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Summary Judgments in Texas.

David Hittner

Lynne Liberato

SUMMARY JUDGMENTS IN TEXAS

JUDGE DAVID HITTNER*
LYNNE LIBERATO**

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

** Chief Staff Attorney, First Court of Appeals, Houston, Texas; B.S., Sam Houston State University (1974); M.S., East Texas State University (1977); J.D., South Texas College of Law (1980). The authors acknowledge with appreciation the assistance of Mark E. Steiner, Staff Attorney, First Court of Appeals.

Texas Rule of Civil Procedure 166a,[1] which governs summary judgment practice, permits a party on either side to obtain a prompt disposition of a case involving patently unmeritorious claims or untenable defenses.[2] When it was adopted in 1950, the purpose of the rule was, and remains, to eliminate delay and expense.[3] The rule provides a means of summarily terminating a case when a question of law is involved and no genuine issue of material fact exists.[4] Summary judgment is a harsh remedy which courts will deny unless the movant clearly establishes a right to it as a matter of law.[5] Rule 166a is not intended to deprive a litigant of a full hearing on any fact issue.[6]

Because a number of summary judgments are reversed on appeal,[7] it is important for the practitioner, when filing a motion for summary

1. TEX. R. CIV. P. 166a. Prior to the January 1, 1988, amendments to the Texas Rules of Civil Procedure, this rule was designated 166-A rather than 166a. *See id.* (Historical Note: 1988 Amendment).

2. Diversified Human Resources Group, Inc. v. Levinson-Polakoff, 752 S.W.2d 8, 10 (Tex. App.—San Antonio 1988, no writ); Querner Truck Lines, Inc. v. Alta Verde Indus., Inc., 747 S.W.2d 464, 469 (Tex. App.—San Antonio 1988, no writ).

3. McDonald, *Summary Judgment*, 30 TEX. L. REV. 285, 286 (1952).

4. TEX. R. CIV. P. 166a(c); *see also* Gaines v. Hamman, 163 Tex. 618, 625, 358 S.W.2d 557, 563 (1962); Guaranty Fed. Sav. & Loan Ass'n v. Horseshoe Operating Co., 748 S.W.2d 519, 521 (Tex. App.—Dallas 1988, no writ).

5. *See* INA of Texas v. Bryant, 686 S.W.2d 614, 615 (Tex. 1985)(movant has burden to prove right to judgment as matter of law); Odeneal v. Van Horn, 678 S.W.2d 941, 941 (Tex. 1984)(movant must prove action or defense as matter of law).

6. Gulbenkian v. Penn, 151 Tex. 412, 416, 252 S.W.2d 929, 931 (1952). *See generally* Hittner, *Summary Judgments in Texas*, 22 HOUSTON L. REV. 1109, 1109 (1985).

7. *See* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 675 (Tex. 1979)(from 1968 to 1976 seventy percent of summary judgments granted were reversed on appeal).

judgment, to understand the types of cases that lend themselves to disposition by summary judgment and to follow strictly the procedural steps in rule 166a. This article will first discuss the procedural and substantive aspects of obtaining, opposing, and appealing a summary judgment, then review those types of cases amenable to summary judgment, and finally compare state with federal summary judgment practice.

I. PROCEDURE FOR SUMMARY JUDGMENT

A. *Motion for Summary Judgment*

The summary judgment process begins with the filing of a motion.[8] In the absence of a motion for summary judgment by a party to the suit, no court has the power to render such a judgment.[9]

The basis for the motion for summary judgment is that no genuine issue exists as to any material fact and that the movant is entitled to summary judgment as a matter of law.[10] Rule 166a(c) unequivocally requires that the motion shall state with specificity the grounds upon which the movant is relying.[11] Stating grounds with specificity defines the issues and gives the non-movant adequate notice for opposing the motion.[12]

Rule 166a(c) requires that the reasons for summary judgment be in writing and before the trial judge at the hearing.[13] No oral testimony will be considered at the hearing on a motion for summary judgment.[14] At the summary judgment hearing, counsel should strenuously oppose any attempt to use oral testimony (or argument of counsel) to deviate from the written documents on file, and the court

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8. *See* TEX. R. CIV. P. 166a(a)(b) (either claimant or defendant may move for summary judgment).

9. Hodde v. Young, 672 S.W.2d 45, 47 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

10. TEX. R. CIV. P. 166a(c).

11. 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)(misclassification of specific ground for summary judgment as "suit on a sworn account" sufficient to defeat summary judgment even though affidavit and motion for summary judgment correctly alluded to properly worded breach of lease agreement).

12. Westchester Fire Ins. Co. v. Alvarez, 576 S.W.2d 771, 772 (Tex. 1978).

13. TEX. R. CIV. P. 166a(c); *see also* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 677 (Tex. 1979).

14. Richards v. Allen, 402 S.W.2d 158, 160 (Tex. 1966); Citizens State Bank of Dickenson v. Shapiro, 575 S.W.2d 375, 383 (Tex. App.—Tyler 1978, writ ref'd n.r.e.).

should not permit or consider such testimony.[15] Any issues that are not before the court at the hearing may not be considered for the first time on appeal.[16]

B. *Time for Filing Motion for Summary Judgment*

The motion for summary judgment shall be filed and served at least twenty-one days before the time specified for the hearing.[17] In computing the time, exclude the day notice is given and the day of the hearing.[18]

This twenty-one day requirement has been strictly construed by the courts and should be carefully followed. In *Extended Services Programs v. First Extended Service Corp.*,[19] the court held that an affidavit filed eighteen days before the hearing on behalf of a movant was not properly introduced in the trial court as summary judgment evidence.[20] It also held that depositions filed after the summary judgment hearing could not properly be considered because the nonmovant did not have fourteen full days to respond.[21]

Several cases indicate that both the notice and motion must be filed twenty-one days prior to the hearing on the motion for summary judgment.[22]

C. *Time for Response*

Rule 166a(c) provides that "[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response."[23] To be con-

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15. *See* Nash v. Corpus Christi Nat'l Bank, 692 S.W.2d 117, 119 (Tex. App.—Dallas 1985, writ ref'd n.r.e.)(improper for trial court to hear testimony of witnesses at summary judgment hearing).

16. *Id.*; State Bd. of Ins. v. Westland Film Indus., 705 S.W.2d 695, 696 (Tex. 1986); Forsman v. Forsman, 694 S.W.2d 112, 115 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); Roling v. McGeorge, 645 S.W.2d 886, 887 (Tex. App.—Tyler 1983, no writ).

17. TEX. R. CIV. P. 166a(c).

18. Williams v. City of Angleton, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

19. 601 S.W.2d 469 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

20. *Id.* at 470.

21. *Id.*

22. *See* Tafollo v. Southwestern Bell Tel. Co., 738 S.W.2d 306, 307 (Tex. App.—Houston [14th Dist.] 1987, no writ)(motion shall be filed and notice received 21 days before hearing); Williams v. City of Angleton, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)(21 days required between date of notice and date of hearing).

23. TEX. R. CIV. P. 166a(c).

sidered for summary judgment purposes, amended pleadings must be on file a full seven days before the hearing,[24] although the response may be filed on the seventh day before the hearing.[25]

While the response should always be timely filed, courts occasionally allow a late response.[26] The adverse party should not rely, however, upon the court's ability to permit late filing because this is strictly discretionary.[27] The refusal to permit late filing of a response is not an abuse of discretion by the trial judge.[28]

If a court allows late filing of a response to a motion for summary judgment, the court must affirmatively indicate in the record acceptance of the late filing.[29] In the absence of such indication, the appellate court will presume that the judge refused the late filing, even if the response appears as part of the appellate transcript.

D. *Service*

The motion for summary judgment and response should be served promptly on opposing counsel, and a certificate of service should be included in any motion for summary judgment. If notice is not given, the judgment may be reversed on appeal.[30]

A party may waive the twenty-one day requirement of notice of

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24. Goswami v. Metropolitan Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988).

25. Volvo Petroleum, Inc. v. Getty Oil Co., 717 S.W.2d 134, 137-38 (Tex. App.—Houston [14th Dist.] 1986, no writ).

26. Ossorio v. Leon, 705 S.W.2d 219, 221 (Tex. App.—San Antonio 1985, no writ); Travelers Constr., Inc. v. Warren Bros. Co., 613 S.W.2d 782, 785 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

27. *See, e.g.*, Folkes v. Del Rio Bank & Trust Co., 747 S.W.2d 443, 444 (Tex. App.—San Antonio 1988, no writ)(trial court did not abuse discretion in denying permission to file late response); Pinckley v. Gallegos, 740 S.W.2d 529, 532 (Tex. App.—San Antonio 1987, no writ)(no abuse of discretion in refusing to accept late-filed affidavits); Keever v. Hall & Northway Advertising, Inc., 727 S.W.2d 704, 705 (Tex. App.—Dallas 1987, no writ)(court's failure to accept late-filed response not abuse of discretion).

28. INA of Texas v. Bryant, 686 S.W.2d 614, 615 (Tex. 1985).

29. Goswami v. Metropolitan Sav. & Loan Ass'n, 751 S.W.2d 487, 490 (Tex. 1988); M & M Constr. Co. v. Great Am. Ins. Co., 749 S.W.2d 526, 527 (Tex. App.—Corpus Christi 1988, no writ); *cf.* Energo Int'l Corp. v. Modern Indus. Heating, 722 S.W.2d 149, 151-52 (Tex. App.—Dallas 1986, no writ)(docket entry inadequate indication of acceptance).

30. Rozsa v. Jenkinson, 754 S.W.2d 507, 509 (Tex. App.—San Antonio 1988, no writ). An allegation that a party received less notice of a summary judgment hearing than required by the rule does not present a jurisdictional question. Davis v. Davis, 734 S.W.2d 707, 712 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). The issue may not be raised for the first time on appeal. There must be an objection in the trial court. *Id.*

motion for summary judgment.[31] For example, in *Davis v. Davis*,[32] two parties filed motions for summary judgment directed against the appellant.[33] One motion gave the appellant twenty-one days notice but the other did not.[34] The trial court considered both motions at the same time.[35] The appellate court found that the appellant with less notice waived any objection because he participated in the hearing without objection, and failed to ask for a continuance, rehearing, or new trial.[36]

E. *Continuances*

If the respondent's affidavits show an inability to obtain essential summary judgment evidence that will justify opposition to a summary judgment, the court may deny the motion for summary judgment or order a continuance. For example, to file a sufficient response, the non-movant may need additional time to secure necessary documentation or affidavits or to allow for the taking of depositions.

Granting a request for a continuance of the summary judgment hearing is within the trial court's discretion, and the trial court's ruling will not be disturbed on appeal unless an abuse of discretion is shown.[37] In *Thomson v. Norton*,[38] no abuse of discretion was found when the trial court refused to grant a continuance to a newly-appointed attorney who desired additional time to become familiar with

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31. Lofthus v. State, 572 S.W.2d 799, 800 (Tex. Civ. App.—Amarillo 1978, writ ref'd n.r.e.)(counsel appeared on day of hearing, given opportunity to file affidavits opposing motion for summary judgment and failed to do so, and failed to move for additional time); Brown v. Capital Bank, 703 S.W.2d 231, 234 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.)(argument at submission that respondent could present facts essential to oppose summary judgment, absent affidavit stating such reasons, not sufficient cause for continuance); Delta (Del.) Petroleum v. Houston Fishing Tools Co., 670 S.W.2d 295, 296 (Tex. App.—Houston [1st Dist.] 1983, no writ)(waiver of notice based on fact appellant made no motion for continuance, did not appear at hearing, and made no post trial motion complaining of lack of notice); Carr v. Densford, 477 S.W.2d 644, 646 (Tex. Civ. App.—Amarillo 1972, no writ)(waiver of notice requirement because no request made for additional time or for continuance).

32. 734 S.W.2d 707 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

33. *See id.* at 712.

34. *See id.*

35. *Id.*

36. *Id.*

37. Smith v. Christley, 684 S.W.2d 158, 161 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); Schero v. Astra Bar, Inc., 596 S.W.2d 613, 615 (Tex. Civ. App.—Corpus Christi 1980, no writ).

38. 604 S.W.2d 473 (Tex. Civ. App.—Dallas 1980, no writ).

the law and facts in the case.[39] The court supported its decision on the grounds that the client had at all times prior to the hearing been represented by a lawyer.[40]

The minimum twenty-one day period required from filing and notice to the hearing does not begin again when a continuance is granted, because the period is measured from the original filing day.[41]

II. SUMMARY JUDGMENT EVIDENCE

Summary judgment evidence, whether offered through depositions, affidavits, or interrogatories, must be presented in a form that would be admissible in a conventional trial proceeding.[42] Neither the motion for summary judgment[43] nor the response,[44] even if sworn,[45] is ever proper summary judgment proof. When both parties move for summary judgment, the trial court may consider the combined summary judgment evidence to decide how to rule on the motions.[46]

As of January 1, 1988, parties no longer file depositions, interrogatory answers, and responses to requests for documents with the trial court or the clerk.[47] To make rule 166a consistent with that change, the rule now provides that the trial court may consider deposition transcripts, interrogatory answers, or other discovery responses in the motion or response.[48] Admissions contained in responses to requests for admissions can only be considered by the trial court if filed at the time of the hearing.[49]

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39. *Id.* at 478.

40. *Id.*

41. Williams v. City of Angleton, 724 S.W.2d 414, 417 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

42. Hidalgo v. Surety Sav. & Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1972).

43. *Id.*; Trinity Universal Ins. Co. v. Patterson, 570 S.W.2d 475, 478 (Tex. Civ. App.—Tyler 1978, no writ).

44. Nicholson v. Memorial Hosp. Sys., 722 S.W.2d 746, 749 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

45. *See* Keenan v. Gibraltar Sav. Ass'n, 754 S.W.2d 392, 394 (Tex. App.—Houston [14th Dist.] 1988, no writ)(document attached to response merely sworn verification and not proper summary judgment evidence).

46. Woods v. Applemack Enter., 729 S.W.2d 328, 331 (Tex. App.—Houston [14th Dist.] 1987, no writ); River Oaks Shopping Center v. Pagan, 712 S.W.2d 190, 193 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

47. TEX. R. CIV. P. 206.

48. TEX. R. CIV. P. 166a(c).

49. *Id.*

A. *Pleadings*

The pleadings in a case must generally outline and define the issues and be supported by summary judgment evidence. A summary judgment proceeding is a "trial" with respect to filing amended pleadings according to Texas Rule of Civil Procedure 63.[50] Litigants may alter their pleadings, although they must obtain leave of the court before filing any amended pleadings within seven days of the date of the hearing.[51] Pleadings themselves, even if verified, do not constitute summary judgment evidence.[52]

1. Pleading Deficiencies

A summary judgment should not be based on a pleading deficiency that could be cured by amendment (i.e., subject to a special exception).[53] If the opportunity to amend is given, however, but no amendment is made or a further defective pleading is filed, summary judgment may then be proper.[54] If a pleading deficiency is of the type

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50. Wheeler v. Yettie Kersting Memorial Hosp., No. 01-88-24-CV, at 5 (Tex. App.—Houston [1st Dist.], August 31, 1988, n.w.h.)(not yet reported).

51. *Id.* at 5-6.

52. City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979); Hidalgo v. Surety Sav. & Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1971); Pinckley v. Gallegos, 740 S.W.2d 529, 534 (Tex. App.—San Antonio 1987, no writ); Randall v. Dallas Power & Light Co., 745 S.W.2d 397, 399 (Tex. App.—Dallas 1987), *rev'd on other grounds*, 752 S.W.2d 4 (Tex. 1988); 4 Acres of Real Property v. State, 740 S.W.2d 494, 496 (Tex. App.—Beaumont 1987, no writ).

53. Massey v. Armco Steel Co., 652 S.W.2d 932, 934 (Tex. 1983)(failure to state cause of action); Texas Dept. of Corrections v. Herring, 513 S.W.2d 6, 9-10 (Tex. 1974)(failure to state cause of action); James v. Hitchcock Indep. School Dist., 742 S.W.2d 701, 704 (Tex. App.—Houston [1st Dist.] 1987, writ denied)(failure to state cause of action); Truckline LNG Co. v. Trane Thermal Co., 722 S.W.2d 722, 724 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)(petition failed to show when contract breached and thus when statute of limitations accrued); Farrell v. Crossland, 706 S.W.2d 158, 160 (Tex. App.—El Paso 1986, writ dism'd); Meisler v. Bankers Capital Corp., 668 S.W.2d 828, 830 (Tex. App.—Houston [14th Dist.] 1984, no writ)(failure to allege proper capacity to sue); Winograd v. Clear Lake City Water Auth., 654 S.W.2d 862, 863 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)(failure to state cause of action); *cf.* Portugal v. Jackson, 647 S.W.2d 393, 394 (Tex. App.—Waco 1983, writ ref'd n.r.e.)(in *Portugal* and *Farrell*, because no complaint to trial court that summary judgment motion raised on attack on pleading defect rather than by special exception, matter could not be raised for first time on appeal); Atlantic Richfield v. Exxon, 663 S.W.2d 858, 865 (Tex. App.—Houston [14th Dist.] 1983), *rev'd on other grounds*, 678 S.W.2d 944 (Tex. 1984)(summary judgment proper in challenge to cause of action founded on unambiguous writings).

