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Texas Rule of Civil Procedure 166a(i): A New Weapon for Texas Defendants Comment.

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COMMENTS

TEXAS RULE OF CIVIL PROCEDURE 166a(i): A NEW WEAPON FOR TEXAS DEFENDANTS

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A little neglect may breed great mischief . . . for want of a nail the shoe was lost; for want of a shoe the horse was lost; for want of a horse the rider was lost.[1]

I. INTRODUCTION

Recently, the Texas Supreme Court adopted Texas Rule of Civil Procedure 166a(i), also known as the "no-evidence" motion.[2] This rule brings Texas closer to federal summary judgment practice by shifting the burden to produce "summary judgment evidence raising a genuine issue of material fact" from the movant to the non-movant.[3] Paragraph (i) of Rule 166a provides:

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1. BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC (1758), *reprinted in* BENJAMIN FRANKLIN, AUTOBIOGRAPHY AND OTHER WRITINGS 171 (Russell B. Nye ed., 1958).

2. *See* TEX. R. CIV. P. 166a(i) (noting that this rule became effective September 1, 1997).

3. *Compare id.* (requiring courts to grant summary judgment motions "unless the respondent produces summary judgment evidence raising a genuine issue of material fact"), *with* FED. R. CIV. P. 56(c) (directing federal courts to grant summary judgment "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"). Beginning in 1986 with *Celotex Corp. v. Catrett*, federal courts have construed Rule 56 as shifting the burden of providing evidence from the movant to the non-movant after the movant has identified an evidentiary deficiency. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (holding that summary judgment is proper "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). Several commentators have noted that the new no-evidence motion resembles federal summary judgment law. *See* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1318, 1355 (1998) (indicating that until Texas courts begin interpreting revised Rule 166a, federal authority provides guidance for interpretation of the rule); Chief Justice Thomas R. Phillips, *Supreme Court Update*, 60 TEX. BAR J. 858, 861 (1997) (noting that Rule 166a "conform[s] our summary judgment practice more closely to that of the federal courts and most other states"); Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (noting that federal summary judgment rules, like the new summary judgment rule in Texas, requires non-movants to produce evidence in summary judgment motions); Janet Elliot & Robert Elder, Jr., *Reaching Down & Touching Up; Hyperactive Supreme Court Continues to Extend Power*, TEX. LAW., July 28, 1997, at 1 (discussing Texas summary judgment procedure as moving toward federal jurisprudence); *Toxic Tort Revolution: Harbinger of Prior Proof?*, TEX. LAW., Aug. 4, 1997, at 1 (stating that some members of the Supreme Court

> After adequate time for discovery a party without presenting summary judgment evidence may move for summary judgment on the ground that there is *no evidence* of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is *no evidence*. The court *must* grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.[4]

Advisory Committee voiced concern over adoption of federal summary judgment practice).

4. See TEX. R. CIV. P. 166a(i) (emphasis added). Several commentators have voiced concern over the language in the rule which states the court *must* grant summary judgment unless the non-movant produces adequate summary judgment evidence. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6691–95 (Nov. 23, 1996) (statement of Russell McMains) (on file with the *St. Mary's Law Journal*) (relating Russell McMains's and other advisory committee members' concern over the mandatory language of the new rule); Judge David Hittner & Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, K–10 (Sept. 16, 1997) (unpublished Article presented before the Houston Bar Assoc. litigation section) (on file with the *St. Mary's Law Journal*) (explaining that speculation over the court's use of the word "must exist"). Specifically, practitioners fear that if a court's obligation to grant summary judgment is mandatory, then "summary judgment denials will be reviewable by mandamus." *Id.* However, the Texas Supreme Court indicated that mandamus relief for denied summary judgment motions was not the purpose of the rule. *See id.* (stating that "[c]ourt members have said that availability of mandamus review is not the intent of the rule"). Moreover, the comment to Rule 166a(i) maintains that "[t]he denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c)." TEX. R. CIV. P. 166a cmt. to 1997 change. Because a summary judgment is interlocutory in nature, the denial of a summary judgment is generally not appealable. *See* Humphreys v. Caldwell, 888 S.W.2d 469, 470 (Tex. 1994) (holding that a party cannot appeal from a denial of a summary judgment motion); Novak v. Stevens, 596 S.W.2d 848, 849 (Tex. 1980) (stating that an order on a motion for summary judgment is interlocutory). Review of a granted summary judgment under traditional summary judgment practice involves a determination as to "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." Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970) (emphasis omitted). Assisting the non-movant in attacking the summary judgment on appeal, appellate courts are to take evidence favorable to the non-movant as true and are to resolve every reasonable inference in favor of the non-movant. *See* Goswami v. Metropolitan Savs. & Loan Ass'n, 751 S.W.2d 487, 491 (Tex. 1988) (noting that appellate courts should presume evidence that favors the non-movant to be true); Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548–49 (Tex. 1985) (outlining the presumptions in review of a motion for summary judgment). The appropriate standard in determining whether the non-movant has raised a genuine issue of material fact under the new rule will likely be equivalent to the "no evidence" analysis used by appellate courts in Texas. *See* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1360–61 (1998) (indicating that the amount of evidence necessary to defeat a no-evidence motion will be similar to "the directed verdict or . . . 'no-evidence' standard applied to a jury verdict"). Conse-

Proponents laud the no-evidence motion for its capacity to relieve an overburdened state judiciary and reduce exorbitant litigation expenses by allowing judges to remove unmeritorious cases from their dockets.[5] By contrast, those opposed to the no-evidence motion contend that it: (1) infringes upon the right to trial by jury guaranteed by the Texas Constitution;[6] (2) encourages defendants to liberally file no-evidence motions;[7]

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quently, the non-movant must proffer "more than a scintilla of evidence" to defeat a granted no-evidence motion on appeal. *Id.*; *see also* JUSTICE JOHN CORNYN, TEXAS SUMMARY JUDGMENTS 4 (Elaine Carlson ed., The Rutter Group 1997) (relating that "'some,' or more than a scintilla, of evidence must exist to support each element of claims and defenses" (quoting Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361 (1960))). Notably, case law prior to the no-evidence motion expressly forbade courts from employing a no-evidence review in summary judgments. *See* Garcia v. John Hancock Variable Life Ins. Co., 859 S.W.2d 427, 436 (Tex. App.—San Antonio 1993, writ denied) (noting "the defendant in state court is not entitled to a summary judgment merely because there is 'no evidence' to support the plaintiff's allegations" (quoting Jones v. General Elec. Co., 543 S.W.2d 882, 884 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.))); Flores v. H.E. Butt Stores, Inc., 791 S.W.2d 160, 162 (Tex. App.—Corpus Christi 1990, writ denied) (explaining that a motion for summary judgment may not rely on the no-evidence standard as in a directed verdict).

5. *See* Judge David Hittner & Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, K-10 (Sept. 16, 1997) (unpublished Article presented before the Houston Bar Assoc. litigation section) (on file with the *St. Mary's Law Journal*) (listing the bases for support of the new rule including: "[n]o-evidence summary judgments help eliminate frivolous cases for which the plaintiff could not prevail at trial;" "[t]he defendant should not have to prove there is no evidence if he or she has done a good job in discovery and uncovered no evidence to support one or more element[s];" and "[the no-evidence motion] will decrease expense"); *see also* Charles L. Babcock, To the Editor, *Summary Judgment Rule Was Misread*, TEX. LAW., Sept. 1, 1997, at 25 (opining that the no-evidence motion is a "much-needed reform in our summary judgment practice" which will "serve the laudable goal of getting cases out of the system that can't be proved, thus saving costs for everyone"), *available in* LEXIS, Tex Library, Txnews File; Janet Elliot, *A Matter of Judgment*, TEX. LAW., Sept. 8, 1997, at 1 (reporting that supporters of the new rule "say it is intended only to be used to eliminate frivolous cases before they get to trial"), *available in* LEXIS, Tex Library, Txnews File; *cf.* Evelyn V. Keyes, *Summary Judgment Practice in Texas: A Guide to Reform*, 57 TEX. BAR J. 1170, 1183 (1994) (opining that "in Texas motions for summary judgment are frequently denied or reversed on appeal, especially in complex cases, burdening the courts with non-meritorious litigation and causing many millions of dollars of waste every year in terms of lawyers' fees, unmerited settlements, and unnecessary court costs"); Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 619 (1988) (contending that the adoption of federal summary judgment standards would reduce "overcrowded court dockets and the high cost of litigation," and that the advantages of liberalized summary judgments "include: reduction of court congestion, avoidance of expensive trials, and disposition of frivolous cases at an early stage").

6. *See* TEX. CONST. art. I, § 15 (providing that "[t]he right of trial by jury shall remain inviolate. The Legislature shall pass such laws as may be needed to regulate the same, and to maintain its purity and efficiency."); TEX. CONST. art. V, § 10 (stating that "in the trial of all cases in the District Courts, the plaintiff or defendant shall, upon application made in

and (3) further shifts the balance of power in Texas courts to defendants.[8] Notwithstanding the controversy surrounding the rule, summary judgments in Texas are now more likely to be granted under the amended rule than under the old rule in light of summary judgment practice in federal courts.[9]

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open court, have the right to trial by jury"); Dissenting Opinion on Final Approval of Revisions to Texas Rule of Civil Procedure 166a(i), 948–49 S.W.2d (Tex. Cases) xxxvi, xxxvii (Sept. 9, 1997) (Spector, J., dissenting) [hereinafter *Spector's Dissent*] (contending that infringement on "the constitutional rights of aggrieved citizens to seek redress" outweighs any benefits provided by the new rule); *cf.* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 77 n.20 (1990) (emphasizing that liberalization of summary judgment procedure in federal courts may deny the right to trial by jury protected under the Seventh Amendment to the United States Constitution). It is important to note that the Seventh Amendment to the United States Constitution is inapplicable to state courts; consequently, the Texas Constitution provides the only relevant challenge to summary judgments denying a citizen's right to trial by jury. *See* Wooten v. Dallas Hunting & Fishing Club, Inc., 427 S.W.2d 344, 346 (Tex. Civ. App.—Dallas, 1968, no writ) (explaining that the Seventh Amendment "does not apply to proceedings in state courts").

7. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (asserting that the Texas Supreme Court failed to adopt a rule that will "keep 'no-evidence' summary judgment motions from being filed in virtually every case"); Janet Elliot; *A Matter of Judgment*, TEX. LAW., Sept. 8, 1997, at 1 (noting that "Lynne Liberato, chair of the State Bar's Appellate Practice and Advocacy Section, has been telling lawyers at seminars that summary judgment motions likely will be filed in every case, much as they are in the federal system").

8. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (arguing that the amended rule unfairly burdens plaintiffs). Critics of the federal summary judgment rule, which is similar to the new Texas Rule 166a(i), assert that requiring the respondent in a motion for summary judgment to bear the burden unjustly swings the pendulum of justice toward defendants. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 93 (1990) (opining that "the increased availability of summary judgment alters the balance of power between plaintiffs and defendants in the pretrial phases of litigation by raising both the costs and risks to plaintiffs at the summary judgment stage while diminishing both for defendants").

