailing judicial attitude is towards a strict review of all information contained in the affidavits and depositions, counsel on both sides should employ ingenuity in selecting the materials necessary for a summary judgment proceeding.

There are a substantial number of other situations which arise that call for informed judgment on the part of the attorney when deposition or affidavit content is being considered. If the only summary judgment proof offered comes from the deposition or affidavit of an *interested* witness, such testimony, to establish a fact as a matter of law, “‘must be clear, direct and positive with no circumstances in evidence tending to discredit or impeach such testimony.’”⁶⁷ While evidence which favors the movant’s position is not considered unless it is uncontradicted, any such uncontradicted evidence from an interested witness cannot be considered as doing more than raising a fact issue unless it is clear, direct, and positive.⁶⁸ It should be noted, however, that this rule is general, and not invariable, and that motions for summary judgment should not instantly dissolve simply because the cry “interested witness” is raised.

62. *Crain v. Davis*, 417 S.W.2d 53, 55 (Tex. 1967); see *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 233 (Tex. 1962). Affidavits opposing a motion for summary judgment must meet the requirements set forth in subdivision (e) of rule 166-A.

63. 163 Tex. 618, 358 S.W.2d 557 (1962).

64. *Id.* at 626, 358 S.W.2d at 562. There are evidently certain instances in which the motion for summary judgment need not be supported by the movant’s affidavit; however, such situations are very few in number. See *Willoughby v. Jones*, 151 Tex. 435, 444, 251 S.W.2d 508, 514 (1952). Further, an “acknowledgment” is not an “affidavit” as required by rule 166-A. *Perkins v. Crittenden*, 462 S.W.2d 565, 567 (Tex. 1970).

65. *Gaines v. Hamman*, 163 Tex. 618, 626, 358 S.W.2d 557, 562 (1962).

66. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965).

67. *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972); see *Cochran v. Wool Growers Cent. Storage Co.*, 140 Tex. 184, 191, 166 S.W.2d 904, 908 (1942).

68. *Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965). See also Comment, *Uncontradicted Party Testimony*, 2 BAYLOR L. REV. 342 (1950).

In an increasingly specialized society, the effect of expert testimony in summary judgment proceedings should be cautiously considered and its applicable scope carefully examined. In *Gibbs v. General Motors Corp.*,⁶⁹ the defendant in a manufacturer's liability suit offered in support of its motion for summary judgment the affidavit of an expert which stated that the failure of the unit in question was not the result of a manufacturing defect. The court held the Texas rule was that expert opinion testimony, adduced in support of a motion for summary judgment, would not establish the facts asserted as a matter of law.⁷⁰ Accordingly, the non-movant plaintiff did not have the burden to come forward with evidence of like quality if he wished to avoid summary judgment.⁷¹ Earlier, in *Broussard v. Moon*,⁷² the court concluded that uncontradicted expert testimony concerning what a reasonably prudent dishwasher repairman should do, was inconclusive under the rule that opinion testimony could not establish any material fact as a matter of law.⁷³

In *Luttes v. State*,⁷⁴ the court commented that the mere qualification of a witness as an expert did not cut off the fact finder from exercising considerable judgment as to how far the expert's opinions were to be relied upon.⁷⁵ The court reaffirmed the soundness of this view in the malpractice case of *Snow v. Bond*.⁷⁶ In that case, the court stated that the affidavit of a *disinterested* doctor, supporting the defendants, was insufficient to warrant affirmance of the summary judgment for the defendants. The testimony of the experts had been expressed in terms of a conclusion as to what a reasonably prudent doctor should do in a given hypothetical situation. The court reasoned that the

69. 450 S.W.2d 827 (Tex. 1970).

70. *Id.* at 829.

71. *Id.* at 829; *see, e.g.*, *Broussard v. Moon*, 431 S.W.2d 534, 537 (Tex. 1968); *Hood v. Texas Indem. Ins. Co.*, 146 Tex. 522, 524, 209 S.W.2d 345, 346 (1948). *General Motors* cited *Markwell v. General Tire & Rubber Co.*, 367 F.2d 748 (7th Cir. 1966) and contended that *Markwell* allowed expert testimony to be introduced in support of a summary judgment. The Texas Supreme Court refused, however, to follow *Markwell* because it was based on a provision in the federal rules that was not included in rule 166-A. *Gibbs v. General Motors Corp.*, 450 S.W.2d 827, 829 (Tex. 1970).

72. 431 S.W.2d 534 (Tex. 1968).

73. *Id.* at 536-37. *But see Coxson v. Atlanta Life Ins. Co.*, 142 Tex. 544, 549, 179 S.W.2d 943, 945 (1944) wherein the court reveals a situation in which expert testimony might be conclusive on the trier of fact.

74. 159 Tex. 500, 324 S.W.2d 167 (1958).

75. *Id.* at 533, 324 S.W.2d at 189; *see Maryland Cas. Co. v. Hearsks*, 144 Tex. 317, 321, 190 S.W.2d 62, 64 (1945); *Simmonds v. St. Louis B. & M. Ry.*, 127 Tex. 23, 27, 91 S.W.2d 332, 334 (1936).