54. Texas Dept. of Corrections v. Herring, 513 S.W.2d 6, 10 (Tex. 1974); Hidalgo v. Surety Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1971); Russell v. Department of Human Resources, 746 S.W.2d 510, 512-13 (Tex. App.—Texarkana 1988, no writ).

that could not be cured by an amendment, a special exception would be unnecessary, and a summary judgment is proper if the facts alleged establish the absence of a right of action or create an insuperable barrier to recovery.[55]

2. Summary Judgment Granted "On the Pleadings"

In essence, pleadings may not be considered as proof to defeat an otherwise valid summary judgment. They may, however, form the basis for a summary judgment for a defendant when the plaintiff states no cause of action or legal claim.[56] When directed solely at the plaintiff's petition, the reviewing court must accept as true every allegation against which the motion is directed.[57]

Sworn account cases are also an exception. When there is no proper verified denial of a suit on a sworn account, the pleadings can be the basis for summary judgment.[58]

In *Hidalgo v. Surety Savings & Loan Association*,[59] the supreme court delineated when a summary judgment could be granted on the pleadings:

> We are not to be understood as holding that summary judgment may not be rendered, when authorized, *on the pleadings*, as, for example, when suit is on a sworn account under Rule 185, Texas Rules of Civil Procedure, and the account is not denied under oath as therein provided, or when the plaintiff's petition fails to state a legal claim or cause of action. In such cases summary judgment does not rest on proof supplied by pleading, sworn or unsworn, but on deficiencies in the opposing pleading.[60]

B. *Depositions*

If deposition testimony meets the standards for summary judgment

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55. Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972).

56. *See* Perser v. City of Arlington, 738 S.W.2d 783, 784 (Tex. App.—Fort Worth 1987, writ denied)(suit based on gambling debt).

57. Abbot v. City of Kaufman, 717 S.W.2d 927, 929 (Tex. App.—Tyler 1986, writ dism'd w.o.j.); Gottlieb v. Hofheinz, 523 S.W.2d 7, 10 (Tex. App.—Houston [1st Dist.] 1975, writ dism'd w.o.j.).

58. Enernational Corp. v. Exploitation Eng'rs, 705 S.W.2d 749, 750 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); Waggoner's Home Lumber Co., Inc. v. Bendix Forest Products Corp., 639 S.W.2d 327, 328 (Tex. App.—Texarkana 1982, no writ); *see also infra* VIII.A. (Sworn Accounts).

59. 462 S.W.2d 540 (Tex. 1971).

60. *Id.* at 543 n.1 (emphasis in original).

evidence ("clear, positive, direct, otherwise free from contradictions and inconsistencies and, if untrue," could be readily controverted), it will support a valid summary judgment.[61]

1. Evidentiary Considerations

A deposition does not become evidence against the party until it is introduced in court. However, deposition testimony may be given the same weight as any other summary judgment evidence.[62] Such testimony has no controlling effect as compared to an affidavit, even if the deposition is more detailed than the affidavit. Thus, if conflicting inferences may be drawn from the two statements made by the same party, one in an affidavit and the other in a deposition, a fact issue is presented.[63]

Deposition testimony is subject to the same exceptions that might have been made to questions and answers if the witness had testified at trial.[64] It has the force of an out-of-court admission and may be contradicted or explained in a summary judgment proceeding.[65]

Hearsay generally is fatal; however, Texas Rule of Evidence 802 provides that inadmissible hearsay admitted without objection shall not be denied probative value simply because it is hearsay. As applied to summary judgment evidence, this has been held to mean that an objection of hearsay must be raised in a response or reply to a response.[66]

2. Deposition Evidence Procedural Requirements

To be used as summary judgment evidence, depositions must be signed (unless waived) and filed at the time the summary judgment is

61. Wiley v. City of Lubbock, 626 S.W.2d 916, 918 (Tex. App.—Amarillo 1981, no writ).

62. Jones v. Hutchison County, 615 S.W.2d 927, 930 n.3 (Tex. Civ. App.—Amarillo 1981, no writ).

63. Randall v. Dallas Power & Light, 752 S.W.2d 4, 7 (Tex. 1988); Gaines v. Hamman, 163 Tex. 618, 626, 358 S.W.2d 557, 562 (1962); *cf.* Tenowich v. Sterling Plumbing Co., 712 S.W.2d 188, 189 (Tex. App.—Houston [14th Dist.] 1986, no writ)(no conflict between affidavit and deposition testimony).

64. *See* Molnar v. Engels, Inc., 705 S.W.2d 224, 226 (Tex. App.—San Antonio 1985, no writ); Combs v. Morrill, 470 S.W.2d 222, 224 (Tex. Civ. App.—San Antonio 1971, writ ref'd n.r.e.). Depositions also are subject to objections as to form and manner of taking, as provided by rule 204(4). *See* TEX. R. CIV. P. 204(4).

65. *Molnar*, 705 S.W.2d at 226.

66. Dolenz v. A. B., 742 S.W.2d 82, 83 n.2 (Tex. App.—Dallas 1987, writ denied)(affidavits contained inadmissible hearsay).

heard.[67] Beginning January 1, 1988, depositions are no longer filed with the trial court clerk.[68] In an instructive opinion, the Dallas Court of Appeals recently outlined the proper procedure for using a deposition as summary judgment evidence:

> If an attorney has an original deposition and wishes to rely upon the deposition in its entirety to support a motion for summary judgment, he or she can attach the entire deposition, with the original court reporter's certificate to authenticate the deposition, to the motion as an exhibit. If an attorney has only a copy of a deposition or wishes to rely only on excerpted portions of a deposition (so that the excerpted pages are copies), he or she can nonetheless attach the copy or the page copies as an exhibit to the motion for summary judgment, together with a copy of the court reporter's certificate, and his or her own original affidavit certifying the truthfulness and correctness of the copied material. The deposition material is then filed, as an exhibit to the motion for summary judgment itself, and placed before the court; it has been authenticated by the court reporter's original certificate or by the attorney's original affidavit.[69]

Even if they are attached to the motion or response, extracts from unfiled depositions that are not supported by affidavit or properly authenticated are not proper evidence.[70] On appeal, even if the parties stipulate to the authenticity of the depositions, the appellate court will not consider them.[71]

If a party desires to make a deposition part of the appellate record, the party must specifically request that the deposition be included in the transcript. For example, in *Khalaf v. United Business Investments, Inc.*,[72] even though both parties' briefs stated that the appellant's deposition had been taken prior to the summary judgment hearing, neither party had requested that the deposition be made a

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67. Velde v. Swanson, 679 S.W.2d 627, 630 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Barrow v. Jack's Catfish Inn, 641 S.W.2d 624, 625 (Tex. App.—Corpus Christi 1982, no writ); Graves v. George Dullnig & Co., 548 S.W.2d 502, 504 (Tex. Civ. App.—Eastland 1977, no writ).

68. TEX. R. CIV. P. 206(2). Rule 206(2) designates the attorney who has taken the deposition (the attorney who asked the first question appearing in the transcription) as the "custodial attorney" of the deposition. *Id.*

69. Deerfield Land Joint Venture v. Southern Union Realty Co., No. 05-88-516-CV, at 8-9 (Tex. App.—Dallas, August 22, 1988, n.w.h.)(not yet reported).

70. *Id.* at 5.

71. *Id.* at 9.

72. 615 S.W.2d 869 (Tex. App.—Houston [1st Dist.] 1981, no writ).

part of the appellate record, and the court would not consider the deposition on appeal.[73]

C. *Answers to Interrogatories and Requests for Admissions*

Answers to requests for admissions and interrogatories may be used only against the party filing them.[74] When the non-movant has answered requests for admissions or interrogatories, these answers cannot be used to defeat the motion on the ground that they raise a material fact issue.[75] Denials to requests for admissions are not proper summary judgment evidence.[76]

1. Deemed Admissions

Where a party has failed to answer requests for admissions, that party will be precluded from offering summary judgment proof contrary to those admissions, because an unanswered admission is automatically deemed admitted.[77] Admissions, once made or deemed by the court, may not be contradicted by any evidence, whether in the form of live testimony or summary judgment affidavits.[78] Any matter established under rule 169 (Requests for Admission) is conclusively established as to the party making such admission, unless on motion it is withdrawn or amended with permission of the court.[79]

Facts alleged in pleadings not in the alternative are judicial admis-

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73. *Id.* at 871.

74. Keever v. Hall & Northway Advertising, Inc., 727 S.W.2d 704, 705 (Tex. App.—Dallas 1987, no writ); Sprouse v. Texas Employers Ins. Ass'n, 459 S.W.2d 216, 219-20 (Tex. Civ. App—Beaumont 1970, writ ref'd n.r.e.); TEX. R. CIV. P. 168(2).

75. Walker v. Horine, 695 S.W.2d 572, 575 (Tex. App.—Corpus Christi 1985, no writ); Fort Bend Indep. School Dist. v. Weiss, 570 S.W.2d 241, 243 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); Jeffrey v. Larry Plotnick Co., Inc., 532 S.W.2d 99, 102 (Tex. Civ. App.—Dallas 1975, no writ).

76. City of Richland Hills v. Bertelsen, 724 S.W.2d 428, 431 (Tex. App.—Fort Worth 1987, no writ); Denton Constr. Co. v. Mike's Elec. Co., 621 S.W.2d 846, 848 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

77. TEX. R. CIV. P. 169; Velchoff v. Campbell, 710 S.W.2d 613, 614 (Tex. App.—Dallas 1986, no writ).

78. Culp v. Hawkins, 711 S.W.2d 726, 727-28 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); Henke Grain Co. v. Keenan, 658 S.W.2d 343, 347 (Tex. App.—Corpus Christi 1983, no writ); *see also* Smith v. Home Indem. Co., 683 S.W.2d 559, 562 (Tex. App.—Fort Worth 1985, no writ). Note that a motion to deem facts admitted is unnecessary under the rules. Failure to respond deems the requests admitted under TEX. R. CIV. P. 169(1).

79. *Velchoff*, 710 S.W.2d at 614; *Home Indem. Co.*, 683 S.W.2d at 562.

sions by the pleader that cannot be contradicted by the pleader.[80]

2. Evidentiary Considerations

To be considered summary judgment proof, answers to interrogatories or requests for admissions must be otherwise admissible into evidence, but neither the depositions, requests for admissions, nor interrogatories need be introduced formally at the summary judgment hearing.[81] The attorney opposing the motion should be certain that these documents are on file or were filed with the motion for summary judgment. In addition, these papers should be inspected for conclusions, hearsay, and opinion testimony, which must be brought to the attention of the trial court in a responsive pleading.

D. *Documents*

Documents are an important type of summary judgment proof.

1. Attaching Documents to Summary Judgment Motions and Responses

A motion for summary judgment must be supported by its own proof and not by reference to the pleadings. As such, supporting documents should be attached either to the affidavit that refers to the document or to the motion for summary judgment itself.[82] The nonmovant may use the movant's own exhibit against the movant to establish the existence of a fact question.[83]

The importance of attaching all documentation to the motions for summary judgment and to responses is illustrated in many cases. For example, in *MBank Brenham, N.A. v. Barrera*,[84] the supreme court held that there was no evidence to conflict with movant's summary judgment proof because, in its answer, the non-movant failed to attach his opponent's abandoned pleadings, which presumably raised

80. Beta Supply, Inc. v. G.E.A. Power Cooling Sys., Inc., 748 S.W.2d 541, 542 (Tex. App.—Houston [1st Dist.] 1988, writ denied).

81. Stewart v. United States Leasing Corp., 702 S.W.2d 288, 290 (Tex. App.—Houston [1st Dist.] 1985, no writ); Able Fin. Co. v. Whitaker, 388 S.W.2d 437, 439 (Tex. Civ. App.—Tyler 1965, writ dism'd by agr.).

82. Trimble v. Gulf Paint & Battery, Inc., 728 S.W.2d 887, 888 (Tex. App.—Houston [1st Dist.] 1987, no writ).

83. Keever v. Hall & Northway Advertising, Inc., 727 S.W.2d 704, 706 (Tex. App.—Dallas 1987, no writ).

84. 721 S.W.2d 840 (Tex. 1986).

fact issues.[85] The court held that copies of the abandoned pleadings, with supporting affidavits or other authentication as required by rule 166a, should have been attached to the response.[86]

In *Zarges v. Bevan*,[87] the supreme court stated that, absent controverting summary judgment proof, an affidavit attached to a motion for summary judgment that incorporated by reference a certified copy of a note attached to plaintiff's first amended petition, was enough to prove the movants were owners and holders of the note.[88] *Zarges* illustrates again the importance of specifically calling to the court's attention, by appropriate response, defects in the movant's motion.[89]

2. Evidentiary Considerations

Any supporting documentation relied on to support a summary judgment must be sound in terms of its own evidentiary value. In *Dominguez v. Moreno*,[90] a trespass to try title case, the plaintiff attached to the summary judgment motion a partial deed from the common source to his father.[91] The "deed" contained no signature, no date, and supplied nothing more than a granting clause and description of the land.[92] The court held, in essence, that the writing was not a deed and was not the type of evidence that would be admissible at a trial on the merits.[93]

3. Copies

Copies of original documents (promissory notes, leases, contracts, etc.) are acceptable if accompanied by a properly sworn affidavit that the attached documents are "true and correct" copies of the

85. *Id.* at 842.

86. *Id.*

87. 652 S.W.2d 368 (Tex. 1983).

88. *Id.* at 369.

89. *Id.*; *see also* Mercer v. Daoran Corp., 676 S.W.2d 580, 583 (Tex. 1984)("best evidence rule" applied to summary judgment evidence); Life Ins. Co. of Virginia v. Gar-Dal, Inc., 570 S.W.2d 378, 380 (Tex. 1978)(properly identified photocopy of note attached to affidavit was proper summary judgment evidence); Clark v. Dedina, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd w.o.j.)(photocopy of note affiant swore was true and correct was proper summary judgment evidence).

90. 618 S.W.2d 125 (Tex. Civ. App.—El Paso 1981, no writ).

91. *Id.* at 126.

92. *Id.*

93. *Id.*

originals.[94]

In *Norcross v. Conoco, Inc.*,[95] the court reversed a summary judgment on a sworn account because the affiants merely stated that copies of invoices and accounts attached were true and correct copies of the original documents.[96] No reference was made to having personal knowledge of the information contained in the attached invoice records.[97] The affiants did not state that the invoices or accounts were just and true or correct and accurate.[98] Thus, said the court, the invoices were not competent summary judgment proof.[99]

4. Judicial Notice of Court Records

A trial court may take judicial notice of its own records in a case involving the same subject matter between the same or nearly identical parties. However, on motion for summary judgment, certified copies of court records in a different case, even if pending in the same court, should be attached to the motion in the second case. The failure of the movants to attach the records precludes granting of summary judgment.[100]

E. *Affidavits*

Affidavits, sworn statements by competent witnesses, usually are essential to support allegations in a motion for summary judgment or in a response. Rule 166a provides that a party may move for summary judgment with or without supporting affidavits.[101] However, it is highly unusual for a summary judgment to be granted without supporting affidavits. More often than not, they are the vehicle by which the court is shown that there are no factual questions or, conversely, that there are facts in issue.

A party need not supplement answers to interrogatories requesting

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94. Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986); TEX. R. EVID. 902.

95. 720 S.W.2d 627 (Tex. App.—San Antonio 1986, no writ).

96. *Id.* at 632.

97. *Id.*

98. *Id.*

99. *Id.*; *see also infra*, II.E.4. (Effect of Improper Affidavits).

100. Gardner v. Martin, 162 Tex. 156, 159, 345 S.W.2d 274, 276 (1961); Chandler v. Carnes Co., 604 S.W.2d 485, 487 (Tex. Civ. App.—El Paso 1980, no writ).

101. Kilpatrick v. State Bd. of Registration for Professional Eng'rs, 610 S.W.2d 867, 871-72 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

designation of witnesses to use an affidavit of a previously undisclosed witness to support a summary judgment motion or response.[102]

1. Form of Affidavits

The requirements for affidavits under Texas Rule of Civil Procedure 166a(e) are that the affidavit must show affirmatively that it is based on personal knowledge and that the facts sought to be proved would be "admissible in evidence" at a conventional trial.[103]

A verification attached to the motion or response that the contents are within the affiant's knowledge and are true and correct does not constitute a proper affidavit in support of summary judgment under rule 166a(e). The affidavit itself must set forth facts and show the affiant's competency, and the allegations contained in the affidavit must be direct, unequivocal, and such that perjury is assignable.[104]

The rule 166a(e) requirement that the affidavit affirmatively show that the affiant is competent to testify to the matters contained in the affidavit is not satisfied by an averment that, for example, he or she is "over twenty-one years of age, of sound mind, capable of making this affidavit and personally acquainted with the facts herein stated." Rather, the affiant should detail those particular facts that demonstrate that he or she has personal knowledge.

Good practice dictates that phrases such as "I believe" or "to the best of my knowledge and belief" should never be used in any supporting affidavit. Statements in a non-movant's affidavit based upon the "best of his knowledge" have been held insufficient to support a response raising fact issues.[105] Such statements, said the Fort Worth Court of Appeals in *Campbell v. Fort Worth Bank & Trust*,[106] are no evidence at all.[107] Explained the court:

A person could testify with impunity that to the best of his knowledge,

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102. Gandara v. Novasad, 752 S.W.2d 740, 743 (Tex. App.—Corpus Christi 1988, no writ). The court reasoned that the rule 166b(6)(b) duty to supplement answers to interrogatories does not apply to summary judgments because of rule 166a(c)'s more particular requirements for the deadlines for filing affidavits in support of a summary judgment. *Id.* at 742-43.

103. Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984); TEX. R. CIV. P. 166a(e).

104. Keenan v. Gibraltar Sav. Ass'n, 754 S.W.2d 392, 394 (Tex. App.—Houston [14th Dist.] 1988, no writ).

105. Campbell v. Fort Worth Bank & Trust, 705 S.W.2d 400, 402 (Tex. App.—Fort Worth 1986, no writ).

106. *Id.*

107. *Id.*

> there are twenty-five hours in a day, eight days in a week, and thirteen months in a year. Such statements do not constitute factual proof in a summary judgment proceeding.[108]

Conversely, *Moya v. O'Brien*[109] suggests that the requirement that the affiant have personal knowledge does not preclude the use of the words "I believe" in a supporting affidavit, if the content of the entire affidavit shows that the affiant has personal knowledge.[110] The court noted, however, that:

> [W]hen the portions of the affidavits containing hearsay are not considered, the remaining statements in the affidavits contain sufficient factual information to sustain the burden of proving the allegations in the motion for summary judgment.[111]

An affidavit in substantially correct form is essential summary judgment proof. In *Sturm Jewelry, Inc. v. First National Bank, Franklin*,[112] the court found that the absence of a jurat was a substantial defect and not a simple defect in form.[113] The plaintiff attached "affidavits" that were not signed by a notary public or any other person authorized to administer an oath.[114] The court held that the jurat was an integral part of the Texas Rule of Civil Procedure 166a(e) prescription for the form of an affidavit, and its absence made the plaintiff's "affidavit" a fundamentally defective instrument.[115] A purely formal deficiency in an affidavit, however, can be waived if it is not properly raised at the trial level.[116]

It is generally not advisable for the attorney representing the movant to make the affidavit, since the affidavit must be based on personal knowledge and not on hearsay.[117]

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108. *Id.*

109. 618 S.W.2d 890 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

110. *Id.* at 893.

111. *Id.*

112. 593 S.W.2d 813 (Tex. Civ. App.—Waco 1980, no writ).

113. *Id.* at 814; *see also* Trimble v. Gulf Paint & Battery, Inc., 728 S.W.2d 887, 889 (Tex. App.—Houston [1st Dist.] 1987, no writ).

114. *Sturm Jewelry*, 593 S.W.2d at 814.

115. *Id.*

116. Youngstown Sheet & Tube v. Penn, 363 S.W.2d 230, 234 (Tex. 1962)(documentary evidence attached to affidavit not sworn to or certified).

117. Jackson T. Fulgham Co. v. Stewart Title Guar. Co., 649 S.W.2d 128, 130 (Tex. App.—Dallas 1983, writ ref'd n.r.e.); Wells Fargo Constr. Co. v. Bank of Woodlake, 645 S.W.2d 913, 914 (Tex. App.—Tyler 1983, no writ); City of San Antonio Fireman's & Policemen's Civil Serv. Comm'n v. Villenueva, 630 S.W.2d 661, 664 (Tex. Civ. App.—San Antonio 1981, writ ref'd n.r.e.).

2. Substance of Affidavits

The affidavit must set forth facts, not legal conclusions.[118] The line separating admissible statements of fact and inadmissible opinions or conclusions cannot always be precisely drawn. Thus, it is important for the practitioner to be very careful in preparing the affidavits to be used as summary judgment proof.

In *Schultz v. General Motors Acceptance Corp.*,[119] the court held that an affidavit supporting the creditor's motion for summary judgment merely recited a legal conclusion in stating that certain collateral was disposed of "at public sale in conformity with reasonable commercial practices . . . in a commercially reasonable manner."[120] Summary judgment was precluded, absent facts concerning the sale of the collateral in question.[121]

The affidavit must not contain information that is a unilateral and subjective determination of the facts or an opinion about such facts.[122] In *Manges v. Astra Bar, Inc.*,[123] the court considered statements in an opposing affidavit that all adjustments, off-sets, and counterclaims had not been deducted from sums sued upon and that the defendant had not been credited with all payments made.[124] The court held these statements were mere conclusions and insufficient to raise a fact issue.[125] In *Wise v. Dallas Southwest Media Corp.*,[126] the summary judgment proof consisted of affidavits of interested witnesses that the court determined were simply unilateral, subjective thoughts and opinions and, thus, not competent summary judgment evidence.[127]

A court will not speculate whether the affiant could establish the

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118. Beta Supply, Inc. v. G.E.A. Power Cooling Sys., Inc., 748 S.W.2d 541, 542 (Tex. App.—Houston [1st Dist.] 1988, writ denied); Harbour Heights Dev., Inc. v. Seaback, 596 S.W.2d 296, 297 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

119. 704 S.W.2d 797 (Tex. App.—Dallas 1985, no writ).

120. *Id.* at 798.

121. *Id.*

122. *E.g.*, Armstrong v. Harris County, 669 S.W.2d 323, 328 (Tex. App.—Houston [1st Dist.] 1983, writ ref'd n.r.e.); Inwood Forest Community Improvement Ass'n v. R.J.S. Dev. Co., 630 S.W.2d 751, 754 (Tex. App.—Houston [1st Dist.] 1982, no writ).

123. 596 S.W.2d 605 (Tex. Civ. App.—Corpus Christi 1980, no writ).

124. *Id.* at 610.

125. *Id.*; *accord* Harley-Davidson Motor Co., Inc. v. Young, 720 S.W.2d 211, 216 (Tex. App.—Houston [14th Dist.] 1986, no writ).

126. 596 S.W.2d 533 (Tex. Civ. App.—Beaumont 1979, no writ).

127. *Id.* at 534.

facts contained in the affidavit if testifying from the witness stand.[128] The affidavit will be taken at face value.[129] Affidavits may not be based on hearsay.[130] However, inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay.[131]

Affidavits that violate the parol evidence rule are not competent summary judgment evidence.[132] If the prerequisites of Texas Rule of Evidence 803(6), which sets out the requirements for admitting a business record into evidence, are not met, a business record may not be proper summary judgment proof.[133]

3. Attach Affidavit to Motion/Response to Summary Judgment

As with other summary judgment evidence, affidavits that are attached to pleadings rather than to the motion for summary judgment do not constitute summary judgment evidence.[134]

Affidavits attached to previously filed motions for summary judgment and responses present another issue. *Doussan v. Disch*[135] is a case in which the court upheld a summary judgment following a second motion for summary judgment that incorporated by reference evidence attached to the first motion for summary judgment.[136] The *Doussan* court expressly disagreed with *Corpus Christi Municipal Gas Corp. v. Tuloso-Midway Independent School District*,[137] which held that supporting proof "should be attached" to the motion or affidavit

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128. A & S Elec. Contractors, Inc. v. Fischer, 622 S.W.2d 601, 603 (Tex. Civ. App.—Tyler 1981, no writ).

129. Netherland v. Wittner, 624 S.W.2d 685, 687-88 (Tex. App.—Houston [14th Dist.] 1981, no writ).

130. Lopez v. Hink, No. C14-86-783-CV, at 4 (Tex. App.—Houston [14th Dist.], Aug. 11, 1988, n.w.h.)(not yet reported); Butler v. Hide-A-Way Lake Club, Inc., 730 S.W.2d 405, 410-11 (Tex. App.—Eastland 1987, writ ref'd n.r.e.).

131. TEX. R. EVID. 802; Dolenz v. A. B., 742 S.W.2d 82, 83-84 n.2 (Tex. App.—Dallas 1987, no writ).

132. Rosemont Enter., Inc. v. Lummis, 596 S.W.2d 916, 924 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

133. TEX. R. EVID. 803(6); *see also* Travelers Constr., Inc. v. Warren Bros. Co., 613 S.W.2d 782, 785-86 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

134. Sugarland Business Center, Ltd. v. Norman, 624 S.W.2d 639, 642 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

135. 629 S.W.2d 111 (Tex. App.—Dallas 1982, no writ).

136. *Id.* at 112.

137. 595 S.W.2d 203, 204-05 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).

but not to the pleading.[138]

In *Vaughn v. Burroughs Corp.*,[139] the court found no reversible error in the trial court's consideration of summary judgment evidence attached to previous motions for summary judgment.[140] The non-movant waived "defects in form" by failure to except in writing to the motion for summary judgment or the affidavit accompanying the motion.[141] The court noted that the non-movant should have incorporated the evidence by reference, attached the evidence to the third motion for summary judgment or included in it an affidavit presented with the motion.[142]

In *McCurry v. Aetna Casualty & Surety Co.*,[143] the court held that as long as the "affidavit is on file at the time of the summary judgment hearing, it need not have been filed specifically in support of or reply to the present motion for summary judgment."[144]

Notwithstanding the *Doussan*, *Vaughn*, and *McCurry* opinions, careful practice seems to dictate attaching an entirely new set of supporting affidavits to all subsequent motions and responses.

4. Effect of Improper Affidavits

Affidavits not meeting the requirements of rule 166a will neither sustain nor preclude a summary judgment,[145] and will not be entitled to evidentiary consideration.[146] Prior to January 1, 1978, if a deficiency in an affidavit was substantive, the opponent's right to argue the deficiency on appeal was not waived by failure to except during the permissible time limits.[147] With the 1978 amendment of rule 166a(e), "defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an

138. *Doussan*, 629 S.W.2d at 112.

139. 705 S.W.2d 246 (Tex. App.—Houston [14th Dist.] 1986, no writ).

140. *Id.* at 248.

141. *Id.*

142. *Id.*

143. 742 S.W.2d 863 (Tex. App.—Corpus Christi 1987, writ dism'd).

144. *Id.* at 867.

145. Box v. Bates, 162 Tex. 184, 187, 346 S.W.2d 317, 319 (1961).

146. *See* Perkins v. Crittendon, 462 S.W.2d 565, 568 (Tex. 1970)(acknowledgement not affidavit so as to constitute proper summary judgment proof).

147. Habern v. Commonwealth Nat'l Bank of Dallas, 479 S.W.2d 99, 100-01 (Tex. Civ. App.—Dallas 1972, no writ).

opposing party with opportunity, but refusal, to amend."[148]

The impact of this amendment requiring objection to improper affidavits by parties opposing motions for summary judgment is significant. The Texas Supreme Court left no doubt of its position when it stated in *City of Houston v. Clear Creek Basin Authority*,[149] that the non-movant must specify the opposition to the motion and that the intent of the 1978 rule revision is to prevent the non-movant from "laying behind the log" with objections until appeal.[150]

5. Affidavits in Bad Faith

If a trial court concludes that an affidavit submitted on a motion for summary judgment was presented "in bad faith or solely for the purpose of delay," it may impose sanctions on the party employing the offending affidavits.[151] Such sanctions include the reasonable expenses incurred by the other party, including attorney's fees, as a result of the filing of the affidavits. Sanctions for affidavits in bad faith also may include holding an offending party or attorney in contempt.

Although the provision for sanctions has been part of rule 166a since its inception, there is only one reported case involving bad faith affidavits.[152] With the increasing availability and use of sanctions in other aspects of Texas litigation, it is likely that judges and litigants will rely more heavily on rule 166a(g).[153]

F. *Interested Witnesses and Expert Testimony*

For many years, Texas courts held that the affidavit of an interested

148. Walkoviak v. Hilton Hotels Corp., 580 S.W.2d 623, 626-27 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.).

149. 589 S.W.2d 671 (Tex. 1979).

150. *Id.* at 675; *see also* Dolenz v. A. B., 742 S.W.2d 82, 83-84 n.2 (Tex. App.—Dallas 1987, writ denied)(unobjected hearsay in affidavits waives complaint of inadmissible evidence).

151. TEX. R. CIV. P. 166a(g).

152. Toliver v. Bergmann, 297 S.W.2d 208, 210 (Tex. Civ. App.—San Antonio 1956, no writ).

153. *See* TEX. R. CIV. P. 166a(g). The imposition of sanctions is also authorized by TEX. R. CIV. P. 13 (groundless and false pleadings); TEX. R. CIV. P. 215 (discovery abuse); TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001-9.014 (Vernon Supp. 1988)(groundless and bad faith pleadings); and TEX. R. APP. P. 84 (frivolous appeals). *See generally* Hittner & Boudreaux, *Frivolous Appeals in Texas*, 50 TEX. B.J. 358, 358, 361-64 (April 1987)(discussing sanctions available when appeal frivolous); Kilgarlin & Jackson, *Sanctions for Discovery Abuse Under New Rule 215*, 15 ST. MARY'S L.J. 767, 767-826 (1984)(overview of sanctions available in discovery process).

or expert witness would not support a summary judgment.[154] However, the 1978 amendment to rule 166a(c) specifically permits the granting of a motion for summary judgment based on the uncontroverted testimonial evidence of an interested witness, or of an expert witness, if the trier of fact must be guided solely by the opinion testimony of experts as to a subject matter. The evidence must meet the following criteria:

1. It is clear, positive, and direct;
2. It is otherwise credible and free from contradictions and inconsistencies; and
3. It could have been readily controverted.[155]

1. Expert Opinion Testimony

Using expert opinion testimony can be a valuable tool in subjecting frivolous suits and defenses to early disposition before a cause proceeds to trial on the merits.[156] However, the use of expert testimony can work both ways. Expert testimony supporting the non-movant's response may preclude a summary judgment by raising issues of fact material to the elements of the non-movant's cause of action.[157]

Expert witness evidence in light of the 1978 amendments to rule 166a(c) was considered in the significant case of *Duncan v. Horning*.[158] In affirming a summary judgment based upon a party's affidavit as an expert witness, the court held that the opinion of an interested expert is competent summary judgment proof when it complies with the criteria set out in rule 166a(c).[159] In this case, the de-

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154. *See, e.g.*, Lewisville State Bank v. Blanton, 525 S.W.2d 676, 676 (Tex. 1975); Swilley v. Hughes, 488 S.W.2d 64, 64 (Tex. 1972); Gibbs v. General Motors Corp., 450 S.W.2d 827, 828-29 (Tex. 1970).

155. Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986); TEX. R. CIV. P. 166a(c).

156. *See, e.g.*, Wheeler v. Aldama-Luebbert, 707 S.W.2d 213, 216-17 (Tex. App.—Houston [1st Dist.] 1986, no writ)(defendant physician's affidavit established standard of care and diagnosis and treatment met standard); Tijerina v. Wennermark, 700 S.W.2d 342, 346-48 (Tex. App.—San Antonio 1985, no writ)(defendant attorney qualified to offer expert opinion on standard of competency for legal representation in own legal malpractice case); Milkie v. Metni, 658 S.W.2d 678, 680 (Tex. App.—Dallas 1983, no writ)(defendant physician's affidavit and testimony established standard of care in absence of controverting evidence by plaintiff).

157. *See* Walkoviak v. Hilton Hotels Corp., 580 S.W.2d 623, 626 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.)(security expert's affidavit raised material fact issues and prevented summary judgment).

158. 587 S.W.2d 471 (Tex. Civ. App.—Dallas 1979, no writ).

159. *Id.* at 473.

fendant dentist's affidavit met all requirements of the rule and stated his opinion "based upon a reasonable degree of dental probability."[160] The plaintiff non-movant had the opportunity to controvert.[161] However, plaintiff's expert's affidavit included only general statements and opinions that were insufficient to rebut the defendant's own affidavit.[162] Further, the plaintiff's personal (non-expert) affidavit contained merely "conclusions of a lay witness," which were not competent evidence, and thus, not considered for purposes of controverting the movant's affidavit.[163] Mere conclusions of a lay witness are not competent evidence for the purpose of controverting expert opinion evidence.[164]

The expert's affidavit should be specific. In *Coan v. Winters*,[165] the court reversed a summary judgment that had been granted in a medical malpractice case based on deposition testimony of an expert physician who testified that the defendant doctor had treated the plaintiff correctly.[166] The court noted the lack of specificity in the expert's affidavit, saying:

> Appellee should have first asked the doctor what the standard of care for [the plaintiff's] condition was and then asked specifically whether or not specific conduct of [the defendant physician] met that standard of care. The questions posed in this case simply asked the broad, general question of whether or not his overall care, without any specificity, came within the standard of care, with which [the expert doctor] claimed to be familiar.[167]

2. Non-Expert, Interested Witness Testimony

In addition to expert testimony, non-expert, interested party testi-

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160. *Id.*

161. *Id.* at 474.

162. *Id.*

163. *Id.* In medical malpractice actions, the elements of negligence and proximate cause must be established by expert testimony. Tilotta v. Goodall, 752 S.W.2d 160, 163 (Tex. App.—Houston [1st Dist.] 1988, writ pending). Testimony from a lay witness regarding negligence and proximate cause is without probative force in medical malpractice actions. *Id.*

164. Nicholson v. Memorial Hosp. Sys., 722 S.W.2d 746, 751 (Tex. App.—Houston [14th Dist.] 1986, no writ).

165. 646 S.W.2d 655 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.).

166. *Id.* at 656.