9. *Cf.* DAVID HITTNER ET AL., FIFTH CIRCUIT FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 14:132 (1996) (commenting that "federal judges are more receptive to summary judgement motions" because movants are no longer required "to disprove the other party's case"). The conclusion that switching the burden from the movant to the non-movant will result in more summary judgments is based on the experience in federal courts after the United States Supreme Court handed down three cases in 1986, commonly referred to as the Trilogy, which liberalized federal summary judgment standards and placed the burden to raise a genuine issue of fact on the non-movant after the movant satisfied his initial burden. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (shifting the burden once the movant makes an initial showing); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248–49 (1986) (discussing federal summary judgment standards); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986) (explaining the non-movant's bur-

Before the introduction of the new no-evidence motion, summary judgment procedure in Texas was firmly established.[10] Adopted in 1950,

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den). With regard to the Trilogy's effect upon federal summary judgment practice, Judge Hittner explained that:

> [n]ot requiring the moving party to disprove the other party's case greatly increases the utility of motions for summary judgment. The other party can be forced to 'reveal its hand' early in the case rather than only at the time of trial. As a result of *Celotex*, federal judges are more receptive to summary judgment motions.

DAVID HITTNER ET AL., FIFTH CIRCUIT FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 14:132 (1996); *see also* Glenn S. Koppel, *Populism, Politics, and Procedure: The Saga of Summary Judgment and the Rulemaking Process in California*, 24 PEPP. L. REV. 455, 491 (1997) (explaining that "[t]he [T]rilogy enhanced the utility of summary judgment as a tool in the hands of defendants to dismiss claims, and in the hand of courts to manage crowded dockets"); Georgene M. Vairo, *Through the Prism: Summary Judgment and the Trilogy* (underscoring the impact of the Trilogy on federal summary judgment practice by noting, "[t]he decisions send a message to the lower federal courts that they should not be so wary in granting summary judgment."), *in* TRIAL EVIDENCE, CIVIL PRACTICE, AND EFFECTIVE LITIGATION TECHNIQUES IN FEDERAL AND STATE COURTS, at 1557, 1560 (ALI-ABA Course of Study 1991), *available in* WL C607 ALI-ABA 1557. These burdens have proved to be troublesome for some states following the federal rule. *See* William A. McCormack & Maureen B. Hogan, *Summary Judgment: A Strengthened Focus*, 36 JUN. B. B.J. 9, 9 (1992) (noting that in Massachusetts, which expressly adopted *Celotex* by judicial opinion in 1991, "the experience in the trial court of the Commonwealth has been special difficulty in obtaining summary judgment"). In trying to explain why trial courts in Massachusetts have been reluctant to embrace the burden shift under *Celotex*, commentators have suggested that irresponsible lawyers have flooded the courts with summary judgments, thereby overwhelming the judges "with motions that are unsupported and have no chance of success." *See id.* (relating explanations for few summary judgments being granted after *Celotex*, including the possibility that judges choose to deny summary judgment motions as a time saving mechanism, in light of crowded dockets). Another reason proffered for judges' reluctance to utilize summary judgments after *Celotex* is the fear of reversal if any possibility exists that there might be an issue. *See* Steven P. Garmisa, *New Summary Judgment Rule Aimed at Saving Time*, CHI. DAILY LAW BULL., Jan. 26, 1996, at 5 (expressing the concern that "some trial judges, acting out of fear of reversal, allow cases to survive summary judgment if there is any dispute about any fact"), *available in* Westlaw, CHIDLB Database.

10. *See Spector's Dissent*, *supra* note 6, at xxxvi, xxxvii (stating that "[t]he Court's adoption of Rule 166a(i) effectively discards a well-developed body of summary judgment law that has been available to guide the bench and bar."). Prior to the adoption of the no-evidence motion, case law interpreting Rule 166a required that the movant carry the burden of proving that "no genuine issue as to any material fact" existed. Gulbenkian v. Pennsylvania, 151 Tex. 412, 416, 252 S.W.2d. 929, 931 (1952). Thus, the party moving for summary judgment was required to establish he was "entitled to judgment as a matter of law." Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548 (Tex. 1985). "In deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true." *Id.* at 548–49. Further, courts should resolve any doubts in favor of the non-movant concerning whether a genuine issue of material fact is present. *See id.* at 549; *Gulbenkian*, 151 Tex. at 416, 252 S.W.2d at 931. The purpose of the summary judgment motion in Texas was "to eliminate patently unmeritorious claims and untenable defenses." City of Houston v. Clear Creek Basin Auth., 589

Texas courts reluctantly embraced Texas Rule of Civil Procedure 166a, fearing that summary judgments would deny parties access to jury trials.[11] As a result of this fear, Texas courts granted few summary judgments.[12] Indeed, because movants were shouldered with the burden of negating the existence of a fact issue in the non-movants claim or defense, movants were readily denied summary judgments.[13]

S.W.2d 671, 678 n.5 (Tex. 1979) (citing *Gulbenkian*, 151 Tex. at 416, 252 S.W.2d at 931). As recently as 1989, the Texas Supreme Court reaffirmed its refusal to adopt the federal standard for summary judgment. *See* Casso v. Brand, 776 S.W.2d 551, 556–57 (Tex. 1989) (noting that the Texas approach to summary judgment "eliminates patently unmeritorious cases while giving due regard for the right to a jury determination of disputed fact questions," while federal summary judgment motions "are designed to secure the just, speedy and inexpensive determination of every action"). In revising Rule 166a to include the no-evidence motion, the court effectively reversed *Casso*, which refused to employ the federal standard in Texas summary judgment procedure. *See* 7 WILLIAM V. DORSANEO, III, TEXAS LITIGATION GUIDE § 101.01 (Matthew Bender & Co. ed., Aug. 1997) (stating that the revision of Rule 166a reverses "the Texas Supreme Court's decision in *Casso*"). Prior to the revision of Rule 166a to include a no-evidence motion, a non-movant's failure to answer the summary judgment motion did not permit courts to grant default summary judgment motions. *See McConnell*, 858 S.W.2d at 348 (stating that "the non-movant's failure to answer or respond cannot supply by default the summary judgment proof necessary to establish the movant's right" (citing City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979))). Under Rule 166a(i), however, summary judgment is proper when the non-movant fails to respond to a no-evidence motion. *See* TEX. R. CIV. P. 166a(i) (requiring courts to grant summary judgment "unless the respondent produces summary judgment evidence raising a genuine issue of material fact").

11. *See* Roy W. McDonald, *The Effective Use of Summary Judgment*, 15 Sw. L.J. 365, 367 (1961) (relating that the summary judgment in Texas "must be made with recognition of the state's extraordinary faith in trial by jury"). "Since 1845 the state constitution has protected [the right to trial by jury] in substantially all civil actions, whether of a legal or equitable nature. Moreover, this enthusiasm is almost unrivaled elsewhere in this country." *Id.* Summary judgments in Texas have no common law foundation and are available to litigants only because of Rule 166a. *See* Tobin v. Garcia, 159 Tex. 58, 63, 316 S.W.2d 396, 400 (1958) (articulating that "the right to summary judgment was unknown to common law and exists in [Texas] only by virtue of that rule"). When promulgated, "the Texas rules had omitted a summary judgment provision." Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 629 n.92 (1988).

12. *See Clear Creek Basin Auth.*, 589 S.W.2d at 675 (demonstrating the futility of the summary judgment motion by stating that in 1977, "fewer than two percent of the civil cases disposed of in Texas in the six preceding years were decided by summary judgment").

13. *Compare* Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 (Tex. 1991) (explaining that the defendant had to disprove, as a matter of law, at least one element of the plaintiff's claim to obtain summary judgment), *and Clear Creek Basin Auth.*, 589 S.W.2d at 678 (emphasizing that the movant bears the burden in a summary judgment motion), *with* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (explaining that the movant in federal court "ha[s] the burden of showing the absence of a genuine issue as to any material fact"). Placing the burden on the movant in Texas created a substantial hurdle in obtaining summary judgments. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6692 (Nov.

This difficult burden placed on movants produced troubling inconsistencies in some cases.[14] For example, in *Prestegord v. Glenn*,[15] the Texas Supreme Court reversed the granting of a summary judgment motion for the defendants because the defendants failed to negate the existence of proximate causation.[16] Subsequently, the supreme court affirmed a directed verdict for the defendants after the plaintiffs failed to establish proximate causation in its case-in-chief.[17] Requiring the defendant to negate the existence of a genuine issue of material fact at the summary judgment stage proved a waste of resources for the plaintiff, defendant, and all courts involved in the litigation.[18] Indeed, "[t]he trial was an 'empty

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23, 1996) (statement of Judge David Peeples) (on file with the *St. Mary's Law Journal*) (relating Judge David Peeples' discussion that "[o]ur whole history is of courts being reluctant to grant summary judgments."); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243, 302 (1989) (explaining that because of the burden placed on the movant, parties "frequently cannot challenge factually unsupportable claims or defenses prior to the trial on the merits"); Dean M. Swanda, *Summary Judgment Practice*, 46 BAYLOR L. REV. 721, 735 (1994) (discussing that even though "summary judgment may be proper, obtaining that summary judgment and having it withstand appellate review may be a daunting task").

14. *See* Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 636 (1988) (noting that Texas courts denied summary judgment motions where a directed verdict would be appropriate "if a trial were had on the same day").

15. 441 S.W.2d 185 (Tex. 1969).

16. *See Prestegord*, 441 S.W.2d at 187 (explaining that "[t]he summary judgment record does not negative the existence of genuine and material fact issues . . .").

17. *See* Glenn v. Prestegord, 456 S.W.2d 901, 903 (1970) (approving the trial court's directed verdict based on the plaintiff's failure to establish proximate causation).