76. 438 S.W.2d 549 (Tex. 1969).

question of what a reasonably prudent doctor would have done must be determined by the trier of fact after being advised in regard to the medical standards of practice and treatment in the particular case.⁷⁷ As a practical matter, when expert testimony is offered by one party, the court normally affords the other party ample opportunity to produce affidavits of experts in opposition. As a result, it is often extremely difficult to secure a valid summary judgment in cases of a more complex nature where expert testimony is required.

It has also been established that when both parties have motions for summary judgment before the court at the same time, each motion is entitled to be treated with equal dignity, and the evidence accompanying one motion may be considered in deciding the other.⁷⁸ In the *City of Fort Worth v. Taylor*,⁷⁹ the Texas Supreme Court confirmed that the trial court is not limited to a ground set forth in the motion if there are other grounds existing which make summary judgment appropriate as a matter of law.⁸⁰ Three years after *Taylor*, the court in *Cowan v. Woodrum*⁸¹ reversed a judgment granted the plaintiff by the court of civil appeals, and held that a party is not entitled to the entry of a summary judgment unless he actually filed such a motion.⁸² All of the cases previously discussed point out the fact that unfaltering vigilance is called for even at this premature stage of the proceedings. In many instances, difficulties encountered in dealing with the summary judgment procedure can be ascribed to error on the part of the attorney rather than to the intangible aspects of this pretrial practice. The active practitioner should thoroughly familiarize himself with these technical

77. *Id.* at 550-51.

78. *DeBord v. Muller*, 446 S.W.2d 299, 301 (Tex. 1969); *see Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780, 784 (2d Cir.), *cert. denied*, 328 U.S. 870 (1946); *Baccus v. City of Dallas*, 454 S.W.2d 391, 392 (Tex. 1970). As a warning note, one should be aware of the supreme court's decision in *Texas Dep't. of Corrections v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974), where it was held that the non-moving party may not be denied the opportunity to amend his pleadings because they were attacked via a summary judgment motion rather than by special exceptions.

79. 427 S.W.2d 316 (Tex. 1968).

80. *Id.* at 318; *see Phil Phillips Ford, Inc. v. St. Paul Fire & Marine Ins. Co.*, 465 S.W.2d 933, 937 (Tex. 1971); *In re Estate of Price*, 375 S.W.2d 900, 904 (Tex. 1964). *But see DeBord v. Muller*, 446 S.W.2d 299, 301 (Tex. 1969).

81. 472 S.W.2d 749 (Tex. 1971) (per curiam).

82. *Id.* at 750; *accord*, *Hinojosa v. Edgerton*, 447 S.W.2d 670, 673 (Tex. 1969) (on motion for rehearing). It is interesting to note the confusion generated by the question of attorney's fees in summary judgment cases. The Texas Supreme Court resolved numerous conflicts by its decision in *Coward v. Gateway Nat'l Bank*, 525 S.W.2d 857, 859 (Tex. 1975) when it concluded that prima facie evidence of reasonable attorney's fees as established by the fee schedule was insufficient to sustain the burden of the movant under rule 166-A with respect to the reasonableness issue.

requirements, since many attempts to secure a summary judgment have miscarried due only to a failure to ascertain the law accurately.

CONCLUSION

Certainly no one would contend that all of the problems inherent in summary judgment practice have been resolved or that all is presently at ease with the procedure. The patently abstract nature of the rule itself renders invalid any such assertion. It is certain, however, that summary judgments will be more critically reviewed. The pertinent statistics make it indisputable that the motion for summary judgment should not simply become part of a mechanical pretrial ritual. The invocation of this judicial process should always be the end product of an intelligent exercise in selectivity.

Counsel should also be aware of the strategic importance that attaches to a decision on whether or not to move for summary judgment. At this embryonic stage of the proceedings, mature deliberation should be exercised unless the prospective movant deems his position so invulnerable that he is willing to fully disclose to the court and his opponent nearly all of the evidentiary support underlying his theories. Without denying its usefulness and importance, the boast that summary judgment is the most "effective weapon in the arsenal of legal administration"⁸³ often seems difficult to reconcile with present statistics.⁸⁴ In a considerable number of cases, a "more dismal picture" is presented of a procedure ineptly and erroneously invoked.⁸⁵ While the motion for summary judgment calls for the exercise of judicial talent, its effectiveness as a procedural technique depends in no small measure on the conscientiousness and ability of the attorney.⁸⁶ The accomplished attorney-movant should attempt to assist the wary and beleaguered trial

83. Shientag, *Summary Judgment*, 4 FORDHAM L. REV. 186 (1935).

84. See text accompanying note 5 *supra*; Bauman, *A Rationale of Summary Judgment*, 33 IND. L.J. 467 n.2 (1958).

85. *Id.* at 467.