167. *Id.* at 657; *see also* Ford v. Ireland, 699 S.W.2d 587, 589 (Tex. App.—Texarkana 1985, no writ)(physician's evidence failed to show by uncontroverted evidence that plaintiff had no cause of action on all theories alleged, including failure to disclose risk of delay in treatment).

mony may provide a basis for summary judgment.[168] The interested party's testimony also must be "clear, positive and direct, otherwise credible . . . and could have been readily controverted."[169]

An example of a case in which the supreme court held that an affidavit failed to meet the rule 166a criteria that the uncontroverted testimony of an interested party be "clear . . . and readily controverted" was not met is *Bessent v. Times-Herald Printing Co.*[170] The supreme court reversed a summary judgment in a libel suit based on the substantive inadequacy of the supporting affidavit.[171] The affidavit of the movant newspaper's vice-president was used to establish absence of malice as a matter of law.[172] Saying that the affidavit could not be readily controverted, the court listed three factors that in combination indicate its inadequacy: 1) the affidavit was by an interested party; 2) who asserted the accuracy and reliability of admittedly false statements; and 3) the assertions were based on knowledge of the facts under the newspaper employee's control.[173]

III. BURDEN OF PROOF

The burden of proof and presumptions for an ordinary or conventional trial are immaterial to the burden that the movant in a summary judgment hearing must bear.[174] The burden of demonstrating lack of a genuine issue of material fact is upon the movant, and all doubts are resolved against the movant.[175] The movant has the burden of establishing entitlement to a summary judgment by conclusively proving all elements of the cause of action or defense as a

168. Republic Nat'l Leasing Corp. v. Schindler, 717 S.W.2d 606, 607 (Tex. 1986); Danzy v. Rockwood Ins. Co., 741 S.W.2d 613, 615 (Tex. App.—Beaumont 1987, no writ).

169. TEX. R. CIV. P. 166a(c).

170. 709 S.W.2d 635 (Tex. 1986).

171. *Id.* at 635.

172. *Id.* at 636.

173. *Id.* (citing *Beaumont Enter. & Journal v. Smith*, 687 S.W.2d 729 (Tex. 1985)); *see also* Bankers Commercial Life Ins. Co. v. Scott, 631 S.W.2d 228, 231 (Tex. App.—Tyler 1982, writ ref'd n.r.e.)(issues of intent and knowledge in conspiracy case not readily controverted); Zollar v. Smith, 710 S.W.2d 155, 158-59 (Tex. App.—Eastland 1986, no writ)(intent not matter readily controverted).

174. Evans v. Conlee, 741 S.W.2d 504, 509 (Tex. App.—Corpus Christi 1987, no writ); Greg v. Galo, 720 S.W.2d 116, 118-19 (Tex. App.—San Antonio 1986, no writ); Garcia v. Fabela, 673 S.W.2d 933, 937-38 (Tex. App.—San Antonio 1984, no writ).

175. University of Texas Health Science Center at Houston v. Big Train Carpet of El Campo, Inc., 739 S.W.2d 792, 792 (Tex. 1987); El Chico Corp. v. Poole, 732 S.W.2d 306, 315 (Tex. 1987); City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678-79 (Tex. 1979).

matter of law.[176]

A. *Plaintiff as Movant*

When the plaintiff moves for summary judgment, he or she must show entitlement to prevail on each element of the cause of action, except damages. Damages are specifically exempt by rule 166a(a).[177] The plaintiff has met the burden if he or she produces evidence that would be sufficient to support an instructed verdict at trial.[178] The plaintiff is not under any obligation to negate affirmative defenses.[179]

In *Golden Triangle Energy v. Wickes Lumber*,[180] the court reversed a summary judgment based on the failure of a motion for summary judgment to address a counterclaim.[181] When the non-movants filed their response raising an affirmative defense of usury, they also counter-claimed on that assertion.[182] The motion for summary judgment set out no grounds why movant would be entitled to judgment as a matter of law, nor did it present any evidence as to whether the disputed transaction was usurious.[183]

B. *Defendant as Movant*

A defendant who moves for summary judgment has the burden of showing as a matter of law that no material issue of fact exists as to the plaintiff's cause of action.[184] This may be accomplished by defendant's summary judgment evidence showing that at least one element of plaintiff's cause of action has been established conclusively against the plaintiff.[185] A summary judgment for the defendant dis-

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176. MMP, Ltd. v. Jones, 710 S.W.2d 59, 60 (Tex. 1986); Odeneal v. Van Horn, 678 S.W.2d 941, 941 (Tex. 1984); TEX. R. CIV. P. 166a(c).

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

178. Gulf, Colorado & Santa Fe Ry. Co. v. McBride, 159 Tex. 442, 454, 322 S.W.2d 492, 500 (1958); Braden v. New Ulm State Bank, 618 S.W.2d 780, 782 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e).

179. *See infra*, III.C. (Affirmative Defenses).

180. 725 S.W.2d 439 (Tex. App.—Beaumont 1987, no writ).

181. *Id.* at 441.

182. *Id.* at 440.

183. *Id.* at 441.

184. Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165, 166-67 (Tex. 1987); Griffin v. Rowden, 654 S.W.2d 435, 435-36 (Tex. 1983); Citizens First Nat'l Bank v. Cinco Exploration Co., 540 S.W.2d 292, 294 (Tex. 1976).

185. Gray v. Bertrand, 723 S.W.2d 957, 958 (Tex. 1987); Sakowitz, Inc. v. Steck, 669

posing of the entire case is proper only if, as a matter of law, plaintiff could not succeed upon any theories pleaded.[186]

A plaintiff must establish each element of the cause of action in order to prevail at a trial on the merits. Therefore, if a defendant is able to prove that at least one element of the plaintiff's cause is insufficient, then the defendant's summary judgment should be granted.[187]

For example, in *Sakowitz, Inc. v. Steck*,[188] the supreme court discusses in detail the Texas law concerning the issue of malice, as it relates to a case involving tortious interference with an existing contract.[189] The plaintiff, Steck, sued Sakowitz for tortious interference with the employment contract that Steck had with Oshman's Sporting Goods.[190] Steck brought suit because she was fired after Sakowitz's attorney contacted Oshman's and complained that Oshman's hiring of Steck breached Steck's previous non-competition agreement with Sakowitz.[191] The majority opinion stated that the necessary elements of a cause of action for tortious interference with a contract are: "(1) that the defendant maliciously interfered with the contractual relationship and (2), without legal justification or excuse."[192] The court concluded that, by uncontroverted summary judgment proof, Sakowitz had shown that one of the elements of Steck's cause of action was insufficient.[193] The court reasoned:

> Sakowitz's attorney, who prepared and sent the letter to Oshman's, showed by affidavit at the summary judgment hearing that he sent the letter to protect the rights of his client only after careful study and with no ill will or malice but in the good faith belief that under the applicable

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S.W.2d 105, 107-08 (Tex. 1984); Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 311 (Tex. 1983); Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970).

186. Delgado v. Burns, 656 S.W.2d 428, 429 (Tex. 1983); *Gibbs*, 450 S.W.2d at 828; Williams v. Good Health Plus, Inc., 743 S.W.2d 373, 378 (Tex. App.—San Antonio 1987, no writ); Wheeler v. Aldana-Luebbert, 707 S.W.2d 213, 215 (Tex. App.—Houston [1st Dist.] 1986, no writ); Dodson v. Kung, 717 S.W.2d 385, 390 (Tex. App.—Houston [14th Dist.] 1986, no writ).

187. Manoogian v. Lake Forest Corp., 652 S.W.2d 816, 818 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

188. 669 S.W.2d 105 (Tex. 1983).

189. *Id.* at 107.

190. *Id.* at 106.

191. *Id.*

192. *Id.* at 107. It should be noted that the three dissenting justices set forth different elements that they contended were the essential elements in a claim for tortious interference. *See id.* at 108 (Wallace, J., dissenting).

193. *Id.* at 107-08.

> law, Steck had agreed not to compete. In *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex. 1979), we held that pleadings do not constitute summary judgment proof. We also held that a non-movant, like Steck, must come forward by written motion and sworn proof to controvert the summary judgment proof. Plaintiff Steck's response to the motion for summary judgment included no sworn statement that Sakowitz acted without legal justification or excuse. She attached an unsworn brief about the law from which we infer that she contended that Sakowitz asserted an unfounded claim.
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> . . .
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> We hold Sakowitz made a showing of its legal justification, but Steck produced no summary judgment evidence to raise a fact question regarding the lack of justification for Sakowitz's letter to Oshman's. Therefore, Steck failed to raise an issue about one of the two necessary elements to prevail on a tortious interference cause of action.[194]

In *Poe v. San Antonio Express-News Corp.*,[195] the court stated that in a defamation suit, it is the defendant's responsibility to establish a defense to each element of the cause of action.[196] In this case, a suit by a school teacher against a newspaper, the burden was upon the defendant to prove:

a. The plaintiff was a public official;
b. The truth of the statements in the publication;
c. The absence of malice;
d. The publication was privileged;
e. The absence of negligence; and
f. The total absence of any damages.[197]

In reversing in favor of the defendant newspaper, the court found that the evidence was sufficient to raise a fact issue as to certain elements of damages and that the summary judgment evidence did not establish a total absence of damages as a matter of law.[198]

The Texas Supreme Court specifically addressed the question of the burden on the movant to prove the absence of malice in a libel case in *Beaumont Enterprise & Journal v. Smith*.[199] The key affidavit in support of the summary judgment contained language concerning the af-

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194. *Id.*

195. 590 S.W.2d 537 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.).

196. *See id.* at 539 (defendant moving for summary judgment must establish all matters constituting its defense).

197. *Id.* at 542.

198. *Id.*

199. 687 S.W.2d 729 (Tex. 1985).

fiant's own state of mind. In reversing the summary judgment, the supreme court stated that the affidavit "as to her own state of mind is not evidence that could have been readily controverted; therefore it is not evidence that will support a summary judgment."[200]

Channel 4, KGBT v. Briggs[201] involved a libel action in which the plaintiff sued a television station because it depicted him during a news segment concerning the activities of the Ku Klux Klan.[202] In affidavits, the station news manager and the reporter claimed that the plaintiff's likeness appeared as a fluke from the re-use of an unerased video tape.[203] The court distinguished this case from *Bessent* and *Smith*.[204] It said instead of being "mere self-serving statements about their state of mind," the Channel 4 affidavits go "beyond state of mind to establish an objective explanation for the mistake."[205]

C. *Affirmative Defenses*

A defendant may move for a summary judgment based on an affirmative defense. The defendant's burden is to prove conclusively all elements of the affirmative defense as a matter of law such that there is no genuine issue of material fact.[206] The movant defendant must come forward with summary judgment evidence with respect to each element of the affirmative defense.[207] Unless the movant conclusively establishes the affirmative defense, the non-movant plaintiff has no burden in response to a motion for summary judgment filed on the basis of an affirmative defense.[208]

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

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200. *Id.* at 730; *accord* Bessent v. Times-Herald Printing Co., 709 S.W.2d 635, 636 (Tex. 1986); Goodman v. Gallerano, 695 S.W.2d 286, 288 (Tex. App.—Dallas 1985, no writ).

201. 31 Tex. Sup. Ct. J. 546 (June 29, 1988).

202. *Id.* at 547.

203. *Id.*

204. *Id.* at 548.

205. *Id.*; *see also infra*, X (Conclusion and Recommendation).

206. Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex. 1984); Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972); Pierson v. Houston Indep. School Dist., 698 S.W.2d 377, 380 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.); *accord* Bessent v. Times-Herald Printing Co., 709 S.W.2d 635, 636 (Tex. 1986).

207. Nichols v. Smith, 507 S.W.2d 518, 520 (Tex. 1974).

208. Torres v. Western Casualty & Sur. Co., 457 S.W.2d 50, 52 (Tex. 1970).

tive defense.[209] The affirmative defense will prevent the granting of a summary judgment only if each element of the affirmative defense is raised by evidence that would be admissible upon the trial of the case.[210] In essence, the party raising the affirmative defense as a defense to a summary judgment motion must either:

(1) present a disputed fact issue on the opposing party's failure to satisfy his or her own burden; or
(2) establish his or her own affirmative defense by summary judgment proof.[211]

An "ordinary defense," which tends to deny or rebut factual assertions, is treated differently than an affirmative defense. In *Palmer v. Enserch Corp.*,[212] prior to the hearing on the motion for summary judgment, the non-movant amended its pleadings to include an additional defensive theory of potential liability resulting from a corporate merger.[213] In a case in which an affirmative defense is established, the burden of raising a disputed fact issue shifts to the non-movant.[214] Conversely, in this case, because the motion for summary judgment did not address the "ordinary defense" that was raised in the amended pleading of potential liability resulting from a corporate merger, movant did not meet its burden to establish a basis for summary judgment as a matter of law.[215]

The assertion of a statute of limitations defense may present the peculiar circumstance of an affirmative defense being answered by an affirmative defense. The movant for a summary judgment on the basis of the running of the statute of limitations assumes the burden of proving as a matter of law that the suit is barred by limitations.[216] If

209. Nicholson v. Memorial Hosp. Sys., 722 S.W.2d 746, 749 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.); Kirby Exploration Co. v. Mitchell Energy Corp., 701 S.W.2d 922, 926 (Tex. App.—Houston [1st Dist.] 1985, no writ); Clark v. Dedina, 658 S.W.2d 293, 296 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd w.o.j.); Taylor v. Fred Clark Felt Co., 567 S.W.2d 863, 866 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

210. Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984).

211. "Moore" Burger, Inc. v. Phillips Petroleum Co., 492 S.W.2d 934, 936-37 (Tex. 1972); Petroscience Corp. v. Diamond Geophysical, Inc., 663 S.W.2d 68, 69 (Tex. App.—Houston [14th Dist.] 1983), *writ ref'd n.r.e. per curiam*, 684 S.W.2d 668 (Tex. 1984).

212. 728 S.W.2d 431 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

213. *Id.* at 433.

214. *Id.* at 435.

215. *Id.* at 437.

216. Delgado v. Burns, 656 S.W.2d 246, 248 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

the non-movant asserts the "discovery rule" to circumvent the bar of limitations, the non-movant must offer competent summary judgment proof raising that as an affirmative defense.[217] Likewise, when the non-movant interposes a suspension statute, the burden is then placed on the movant to negate the applicability of the tolling statute.[218]

D. *Both Parties as Movants*

Both parties may move for summary judgment under rule 166a. When both parties move for summary judgment, each party must carry his or her own burden, and neither can prevail because of the failure of the other to discharge his or her burden.[219]

When both parties move for summary judgment and one motion is granted and the other is overruled, all questions presented to the trial court may be presented for consideration on appeal, including whether the losing party's motion should have been overruled.[220] On appeal, the party appealing the denial of the motion for summary judgment must properly preserve this error by raising as a point of error the failure of the trial court to grant the appellant's motion.[221]

The appeal should be taken from the summary judgment granted. In *Adams v. Parker Square Bank*,[222] both parties moved for summary judgment.[223] The appellant limited his appeal to the denial of his own summary judgment rather than appealing from the granting of his opponent's summary judgment.[224] The court held that the appellant

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217. Smith v. Knight, 608 S.W.2d 165, 166 (Tex. 1980). *Contra* Weaver v. Witt, 561 S.W.2d 792, 794 (Tex. 1977). The discovery rule states in essence that the statute of limitations does not begin to run until the "wrong" has been discovered or until a party acquires knowledge that in the exercise of reasonable diligence by a plaintiff, would lead to the discovery of the wrong. Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. 1967).

218. Zale Corp. v. Rosenbaum, 520 S.W.2d 889, 891 (Tex. 1975); Salazar v. Amigos Del Valle, Inc., No. 13-87-310-CV, at 5 (Tex. App.—Corpus Christi, June 30, 1988, n.w.h.)(not yet reported).

219. Federal Deposit Ins. Corp. v. Attayi, 745 S.W.2d 939, 948 (Tex. App.—Houston [1st Dist.] 1988, no writ); The Atrium v. Kenwin Shops of Crockett, 666 S.W.2d 315, 318 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e).

220. Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988); Tobin v. Garcia, 316 S.W.2d 396, 400-01 (Tex. 1958).

221. Buckner Glass & Mirror v. T.A. Pritchard Co., 697 S.W.2d 712, 714-15 (Tex. App.—Corpus Christi 1985, no writ); Holmquist v. Occidental Life Ins. Co., 536 S.W.2d 434, 438 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.).

222. 610 S.W.2d 250 (Tex. Civ. App.—Fort Worth 1980, no writ).

223. *Id.* at 250.

224. *Id.*

should have appealed from the order granting appellee's motion for summary judgment, because an appeal does not lie solely from an order overruling a motion for summary judgment.[225]

In the absence of cross-motions for summary judgment, an appellate court may not reverse an improperly granted summary judgment and render summary judgment for the non-moving party.[226] Cross-motions should be considered by the responding party, when appropriate, to secure on appeal a final resolution of the entire case (i.e., "reversed and rendered" rather than "reverse and remanded").