18. *See* Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 634 (1988) (noting that *Prestegord* is a good example of "the difference between the lip service paid to summary judgment in Texas and the reality that the device has been practically unavailable"); *see also* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 675 (Tex. 1979) (opining that "[a] history of the summary judgment rule . . . reflects that the high hopes of increasing judicial efficiency advanced by the proponents of the rule did not materialize"). Case law prior to the adoption of the no-evidence motion illustrates the differences between obtaining a directed verdict and a summary judgment. *See* Garcia v. John Hancock Variable Life Ins. Co., 859 S.W.2d 427, 435–36 (Tex. App.—San Antonio 1993, writ denied) (explaining that while a directed verdict is appropriate if the plaintiff does not have evidence to support an element of his claim, summary judgment is not proper "based on the failure of the plaintiff to sustain the burden it would have at a trial on the merits"); Lesbrookton, Inc. v. Jackson, 796 S.W.2d 276, 285-86 (Tex. App.—Amarillo 1990, writ denied) (indicating that although a lack of evidence to support an element of a claim might result in directed verdict for the plaintiff, it would not result in summary judgment for the defendant); Flores v. H.E. Butt Stores, Inc., 791 S.W.2d 160, 162 (Tex. App.—Corpus Christi 1990, writ denied) (indicating that summary judgments should not be granted under the "no evidence" standard as in directed verdicts). According to the Texas Fourth Court of Appeals in *Garcia*, "even if the defendant's motion for summary judgment represents proof demon-

formality.'"[19]

Rule 166a(i) aims to eradicate judicial inefficiencies similar to those in *Prestegord* by shifting the burden to the non-movant in an attempt to prevent unnecessary litigation; consequently, courts can make preliminary determinations as to whether the non-movant has any issue to bring forward at trial.[20] However, the rule is problematic in its failure to adopt certain safeguards found in the rejected advisory committee's recommendations, which include sanctions for filing frivolous motions, an attorney certification claiming that there is no evidence to support one or more elements of his opponents cause of action, and a definite time period for filing a no-evidence motion.[21] Moreover, the rule arguably swings the pendulum in Texas further towards the defendant and may prevent parties with legitimate claims from obtaining their day in court.[22]

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strating the plaintiff will likely lose by a directed verdict at trial, the defendant is not entitled to a summary judgment based on the weakness of the plaintiff's claims." *Garcia*, 859 S.W.2d at 435–36.

19. Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 634 (1988).

20. *See* Charles L. Babcock, To the Editor, *Summary Judgment Rule Was Misread*, TEX. LAW., Sept. 1, 1997, at 25 (opining that Rule 166a is "well conceived and a much-needed reform in our summary judgment practice"). "The federal courts have operated quite well since the United States Supreme Court decided *Celotex* . . . which the revised Texas Summary Judgment Rule follows." *Id.*

21. *See* TEXAS SUPREME COURT ADVISORY COMMITTEE, PROPOSAL FOR TEXAS RULE OF CIVIL PROCEDURE 166a (on file with the *St. Mary's Law Journal*) (proposing that a party could not file a no-evidence motion prior to an applicable discovery period or a period set by the court; requiring the moving party to file a "certificate that [he] has reviewed the discovery and that, in the attorney's opinion the discovery reveals no evidence to support the specified elements;" providing sanctions for frivolous no-evidence motions; allowing the non-movant to defeat a no-evidence motion with "discovery product or other material that can be reduced to summary judgment evidence"); Dissenting Opinion on Final Approval of Revisions to Texas Rule of Civil Procedure 166a(i), 948–49 S.W.2d (Tex. Cases) XL, XLI (Sept. 9, 1997) (Baker, J., dissenting) [hereinafter *Baker's Dissent*] (expressing his concern "about why the court continues to use the Supreme Court Advisory Committee with the resultant expenditures of time, efforts and money by its own appointed members, when all recent indications suggest that the court prefers to write its own rules without outside assistance").

22. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (opining that the no-evidence motion further shifts the balance of power in a "legal system [that] is badly skewed in favor of defendants"); Joseph Calve, *TexLex; Wow!*, TEX. LAW., Aug. 25, 1997, at 3 (describing a letter sent to the supreme court by the president of Texas Trial Lawyers Association which states that the court in revising Rule 166a, "has swung so far to one side's interest that there is no fair middle remaining"); Janet Elliot, *Toxic Tort Revolution: Harbinger of Prior Proof?*, TEX. LAW., Aug. 4, 1997, at 1 (relating Joseph D. Jamail's comment that the new summary judgment rule "has the very real potential of becoming a draconian railroad device").

This Comment analyzes the Texas Rule of Civil Procedure 166a(i) no-evidence motion and discusses its likely application in Texas courts.[23] Part II reviews summary judgment practice in federal and Texas state courts in order to determine the likely construction of the new rule. Part III discusses Rule 166a(i) and explores the role of litigation reform in shaping the no-evidence motion. This part also addresses the procedural shortcomings of the new rule and compares Rule 166a(i) with federal summary judgment practice. Part IV assesses whether Rule 166a(i) violates the Texas Constitution by denying citizens the right to trial by jury. Part V investigates whether the no-evidence motion will achieve the objective of increasing judicial expedition and dispatch. Part VI argues that the Texas Supreme Court should either reconsider the advisory committee's recommendations or consider another proposed approach to prevent frivolous no-evidence motion filings and clarify standards for lower courts. Finally, Part VII concludes that revision of paragraph (i) of Rule 166a should include sanctions for filing a frivolous motion and a definite time period for filing a no-evidence motion, allowing summary judgments to further the objective of removing patently unmeritorious claims while preserving the established role of jury trials in Texas.

II. CONSTRUCTION OF THE NO-EVIDENCE MOTION

A. *Purpose of Summary Judgment*

In 1989, the Texas Supreme Court indicated that summary judgments in Texas and federal courts are founded upon different assumptions.[24] While the federal system is concerned with securing "the just, speedy and inexpensive determination of every action,"[25] Texas designed summary

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23. While various forms of summary judgments exist under Texas Rule of Civil Procedure 166a, including litigants establishing all elements of a claim, cross-claim, counterclaim, or affirmative defense as a matter of law, this Comment focuses on the no-evidence motion in the traditional context of the defendant as the movant and the plaintiff as the non-movant. This Comment asserts that while the no-evidence motion will likely reduce litigation costs and ease court dockets by eliminating some unmeritorious cases, it may deter plaintiffs in bringing legitimate claims before a panel of their peers. *Cf. Spector's Dissent*, *supra* note 6, at xxxvi, xxxvii (arguing the new rule will increase the likelihood that meritorious cases will never reach a jury and stating, "[m]y eighteen years on the trial bench, as well as my experience on this Court, have left me convinced that truly frivolous cases are relatively rare and are readily disposed of under the existing rule."); Janet Elliot & Robert Elder Jr., *Reaching Down & Touching Up; Hyperactive Supreme Court Continues to Extend Power*, TEX. LAW., July 28, 1997, at 1 (stating the new summary judgment rule "will put trial judges in the position of being gatekeepers for juries").

24. *See* Casso v. Brand, 776 S.W.2d 551, 555–56 (Tex. 1989) (relating that Texas and federal summary judgments differ in purpose).

25. *Id.* Both the Fifth Circuit and the United States Supreme Court, have commented on the purpose of the federal summary judgment in numerous instances. *See, e.g.*, Celotex

judgments to "eliminate patently unmeritorious claims and untenable defenses."[26] Moreover, unlike federal summary judgment practice, Texas has traditionally treated summary judgment as a disfavored procedural tool.[27] This distinction between the federal and state approach is rooted in Texas's long standing affinity with an individual's right to a jury trial.[28]

While the comment to Rule 166a does not express the purpose of summary judgments in Texas, the no-evidence motion indicates a new paradigm for pretrial disposition.[29] By changing summary judgment standards, the Texas Supreme Court directs its efforts toward the goals of judicial economy.[30] Thus, instead of focusing on the concern that the summary judgment rule is not "'intended to deprive litigants of their

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Corp. v. Catrett, 477 U.S. 317, 323–24 (1986) (noting that "[o]ne of the principal purposes of the summary judgment rule is to isolate claims or defenses, and . . . it should be interpreted in a way that allows it to accomplish this purpose."); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (commenting that the judge's role is to determine whether a genuine issue of fact exists for trial, and not "to weigh the evidence and determine the truth of the matter"); Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940) (noting that the purpose of summary judgment "is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is carefully to test this out, in advance of trial by inquiring and determining whether such evidence exists").

26. *Casso*, 776 S.W.2d at 556 (citing City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 n.5 (Tex. 1979)).

27. *See* JUSTICE JOHN CORNYN, TEXAS SUMMARY JUDGMENTS 3 (Elaine Carlson ed., The Rutter Group 1997) (asserting that the difference between Texas and federal summary judgment practice is that Texas has traditionally regarded the summary judgment motion as a disfavored procedure (citing *Celotex*, 477 U.S. at 327 and *Clear Creek Basin Auth.*, 589 S.W.2d at 678 n.5)). Texas courts have indicated that the summary judgment "is a harsh remedy which must be strictly construed." Garcia v. John Hancock Variable Life Ins. Co., 859 S.W.2d 427, 435 (Tex. App.—San Antonio 1993, writ denied) (citing Bryant v. Winn-Dixie Stores, Inc., 786 S.W.2d 547, 548 (Tex. App.—Fort Worth 1990, writ denied)).

28. *See Casso*, 776 S.W.2d at 557 (explaining that the summary judgment standard "eliminates patently unmeritorious cases while giving due regard for the right to a jury determination of disputed fact questions").

29. *See* JUSTICE JOHN CORNYN, TEXAS SUMMARY JUDGMENTS 3 (Elaine Carlson ed., The Rutter Group 1997) (observing that the revision to Rule 166a "marks the end to the previously disfavored status of summary judgments under the Texas Rules of Civil Procedure"); Chief Justice Thomas R. Phillips, *Texas Supreme Court Update*, 60 TEX. B.J. 858, 861 (1997) (explaining that Rule 166a was rewritten "to conform our summary judgment practice more closely to that of the federal courts and most other states"). Judge Sarah Duncan of the Supreme Court Advisory Committee expressed concern that the new rule represents a change in the foundation of the Texas judicial system by eliminating the presumption that "a plaintiff has a meritorious case unless the defendant proves otherwise." *Hearing of the Supreme Court (Texas) Advisory Comm.* 6305–06 (Nov. 22, 1996) (statement of Judge Sarah Duncan) (on file with the *St. Mary's Law Journal*).

30. *See* Swilley v. Hughes, 488 S.W.2d 64, 68 (Tex. 1972) (explaining that "'the function of summary judgment is the elimination of patently unmeritorious claims or untenable defense'") (quoting Gulbenkian v. Pennsylvania, 151 Tex. 412, 415, 252 S.W.2d 929, 931 (1952).

right to a full hearing on the merits of any real issue of fact,'"[31] the court redirects the purpose of summary judgment motions to "pierc[ing the] pleading in order to ascertain the existence . . . of genuine issues of fact."[32]

B. *Litigation Reform and Rule 166a(i)*

Beginning with perceived abuses in medical malpractice during the 1970s, the Texas legislature was pressured to curb spurious litigation.[33] Tort reform legislation resurfaced in 1985 and 1986 in response to the increasing cost and decreasing availability of insurance.[34] In 1995, the Seventy-Fourth Legislature enacted several measures designed to ease lawsuit abuse in the areas of government liability, deceptive trade practices, medical malpractice, proportionate liability, punitive damages, and venue.[35] According to tort reform advocates, these statutes were

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31. *Gulbenkian*, 151 Tex. at 415, 252 S.W.2d at 931 (quoting Kaufman v. Blackman, 239 S.W.2d 422, 428 (Tex. Civ. App.—Dallas 1951, writ ref'd n.r.e.)).