86. McDonald, *The Effective Use of Summary Judgment*, 15 SW. L.J. 365, 373-74 (1961). Manifestly, a motion for summary judgment is most likely to succeed in those instances where the controversy is relatively uncomplicated. For example, such a motion may frequently be appropriate when the claim or defense turns on the interpretation or applicability of a statute. A motion should also be considered where the claim or defense rests upon tangible proof, such as written documents. I should also emphasize that the utility of the partial summary judgment should not be forgotten. TEX. R. CIV. P. 166-A(a), (b). In the absence of a proper severance, the granting of such a partial motion is interlocutory and nonappealable. *Continental Bus Sys., Inc. v. City of Corpus Christi*, 453 S.W.2d 470, 471 (Tex. 1970) (per curiam); *Steeple Oil & Gas Corp. v. Amend*, 394 S.W.2d 789, 790 (Tex. 1965) (per curiam).

judge by submitting proper authorities and explanatory rationale supportive of his position. Improved proficiency in advocacy is necessitated as the pressure on court calendars and the spiraling cost of litigation will quite possibly make the summary judgment even more important in the near future.

It is indisputable that the indiscriminate use of the summary judgment procedure increases delay and expense in the final disposition of litigation. The procedure thus apparently aggravates the very problem it was designed to solve. For example, it would seem manifest that the summary judgment mode of attack is not always in the best interests of the client. Such a practice is often ill-adapted to cases of a more complex nature requiring the exploration of a full trial. In "the terms of a hackneyed metaphor, it is not a blunderbuss; it is a rifle . . ."⁸⁷ The relentless pursuit of a final summary judgment will in many instances merely serve to set up a temporary roadblock which postpones indefinitely the determination of the suit on the merits. Time is frequently the nemesis of the active practitioner, and when time is ultimately and inevitably converted into a monetary amount, it may also become a formidable rival of the client as well. Moreover, there may be a substantial denial of justice even where summary judgments are properly reversed, because crucial evidence may have been misplaced or perhaps the appellate process may have dimmed the recollections of witnesses at the later trial or made witnesses unavailable due to death or departure from the jurisdiction.

At present, because of the strict judicial interpretation of the rule, there are an undetermined number of lawyers and judges who are of the opinion that the summary judgment practice has lost its utility and viability. As a result, there is evidently strong sentiment existing in favor of substantially amending rule 166-A. On March 27, 1976, by a narrow majority, the Committee on the Administration of Justice of the State Bar of Texas voted to recommend that the substance of the present rule 166-A be materially altered. The changes suggested by the Committee could possibly lead to the promulgation of a new, and critically different, summary judgment rule.⁸⁸ In certain instances, these modifi-

87. McDonald, *The Effective Use of Summary Judgment*, 15 Sw. L.J. 365, 367 (1961).

88. With reference to subsection (c) of rule 166-A, the pertinent changes presently recommended by the Committee on the Administration of Justice are italicized below:

(c) Motion and Proceedings Thereon. The motion for summary judgment shall state the specific grounds therefor. *The motion and all affidavits shall be served at least twenty-one days before the time specified for the hearing. The adverse*

cations of the rule would have the effect of requiring affirmative action on the part of the *non-movant*. The suggested amendments to the rule would seem to promote the ferreting out of any existing fact issues at this early phase of the proceedings, rather than giving the non-movant until the final stages of the appellate process to come forward asserting controlling issues of fact. The underlying purpose of such changes in the structure of the rule seems to be an attempt to significantly increase the number of instances in which summary judgment may be properly granted. Whether the goals of those favoring such alterations in rule 166-A will ever be attained remains to be seen.

In any event, the summary judgment practice should not be relegated to the dustbin of antiquity, for this procedure will remain an effective weapon in the advocate's arsenal if it is handled with the requisite degree of precision. The selective use of this valuable pretrial procedure can save time, energy, and money for both courts and litigants. Caution, however, should be the prevailing watchword since the topic will undoubtedly continue to be a subject of substantial appellate attention. As a result, it may be wise to remember the admonition of a judge who commented years ago that summary judgment proceedings might be misused to attempt to cut a trial short. He concluded his observation with the warning that the "short cutting of trials is not an end in itself but a means to an end, and that in the conduct of trials, as in other endeavors, it is quite often true that the longest way around is the shortest way through."⁸⁹

party not later than 7 days prior to the day of hearing may serve opposing affidavits or other written response. No oral testimony shall be received at the hearing. If the moving party has by motion, pleadings, depositions, answers to interrogatories, admissions on file or affidavits, if any, shown that there is no genuine issue for trial the adverse party may not rest upon the mere allegations or denials of his pleadings, but he must define specifically in writing the issues he contends are controverted or point out the defects in the movant's proof and respond with depositions, answers to interrogatories, admissions on file, or affidavits, if any, showing by specific facts that there is a genuine issue for trial. If he does not so respond summary judgment shall be entered against him.

However, it should be noted that the changes in rule 166-A, as presently proposed by the Committee, have no binding effect and merely serve as recommendations to the Supreme Court of Texas.

89. *Gray Tool Co. v. Humble Oil & Ref. Co.*, 186 F.2d 365 (5th Cir. 1951). In *O'Byrne v. Oak Park Trust & Sav. Bank*, 450 S.W.2d 411, 418-19 (Tex. Civ. App.—Beaumont 1970, writ ref'd n.r.e.), the concurring justices expressly noted the trend toward abuse of the summary judgment procedure.