Hall v. Mockingbird AMC/Jeep, Inc.[227] illustrates the advantage of filing a cross-motion for summary judgment.[228] In *Hall*, the trial court granted a summary judgment for the plaintiff.[229] The court of appeals reversed the trial court's judgment for Hall and rendered the judgment for the defendant.[230] The supreme court reversed and remanded the cause, stating that judgment could not be rendered for the defendants because the defendants had not moved for summary judgment.[231]

IV. Responding to and Opposing a Summary Judgment

The seminal case in summary judgment procedure is *City of Houston v. Clear Creek Basin Authority*.[232] In that case, the supreme court held that "both the reasons for the summary judgment and the objections to it must be in writing and before the trial judge at the hearing."[233] In so holding, the court considered rule 166a(c), which states

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225. *Id.*

226. *E.g.*, CRA, Inc. v. Bullock, 615 S.W.2d 175, 176 (Tex. 1981); Rice v. English, 742 S.W.2d 439, 445-46 (Tex. App.—Tyler 1987, writ dism'd); City of West Tawakoni v. Williams, 742 S.W.2d 489, 495 (Tex. App.—Dallas 1987, no writ).

227. 592 S.W.2d 913 (Tex. 1979).

228. *Id.* at 913-14; *see also City of West Tawakoni*, 742 S.W.2d at 495 (absent cross-motions, judgment reversed and remanded rather than reversed and rendered).

229. *Hall*, 592 S.W.2d at 913.

230. *Id.*

231. *Id.* at 914; *see also* Alzo Advertising, Inc. v. Industrial Properties Corp., 722 S.W.2d 524, 529 (Tex. App.—Dallas 1986, no writ)(tenants' failure to move for summary judgment in trial court resulted in appellate court reversing and remanding cause); Int'l Medical Sales, Inc. v. Prudential Ins. Co., 690 S.W.2d 84, 86 (Tex. App.—Dallas 1985, no writ)(prevailing party failed to move for summary judgment and appellate court could only reverse and remand to trial court).

232. 589 S.W.2d 671 (Tex. 1979).

233. *Id.* at 674-77; *see also* Central Educ. Agency v. Burke, 711 S.W.2d 7, 8-9 (Tex. 1986)(improper reversal of summary judgment on grounds not properly before trial or appel-

in part:

> "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."[234]

The court also considered the 1978 addition to rule 166a(e), which provides: "Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."[235]

A. *Necessity for Response*

Some attorneys remain convinced that not filing a response is a good way to "lie behind the log." This attitude is baffling. Failing to file a response is not lying behind a log, but laying down your arms.

Once the movant has established the right to a summary judgment on the issues presented, the non-movant's response should present to the trial court a genuine issue of material fact that would preclude summary judgment.[236] Failure to file a response does not authorize summary judgment by default.[237] As a matter of practice, however, the attorney who receives a motion for summary judgment filed against a client should always file a written response, even though technically no response may be necessary when the movant's summary judgment proof is "legally insufficient."[238]

The non-movant must expressly present to the trial court any reasons for avoiding the movant's right to a summary judgment. In the absence of a response raising such reasons, these matters may not be

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late court); State Bd. of Ins. v. Westland Film Indus., 705 S.W.2d 695, 696 (Tex. 1986)(court of appeals may not reverse summary judgment on grounds not properly before it); Griggs v. Capitol Mach. Works, Inc., 701 S.W.2d 238, 238 (Tex. 1985)(court will not hear appeal objecting to summary judgment where appellant failed to make same objection to motion for summary judgment in trial court); Munoz v. Gulf Oil Co., 693 S.W.2d 372, 373 (Tex. 1985)(statement of facts, not properly before trial court which granted summary judgment, could not be considered on appeal).

234. *City of Houston*, 589 S.W.2d at 676-77 (citing Texas Rule of Civil Procedure 166a(c)).

235. *Id.* at 677.

236. Wheeler v. Aldama-Luebbert, 707 S.W.2d 213, 215 (Tex. App.—Houston [1st Dist.] 1986, no writ).

237. Cotton v. Ratholes, Inc., 699 S.W.2d 203, 205 (Tex. 1985); Combs v. Fantastic Homes, Inc., 584 S.W.2d 340, 344 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam*, 596 S.W.2d 502 (Tex. 1979).

238. Cove Investments, Inc. v. Manges, 602 S.W.2d 512, 514 (Tex. 1980).

raised for the first time on appeal.[239] This is true even if the constitutionality of a statute is being challenged.[240]

B. *Inadequate Responses*

Neither the trial court nor the appellate court has the duty any longer to sift through the summary judgment record to see if there are other issues of law or fact that could have been raised by the nonmovant, but were not.[241] For example, a response that merely asserts that depositions on file and other exhibits "effectively illustrate the presence of contested material fact [sic]" will not preclude summary judgment.[242] Further, a motion for summary judgment is not defeated by the presence of an immaterial fact issue.[243]

Generally, an amended answer will not suffice as a response to a motion for summary judgment.[244] The filing of an affidavit alone, without any additional responsive document, has been held to be an adequate response under the summary judgment rule.[245] More recently, a court took the opposite stance and held that an affidavit stating facts that would raise a fact issue was inadequate if the answer to the motion or other written response fails to point out the fact issue raised by the affidavit.[246] Similarly, in a case in which a deposition on file was not referred to in a proper response, the deposition was held not to create a fact issue.[247]

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239. State Bd. of Ins. v. Westland Film Indus., 705 S.W.2d 695, 696 (Tex. 1986)(per curiam); Griggs v. Capital Mach. Works, Inc., 701 S.W.2d 238, 238 (Tex. 1985)(per curiam); Castleberry v. Goolsby Bldg. Corp., 608 S.W.2d 763, 765 (Tex. Civ. App.—Corpus Christi 1980), *aff'd*, 617 S.W.2d 665 (Tex. 1981).

240. *See* City of San Antonio v. Schautteet, 706 S.W.2d 103, 104 (Tex. 1986)(constitutionality of city ordinance not raised in trial court could not be considered on appeal).

241. Holmes v. Dallas Int'l Bank, 718 S.W.2d 59, 60 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); Woolridge v. Gross Nat'l Bank, 603 S.W.2d 335, 344 (Tex. Civ. App.—Waco 1980, no writ).

242. I.P. Farms v. Exxon Pipeline Co., 646 S.W.2d 544, 545 (Tex. App.—Houston [1st Dist.] 1982, no writ).

243. Austin v. Hale, 711 S.W.2d 64, 68 (Tex. App.—Waco 1986, no writ); Borg-Warner Acceptance Corp. v. C.I.T. Corp., 679 S.W.2d 140, 144 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.).

244. Meineke Discount Muffler Shops v. Coldwell Banker Property Management Co., 635 S.W.2d 135, 137 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

245. Engel v. Pettit, 713 S.W.2d 770, 772 (Tex. App.—Houston [14th Dist.] 1986, no writ).

246. Shank, Irwin, Conant & Williamson v. Durant, Mankoff, Davis, Woleno & Francis, 748 S.W.2d 494, 498 (Tex. App.—Dallas 1988, no writ).

247. Taylor v. Taylor, 747 S.W.2d 940, 946 (Tex. App.—Amarillo 1988, writ denied).

In *Callaway v. Mahaguna*,[248] the court considered an exemplified copy of a California judgment that was attached to the plaintiff's trial brief, rather than to the motion.[249] The court held it was a defect in form and not grounds for reversal because it had not specifically been pointed out.[250]

Absent a written response to a motion for summary judgment, prior pleadings raising laches and the statute of limitations have been held insufficient to preserve those issues for appeal.[251]

C. *Appellate Considerations*

In the absence of a response, the only issue before an appellate court is whether the motion for summary judgment is sufficient as a matter of law.[252] In *Fisher v. Capp*,[253] the court reasoned:

> The lesson of *Clear Creek* is crystal clear. If the non-movant wishes to contend on appeal that summary judgment was improperly granted, and does not file a written response to the motion for summary judgment, the only issue before the appellate court is whether the grounds expressly presented to the trial court by the movant's motion are insufficient as a matter of law to support summary judgment. Any other issue raised by the non-movant in the appellate court must have first been raised in the trial court, 1) by written specific response or answer to the motion for summary judgment, 2) expressly presenting the issue to the trial court.[254]

If a party is one of several defendants in a case, that party may consider filing a separate motion for summary judgment, because adopting a co-defendant's grounds for summary judgment will preclude the appellate court from considerating on appeal those grounds

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248. 620 S.W.2d 794 (Tex. Civ. App.—El Paso 1981, no writ).

249. *Id.* at 795.

250. *Id.*

251. *See* Johnson v. Levy, 725 S.W.2d 473, 476-77 (Tex. App.—Houston [1st Dist.] 1987, no writ)(even though no response filed, summary judgment reversed because movant failed to make proper showing that findings of bankruptcy court precluded disposition of subsequent suit in state court); Barnett v. Houston Natural Gas Co., 617 S.W.2d 305, 306 (Tex. Civ. App.—El Paso 1981, writ ref'd n.r.e.)(court considered but rejected claim based on statute of limitations even though response not filed).

252. Fisher v. Capp, 597 S.W.2d 393, 397 (Tex. Civ. App.—Amarillo 1980, writ ref'd n.r.e.).

253. *Id.*

254. *Id.*

independent from the co-defendant's.[255]

V. MOTIONS FOR NEW TRIAL

Occasionally, a trial judge is confronted with a motion for new trial filed by a non-movant following the granting of a motion for summary judgment.[256] *Costello v. Johnson*[257] held that a summary judgment cannot be reversed for an abuse of discretion by the trial court in denying a motion for new trial unless all of the requirements of the *Craddock*[258] test are met.[259]

In the context of a summary judgment, the *Craddock* test is the standard of review applied when the non-movant fails to respond to the motion for summary judgment.[260] The *Craddock* test requires that the judgment 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, but was due to a mistake or accident.[261] The motion for new trial must set up a meritorious defense and be filed at a time when the granting of it will occasion no delay or otherwise work an injury to the plaintiff.[262]

Without citing *Costello*, *Enernational Corp. v. Exploitation Engineers, Inc.*[263] more recently held that the *Craddock* requirements for granting a new trial after a default judgment have no application to obtaining relief from a summary judgment through a motion for new trial.[264] The court reasoned that a summary judgment is granted be-

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255. Texas Util. Fuel Co. v. First Nat'l Bank in Dallas, 615 S.W.2d 309, 313 (Tex. Civ. App.—Dallas 1981, no writ).

256. A "motion for rehearing" is the equivalent of a motion for new trial. Hill v. Bellville Gen. Hosp., 735 S.W.2d 675, 677 (Tex. App.—Houston [1st Dist.] 1987, no writ).

257. 680 S.W.2d 529 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

258. *See* Craddock v. Sunshine Bus Lines, Inc., 134 Tex. 388, 392-93, 133 S.W.2d 124, 126 (Tex. Comm'n App. 1939, opinion adopted) (defines abuse of discretion standard for new trials as applied to default judgments).

259. *Costello*, 680 S.W.2d at 531.

260. *Id.*

261. *Craddock*, 133 S.W.2d at 126.

262. *Id.* In *Lopez v. Lopez*, 31 Tex. Sup. Ct. J. 648 (Sept. 14, 1988), a case where the defendant was not correctly notified of a hearing date, the supreme court qualified the requirement of showing a meritorious defense by stating that requiring such a showing as a prerequisite to granting a new trial violates fourteenth amendment due process rights under the United States Constitution. *Id.* at 649; *see also* Krchnak v. Fulton, No. 07-88-0124-CV, at 12 (Tex. App. — Amarillo, Nov. 1, 1988, n.w.h.) (not yet reported); Pohl & Hittner, *Judgments by Default in Texas*, 37 Sw. L.J. 421, 441-50 (1983).

263. 705 S.W.2d 749 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

264. *Id.* at 751.

cause the movant's summary judgment proof is sufficient as a matter of law, not because a non-movant fails to answer.[265]

Noting the split of authority in *Krchnak v. Fulton*,[266] the Amarillo Court of Appeals analyzed both *Costello* and *Enernational* and concluded that the *Costello* approach was correct.[267] It reasoned that basic fairness and the harshness of a summary judgment required application of the *Craddock* rule to motions for new trial after a summary judgment.[268]

If a court denies a summary judgment motion, it has authority to reconsider and grant a motion for summary judgment.[269]

VI. APPEALABILITY

An order granting a summary judgment is appealable; an order denying a summary judgment is not.[270]

A. *Both Parties File Motions for Summary Judgment*

The only exception to the rule that an order denying a summary judgment is not appealable is when both parties file motions for summary judgment and the court grants one of the motions and overrules the other.[271] When both parties file motions for summary judgment and one is granted and the other overruled, the appellate court may determine all questions presented, including the propriety of the order overruling the losing party's motion.[272] A party appealing the denial of a summary judgment, however, must properly preserve this issue on appeal by raising in the brief the failure to grant his or her motion.[273] On appeal, the proper course is for the appellate court to

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265. *Id.*

266. No. 07-88-0124-CV (Tex. App. — Amarillo, Nov. 1, 1988, n.w.h.) (not yet reported).

267. *Id.* at 12.

268. *Id.* at 12-13.

269. Bennett v. State Nat'l Bank, 623 S.W.2d 719, 721 (Tex. Civ. App.—Houston [1st Dist.] 1981, no writ).

270. Novak v. Stevens, 596 S.W.2d 848, 849 (Tex. 1980); Huffines v. Swor Sand & Gravel Co., Inc. 750 S.W.2d 38, 41 (Tex. App.—Fort Worth 1988, no writ).

271. Tobin v. Garcia, 316 S.W.2d 396, 400 (Tex. 1958).

272. Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988); Teledyne Isotopes, Inc. v. Bravenec, 640 S.W.2d 387, 389 (Tex. App.—Houston [1st Dist.] 1982, writ ref'd n.r.e.).

273. Buckner Glass & Mirror, Inc. v. T.A. Pritchard Co., 697 S.W.2d 712, 714 (Tex. App.—Corpus Christi 1985, no writ).

render judgment on the motion that should have been granted.[274]

B. *Finality of Judgment*

An appeal may be prosecuted only from a final judgment.[275] Generally, to be final, a judgment must dispose of all parties and issues in the case.[276] In *North East Independent School District v. Aldridge*,[277] the court articulated the following presumption of finality rule:

> When a judgment, not intrinsically interlocutory in character, is rendered and entered *in a case regularly set for a conventional trial on the merits* . . . it will be presumed for appeal purposes that the court intended to, and did, dispose of all parties legally before it and of all issues made by the pleadings between such parties.[278]

The rule applicable to summary judgments is different. The presumption of finality rule, as discussed in *Aldridge*, does not apply to summary judgment cases.[279] A summary judgment that does not dispose of all parties and issues in the pending suit is interlocutory and not appealable unless the trial court orders a severance of that phase of the case.[280] In the absence of an order of severance, a party against whom an interlocutory summary judgment has been rendered does not have a right of appeal until the partial judgment is merged into a final judgment disposing of the whole case.[281]

The "Mother Hubbard" provision in a judgment, stating "all relief

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274. Members Mut. Ins. Co. v. Hermann Hosp., 664 S.W.2d 325, 328 (Tex. 1984).

275. Tingley v. Northwestern Nat'l Ins. Co., 712 S.W.2d 649, 650 (Tex. App.—Austin 1986, no writ). *But see* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014 (Vernon Supp. 1988)(setting out four exceptions to rule).

276. Cherokee Water Co. v. Ross, 698 S.W.2d 363, 365 (Tex. 1985); North East Indep. School Dist. v. Aldridge, 400 S.W.2d 893, 895 (Tex. 1966).

277. *Id.*

278. *Id.* at 897-98 (emphasis added).

279. Houston Health Clubs, Inc. v. First Court of Appeals, 722 S.W.2d 692, 693 (Tex. 1986).

280. TEX. R. CIV. P. 41 provides that "[a]ny claim against a party may be severed and proceeded with separately." "A claim may be properly severed if it is part of a controversy which involves more than one cause of action, and the trial judge is given broad discretion in the manner of severance. . . ." Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 525 (Tex. 1982). An example of a case in which the trial court should have entered an interlocutory or partial summary judgment is *Wheeler v. Yettie Kersting Memorial Hospital*, No. 01-88-24-CV (Tex. App.—Houston [1st Dist.] August 31, 1988, n.w.h.)(not yet reported).

281. Conkle v. Builders Concrete Prod. Mfg. Co., 749 S.W.2d 489, 490-91 (Tex. 1988); Teer v. Duddlesten, 664 S.W.2d 702, 704 (Tex. 1984); Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co., 159 Tex. 550, 551, 324 S.W.2d 200, 201 (1959).

not expressly granted herein is denied," does not convert an intrinsically interlocutory summary judgment into a final appealable judgment disposing of remaining claims as to which no motion for summary judgment has been filed.[282]

In *Teer v. Duddlesten*,[283] the court wrote:

> There is no presumption in partial summary judgments that the judgment was intended to make an adjudication about all parties and issues. The Mother Hubbard clause that 'all relief not expressly granted is denied' has no place in a partial summary judgment hearing. The concepts of a partial summary judgment on the one hand, and a judgment that is presumed to determine all issues and facts on the other, are inconsistent.[284]

Determining whether a summary judgment is final may especially be a problem with multi-party litigation.[285] Additionally, failure to dispose of or sever a counterclaim results in an interlocutory or partial summary judgment, and thus an appeal from such judgment is not proper.[286] The filing of a cross-action does not, in and of itself, preclude a trial court from granting summary judgment on part or all of another party's case.[287] A severance would be appropriate in such an instance.[288]

C. *Standard of Review*

In an appeal from a trial on the merits, the standard of review and presumptions run in favor of the judgment. In contrast, in an appeal from a summary judgment, the standard of review and presumptions favor reversal.