32. Jacobson v. National Western Life Ins. Co., 403 S.W.2d 528, 531 (Tex. Civ. App.—Houston 1966, no writ). Another articulation of the function of summary judgments includes the narrowing of relevant issues for trial. *See Gulbenkian*, 151 Tex. at 416, 252 S.W.2d at 931 (describing the purpose of the summary judgment as identifying triable issues of fact and eliminating cases where no issues of fact are present); Traylor v. Unitedbank Orange, 675 S.W.2d 802, 804 (Tex. App.—Beaumont 1984, writ ref'd n.r.e.) (explaining that summary judgments are "used to pierce the pleadings and determine the existence of any triable issues of fact").

33. *See* David A. Kramer, *Issues and Ramifications of Texas Tort Reform*, 18 ST. MARY'S L.J. 713, 714 (1987) (noting that when medical liability insurance rates increased because of costly medical malpractice claims, "[c]oncerned groups pressured state legislatures to pass radical revisions of the tort liability system as it related to medical malpractice claims.").

34. *See* Joseph Sanders & Craig Joyce, *"Off to the Races": The 1980s Tort Crisis and Law Reform Process*, 27 HOUS. L. REV. 207, 212–13 (1990) (noting that legislators enacted several tort reform statutes during the 1980s to offset "skyrocketing" insurance rates).

35. *See* DAVID F. BRAGG & MICHAEL CURRY, DTPA FORMS & PRACTICE GUIDE, SPECIAL LEGISLATIVE SUPP. i (1995) (discussing amendments to the Deceptive Trade Practices Act which limit the "type and amount of damages a jury may award"); James Cahoy, *Tort Reform Legislation Since 1994*, W. LEGAL NEWS, Dec. 6, 1996, at 33, 36 (discussing the tort reform legislation passed in 1995), *available in* 1996 WL 69299. Commentators note that resurgence in the tort reform movement is attributable to a conservative executive and legislative branch in Texas, as well as a nationwide conservative movement. *See* DAVID F. BRAGG & MICHAEL CURRY, DTPA FORMS & PRACTICE GUIDE, SPECIAL LEGISLATIVE SUPP. i (1995) (stating that "[a] combination of factors, including the election of a Republican governor, a more conservative Texas Senate, and a more conservative approach to government nationwide, all contributed to an atmosphere that was conducive to the consideration of tort reform legislation during the 1995 session."); Timothy D. Howell, *So Long "Sweetheart"*—State Farm Fire & Casualty Co. v. Gandy *Swings the Pendulum Further to the Right As the Latest in a Line of Setbacks for Texas Plaintiffs*, 29 ST. MARY'S L.J. 47, 58 (1997) (noting that the tort reform movement and the drastic swinging of the pendu-

necessary to instill fairness and common sense in the Texas judicial system.[36]

Revising Texas Rule of Civil Procedure 166a(i) to include a no-evidence motion represents a further manifestation of the tort reform movement in Texas.[37] Reformers sought to relax the movant's burden in a summary judgment to allow greater utilization of what has been characterized as a futile motion.[38] In 1996, for instance, fewer than one percent

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lum toward defendants in Texas are a result of political conservatism and "negative publicity generated by huge judgments in high profile cases"). Walter Borges, director of the Court Watch program for Texas Citizen Action, articulated the influence that resurgent tort reform efforts have had on litigation in Texas, noting that "[d]ecisions in the court have gutted the Deceptive Trade Practices Act, the most important state consumer law statute[,] limited the ability of Texas consumers to sue doctors and lawyers for malpractice[,] and repeatedly overruled juries on whim to ambiguously redefine what constitutes evidence." Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at B9. The move to counter the litigation explosion is likewise manifested in the federal courts. *See* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 96–97 (1988) (footnotes omitted) (explaining the effect litigation reform has had on federal procedure including: the "adoption of alternative dispute resolution methods, tougher pleading standards, sterner and more readily available sanctions for discovery abuse, [and] more comprehensive pretrial management of cases").

36. *See* Paul Howell, *Texas Tort Reform's Success Visible in Auto Insurance Rates*, DALLAS MORNING NEWS, Nov. 11, 1997, at 19A (discussing the benefits of tort reform legislation).

37. *See* Janet Elliot, *A Matter of Judgment*, TEX. LAW., Sept. 8, 1997, at 1, 14 (noting that "revision of the summary judgment rule was one of the items on the agenda of Texans for Lawsuit Reform"); *cf.* Michael Totty, *Galveston Democrat at Eye of Tort-Reform Storm*, WALL ST. J., Apr. 23, 1997, at T1 (explaining that the House Civil Practices Committee passed a bill, under pressure from Texans for Lawsuit Reform, which would have permitted more liberalized use of the summary judgment). Litigation reform has likewise been the impetus for more liberalized summary judgment standards across the nation. *See* Steven P. Garmisa, *New Summary Judgment Rule Aimed at Saving Time*, CHI. DAILY LAW BULL., Jan. 26, 1996, at 5 (noting that the New Jersey Supreme Court adopted *Celotex* to counter "what is widely perceived as a time of great increase in litigation and one in which many meritless cases are filed, vastly increasing the dockets"), *available in* Westlaw, CHIDLB Database.

38. Statistics show that summary judgment motions are rarely granted in Texas. *See* 68 TEX. JUD. COUNCIL TEX. JUD. SYS. ANN. REP. 189 (1996) (showing that of 470,210 total dispositions, 3,699 were summary judgments in 1996); 67 TEX. JUD. COUNCIL TEX. JUD. SYS. ANN. REP. 187 (1995) (reporting that out of 442,008 cases disposed in 1995, 5,135 were by summary judgment); 66 TEX. JUD. COUNCIL TEX. JUD. SYS. ANN. REP. 177 (1994) (noting that 3,827 of the 438,727 total dispositions for 1994 were summary judgments); 65 TEX. JUD. COUNCIL TEX. JUD. SYS. ANN. REP. 181 (1993) (relating that out of 452,103 cases disposed in 1993, 4,063 were by summary judgment); 64 TEX. JUD. COUNCIL TEX. JUD. SYS. ANN. REP. 173 (1992) (showing that out of 463,518 cases disposed in 1992, 5,210 were by summary judgment); 63 TEX. JUD. COUNCIL TEX. JUD. SYS. ANN. REP. 167 (1991) (detailing that of 454,010 dispositions in 1991, 5,062 were summary judgments); *see also* Dean M. Swanda, *Summary Judgment Practice*, 46 BAYLOR L. REV. 721, 721 (1994) (explaining that

of all cases in Texas were disposed of by summary judgment.[39] Furthermore, even when trial courts have granted summary judgments, appellate courts have overturned a majority of the decisions.[40]

Responding to the failure of Rule 166a to relieve court dockets of unmeritorious cases, reformers pressured Texas legislators to fortify the procedural device by requiring the party with the burden of proof to demonstrate a genuine issue for trial.[41] After receiving notice of the legislature's intent to amend the summary judgment rule, the supreme court amended Rule 166a to include the no-evidence motion,[42] disregarding the recommended version drafted by its advisory committee.

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while attorneys file many motions for summary judgment, trial courts deny many of them). A survey conducted between 1972 and 1977 found that fewer than 2% of civil cases were disposed of by summary judgment in Texas during those years. *See* Evelyn V. Keyes, *Summary Judgment Practice in Texas: A Guide to Reform*, 57 TEX. BAR J. 1170, 1170 (1994) (stating that summary judgments accounted for less than 2% of cases disposed in the 6 years preceding 1977); Robert L. Pittsford & James W. Russell III, Comment, *Summary Judgment in Texas: A Selective Survey*, 14 HOUS. L. REV. 854, 854 (1977) (outlining summary judgment statistics); *see also* Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 619 (1988) (noting that Texas courts have granted summary judgments with caution and given the litigant the benefit of the doubt "when there is the slightest doubt as to the facts").

39. *See* 68 TEX. JUD. COUNCIL TEX. JUD. SYS. ANN. REP. 189 (1996) (indicating that in 1996, out of 470,210 cases disposed in Texas district courts, 3,699 were disposed by summary judgment).

40. *See* Patrick K. Sheehan, *Summary Judgment: Let the Movant Beware*, 8 ST. MARY'S L.J. 253, 254 (1976) (explaining that between 1968 and 1976, 70% of summary judgments which had been granted were reversed on appeal); Dean M. Swanda, *Summary Judgment Practice*, 46 BAYLOR L. REV. 721, 721 (1994) (noting that of those summary judgments granted at the trial court level, "many fail to withstand appellate review"); Noel M.B. Hensley, *Ringing out the Old Rules*, TEX. LAW., Dec. 15, 1997, at 25 (discussing that "Texas has historically reported a notoriously high rate of reversals for summary judgments").

41. *See* Tex. H.B. 95, 75th Leg., R.S. (1997) (requiring the party with the burden of proof at trial to raise an issue of fact in a summary judgment); Tex. S.B. 648, 75th Leg., R.S. (1997) (requiring the movant in a no-evidence motion to "respond with evidence sufficient to entitle the claimant to submission of the claim or issue to the jury"); Janet Elliot, *A Matter of Judgment*, TEX. LAW., Sept. 8, 1997, at 1 (noting that "tort reform advocates had been seeking the change [in summary judgment procedure] in pending legislation filed by [Representative Joe] Nixon"); Michael Totty, *Galveston Democrat at Eye of Tort-Reform Storm*, WALL ST. J., Apr. 23, 1997, at T1 (explaining that the proposed summary judgment standard was a measure pushed through the Texas legislature with the support of Texans for Lawsuit Abuse but rendered unnecessary by the supreme court's adoption of the new rule).

42. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6227–29 (Nov. 22, 1996) (statement of Judge Nathan Hecht) (on file with the *St. Mary's Law Journal*) (reporting Judge Hecht's concern that the Texas Supreme Court's rules not be ceded to the legislature in creating a new summary judgment rule); Chief Justice Thomas R. Phillips, *Texas*

Supreme Court Update, 60 TEX B.J. 858, 861 (1997) (asserting that "immediate action was necessary because the legislature was seriously contemplating the adoption of its own summary judgment standard"); Janet Elliot, *A Matter of Judgment*, TEX. LAW., Sept. 8, 1997, at 1 (explaining that prior to the 1997 legislative session, "the court noticed revision of the summary judgment rule was one of the items on the agenda of Texas For Lawsuit Reform" and reporting that Representative Nixon agreed to "table" his bill after Justices John Cornyn, Priscilla Owen, and Nathan Hechts "showed Nixon a proposed rewrite of Texas' summary judgment rule"). Judge Hecht opined that not only would the summary judgment bill likely pass in the legislature, but the governor would probably sign it. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6228 (Nov. 22, 1996) (statement of Justice Nathan Hecht) (on file with the *St. Mary's Law Journal*). Obviously, no constitutional crisis emerged as a result of the recently adopted no-evidence rule. Nonetheless, it is important to note that the doctrine of separation of powers prevents a branch of government from infringing on the authority of another branch. *See* TEX. CONST. art. II, § 1 (providing that the three branches are to be distinct and separate of one another). Article two of the Texas Constitution provides: "The powers of the Government of the State of Texas shall be divided into three distinct departments, and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted." TEX. CONST. art II, § 1. Hence, separation of powers precludes the legislature from "unduly interfer[ing] with judicial functions under the guise of establishing rules of court." Armadillo Bail Bonds v. State, 802 S.W.2d 237, 241 (Tex. Crim. App. 1990) (en banc) (holding that Article 22.16(c)(2) of the Texas Code of Criminal Procedure violated the separation of powers doctrine encompassed in Article two, Section one of the Texas Constitution). The Texas Supreme Court has both constitutional and statutory authority to create procedural rules that do not abridge the substantive rights of parties. *See* TEX. CONST. art. V, § 31(b) (providing that the "[c]ourt shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts"); TEX. GOV'T CODE ANN. § 22.004 (a) (Vernon 1988) (explaining that the court has "full rulemaking power in the practice and procedure in civil actions, except that its rules may not abridge, enlarge, or modify the substantive rights of a litigant"); J. Patrick Hazel, *New Summary Judgment Rule: A Critique*, 16 ADVOC. 28, 32 (State Bar Litig. Sec. Rep., Austin, Tex.), Spring 1997 (footnote omitted) (acknowledging that "the [Texas] Supreme Court has the constitutional power to make rules of civil procedure, and the legislature further gave them power to repeal any procedural statutes"). Section 22.004 of the Texas Government Code provides that rules adopted by the court override any conflicting laws. *See* TEX. GOV'T CODE ANN. § 22.004(c) (Vernon 1988) (stating that a rule prepared by the court "repeals all conflicting laws and parts of laws governing practice and procedure"). However, the Code also provides that rules and amended rules of procedure remain in "effect unless and until disapproved by the legislature." TEX. GOV'T CODE ANN. § 22.004(b) (Vernon Supp. 1998). Further, the Texas Constitution specifically allows judicial rule making subject to the laws of the state. *See* TEX. CONST. art. V., § 31(b) (providing that "[t]he [Texas] Supreme Court shall promulgate rules of civil procedure for all courts not inconsistent with the laws of the state as may be necessary for the efficient and uniform administration of justice in the various courts."). Thus, while the rule-making function has been left largely to the supreme court through statute and the constitution, the legislature has ultimate authority over the rules. *See* Few v. Charter Oak Fire Ins. Co., 463 S.W.2d 424, 425 (Tex. 1971) (holding that "when a rule of the court conflicts with a legislative enactment, the rule must yield"); McLendon v. McLendon, 847 S.W.2d 601, 607 (Tex. App.—Dallas 1993, writ de-

nied) (discussing that "where a rule of procedure conflicts with a statutory enactment, the statute prevails"); Jack Pope & Steve McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 11 (1978) (noting that "[i]t is well established that when a rule of civil procedure promulgated by the Texas Supreme Court conflicts with a legislative enactment, the court promulgated rule must yield to the legislative enactment."); Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 142 (1988) (footnote omitted) (noting that "although the Texas Supreme Court initiates the rule-making process, the legislature has ultimate approval"). Implicit in the legislature's delegation of the rule-making power to the supreme court is its plenary power over the rules. *See* Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 161–62 (1988) (explaining that although the legislature, through statute and constitutional amendment, intended to strengthen the supreme court's power to create rules of procedure, the legislature did not wish to abandon "its role in the rule-making process as ultimate arbiter").

Legislative influence on judicial rule-making appears to be a violation of separation of powers. *See* Dean Wigmore, *All Legislative Rules for Judicial Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 276 (1928) (contending that rule-making is the exclusive duty of the judiciary). At least nine states have enacted constitutional provisions allocating exclusive rule-making authority to the judiciary, and the Supreme Court of New Mexico did so pursuant to the doctrine of separation of powers. *See* Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 162–63 n.116 (1988) (discussing the argument that sharing the rule-making power between the legislature and the judiciary is violative of the doctrine of separation of powers (citing Ammerman v. Hubard Broadcasting, Inc., 551 P.2d 1354, 1359 (N.M. 1976))). However, because procedural and substantive rights are interrelated, rule-making has necessitated cooperation between the two branches. *See* Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal Rule 23*, 39 ARIZ. L. REV. 461, 461–62 (1997) (footnotes omitted) (relating that "[t]he line between substance and procedure is notoriously shadowy; many legitimate rules of court have substantive consequences, just as much substantive law has procedural implications."); Jack Pope & Steve McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 8 (1978) (opining that "[t]he entanglement of procedure and substance demands that the legislature and the courts reach a practical accommodation in making rules of procedure."). One argument in support of the legislature and judiciary sharing the judicial rule-making responsibility is that the judiciary "can utilize its experience and ability to quickly adapt to the changing needs of the courts and bar," while the legislature "can effectuate policy decisions by its power to disapprove rules that encroach on the legislative function." Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 185 (1988). Although a constitutional crisis might arise if the legislature and the judiciary created conflicting laws and rules governing civil procedure, the two branches have cooperated in the rule making process and averted any such conflict. *See* Bruce L. Dean, Comment, *Rule-Making in Texas: Clarifying the Judiciary's Power to Promulgate Rules of Civil Procedure*, 20 ST. MARY'S L.J. 139, 185 (1988) (explaining that because the judiciary and legislature have compromised in their sharing of the rule-making power, the two branches have been able to "work together in resolving difficulties instead of forcing a constitutional confrontation"); *cf.* Jack Pope & Steve McConnico, *Texas Civil Procedure Rule Making*, 30 BAYLOR L. REV. 5, 9 (1978) (describing a

By promulgating Rule 166a(i), The Texas Supreme Court seeks to further the expeditious administration of justice at the least expense possible.[43] However, the enactment of this rule arguably shifts the balance of power in Texas to defendants in summary judgment motions and stymies the objective of "just, fair, equitable and impartial adjudication of the rights of litigants"[44] in the process. Consequently, the no-evidence motion has been criticized for its failure to: (1) reconcile the requirements for summary judgment evidence with federal standards in light of the shift of burden to the non-movant and (2) adopt the recommendations of the Supreme Court Advisory Committee, including a bright line test delineating when a no-evidence motion may be filed and sanctions for frivolous no-evidence motion filing may be imposed.

The questions and concerns surrounding application of the no-evidence motion will inevitably be answered by courts in the future. Until that time, however, an examination of federal summary judgment jurisprudence may shed light on the manner in which Texas courts will construe the new rule.[45]

"situation in which the court overrules a prior statute by rule, then the legislature readopts the statute, after which the court readopts the rule, leading to an 'intolerable' conflict").

43. *See* TEX. R. CIV. P. 1 (outlining the objectives of the Texas Rules of Civil Procedure). Rule 1 provides:

> The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

TEX. R. CIV. P. 1; *see also* Gonzalez v. United States Fidelity & Guar. Co., 274 S.W.2d 537, 540 (Tex. 1955) (explaining that Rule 1 requires the rules to be construed with "the objective that a maximum number of cases be decided on grounds of 'substantive law.' But it emphasizes equally the further purpose of 'expedition and dispatch,' which in turn requires that rules conducive to orderly and expeditious litigation shall be respected."); Scott A. Brister, *Lonesome Docket: Using the Texas Rules to Shorten Trials and Delay*, 46 BAYLOR L. REV. 525, 530 (1994) (noting that "Rule 1 'emphasizes equally' the goals of justice and dispatch"); Michol O'Connor, *How You Can Change a Texas Rule of Civil Procedure*, 41 TEX. B.J. 1073, 1075 (1978) (explaining that "[t]he ultimate criterion for adoption of a rule change is whether the change will produce a better administration of justice.").

44. TEX. R. CIV. P. 1; *see* Janet Elliot, *A Matter of Judgment*, TEX. LAW., Sept. 8, 1997, at 1 (discussing the potential unfairness of the new rule to plaintiffs). *But see* Noel M.B. Hensley, *Ringing out the Old Rules*, TEX. LAW., Dec. 15, 1997, at 25 (opining that the no-evidence motion "should promote the overall objective of the Texas Civil Procedural rules . . . to secure a just adjudication of litigants' rights with as great expedition and dispatch . . . as may be practicable").

45. *See* RICHARD E. FLINT, TEXAS CIVIL PROCEDURE, CASES AND MATERIALS 336–41 (1997) (on file with the *St. Mary's Law Journal*) (examining federal summary judgment practice in the absence of case law interpreting Rule 166a(i)). While the burden shift under the no-evidence motion clearly represents a movement toward federal summary judgment procedure, neither the rule nor the comment to the rule indicate that Rule

C. *Federal Summary Judgment Practice*

1. *Celotex Corp. v. Catrett*

The United States Supreme Court decided three cases in 1986, commonly referred to as the Trilogy.[46] These cases established the current summary judgment procedure in the federal courts.[47] In *Celotex Corp. v.*

166a(i) is to be construed as the *Celotex* trilogy. *See* TEX. R. CIV. P. 166a(i) (describing the no-evidence motion without making reference to *Celotex*). Although the advisory committee's recommendations were not adopted by the supreme court, some members of the committee argued against adopting the *Celotex* rule, favoring instead a compromise. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6283–84 (Nov. 22, 1996) (on file with the *St. Mary's Law Journal*) (relating members' discussion that *Celotex* not be adopted in Rule 166a(i)). In the end, however, Rule 166a(i) moves Texas closer to federal summary judgment standards. *See* Chief Justice Thomas R. Phillips, *Texas Supreme Court Update*, 60 TEX. B.J. 858, 861 (1997) (explaining that the no-evidence motion likens Texas to federal summary judgment jurisprudence); *see also* JUSTICE JOHN CORNYN, TEXAS SUMMARY JUDGMENTS 5 (Elaine Carlson ed., The Rutter Group 1997) (relating that Rule 166a(i) "appears to adopt the *Celotex* rule").

46. *See* Allen K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of the Facts in Constitutional Tort Law*, 47 AM. U. L. REV. 1, 58 (1997) (noting that *Celotex*, *Matsushita*, and *Anderson* comprise the trilogy of cases influencing federal summary judgment); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1400 (1998) (referring to *Celotex*, *Matsushita*, and *Anderson* as the trilogy of Supreme Court decisions clarifying the summary judgment standard required in federal summary judgment); Kathryn R. Urbonya, *Interlocutory Appeals from Orders Denying Qualified Immunity: Determining the Proper Scope of Appellate Jurisdiction*, 55 WASH. & LEE L. REV. 3, 14 (1998) (discussing how federal summary judgment was changed by a trilogy of cases—*Matsushita*, *Anderson*, and *Celotex*).

47. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (stating that "[t]he moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof."); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) (relating that "summary judgment will not lie if the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party"); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986) (holding that once the moving party has carried its initial burden, the non-movant must demonstrate a genuine issue of material fact exists). In *Matsushita*, the Court explained that a genuine issue of material fact involves a showing of more than "some metaphysical doubt as to the material facts." *Id.* Unlike the amendment process the Texas Supreme Court used to change the rules of civil procedure, federal courts transposed the burden from the movant to the non-movant through common law. *See Celotex*, 477 U.S. at 322 (holding that a summary judgment motion should be granted "after adequate time for discovery . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"); Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 AM. J. TRIAL ADVOC. 433, 440 (1987) (explaining that Rule 56 does not specify which party has the burden of proof in a motion for summary judgment, and that the burden has been defined by case law).