Gibbs v. General Motors Corp.[289] sets out the standard of appellate review for summary judgments.[290] In *Gibbs*, the supreme court stated:

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282. Sakser v. Fitze, 708 S.W.2d 40, 42 (Tex. App.—Dallas 1986, no writ).

283. 664 S.W.2d 702 (Tex. 1984).

284. *Id.* at 704.

285. *See* Schlipf v. Exxon Corp., 644 S.W.2d 453, 454 (Tex. 1982)(summary judgment properly granted in suit involving multiple plaintiffs, defendant and intervenor).

286. Tingley v. Northwestern Nat'l Ins. Co., 712 S.W.2d 649, 650 (Tex. App.—Austin 1986, no writ).

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

288. *Id.* at 643-44.

289. 450 S.W.2d 827 (Tex. 1970).

290. *Id.* at 828.

> [T]he question on appeal, as well as in the trial court, is not whether the summary judgment proof raises fact issues with reference to the essential elements of a plaintiff's claim or cause of action, but is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action.[291]

The rules to be followed by an appellate court in reviewing a summary judgment record are set forth by the supreme court in *Nixon v. Mr. Property Management Co.*,[292] 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.
> 2. In deciding whether or not 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-movants and any doubts resolved in their favor.[293]

The appellate court will not consider evidence that favors the movant's position unless it is uncontroverted.[294]

When a summary judgment order does not state the specific grounds upon which it is granted, a party appealing from such order must show that each of the independent arguments alleged in the motion is insufficient to support the order.[295] For this reason, it is an advantage to the movant to obtain a broad judgment that can be sustained on any theory presented to the trial court in the motion. Conversely, the losing non-movant should seek to have the court specify the ground upon which judgment was granted if it was upon one of the several grounds.

By the same token, the judgment cannot be affirmed on any

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291. *Id.*

292. 690 S.W.2d 546 (Tex. 1985).

293. *Id.* at 548-49; *accord* Montgomery v. Kennedy, 669 S.W.2d 309, 310-11 (Tex. 1984); Wilcox v. St. Mary's Univ. of San Antonio, Inc., 531 S.W.2d 589, 592-93 (Tex. 1975); Bergen v. Verco Mfg. Co., 690 S.W.2d 115, 117 (Tex. App.—El Paso 1985, writ ref'd n.r.e.); Gano v. Jamail, 678 S.W.2d 152, 155 (Tex. App.—Houston [14th Dist.] 1984, no writ).

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

295. Tilotta v. Goodall, 752 S.W.2d 160, 161 (Tex. App.—Houston [1st Dist.] 1988, no writ); McCrea v. Cubilla Condominium Corp., 685 S.W.2d 755, 757 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

grounds not presented in the motion for summary judgment.[296]

D. *Appellate Record*

The appellate court may consider only the evidence on file before the trial court at the time of the hearing.[297] When the summary judgment record is incomplete, any omitted documents are presumed to support the trial court's judgment. In *Desantis v. Wacherhut Corp.*,[298] the only proof offered by the movant was an affidavit that was not included in the appellate record.[299] The court upheld the summary judgment for the movant because the burden was on the non-movant challenging the summary judgment to bring forward the record from the summary judgment proceeding to prove harmful error.[300] In *DeBell v. Texas General Realty*,[301] it was clear that the trial court considered at least one deposition that was not brought forward on appeal.[302] The appellate court presumed that the missing deposition would have supported the summary judgment granted by the trial court.[303]

Occasionally, a trial judge will receive a request to file findings of fact and conclusions of law after the granting of a motion for summary judgment. This request should be denied. Because the judge has no factual disputes to resolve, findings of fact, conclusions of law, and statements of fact have no place in summary judgment matters.[304]

E. *Appellate Briefs*

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

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296. Hall v. Harris County Water Control & Improvement Dist. No. 50, 683 S.W.2d 863, 867 (Tex. App.—Houston [14th Dist.] 1984, no writ).

297. Gandara v. Novasad, 752 S.W.2d 740, 743 (Tex. App.—Corpus Christi 1988, no writ).

298. 31 Tex. Sup. Ct. J. 616 (July 13, 1988).

299. *Id.* at 621.

300. *Id.*

301. 609 S.W.2d 892 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

302. *Id.* at 893.

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

304. Cotton v. Ratholes, Inc., 699 S.W.2d 203, 204 (Tex. 1985); Singleton v. LeCoure, 712 S.W.2d 757, 761 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.).

case in a light most favorable to the non-movant appellant.[305] Because the appellate court will be reviewing the summary judgment with all presumptions in favor of the appellant, it is not enough to rest on the decision of the trial court. An appellee in a summary judgment appeal must thoroughly and carefully brief the case. The appellee should not simply refute the appellant's arguments, but aggressively present to the appellate court the express reasons why the trial court was correct in granting summary judgment.

As to devising points of error, the supreme court has approved the following single, broad point of error on appeal: "The trial court erred in granting the motion for summary judgment."[306] This wording will allow argument as to all the possible grounds upon which summary judgment should have been denied.[307]

In preparing the brief, remember that issues not expressly presented in the trial court may not be considered at the appellate level as grounds for reversal or as other grounds in support of a summary judgment.[308] In *Combs v. Fantastic Homes*,[309] the court defined "issues."[310] Judge Guittard wrote:

> [A] summary judgment cannot be attacked on appeal on a question not presented to the trial court, either as a specific ground stated in the motion or as a fact issue presented by the opposing party in a written answer or other response. Accordingly, we hold that the opposing

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

306. Malooly Bros., Inc. v. Napier, 461 S.W.2d 119, 121 (Tex. 1970); *see also* Cassingham v. Lutheran Sunburst Health Serv., 748 S.W.2d 589, 590 (Tex. App.—San Antonio 1988, no writ)(approving general assignment of error). Other, more specific points may be used but the judgment must be affirmed if there is another possible ground on which the judgment could have been entered. Dubow v. Dragon, 746 S.W.2d 857, 859 (Tex. App.—Dallas 1988, no writ).

307. *Malooly Bros.*, 461 S.W.2d at 121. However, in an Austin Court of Appeals case, the court affirmed the summary judgment because the appellant failed to assign error or brief the several grounds upon which the court granted summary judgment. Rodriguez v. Morgan, 584 S.W.2d 558, 559 (Tex. Civ. App.—Austin 1979, no writ)(citing *Malooly Bros.*, 461 S.W.2d at 121). Given this court's discussion of the lack of briefing of other grounds, this case appears to stand for the need to adequately brief each issue raised by the summary judgment, rather than the requirement of separate points of error. *See id.* at 558-59.

308. *See, e.g.*, W.R. Grace Co. v. Scotch Corp., No. 03-87-249-CV, at 8 (Tex. App.—Austin, June 8, 1988, n.w.h.)(not yet reported) (appellate court considered issues correctly presented in trial court); Dickey v. Jansen, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.)(appellant failed to address issues in trial court which it raised on appeal); *see also infra*, IV. (Responding to and Opposing a Summary Judgment).

309. 584 S.W.2d 340 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).

310. *Id.* at 343.

> party, without filing an answer or other response, may raise for consideration on appeal the insufficiency of the summary judgment proof to support the specific grounds stated in the motion, but that he may not, in the absence of such an answer or other response, raise any other 'genuine issue of material fact' as a ground for reversal. In other words, the opposing party may challenge the grounds asserted by the movant, but he may not assert the existence of 'issues' not presented to the trial court by either party.[311]

Cases disposed of by summary judgment often have voluminous transcripts. The importance of meeting briefing requirements, such as referencing the page of the record where the matter complained of may easily be found, cannot be underestimated.[312]

F. *Other Considerations*

If a summary judgment is reversed, the parties are not limited to the theories asserted in the original summary judgment at a later trial on the merits.[313]

An appeal from a summary judgment has been held to be taken for delay and without sufficient cause and penalties have been assessed for bringing the appeal.[314]

VII. ATTORNEY'S FEES

The amount of an award of attorney's fees rests in the sound discretion of the trial court, and its judgment will not be reversed on appeal without a clear showing of abuse of discretion.[315] The court may take judicial notice of the customary and usual attorney's fees and the case file contents without further evidence being presented in a court proceeding.[316]

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

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311. *Id.*

312. *See* TEX. R. APP. P. 74(d) (requiring brief to reference page of record where matter located).

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

314. Triland Inv. Group v. Tiseo Paving Co., 748 S.W.2d 282, 285 (Tex. App.—Dallas 1988, no writ).

315. Reintsma v. Greater Austin Apartment Maintenance, 549 S.W.2d 434, 437 (Tex. Civ. App.—Austin 1977, writ dism'd).

316. TEX. CIV. PRAC. & REM. CODE ANN. § 38.004 (Vernon 1986); *see also* Flint & Assoc. v. Intercontinental Pipe & Steel, Inc., 749 S.W.2d 622, 626 (Tex. App.—Dallas 1987, writ dism'd)(court took judicial notice of claims filed in case).

court. However, it does have authority, by examining the entire record, to determine whether a particular award is excessive. An appellate court may draw upon its knowledge as judges and lawyers and determine the matter in light of the testimony, the record, and the amount in controversy.[317]

Attorney's fees must be specifically pleaded to be recovered.[318] When a movant includes attorney's fees in a summary judgment motion, the movant has, in effect, added another cause of action. Unless the court has taken judicial notice under Civil Practice & Remedies Code section 38.004, this cause of action is measured by the same standard as for summary judgment proof.[319] If attorney's fees are recoverable under Civil Practice & Remedies Code section 38.001,[320] in addition to the other summary judgment requirements, the time and notice requirements of section 38.002[321] must be met in order to sup-

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317. Giles v. Cardenas, 697 S.W.2d 422, 429 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); Republic Nat'l Life Ins. Co. v. Heyward, 568 S.W.2d 879, 887 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.)(citing *Southland Life Ins. Co. v. Norton*, 5 S.W.2d 767, 769 (Tex. Comm'n App. 1928, holding approved)).

318. Comment, *The Recovery of Attorney's Fees in Texas*, 4 ST. MARY'S L.J. 340, 342 (1972).

319. Bakery Equip. & Serv. v. Aztec Equip. Co., 582 S.W.2d 870, 873 (Tex. Civ. App.—San Antonio 1979, no writ); Lindley v. Smith, 524 S.W.2d 520, 524 (Tex. Civ. App.—Corpus Christi 1975, no writ).

320. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986). Section 38.001 provides that:

> A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for:
>
> (1) rendered services;
>
> (2) performed labor;
>
> (3) furnished material;
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> (4) freight or express overcharges;
>
> (5) lost or damaged freight or express;
>
> (6) killed or injured stock;
>
> (7) a sworn account; or
>
> (8) an oral or written contract.

Id.

321. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (Vernon 1986). Section 38.002 provides:

> To recover attorney's fees under [Chapter 38]:
>
> (1) the claimant must be represented by an attorney;
>
> (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and
>
> (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented.

Id.

port an award of attorney's fees.

An affidavit by the movant's attorney should be annexed to the motion for summary judgment.[322] Such an affidavit is "expert opinion testimony" that may be considered regarding reasonable attorney's fees.[323] Additionally, the attorney for the non-movant may file an affidavit contesting the reasonableness of the movant's attorney's affidavit in support of attorney's fees, thus creating a fact issue.[324]

A. *Fixed Percentage Fees*

Promissory notes frequently provide for attorney's fees in a fixed percentage clause that requires the payment of a stipulated percentage of the unpaid balance upon default. In a summary judgment hearing, when the note includes a stipulated percentage of the unpaid balance as attorney's fees, proof as to the reasonableness of the fixed percentage fee is not required unless the pleadings and proof challenge the reasonableness of that amount.[325] Thus, where a non-movant offers no summary judgment evidence to indicate that the stipulated amount was unreasonable, the trial court's award of attorney's fees is proper.[326]

B. *Reasonable Percentage Fees*

Promissory notes often provide for attorney's fees in a reasonable percentage clause that requires the maker to pay a reasonable fee

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322. Gensco, Inc. v. Transformaciones Metalurgicias Especiales, S.A., 666 S.W.2d 549, 554 (Tex. App.—Houston [14th Dist.] 1984, writ dism'd).

323. *See id.* (affidavit of attorney sufficient to show reasonableness of fees); Sunbelt Constr. Corp., Inc. v. S & D Mechanical Contractors, Inc., 668 S.W.2d 415, 418 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.)(attorney's affidavit as to reasonable fees sufficient).

324. Tesoro Petroleum Corp. v. Coastal Ref. & Mktg., Inc., 754 S.W.2d 764, 767 (Tex. App.—Houston [1st Dist.] 1988, no writ); Giao v. Smith & Lamm, P.C., 714 S.W.2d 144, 148 (Tex. App.—Houston [1st Dist.] 1986, no writ)(citing *Morgan v. Morgan*, 657 S.W.2d 484, 491-92 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd)(writ dismissed for factors to be considered in determining reasonableness of attorney's fees)); General Specialties, Inc. v. Charter Nat'l Bank—Houston, 687 S.W.2d 772, 773 (Tex. App.—Houston [14th Dist.] 1985, no writ).

325. Kuper v. Schmidt, 161 Tex. 189, 191-92, 338 S.W.2d 948, 950 (1960); Highlands Cable Tel., Inc. v. Wong, 547 S.W.2d 324, 328 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

326. Houston Furniture Distribution, Inc. v. Bank of Woodlake, 562 S.W.2d 880, 884 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

upon default.[327] Although this type of clause requires opinion evidence, an attorney's affidavit is admissible under Texas Rule of Civil Procedure 166a(c). Thus, a summary judgment can be an appropriate vehicle for recovery of such attorney's fees based upon the affidavit testimony of the movant's attorney. Whenever the word "reasonable" appears in connection with the recovery or entitlement to attorney's fees, an affidavit in support of such fees should be annexed to the motion for summary judgment.[328]

VIII. Types of Cases Amenable to Summary Judgment

Some types of cases particularly lend themselves to summary judgment disposition; other categories of cases are not appropriate for summary judgment disposition.[329]

A. *Sworn Accounts*

A motion for summary judgment often is used in suits on sworn account. Rule 185 provides that a suit on a sworn account may be proper in the following instance:

> When any action or defense is founded upon an open account or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept . . . .[330]

An action commenced under rule 185 is one of procedure, not a matter of substantive law, with regard to the evidence necessary to establish a prima facie case of the right to recover.[331] In a suit on sworn account, a litigant whose opponent has not filed a proper rule

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327. Woods Exploration & Prod. Co. v. Arkla Equip. Co., 528 S.W.2d 568, 470 (Tex. 1975).

328. *See* Corporate Funding, Inc. v. City of Houston, 686 S.W.2d 630, 631-32 (Tex. App.—Texarkana 1984, no writ).

329. Juvenile matters usually are not a proper subject for summary judgment. State v. L.J.B., 561 S.W.2d 547, 549 (Tex. Civ. App.—Dallas 1977, no writ); *see also supra,* § VII.E. (Tort Actions).

330. *Id.*

331. Rizk v. Financial Guardian Ins. Agency, Inc., 584 S.W.2d 860, 862 (Tex. 1979); Meaders v. Biskamp, 159 Tex. 79, 82, 316 S.W.2d 75, 78 (1958); *see also* Achimon v. J.I. Case Credit Corp., 715 S.W.2d 73, 76 (Tex. App.—Dallas 1986, writ ref'd n.r.e.)(Stephens, J., concurring) (failure to state sworn account).

185 and 93(10)[332] answer may secure what is essentially a summary judgment on the pleadings, because noncompliance with these rules, in effect, concedes that there is no defense.[333]

In a suit on sworn account, if the defendant fails to file a written denial under oath, at trial that party will not be permitted to dispute the receipt of the items or services or the correctness of the stated charges.[334] As a general rule, a sworn account is prima facie evidence of a debt, and the account need not be formally introduced into evidence, unless the account's existence or correctness has been denied in writing under oath.[335]

1. Requirements for Petition

A sworn account petition is to be supported by an affidavit "to the effect that such claim is, within the knowledge of affiant, just and true."[336] "No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings."[337] If special exceptions are filed and sustained, the account (invoices or statement of account) should show the nature of the item sold, the date, and the charge.[338] If challenged by special exceptions, technical and unexplained abbreviations, code numbers, and the like are insufficient to identify items and terms and must be explained.[339] Also, if special exceptions are sustained, the language used in the account must have a common meaning and must not be of the sort understood only in the industry in which it is used.[340]

In *Price v. Pratt*,[341] the court held that pleadings containing no key

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332. TEX. R. CIV. P. 93 (section 10 of rule 93 requires verified affidavit denying account).

333. Hidalgo v. Surety Sav. & Loan Ass'n, 462 S.W.2d 540, 543 n.1 (Tex. 1971); Enernational Corp. v. Exploitation Eng'rs, Inc., 705 S.W.2d 749, 750 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.); Waggoners' Home Lumber Co., Inc. v. Bendix Forest Prods. Corp., 639 S.W.2d 327, 328 (Tex. App.—Texarkana 1982, no writ).

334. Vance v. Holloway, 689 S.W.2d 403, 404 (Tex. 1985); Airborne Freight Corp. v. CRB Mktg., Inc., 566 S.W.2d 573, 574 (Tex. 1978).