Catrett,[48] the watershed case of modern federal summary judgment procedure, the Supreme Court clarified the moving and responding parties' burdens in a motion for summary judgment. Specifically, the *Celotex* Court held that the movant bears the initial burden of identifying the portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which exhibit the lack of a genuine issue of fact.[49] The *Celotex* Court did not elaborate on the specific requirements a movant must proffer to reach his or her initial burden;[50] however, the movant is not obligated to provide any evidence negating the opponent's case once the burden is satisfied.[51] Instead, the burden shifts to the non-movant to produce evidence to withstand summary judgment.[52] Consequently, once the movant identifies "the absence of a genuine issue of material fact," the non-movant must "go beyond the pleadings and by . . . affidavits or . . . 'depositions, answers to interrogatories, and admissions on file'" provide facts raising a "genuine issue."[53]

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48. 477 U.S. 317 (1986). In *Celotex*, the plaintiff, on behalf of her deceased husband, brought a wrongful death action against 15 different asbestos manufacturers and distributors, claiming her husband's death resulted from exposure to their products. *See Celotex*, 477 U.S. at 319. A district court granted summary judgment after the case had been on file for nearly two years because the plaintiffs failed to show exposure to the defendants' products. *See id.* The District of Columbia Circuit Court of Appeals reversed on the ground that federal summary judgment procedure places the burden on the movant to show the nonexistence of a genuine issue of material fact. *See id.* at 319, 321–22. The Supreme Court, in a 5–4 opinion, reversed and remanded, holding that summary judgment is proper "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* at 322.

49. *Id.* at 323.

50. *See id.* (describing, in general language, the movant's burden as "informing the . . . court of the basis for its motion and identifying" the portions of the non-movant's claim wanting in evidentiary support). Justice White, in his concurring opinion, defined the movant's preliminary burden in the negative, stating: "The movant must discharge the burden the rule places on him: It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." *Id.* at 328 (White, J., concurring). The Fifth Circuit has taken a similar approach to defining the movant's initial burden. *See* Russ v. International Paper Co., 943 F.2d 589, 592–93 (5th Cir. 1991) (stating that it is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion).

51. *See* DAVID HITTNER ET AL., FIFTH CIRCUIT FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 14:129 (1996) (noting that the movant has no obligation to negate the opponent's case).

52. *See Celotex*, 477 U.S. at 322–23 (holding that after an adequate discovery period, if a non-movant fails to provide evidence supporting the existence of an essential element of its case, upon which it will carry the burden of proof during trial, summary judgment is appropriate).

53. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (quoting FED. R. CIV. P. 56(e)).

2. *Matsushita Electric Industrial Corp. v. Zenith Radio*

In *Matsushita Electric Industrial Corp. v. Zenith Radio Corp.*,[54] the Supreme Court revisited the non-movant's burden in a summary judgment proceeding. As before, the court reasoned that once the movant identified an evidentiary insufficiency, the non-movant was required to raise a genuine issue of material fact in a motion for summary judgment.[55] In a 5-4 decision upholding the district court's order granting summary judgment in an anti-trust case, the Court further articulated the rule that a non-movant "must do more than simply show a metaphysical doubt as to the material facts."[56] Instead, the non-movant "must come forward with 'specific facts showing that there is a genuine issue for trial.'"[57] Furthermore, a party making an inherently implausible claim is required to meet an even higher evidentiary threshold once the movant has satisfied his initial burden.[58] Finally, after considering the record as a whole, if a rational fact finder could not possibly find for the non-movant, then "there is no genuine issue for trial."[59]

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54. 475 U.S. 574 (1986). *Matsushita* involved a complex anti-trust suit brought against Japanese television manufacturers. *See Matsushita*, 475 U.S. at 577–78 (explaining that American television manufacturers sued 21 Japanese owned corporations for illegally conspiring "to drive American firms from the CEP market"). A district court granted summary judgment for the defendants because the plaintiffs failed to raise a genuine issue of material fact that the defendants engaged in a conspiracy which caused injury. *See id.* at 578–79 (failing to find a genuine issue of fact as to a conspiracy). The Third Circuit Court of Appeals reversed based on the belief that a rational factfinder could have found a conspiracy. *See id.* at 580–81 (noting that the court of appeals relied upon inferences to find a genuine issue of material fact). In reversing the court of appeals, the Supreme Court found that the plaintiffs failed to create a genuine issue of fact because there existed "no rational motive to conspire." *Id.* at 596–98.

55. *See id.* at 586–87 (noting that a genuine issue is present where a rational trier of fact could find for the non-movant).

56. *Id.* at 586 (citing Deluca v. Atlantic Refin. Co., 176 F.2d 421, 423 (9th Cir. 1949)).

57. *Id.* at 587 (citing Fed. Rule Civ. P. 56(e) (emphasis added)); *see* Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 468–69 (1983) (analyzing the Court's holding that inferences made by a non-movant must be "reasonable").

58. *See Matsushita Elec.*, 475 U.S. at 587 (stating that "if the factual context renders respondents' claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary"); William M. Lafferty & W. Leighton Lord III, *Towards a Relaxed Summary Judgment Standard for the Delaware Court of Chancery: A New Weapon Against "Strike" Suits*, 15 DEL. J. CORP. 921, 938 (1990) (explaining that "if the factual context renders a claim implausible, then the non-movant must present more persuasive evidence").

59. Matsushita Industrial Corp. v. Zenith Radio, 475 U.S. 574, 587 (1986).

3. *Anderson v. Liberty Lobby*

Shortly after the *Zenith* decision, the Court expanded its summary judgment jurisprudence in *Anderson v. Liberty Lobby, Inc.*[60] In *Anderson*, the Court compared summary judgments to directed verdicts and noted that while the two procedural devices are brought at different stages of litigation, both involve an examination as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law."[61] The Court explained that judges should examine summary judgment evidence "through the prism of the substantive evidentiary burden."[62] In other words, courts should analyze evidence in a motion for summary judgment using the proper standard of proof that would apply at trial.[63] Under the facts in *Anderson,* the Court concluded that the proper approach to a summary judgment proceeding was whether a rea-

60. 477 U.S. 242 (1986). In *Anderson*, a not-for-profit corporation brought suit against a magazine for libel based on the magazine's portrayal of the corporation as a neo-nazi organization. *See Anderson*, 477 U.S. at 244, 245. A trial court granted summary judgment for the magazine after finding that the plaintiffs failed to show actual malice. *See id.* at 246. The Court of Appeals for the District of Columbia reversed, asserting that actual malice need not be proved by clear and convincing evidence at the summary judgment stage. *See id.* at 244, 247 (explaining that summary judgment was improperly granted with respect to nine of the statements because actual malice could be reasonably inferred). In vacating and remanding the decision of the Court of Appeals, the Supreme Court held that the clear and convincing standard should be applied in a libel action when determining whether the movant has raised a genuine issue of fact as to malice for summary judgment. *See id.* at 255–57 (noting that courts should utilize substantive evidentiary standards in evaluating summary judgment).

61. *Id.* at 251–52.

62. *Id.* at 254.

63. *See* DAVID HITTNER ET AL., FIFTH CIRCUIT FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 14:127 (1996) (discussing that "[t]he moving party's evidence is judged by the same standard of proof applicable at trial. If a higher-than-normal standard of proof would apply at trial, it also applies on a motion for summary judgment."). The Supreme Court in *Anderson* expressly negated the notion that judges are required to weigh evidence, thereby usurping the function of the jury, in a motion for summary judgment. *See Anderson*, 477 U.S. at 249 (indicating that "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). Thus, "[i]f the evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted." *Id.* at 249–50. Ultimately, to overcome a motion for summary judgment in federal court, the evidence must be such "that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 249. A determination as to whether a party raised a genuine issue of material fact invariably seems to involve at least some weighing of evidence by judges. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgments*, 100 YALE L.J. 73, 85 (1990) (explaining Justice Brennan's concern that determining a genuine issue of material fact "could surely be understood as an invitation—if not an instruction—to trial courts to assess and weigh evidence as much as a juror would").

sonable jury could find actual malice under the clear and convincing standard.[64]

III. Texas Rule of Civil Procedure 166a(i)

By establishing the movant's burden in obtaining summary judgment in federal court, the Trilogy provided persuasive authority for the addition of the no-evidence motion to Texas summary judgment practice. Indeed, most commentators agree that Rule 166a(i) was drafted to mirror federal summary judgment practice.[65] However, there was much debate on how the new rule should be structured. In fact, the Texas Supreme Court attached a lengthy comment explaining Rule 166a(i) in which two justices on the court wrote dissenting opinions to the rule.[66]

While rules of civil procedure are often accompanied by notes and comments, the comment to rule 166a(i) is the first to define its purpose as "inform[ing] the construction and application of the rule."[67] The comment also reminds practitioners that the no-evidence motion does not apply to paragraphs (a) or (b) of Rule 166a, which require "the movant [to] prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law."[68] In other words, the no-evidence motion does not affect typical summary judgment motions in which the movant attempts to establish "all essential elements of his cause of action or defense as a matter of law."[69] The no-evidence motion applies only when the party who would have the burden of proof at trial

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64. *See Anderson*, 477 U.S. at 255–56 (holding that in an action for libel, the relevant inquiry at the summary judgment stage was whether the plaintiff raised a genuine issue for trial applying the clear-and-convincing standard).

65. *See* Chief Justice Thomas R. Phillips, *Supreme Court Update*, 60 Tex. Bar J. 858, 861 (1997) (noting that Rule 166a(i) brings Texas closer to federal summary judgment practice); *see also* Justice John Cornyn, Texas Summary Judgments 5 (Elaine Carlson ed., The Rutter Group 1997) (commenting that Rule 166a(i) "appears to adopt the *Celotex* rule"); Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, San Antonio Express-News, May 22, 1997, at 9B (discussing that the burden of proof under Texas Rule 166a(i) is the same as federal summary judgment jurisprudence); Noel M.B. Hensley, *Ringing out the Old Rules*, Tex. Law., Dec. 15, 1997, at 25 (reporting that "[t]he federal standard was . . . used as a reference point for those involved in creating the new Texas rule.").

66. *See Spector's Dissent*, *supra* note 6, at xxxvi, xxxvi; *Baker's Dissent*, *supra* note 21, at xxxvi, xxxviii.