335. Airborne Freight Corp. v. CRB Mktg., Inc., 566 S.W.2d 573, 574 (Tex. 1978).

336. TEX. R. CIV. P. 185.

337. *Id.*; *see also* Enernational Corp. v. Exploitation Eng'rs, 705 S.W.2d 749, 750-51 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)(quoting rule 185).

338. Hassler v. Texas Gypsum Co., 525 S.W.2d 53, 55 (Tex. Civ. App.—Dallas 1975, no writ).

339. *See id.*

340. *See id.*

341. 647 S.W.2d 756 (Tex. App.—Corpus Christi 1983, no writ).

to abbreviations or other explanation of the meaning of the items listed were legally insufficient to support a summary judgment on a sworn account.[342] Under rule 185, effective April 1, 1984,[343] the holding in this case is still viable when special exceptions have been raised by the defendant and sustained by the trial court. Clients should be advised that if their invoicing and billing is done with computer numbers or abbreviations only, a key to this "business shorthand" should be attached to the pleadings or be readily available if repleading is necessary.

2. Answer/Denial

The answer must be a written denial supported by an affidavit denying the account.[344] When a party suing on a sworn account files a motion for summary judgment on the sole ground that the non-movant's pleading is insufficient under rule 93(10) because no proper sworn denial is filed, the non-movant may still amend and file a proper sworn denial.[345] The non-movant is not precluded from amending and filing a proper sworn denial to the suit itself at any time allowed under Texas Rule of Civil Procedure 63.

In *Brightwell v. Barlow, Gardner, Tucker & Garsek*,[346] the court considered whether it was proper for the verified denial to appear only in the affidavit in response to the motion for summary judgment, and not in the defendant's answer.[347] The court stated that rules 185 and 93 (now rule 93(10)), when read together and applied to suits on sworn accounts, mandate that the language needed to effectively deny the plaintiff's sworn account must appear in a pleading of equal dignity with the plaintiff's petition, and thus must appear in the defend-

342. *Id.* at 757.

343. TEX. R. CIV. P. 185. Effective as of this date, rule 185 was rewritten so that suits on accounts are subject to ordinary rules of pleading and practice. *Id.*

344. TEX. R. CIV. P. 185; *Huddleston v. Case Power & Equip. Co.*, 748 S.W.2d 102, 103 (Tex. App.—Dallas 1988, no writ). In *Huddleston*, the court held that a sworn general denial is insufficient to rebut the evidentiary effect of an appropriate affidavit in support of a suit on a sworn affidavit. *Id.* at 103-04. Further, the court held that the "written denial, under oath" mandated under rule 185 must conform to rule 93(10), which requires the plaintiff's claim to be put at issue through a special verified denial of the account. *Id.* at 103.

345. Requipco, Inc. v. Am-Tex Tank & Equip., Inc., 738 S.W.2d 299, 303 (Tex. App.—Houston [14th Dist.] 1987, no writ); Magnolia Fruit & Produce v. Unicopy Corp., 649 S.W.2d 794, 797 (Tex. App.—Tyler 1983, writ dism'd w.o.j.). *Contra* Bruce v. McAdoo, 531 S.W.2d 354, 356 (Tex. Civ. App.—El Paso 1975, no writ).

346. 619 S.W.2d 249 (Tex. Civ. App.—Fort Worth 1981, no writ).

347. *See id.* at 251.

ant's answer.[348] Explained the court:

> 'An affidavit filed in opposition to a motion for summary judgment does not comprise a part of the defendant's answer to the plaintiff's petition. The fact that such an affidavit in the instant case contained the language referred by Rule 185, does not render it an effective denial of plaintiff's account. Appellant's [plaintiff below] account and verified affidavit, not being effectively denied, constituted prima facie evidence which entitles it to recover . . . .'[349]

The filing of a proper, verified denial overcomes the evidentiary effect of a sworn account and forces the plaintiff to offer proof of the claim.[350] This principle applies to a subsequent summary judgment motion and/or a trial on the merits.[351] If a verified denial is filed, the plaintiff must submit common law proof of the case.[352] The necessary common-law elements of an action on account are:

> (1) that there was a sale and delivery of merchandise;
> (2) that the amount of the account is just, [i.e.] that the prices are charged in accordance with an agreement, [and that] they are the usual, customary, and reasonable prices for that merchandise; and
> (3) that the amount is unpaid.[353]

3. Summary Judgment

Rule 185 also provides that a systematic record, properly verified, "shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath."[354]

Thus, if the affidavit supporting the sworn account petition tracks the language of rule 185 and meets the personal knowledge requirement of rule 166a(e), it generally has been considered proper summary judgment proof in the absence of a sufficient answer to the original petition.[355] A second affidavit in addition to that attached to

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348. *Id.* at 253; Notgrass v. Equilease Corp., 666 S.W.2d 635, 639 (Tex. Civ. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.).

349. *Brightwell*, 619 S.W.2d at 253 (quoting *Zemaco, Inc. v. Navarro*, 580 S.W.2d 616, 620 (Tex. Civ. App.—Tyler 1979, writ dism'd)); *see also Notgrass*, 666 S.W.2d at 639.

350. Rizk v. Financial Guardian Ins. Agency, Inc., 584 S.W.2d 860, 862 (Tex. 1979); Norcross v. Conoco, Inc., 720 S.W.2d 627, 629 (Tex. App.—San Antonio 1986, no writ).

351. *Id.*

352. Pat Womack, Inc. v. Weslaco Aviation, Inc., 688 S.W.2d 639, 641 (Tex. App.—Corpus Christi 1985, no writ).

353. *Id.*

354. TEX. R. CIV. P. 185.

355. *See* TEX. R. CIV. P. 166a(e) (requiring affidavits to be made on personal knowledge).

the plaintiff's petition may be advisable to support a motion for summary judgment on a sworn account. This second affidavit should set forth, once again, the allegations of the sworn account petition. Strictly speaking, this additional affidavit is unnecessary if the answer on file is insufficient under rules 185 and 93(10). If the answer is sufficient under these rules, summary judgment is not precluded, but a second affidavit must be filed substantiating the account as a business record under Texas Rule of Evidence 803(6).

The attorney opposing a summary judgment in a suit based on a sworn account should immediately determine if a sworn denial in accordance with rules 93(10) and 185 is already on file. Prior to April 1, 1984, as exemplified in *Special Marine Products, Inc. v. Weeks Welding & Construction, Inc.*,[356] strict compliance with the former, technical language of rule 185 was mandatory.[357] In this case, the court upheld a summary judgment because appellants alleged that the sworn account was not "just or true" in certain particulars.[358] Because appellants had not filed a sworn denial using the specific language "that each and every item was not just or true, or that some specified items were not just and true," summary judgment was granted.[359] Under current rules 93(10) and 185, such words of art are no longer necessary.[360] It is now sufficient to file a sworn answer denying the account that "is the foundation of the plaintiff's action."[361]

The filing of an answer in strict compliance with rules 93(10) and 185 does not, however, preclude the need to file also a written response to a motion for summary judgment. As a matter of practice, an attorney should always file a written response to all motions for summary judgment.[362]

B. *Written Instruments*

Suits on written instruments such as promissory notes and leases

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Although specifically authorized to make an affidavit under rule 185, attorneys should do so only if they possess personal knowledge of the facts set forth in the affidavit.

356. 625 S.W.2d 822 (Tex. App.—Houston [14th Dist.] 1981, no writ).

357. *See id.* at 824-27; *see also* TEX. R. CIV. P. 185 (Vernon 1976)(former rule 185).

358. *See id.* at 824.

359. *See id.* at 825; *see also* Red Top Prod. v. T. & R. Chem., Inc., 619 S.W.2d 562, 563-64 (Tex. Civ. App.—San Antonio 1981, no writ)(refers to similar case requiring strict compliance with rule 185, before amended).

360. TEX. R. CIV. P. 93(10); TEX. R. CIV. P. 185.

361. TEX. R. CIV. P. 93(10); *see also* TEX. R. CIV. P. 185.

362. *See infra*, § IV. (Responding to and Opposing a Summary Judgment).

are commonly the subject of motions for summary judgment. A summary judgment is proper in cases involving the interpretation of a writing when the writing is determined to be unambiguous.[363] When the writing contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue.[364]

In a suit on a guaranty instrument, a court may grant a summary judgment only if the right to it is established in the record as a matter of law.[365] If the guaranty instrument is worded such that it can be given a definite legal meaning, it is unambiguous, and the court will interpret the contract as a matter of law.[366]

In promissory note cases, the supporting affidavits generally are provided by the owner and holder of the note, such as a corporate or bank officer. An example of such a case is *Batis v. Taylor-Made Fats, Inc.*[367] In *Batis*, the court found plaintiff's summary judgment proof, which consisted of an affidavit by the business records custodian, sufficient to uphold a summary judgment.[368] The affidavit stated that: 1) the plaintiff was the holder and legal owner of the note; 2) the original amount was principal only and no interest on a prior contract was included; 3) the unpaid principal balance was a certain amount; 4) the note was accelerated; 5) notice to appellant was given; 6) plaintiff demanded payment which was refused; and 7) appellant still refused to

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363. RGS, Cardox Recovery, Inc. v. Corchester Enhanced Recovery, Co., 700 S.W.2d 635, 638 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.). If the written instrument is worded such that it can be given a definite legal interpretation, then it is not ambiguous, and the court will construe the contract as a matter of law. Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983). Whether a contract is ambiguous is a question of law for the court to decide. R & P Enter. v. LaGuarta, Garrol & Kirk, Inc., 596 S.W.2d 517, 518 (Tex. 1980); *see also* Hancock v. Krause, No. 01-87-1112-CV, at 3-4 (Tex. App.—Houston [1st Dist.] August 25, 1988, n.w.h.)(not yet reported) (construction of testamentary instrument); Universal Sav. Ass'n v. Killeen Sav. & Loan Ass'n, No. 01-87-1051-CV, at 5-6 (Tex. App.—Houston [1st Dist.] August 25, 1988, n.w.h.)(not yet reported) (letters of credit).

364. Harris v. Rowe, 593 S.W.2d 303, 306 (Tex. 1980); Thompson v. Hambrick, 508 S.W.2d 949, 952 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

365. Houston Commerce Bank v. Carline, No. 01-87-336-CV, at 8 (Tex. App.—Houston [1st Dist.] August 25, 1988, n.w.h.)(not yet reported); Baldwin v. Security Bank & Trust, 541 S.W.2d 908, 910 (Tex. Civ. App.—Waco 1976, no writ).

366. Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

367. 626 S.W.2d 605 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.); *see also* J.T. Fulgham Co. v. Stewart Title Guar. Co., 649 S.W.2d 128, 129-30 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)(affidavit of vice-president of title company stated that company was holder of note).

368. *See Batis*, 626 S.W.2d at 606.

pay.[369]

1. Application of the Parol Evidence Rule

In cases based on written instruments, a common defense, both at trial and on motions for summary judgment, is an allegation of contemporaneous representations (parol evidence) that would entitle the defendant to modify the written terms of the note or contract. The parol evidence rule[370] generally intends to keep out extrinsic evidence of oral statements or representations relative to the making of a contractual agreement, when that agreement is valid and complete on its face. In general, a written instrument that is clear and express in its terms cannot be varied by parol evidence.[371]

2. Exception to Parol Evidence Rule

An important exception to the parol evidence rule permits extrinsic evidence to show fraud in the inducement of a written contract.[372] As an example, the supreme court addressed this problem in *Town North National Bank v. Broaddus*.[373] In this case, three parties signed a note as obligors.[374] After default, the bank brought suit against two of the parties (one party was dismissed due to filing bankruptcy).[375] The bank later brought a motion for summary judgment against the two co-obligors.[376] One of the defendants contested the motion for summary judgment by alleging that a bank officer told him that he would not be held liable on the note.[377] This misrepresentation, argued the defendant, created fraud in the inducement, which constituted a dispute over a material issue and, as such, prevented the granting of a

369. *Id.* at 607.

370. TEX. BUS. & COM. CODE ANN. § 2.022 (Vernon 1968).

371. *See* Pan Am. Bank of Brownsville v. Nowland, 650 S.W.2d 879, 885 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.).

372. *E.g.*, Town North Nat'l Bank v. Broaddus, 569 S.W.2d 489, 491 (Tex. 1978); Lanius v. Shuler, 77 Tex. 24, 27; 13 S.W. 614, 615 (1890); Simpson v. MBank Dallas, N.A., 724 S.W.2d 102, 108 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); Friday v. Grant Plaza Huntsville Assocs., 713 S.W.2d 755, 756 (Tex. App.—Houston [1st Dist.] 1986, no writ); Albritton Dev. Co. v. Glendon Inv., Inc., 700 S.W.2d 244, 246 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

373. 569 S.W.2d 489 (Tex. 1978).

374. *See id.* at 490.

375. *See id.*

376. *Id.*

377. *Id.* at 490-91.

summary judgment.[378] The court held that extrinsic evidence is permitted to prove fraud in the inducement of a note only if there is "a showing of some type of trickery, artifice, or device employed by the payee in addition to the showing that the payee represented to the maker he would not be liable on such note."[379] The supreme court upheld the summary judgment for the bank, stating: "[A] negotiable instrument which is clear and express in its terms cannot be varied by parol agreements or representations of a payee that a maker or surety will not be liable thereon."[380]

C. *Statute of Limitations*

Summary judgment is proper in cases where the statute of limitations is pleaded as a bar to recovery.[381] The movant for a summary judgment on the basis of the running of the statute of limitations assumes the burden of showing as a matter of law that the suit is barred by limitations.[382]

D. *Res Judicata*

Summary judgment is also proper in a case barred by res judicata. Care should be taken to attach the prior judgment to the motion or response.[383] In *Chandler v. Carnes Co.*,[384] the defendant moved for summary judgment based on res judicata.[385] The defendant had attached a certified copy of the prior judgment in its amended motion, but failed to attach a certified copy of the petition in the prior matter.[386] The court held that attachment of the petition was essential to constitute proper summary judgment proof.[387]

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378. *See id.*

379. *Id.* at 494.

380. *Id.* at 491.

381. *See, e.g.*, Salazar v. Amigos Del Valle, Inc., No. 13-87-310-CV, at 2-3 (Tex. App.—Corpus Christi, June 30, 1988, n.w.h.)(not yet reported) (appellants claiming that summary judgment proper where statute of limitations bars slander action).

382. Delgado v. Burns, 656 S.W.2d 428, 429 (Tex. 1983).

383. *See* Jacobs v. Cude, 641 S.W.2d 258, 261 (Tex. App.—Houston [14th Dist.] 1982 writ ref'd n.r.e.)(family law); Chandler v. Carnes Co., 604 S.W.2d 485, 486 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.)(certified copy of prior judgment must be attached to motion for summary judgment to be properly based on doctrine of res judicata).

384. 604 S.W.2d 485 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

385. *Id.* at 486.

386. *Id.* at 486-87.

387. *Id.* at 487.

In *First Federal Savings & Loan Association v. Bustamante*,[388] the defendant savings and loan association asserted in its response to the motion for summary judgment that plaintiff was barred from recovery by res judicata because the issue had been previously litigated in federal court.[389] The response contained no copy of the federal court judgment, certified or otherwise, nor was the judgment annexed to any supporting affidavits.[390] Even though a copy of the judgment was attached to the defendant's second amended original answer, the granting of the summary judgment against the defendant was affirmed on appeal.[391]

E. *Tort Actions*

By contrast, tort actions that allege well-recognized theories are less amenable to summary judgement than are contract cases and cases that allege new theories. Tort cases sometimes involve disputed fact issues that may preclude summary judgment. This should not dissuade practitioners from filing motions for summary judgment in appropriate cases, especially when no fact issue exists as to liability and when only matters of actual and exemplary damages require presentation of evidence. In such a case, an initial interlocutory summary judgment should be granted with damages awaiting later determination by proof in open court.

IX. State Contrasted with Federal Practice

Summary judgment practice in federal court differs significantly from that in state court.[392] In state court, the movant is required to present competent evidence showing entitlement to summary judgment. Until recently, this was also the practice in federal court. In 1986, however, the United States Supreme Court made it clear that, when the non-moving party bears the burden of proof at trial, that party alone has the burden of presenting competent evidence in order

388. 609 S.W.2d 845 (Tex. Civ. App.—San Antonio 1980, no writ).

389. *Id.* at 848-49.

390. *Id.* at 848.

391. *Id.*

392. *See generally* Childress, *A New Era for Summary Judgments: Recent Shifts at the [U.S.] Supreme Court*, 6 Rev. Litigation 262, 262-84 (1987)(discussing Supreme Court's changes in federal summary judgment law); Wallance, *Summary Judgment Ascending*, 14 Litigation 6, 6-9, 54 (Winter 1988)(examining summary judgment practice in federal courts).

to avoid summary judgment.[393]

Federal Rule of Civil Procedure 56(c) provides that summary judgment is proper:

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[394]

Construing rule 56(c), the Supreme Court in *Celotex v. Catrett*,[395] held that summary judgment is mandated when, after an adequate time for discovery has elapsed, the non-movant fails to make a showing sufficient to establish the existence of each element essential to the non-movant's case, in which the non-movant will bear the burden of proof at trial.[396] The movant need not support its motion with affidavits, but need only point out the nonexistence of evidence on an essential element.[397] To avoid summary judgment, the non-movant must then go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, set forth "specific facts showing that there is a genuine issue for trial."[398]

A. *Limitations on* Celotex

Although the *Celotex* decision facilitates obtaining a summary judgment in federal court, the limitations of that holding should be noted. First, the holding requires that a sufficient time for discovery must have elapsed.[399] In *Celotex*, the summary judgment motion was filed one year after the lawsuit commenced.[400] The Court considered this an adequate time span.[401] By contrast, when a motion for summary judgment was filed "shortly after the . . . answer to the complaint and . . . neither party ha[d] conducted any discovery," the Fifth Circuit reversed a summary judgment order on the ground that suffi-

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393. Celotex v. Catrett, 477 U.S. 317, 324 (1986).