67. Tex. R. Civ. P. 166a(i) cmt. to 1997 change.

68. *Id.*

69. Richard E. Flint, Texas Civil Procedure, Cases and Materials 297 (1997) (on file with the *St. Mary's Law Journal*).

on a particular issue has no evidence to raise a triable fact issue.[70] Finally, when the rule and comment are silent, previous "existing rules continue to govern the general requirements of summary judgment practice."[71]

A. *Reconciling Rule 166a(i) with Federal Summary Judgment Practice*

1. Burdens

By adopting the federal burden of proof standard, Texas Rule of Civil Procedure 166a(i) raises more questions than it answers. Under the revised rule, a movant need only "state the elements as to which there is no initial evidence" in order to discharge its initial burden.[72] Although the comment to the rule indicates that no conclusory motions will be permitted, it remains unclear how specific and detailed no-evidence motions must be.[73]

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70. *See* JUSTICE JOHN CORNYN, TEXAS SUMMARY JUDGMENTS 4 (Elaine Carlson ed., The Rutter Group 1997).

71. TEX. R. CIV. P. 166a cmt. to 1997 change.

72. TEX. R. CIV. P. 166a(i).

73. *See* TEX. R. CIV. P. 166a cmt. to 1997 change (providing that "paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case"); Steven L. Martin, *Developments in the Substantive Law*, TEX. LAW., (1997 Year In Review), Dec. 15, 1997, at 18 (observing that inspite of the comment's warning that conclusory motions will not be tolerated, "[o]ne attorney recently received three such motions, all of them one paragraph, all alleging no evidence of any cause of action").

Federal practice may assist the Texas movant in determining the requirements of the initial burden. *See* Russ v. International Paper Co., 943 F.2d 589, 591–92 (5th Cir. 1991) (explaining that the non-movant is required to produce evidence only after the movant satisfies the initial burden of "demonstrating that there is no factual issues warranting trial"). In *Russ*, the United States Court of Appeals for the Fifth Circuit explained that "[s]imply filing a summary judgment motion does not immediately compel the party opposing the motion to come forward with evidence demonstrating material issues of fact as to every element." *Id.* at 591. Federal commentators have emphasized that the movant's initial burden is minimal. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 89 (1990) (explaining that "[c]ourts almost uniformly regard the movant's burden under *Celotex* to be satisfied even by a 'meager' showing, yet mandate that, even under such circumstances, the non-moving party must shoulder a heavy burden in order to survive summary judgment." (citing Pope v. Mississippi Real Estate Comm'n, 695 F. Supp. 253, 262 (N.D. Miss. 1988))). Although specifically identifying the nonexistence of evidence may seem contradictory, the movant should merely specify what element of the opposing party's claim is unsubstantiated by evidence. *See* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1356 (1998) (recommending that the movant list "the elements of the plaintiff's cause of action and then allege which of those elements lack any evidentiary support"); *see also* 7 WILLIAM V. DORSANEO, III, TEXAS LITIGATION GUIDE § 101.104(2) (Matthew Bender & Co. ed., Aug. 1997) (providing that a movant in a summary judgment motion

In addition, the amount of evidence a non-movant must produce after the movant has satisfied its initial burden is ambiguous. The comment to the rule explains that the non-movant "is not required to marshall its proof; its response need only point out evidence that raises a fact issue on the challenged elements."[74] Notwithstanding the comment, which is arguably not primary authority, non-movants may feel pressure to conduct extensive discovery to ensure they have raised a genuine issue of material fact.[75]

Adoption of the federal burden of proof standard also presents problems to plaintiffs because Texas does not have the same procedural safeguards as the federal rules.[76] Specifically, whereas defendants in federal courts must provide line-by-line denials in their answer, defendants in Texas courts may submit general denials.[77] Consequently, a defendant in federal court would be unable to bring a no-evidence motion if obli-

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should "describe with particularity the element or elements of the opponent's claim or defense on which there is no proof").

74. TEX. R. CIV. P. 166a(i) cmt. to 1997 change.

75. *See* Noel M.B. Hensley, *Ringing out the Old Rules*, TEX. LAW., Dec. 15, 1997, at 25 (observing that the rule may "impose a new impetus" for non-movants to conduct substantial up-front discovery). *But see* JUSTICE MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIALS 406 (1998) (asserting that the Texas "Supreme Court elevated the Notes and Comments to the 1997 amendment of [Texas Rule of Civil Procedure] 166a to the status of law"). Although Justice O'Connor contends the comment is law, his discussion of summary judgment evidence does not treat it accordingly. *See id.* at 408–09 (discussing that the comment to the rule merely requires the non-movant "to point out evidence that raises a fact issue," while subsequently observing that Texas non-movants "must not only learn about the existence of the evidence, [but] also must obtain the evidence in admissible form").

76. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (claiming "[t]he federal system . . . requires defendants to offer more detailed responses during discovery, and backs up the requirements with sanctions."); Janet Elliot, *Toxic Tort Revolution: Harbinger of Prior Proof?*, TEX. LAW., Aug. 4, 1997, at 1 (underscoring the danger of adopting federal summary judgment practice "without adopting the federal system's mandatory disclosure and pleading requirements that force defendants to specifically deny allegations").

77. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6291–92 (Nov. 23, 1996) (statement of Richard Orsinger) (on file with the *St. Mary's Law Journal*) (relating committee member Richard Orsinger's concern that adopting *Celotex* in Texas presents problems because "the *Celotex* rule has all the other federal rules to go along with it, like no general denial, and answers that specifically admit or deny allegations"). In Texas, defendants may file general denials under Rule 92 and are permitted to introduce evidence tending "to disprove the facts alleged in the plaintiff's petition and to rebut evidence offered by the plaintiff." W.L. Moody & Co. v. Rowland, 100 Tex. 363, 370, 99 S.W. 1112, 1115 (1907); *see* TEX. R. CIV. P. 92 (providing that a general denial shall put all matters in issue "which are not required to be denied under oath").

gated to admit a portion of a plaintiff's cause of action.[78] In Texas, however, the same defendant could file a general denial, avoid admitting an issue he knows to be true, and bring a no-evidence motion.[79] In such a situation, summary judgment might result simply because the plaintiff failed to ask the right questions.[80]

2. Summary Judgment Evidence

Adopting the federal no-evidence motion has also created problems with summary judgment evidence. In Texas, when attempting to raise a genuine issue of material fact, the non-movant may rely on depositions, interrogatories, affidavits, admissions, stipulations, authenticated and certified public records, and, in some instances, pleadings.[81] Rule 166a(f)

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78. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (explaining that federal courts require "defendants to offer more detailed responses during discovery").

79. *See* Judge David Hittner & Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, K-11 (Sept. 16, 1997) (unpublished Article presented before the Houston Bar Assoc. litigation section) (on file with the *St. Mary's Law Journal*) (explaining that in Texas, "[g]eneral denials keep the plaintiff from getting concessions concerning what is disputed and what is not.").

80. *See* Walter Borges, *High Courts: Advisory Committee Drafts Proposed Summary Judgment Change*, TEX. LAW., Dec. 2, 1996, at 2 (quoting David Beck, former president of the Texas State Bar, as stating, "[movants] shouldn't be able to file a motion if there is evidence but the respondent just didn't ask the right questions").

81. *See* TEX. R. CIV. P. 166a(i) (requiring respondent to present summary judgment evidence); Stewart v. United States Leasing Corp., 702 S.W.2d 288, 290 (Tex. App.—Houston [1st Dist.] 1985, no writ) (discussing what constitutes proper summary judgment evidence). However, the summary judgment motion *itself*, along with the response, any briefs, and extrinsic evidence are not considered proper summary judgment evidence. *See* Americana Motel, Inc. v. Johnson, 610 S.W.2d 143, 143 (Tex. 1980) (holding that sworn pleadings, denials, or requests for admissions do not constitute summary judgment evidence); Hidalgo v. Surety Sav. & Loan Ass'n, 462 S.W.2d 540, 545 (Tex. 1971) (refusing "to regard pleadings, even if sworn, as summary judgment evidence"); Dean M. Swanda, *Summary Judgment Practice*, 46 BAYLOR L. REV. 721, 725 (1994) (stating that "the motion for summary judgment, the response to a motion for summary judgment, statements in a brief and extrinsic evidence, either oral or documentary, are not proper summary judgment evidence"). Also not included as summary judgment evidence are "unsworn witness statements, expert's reports or unauthenticated documents produced in discovery." Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1361 (1998). Pleadings alone will generally not support a summary judgment motion; yet, a judicial admission within a pleading may constitute summary judgment evidence as it eliminates the need to produce evidence relating to admitted matters. *See* 7 WILLIAM V. DORSANEO, III, TEXAS LITIGATION GUIDE § 101.06(2) (Matthew Bender & Co. ed., Aug. 1997) (explaining that, with exception to judicial admissions, pleadings are generally not considered summary judgment evidence). Rule 166a(c) and Texas courts expressly hold that oral testimony may not be received in a hearing for summary judgment. *See* TEX. R. CIV. P. 166a(c) (providing that "no oral testimony shall be received at the [summary judgment]

requires affidavits in support or opposition of the summary judgment motion to "be made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein."[82] Thus, summary judgment evidence used to oppose a motion must not only raise "more than a scintilla of evidence" as to the existence of a genuine issue of material fact, but must also be in admissible form.[83] As a result, affidavits

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hearing"); Tex-Richards v. Allen, 402 S.W.2d 158, 161 (Tex. 1966) (noting that summary judgment hearings do not "authorize the taking of evidence in the usual sense," and holding that a party may supplement its proof at the hearing by "deposition or affidavit and not by the examination of witnesses in open court"). Texas courts do not consider conclusory statements in affidavits summary judgment evidence. *See* Brownlee v. Brownlee, 665 S.W.2d 111, 112 (Tex. 1984) (explaining that affidavits in summary judgments cannot recite mere legal conclusions); Evelyn V. Keyes, *Summary Judgment Practice in Texas: A Guide to Reform*, 57 TEX. B.J. 1170, 1179 (1994) (noting that "Texas summary judgment law has long held that mere conclusions in an affidavit by the respondent are insufficient to raise a fact issue precluding summary judgment"). Notwithstanding the mere conclusion rule, a summary judgment affidavit that "contains both admissible and inadmissible matters" is not necessarily void. 68 TEX. JUR. 3D *Summary Judgment* § 13 (1989).

82. TEX. R. CIV. P. 166a(f); Cuellar v. City of San Antonio, 821 S.W.2d 250, 252 (Tex. App.—San Antonio 1991, writ denied) (discussing that supporting and opposing affidavits in summary judgments "must be made on personal knowledge and set forth facts which would be admissible in evidence"). Summary judgment evidence must be presented in "a form that would be admissible in a conventional trial proceeding." Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243, 250 (1989) (citing *Hidalgo*, 462 S.W.2d at 545). While summary judgment evidence should be in admissible form, the evidence does not need to be formally offered into evidence at the summary judgment hearing. *See Tex-Richards*, 402 S.W.2d at 161 (explaining "while it is essential that depositions, admissions and affidavits be on file, either independently or as a part of the motion for summary judgment, the reply thereto, or some other properly filed instrument, it is not necessary that they be formally offered in evidence upon the summary judgment hearing").