394. FED. R. CIV. P. 56(c).

395. 477 U.S. 317 (1986).

396. *Id.* at 322; *see also* Meyers v. MV Eugenio C, 842 F.2d 815, 817 (5th Cir. 1988); Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1123 (5th Cir. 1988).

397. *Celotex*, 477 U.S. at 323; *see also* Putman v. Insurance Co. of North Am., 673 F. Supp. 171, 175 (N.D. Miss. 1987), *aff'd*, 845 F.2d 1020 (5th Cir. 1988).

398. *Id.* at 324 (quoting Federal Rule of Civil Procedure 56(e)).

399. *Id.* at 322.

400. *See id.* at 319 (suit filed in 1980 and motion filed in 1981).

401. *Id.*

cient time had not elapsed.[402]

The Fifth Circuit has upheld a summary judgment granted fourteen months after the commencement of the case even though the plaintiff's discovery efforts had been considerably frustrated.[403] The court reasoned that the plaintiff should have, but failed to, file a motion pursuant to Federal Rule of Civil Procedure 56(f), requesting a continuance to permit further discovery.[404] Given the facility with which summary judgment can be obtained following *Celotex*, the prudent federal court plaintiff should file a rule 56(f) motion even if he or she feels a summary judgment is premature.

The second limitation of the *Celotex* holding is that, even though the movant need not present summary judgment proof when the non-movant bears the burden of proof at trial, the movant cannot rely on a conclusory statement that the non-movant has not presented evidence on an essential element. Rather, the moving party must specifically point out to the court the absence of evidence showing a genuine dispute.[405]

Finally, although the burden has shifted to the non-movant, the non-movant need not necessarily present his or her own summary judgment evidence. Instead, if the non-movant believes that evidence already submitted by the movant indicates the existence of a genuine issue of material fact, the non-movant may direct the court's attention to that evidence and rely on it without making submissions.[406]

B. *Standard of Proof*

While *Celotex* marked a shift in the burden of proof in federal summary judgment practice, two other 1986 Supreme Court decisions

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402. Fano v. O'Neill, 806 F.2d 1262, 1266 (5th Cir. 1987).

403. Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 136 (5th Cir. 1987).

404. *Id.* at 137. FED. R. CIV. P. 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's 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.

FED. R. CIV. P. 56(f).

405. Fano v. O'Neill, 806 F.2d 1262, 1266 (5th Cir. 1987)(citing Celotex v. Catrett, 477 U.S. 317, 328 (1986)(White, J., concurring)); Slaughter v. Allstate Ins. Co., 803 F.2d 857, 860 (5th Cir. 1986); Fontenot v. Upjohn Co., 780 F.2d 1190, 1195 (5th Cir. 1986).

406. Isquith v. Middle South Util., Inc., 847 F.2d 186, 198-99 (5th Cir. 1988).

served to clarify the standard of summary judgment proof required.[407] Just as in state court, to avoid a summary judgment in federal court, the non-movant must show there is a genuine issue of material fact.[408] Simply showing the existence of a fact issue will not suffice; the issue must be "genuine" and the fact "material."[409] In *Matsushita Electrical Industrial Co. v. Zenith*[410] and *Anderson v. Liberty Lobby, Inc.*,[411] the Court discussed the meaning of the terms "genuine issue" and "material fact."[412]

In *Matsushita*, the Court made it clear that a motion for summary judgment acts in a parallel fashion to the trial motion for directed verdict.[413] The Court wrote: "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' "[414] A genuine issue of fact does not exist if the non-movant's evidence merely shows that "there is some metaphysical doubt as to the material facts."[415] Moreover, there is an inverse relationship between the quality of the evidence the non-movant must present and the overall plausibility of the non-movant's claims.[416] Where the claims appear implausible, the non-movant must come forward with more persuasive evidence to support its claim than would otherwise be required.[417]

In *Liberty Lobby*, the Court discussed the requirement of "materiality."[418] Materiality must be defined by substantive law.[419] "Only dis-

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407. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-88 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-52 (1986).

408. Williams v. Adams, 836 F.2d 958, 960 (5th Cir. 1988); Mosby v. American Medical Intern., Inc., 656 F. Supp. 601, 604 (S.D. Tex. 1987). *Compare* FED. R. CIV. P. 56(c) (summary judgment granted movant if no genuine issue of material fact shown) *with* TEX. R. CIV. P. 166a(c) (summary judgment not proper when genuine issue of material fact exists).

409. *See Liberty Lobby*, 477 U.S. at 247-48.

410. 475 U.S. 574 (1986).

411. 477 U.S. 242 (1986).

412. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-50 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

413. *Matsushita*, 475 U.S. at 588; *see also Liberty Lobby*, 477 U.S. at 250-52 (summary judgment standard mirrors directed verdict standard).

414. *Matsushita*, 475 U.S. at 587; *see also* Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1123 (5th Cir. 1988).

415. *Matsushita*, 475 U.S. at 586.

416. *See id.* at 587.

417. *Id.*

418. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986).

419. *Id.* at 248; *see also* Winters v. Protective Casualty Ins., Co., 678 F. Supp. 144, 145 (M.D. La. 1988).

putes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."[420] The Court in *Liberty Lobby* also elaborated on the amount of evidence required to present a "genuine issue" and thus avoid summary judgment.[421] In evaluating the evidence presented by the nonmovant, the judge must view that evidence "through the prism of the substantive evidentiary burden."[422] Thus, for example, in *Liberty Lobby*, because the plaintiff would have been required to prove actual malice by clear and convincing evidence at trial, the plaintiff/nonmovant was required to present sufficient evidence to allow a reasonable jury to find actual malice by clear and convincing evidence in order to avoid summary judgment.[423]

C. *Antitrust Cases*

The *Matsushita* case marked a clarification in the use of summary judgments in federal antitrust cases.[424] A summary judgment may be granted in an antitrust action. In fact, the antitrust plaintiff must produce stronger evidence in order to avoid summary judgment. While the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, the law limits the range of permissible inferences from ambiguous evidence in a Sherman Act section 1 case. "To survive a motion for summary judgment . . . , a plaintiff seeking damages for a violation of section 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently."[425]

D. *Other Federal Distinctions*

Federal summary judgment practice differs from state practice in two other important respects. First, the notice requirement in federal court is considerably shorter than in state court. While a state court summary judgment motion must be filed at least twenty-one days

420. *Liberty Lobby*, 477 U.S. at 248; *see also* Williams v. Adams, 836 F.2d 958, 961 (5th Cir. 1988); Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc., 831 F.2d 77, 79 (5th Cir. 1987).

421. *Liberty Lobby*, 477 U.S. at 252-55.

422. *Id.* at 254.

423. *Id.* at 254-55.

424. *See generally* Warren & Cranston, *Summary Judgment After Matsushita*, 1 ANTITRUST 12 (1987).

425. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

prior to hearing, federal practice requires only ten days notice, and a response may be filed any time prior to the day of the hearing.[426] Second, assuming that it gives the requisite ten days notice, the federal court may grant summary judgment sua sponte.[427]

X. CONCLUSION AND RECOMMENDATION

This outline is an overview of the status of summary judgment practice in Texas. Attorneys should keep in mind that every trial judge views a motion for summary judgment differently.

Even careful preparation and success at the trial level cannot always preclude an appellate court from actively hunting for a fact issue in order to reverse a summary judgment.[428] The dissent in *Greenway v. Greenway*[429] should be noted as it is especially critical of the majority's efforts to "glean" a fact issue from many statements that are acknowledged by the majority as not being proper summary judgment evidence, because they are either hearsay, conclusion, or obviously not made from personal knowledge.[430]

Nonetheless, a motion for summary judgment provides a useful and effective technique for testing a case in which it is reasonably arguable that only questions of law are presented. Even if the motion is unsuc-

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426. FED. R. CIV. P. 56(c); Isquith v. Middle South Util., Inc., 847 F.2d 186, 195-96 (5th Cir. 1988). *Isquith* dealt with the notice that must be given to a non-movant when a court decides to treat a motion to dismiss as one for summary judgment. *Id.* Federal Rule of Civil Procedure 12(a) provides that a motion to dismiss for failure to state a claim pursuant to rule 12(b)(6) shall be treated as one for summary judgment when matters outside the pleadings are considered by the court. *Id.* The *Isquith* court held that the responding party must be given ten days notice after the court accepted for consideration matters outside the pleadings. However, the court need not specifically notify the parties that the court will consider the motion as one for summary judgment. *Id.* The ten-day period is mandatory and strictly enforced. Western Fire Ins. Co. v. Copeland, 786 F.2d 649, 652 (5th Cir. 1986).

427. To date, the Fifth Circuit has only approved of such a sua sponte grant in dicta. *See* Powell v. United States, 849 F.2d 1576, 1578-79 (5th Cir. 1988). The United States Supreme Court has, however, condoned this practice in *Celotex*, 477 U.S. at 326, and other circuits permit sua sponte summary judgments. Portsmouth Square, Inc. v. Shareholders Protective Comm., 770 F.2d 866, 869 (9th Cir. 1985); Harrington v. Vandalia-Butler Bd. of Educ., 649 F.2d 434, 436 (6th Cir. 1981); FLLI Moretti Cereal v. Continental Grain Co., 563 F.2d 563, 565 (2d Cir. 1977); Choudhry v. Jenkins, 559 F.2d 1085, 1091 (7th Cir.), *cert. denied*, 434 U.S. 997 (1977).

428. *See* Greenway v. Greenway, 693 S.W.2d 600, 601 (Tex. App.—Houston [14th Dist.] 1985, no writ).

429. *Id.* at 602 (Sears, J., dissenting).

430. *Id.*

cessful, the issues in a case should be narrowed and a trial on the merits simplified.

Because the denial of a motion for summary judgment cannot be appealed, the movant must submit to the trial court as complete and concise a motion as possible. To assure the best chance of prevailing, an attorney should:

1. support the motion as thoroughly as possible with depositions, answers to interrogatories and requests for admissions and appropriate documents;
2. index, summarize and organize supporting evidence to ease the court's review;
3. be certain all affidavits are properly verified;
4. use the affidavits of experts, when appropriate.

To best prevent summary judgment, the non-movant should file a response that:

1. argues specifically the presence of genuine issues of material fact;
2. challenges specifically the admissibility of supporting evidence;
3. notes the lack of proper verifications;
4. points out any other failure to meet the requirements for a motion for summary judgment.

Summary judgment enables disposition of cases involving patently unmeritorious claims or untenable defenses. But the initial burden on the movant to establish its case as a matter of law significantly limits its usefulness. This state court limitation is especially apparent in cases in which the initial burden is almost impossible to overcome. For example, in media defamation cases, the state of mind of the defendant cannot be established as a matter of law.[431]

Because of the difficulty of meeting this initial burden, an opposing party frequently cannot challenge factually unsupportable claims or defenses prior to the trial on the merits. Unsupportable cases languish on the court's docket until they are dismissed for want of prosecution, settled, or tried on the merits.

Summary judgments have much broader application in federal court.[432] When the non-movant bears the burden at trial, that party alone has the burden of presenting competent evidence to avoid sum-

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431. *See* Beaumont Enter. & Journal v. Smith, 687 S.W.2d 729, 730 (Tex. 1985)(defendant's affidavit as to own state of mind not readily controvertable); *see also supra*, § III.B. (Defendant as Movant).

432. *See supra*, § IX. (State Contrasted With Federal Practice).

mary judgment. The movant meets its burden by demonstrating that no genuine issue of fact exists. The burden then shifts to the opposing party to show facts that demonstrate a genuine factual dispute. Thus, all the federal court movant has to do is show an absence of evidence to support the other side's case.

Summary judgment is appropriate in federal court when, after an adequate time for discovery has elapsed, the non-movant fails to establish the existence of a fact issue for each element essential to its case for which it bears the burden of proof.

One advantage of the federal practice over state practice is that it is a less costly method of testing an opponent's case. Also, it significantly broadens the issues capable of resolution by summary judgment. In fact, all three of the cases in the trilogy of Supreme Court cases changing federal practice concern areas in which summary judgment would be difficult to secure under state procedure: *Matsushita* involved complex antitrust laws;[433] *Celotex* involved an asbestos products liability suit;[434] and *Liberty Lobby* involved public figure defamation against a media defendant.[435]

Federal practice also affords protections to the non-movant.[436] An adequate time for discovery must have elapsed. Even after discovery, if the non-movant lacks evidence to support key elements in its case, it may complain of lack of access to proof under Federal Rule of Civil Procedure 56(f). A third protection is that the non-movant need not necessarily present its own summary judgment evidence. Rather, the non-movant may direct the court's attention to any evidence already submitted by the movant that indicates the existence of a genuine issue of material fact.

In *Channel 4, KGBT v. Briggs*,[437] the Texas Supreme Court discussed summary judgment burdens of proof in light of the United States Supreme Court's decision in *Liberty Lobby*.[438] The Texas court held for the media defendant on another basis and specifically did not reach the question of whether the burden of proof in summary judg-

433. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 576-79 (1986).

434. *See* Celotex v. Catrett, 477 U.S. 317, 319-21 (1986).

435. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 244-46 (1986).

436. *See supra*, § IX.A. (Limitations on *Celotex*).

437. 31 Tex. Sup. Ct. J. 546 (June 29, 1988); *see also* Brasher v. Carr, 743 S.W.2d 674, 681-82 (Tex. App.—Houston [14th Dist.] 1987, no writ)(*Liberty Lobby* is based on federal procedural law and does not require adherence by state courts).

438. Channel 4, KGBT v. Briggs, 31 Tex. Sup. Ct. J. 546, 547 (June 29, 1988).

ment proceedings applies to public figure defamation cases.[439] In his concurrence, Justice Gonzalez called for viewing summary judgment proof with no interpretive bias favoring either side, and for allocation of the burdens of proof and persuasion to minimize any self-censorship effects of defamation suits.[440] He proposed that the defendant have the initial burden of negating the presence of actual malice.[441] This burden may be met by informing the trial court of the lack of evidence offered by the plaintiff.[442] The burden would then shift to the plaintiff to show the existence of malice by clear and convincing evidence that ultimately can be introduced to the trier of fact.[443]

Justice Gonzalez limited his view to public official or public figure defamation cases.[444] Yet, even though First Amendment cases certainly require a higher level of scrutiny because of the danger of self-censorship, some of the underlying concerns are the same. The movant should not be subjected to the time and expense of a full trial on the merits when the non-movant cannot present even sufficient evidence to raise a question of fact.

In *Celotex*, the court construed Federal Rule of Civil Procedure 56(c) in changing the burden of proof in federal summary judgment practice.[445] Rule 56(c) provides for summary judgment if the summary judgment evidence "show[s] 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."

The same application could be reached in construing Texas Rule of Civil Procedure 166a. The relevant portion is substantially the same as the federal rule. Rule 166a provides for summary judgments if the summary judgment evidence shows:

> 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 issue expressly set out in the motion or in an answer or any other response.[446]

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439. *Id.*

440. *Id.* at 550 (Gonzalez, J., concurring).

441. *Id.*

442. *Id.*

443. *Id.*

444. *Id.* at 549.

445. *Celotex*, 477 U.S. at 322-25.

446. TEX. R. CIV. P. 166a. Under state practice, a trial judge may instruct a verdict because of the failure of a party to demonstrate that there is a fact issue. The standard for

Texas Rule of Judicial Administration 6b(1) and (2) gives time standards for case resolution. It provides that all civil cases other than family law cases should be brought to trial or final disposition within eighteen months from appearance date for jury trials and twelve months from appearance date for nonjury cases. These time standards could serve as a rule of thumb.

The time has come for the Texas Supreme Court to re-evaluate summary judgment practice. In most cases, after eighteen months a non-movant should have the burden of showing sufficient evidence to establish the existence of each element essential to its case in which it bears the burden of proof at trial.

Access to the courts is important. But once a party gains access, its claim should not necessarily go untested until trial. Expanded use of summary judgments would allow unjust claims and defenses to be disposed of expeditiously. If that party cannot present a fact issue after a sufficient time for discovery, the resources of the litigants, their attorneys, and the court would be better spent on other matters.

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granting an instructed verdict is analogous to the standard for granting a summary judgment. R. McDONALD, 4 TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS § 17.26.12 (rev. 1984). The primary difference between the two is the stage at which each motion is made and the evidence on which each is made. A motion for instructed verdict is employed in state courts to present a party's contention that there are no controverted fact issues for the jury's determination. When under the evidence produced before a jury, a party is entitled to a verdict as a matter of law, the court may instruct the jury as to the verdict it must return, or may withdraw the case from the jury and render judgment. *Id.* § 11.25. The "genuine issue" standard for summary judgments in rule 166a is very similar to the instructed verdict standard.