83. *See* TEX. R. CIV. P. 166a cmt. to 1997 change (stating "the existing rules continue to govern the general requirement of summary judgment practice"). In examining summary judgment evidence, Texas courts have traditionally held that "no difference obtains between the standards for evidence that would be admissible in a summary judgment proceeding and those applicable at a regular trial." United Blood Serv. v. Longoria, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam) (citing *Hidalgo*, 462 S.W.2d at 545). The requirement that summary judgment be in admissible form will not be altered under the new rule. *See* Chief Justice Thomas R. Phillips, *Texas Supreme Court Update*, 60 TEX. B.J. 858, 862 (1997) (explaining that "[t]he type and quality of summary judgment proof has not changed."). Affidavits presented in connection with a summary judgment motion "must set forth such facts as would be admissible in evidence." 68 TEX. JUR. 3D *Summary Judgment* § 13 (1989). In preparing a no-evidence summary judgment motion, attorneys should evaluate the manner in which facts might be admitted before the court, "avoiding hearsay, conclusory testimony and interested witness testimony." Martin R. Merritt, *Texas Summary Judgment Evidence*, 53 TEX. B.J. 24, 24 (1990). Attorneys must object to any defects in the summary judgment evidence or the right to complain of the defects is waived on appeal. *See* TEX. R. CIV. P. 166a(c) (providing that "[i]ssues not expressly presented to the

used in support of summary judgment motions should be phrased so that if the testimony was relayed from the witness stand at trial, it would be deemed admissible.[84] Affidavits by interested parties only amount to summary judgment evidence if the testimonial evidence "is (1) clear, positive and direct; (2) otherwise credible; (3) free from contradictions and inconsistencies; and (4) could have been readily controverted."[85]

In contrast to Rule 166a(f), federal summary judgment procedure does not require the non-movant's evidence to be in admissible form.[86] Instead, a non-moving party in federal court need only "come forward with material that can be reduced to summary judgment evidence."[87] Because federal courts do not demand that the non-movant provide admissible evidence in a summary judgment proceeding, the Texas summary judgment evidence standard is more onerous for non-movants than its federal counterpart.[88] In practice, the Texas summary judgment evidence standard precludes non-movants from opposing no-evidence motions with unauthenticated documents or unsworn witness statements obtained dur-

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trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal."). Thus, an attorney should object to an affidavit which is not based on personal knowledge. *See id.* (relating that affidavit testimony should affirmatively show that counsel has personal knowledge of the facts).

84. *See* Crain v. Davis, 417 S.W.2d 53, 55 (Tex. 1967) (holding that an affidavit which contained mere conclusions did not satisfy the requirement of Rule 166a that affidavits set forth facts that would be admissible in trial); Brooks v. Sherry Lane Nat'l Bank, 788 S.W.2d 874, 877 (Tex. App.—Dallas 1990, no writ) (explaining that affidavits should "be worded so as to be admissible if a witness gave the same testimony during trial"). An affidavit based upon hearsay will not satisfy the requirements of Rule 166a because it fails to provide facts that would be considered admissible at trial. *See* Gaston v. Copeland, 335 S.W.2d 406, 408 (Tex. Civ. App.—Amarillo 1960, writ ref'd n.r.e.) (finding that an affidavit did not constitute summary judgment evidence because, as hearsay, it would be inadmissible at trial).

85. Hunsucker v. Omega Indus., 659 S.W.2d 692, 697 (Tex. App.—Dallas 1983, no writ); *see also* TEX. R. CIV. P. 166a(c) (outlining when interested testimony constitutes summary judgment evidence).

86. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986) (explaining that the non-moving party need not produce evidence in an admissible form to avoid summary judgment); JUSTICE MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIALS 409 (1998) (observing that the non-movant in federal court "is not required to produce evidence in a form that is admissible in trial").

87. Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1361 (1998). In *Celotex*, the United States Supreme Court considered unauthenticated letters in denying a motion for summary judgment. *See Celotex Corp.*, 477 U.S. at 324 (noting that the non-movant does not have to "produce evidence in a form that would be admissible at trial in order to avoid summary judgment").

88. *See* JUSTICE MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIALS 409 (1998) (relating that "the burden to obtain evidence is greater under the Texas procedure.").

ing discovery even though they raise a genuine issue of material fact.[89] As a result, Texas Rule 166a(i) effectively adopts the *Celotex* burden on the non-movant to raise a genuine issue of fact without providing the same evidentiary requirements found therein.[90]

By contrast, the advisory committee envisioned a broad allowance as to what evidence a non-movant should have available in defeating a summary judgment motion.[91] Under the committee's proposal, a judge should grant summary judgment unless "the respondent produces summary judgment evidence or discovery product or other material that can be reduced to summary judgment evidence."[92] The committee's recommendations would have allowed the non-movant to offer evidence that would not have required sworn evidence admissible at trial.[93] Consequently, under the committee's proposal, a non-movant might bring unauthenticated documents or unsworn witness statements to defeat a no-evidence motion.[94] Under present rule 166a(i), how-

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89. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6940, 6941 (Jan. 17, 1997) (on file with the *St. Mary's Law Journal*) (discussing three examples of when discovery would not constitute summary judgment evidence).

90. *See Final Approval of Revisions to the Texas Rules of Civil Procedure*, 60 TEX. B.J. 872, 874 (1997) (quoting Justice Baker as stating, "I agree with those Committee members that believe that 'summary judgment evidence' means all the materials specifically identified in Rule 166a(c) plus all other discovery products with probative value referred to in Rule 166a(d). The Committee's recommendation accomplishes that object while the Court's language does not."). Professor William V. Dorsaneo expressed his disfavor of the evidentiary standard by stating: "I oppose the idea that the evidence raising a genuine issue of material fact needs to be in admissible form. I don't think any jurisdiction has that requirement in this kind of a *Celotex* context, and I just continue to be opposed to it." *Hearing of the Supreme Court (Texas) Advisory Comm.* 6899 (Jan. 17, 1997) (on file with the *St. Mary's Law Journal*).

91. *See* TEXAS SUPREME COURT ADVISORY COMMITTEE, PROPOSAL FOR TEXAS RULE OF CIVIL PROCEDURE 166a (on file with the *St. Mary's Law Journal*) (proposing that the non-movant be permitted to produce "discovery product or other material that can be reduced to summary judgment evidence").

92. *Id.* Discovery product includes any matter which "appears reasonably calculated to lead to the discovery of admissible evidence." TEX. R. CIV. P. 166b(2)(a).

93. *See* Janet Elliot, *Toxic Tort Revolution: Harbinger of Prior Proof?*, TEX. LAW., Aug. 4, 1997, at 1 (explaining that "[t]he committee also was more lenient on the type of evidence which could be offered as proof, allowing discovery product or other material that can be reduced to summary judgment evidence; the court [on the other hand,] is requiring summary judgment evidence, which means sworn evidence that could be admitted.").

94. *See* Judge David Hittner & Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, K–10 (Sept. 16, 1997) (unpublished Article presented before the Houston Bar Assoc. litigation section) (on file with the *St. Mary's Law Journal*) (contrasting the evidentiary requirements under the present rule with the standards in the rule drafted by the advisory committee).

ever, such evidence may not be considered in a summary judgment motion.[95]

3. Expert Testimony

Adopting the non-evidence summary judgment rule has also created problems in the context of scientific evidence as delineated by *Dupont v. Robinson*,[96] in which the Texas Supreme Court set forth the requirements that expert testimony be relevant, reliable, and subject to heightened judicial scrutiny.[97] The legitimate policy behind the expert testimony requirements is to ensure that expert testimony is truly based on competent, legitimate scientific theories upon which jurors can rely.[98] Nonetheless, when combined with the burden to raise a genuine issue of material fact in a no-evidence motion, the expert testimony requirements

95. *See id.* (explaining that "unsworn witness statements, [expert] reports or unauthenticated documents produced in discovery" may not be considered in a no-evidence motion under Texas Rule of Civil Procedure 166a(i)).

96. 923 S.W.2d 549 (Tex. 1995).

97. *See* United Blood Serv. v. Longoria, 938 S.W.2d 29, 30 (Tex. 1997) (per curiam) (holding that a party relying upon expert testimony in a summary judgment motion must provide proof of the expert's qualifications); *Robinson*, 923 S.W.2d at 556–57 (adopting the "*Daubert*" evidentiary standard that requires expert testimony to be both reliable and relevant) (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 590 (1993)). According to *Robinson*, to offset the "increased use of expert witnesses and the likely prejudicial impact of their testimony," judges need to maintain "a heightened responsibility to ensure that expert testimony show some indicia of reliability." *Id.* at 553. Moreover, "[i]t is especially important that trial judges scrutinize proffered evidence for scientific reliability when it is based upon novel scientific theories, sometimes referred to as junk science." *Id.* In *Daubert*, the case relied upon by the Texas Supreme Court in the *Robinson* opinion, the United States Supreme Court held that expert testimony should be both relevant and reliable. *See Daubert*, 509 U.S. at 592. Relevancy exists when there is a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Id.* A scientific technique is reliable when it is "grounded in the methods and procedures of science," and is not mere "subjective belief or unsupported speculation." *Id.* at 590. *Daubert* listed several factors for judges to consider in determining whether evidence is reliable and relevant including whether the scientific method has been evaluated by publication and whether the technique is generally accepted in the scientific community. *See id.* at 591–94 (discussing factors to consider in evaluating scientific evidence). *Robinson* also borrows from a Texas Court of Criminal Appeals' decision, which held that scientific evidence offered under the Texas Rules of Criminal Evidence must be reliable and relevant. *See Robinson*, 923 S.W.2d at 556–57 (stating that when scientific evidence is at issue, the trial court's first task is to determine whether the testimony is sufficiently reliable and relevant to help the jury in reaching accurate results (citing Kelly v. State, 824 S.W.2d 568, 572 (Tex. Crim. App. 1992))).

98. *See Robinson*, 923 S.W.2d at 553 (underscoring the role of judges in ensuring that expert testimony is reliable to avoid the prejudice of unsubstantiated scientific theories on jurors).

present non-movants with a substantial hurdle in opposing summary judgments.[99]

4. Adequate Time for Discovery

The adequate time for discovery standard, as enunciated in the new rule, is ambiguous and may result in arbitrary decisions,[100] especially in those cases in which a discovery period is not designated by pretrial order.[101] Rule 166a(i) provides that a party may not bring a no-evidence motion until the opposing party has had "adequate time for discovery."[102] The comment to Rule 166a further states that "[a] discovery period set by pretrial order should be adequate opportunity for discovery

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99. *See* Leslie A. Lunney, *Protecting Juries from Themselves: Restricting the Admission of Expert Testimony in Toxic Tort Cases*, 48 SMU L. REV. 103, 105–07 (1994) (explaining that requiring scientific evidence to be relevant and reliable may deem all of the plaintiff's evidence relating to causation inadmissible thereby "making summary judgment in favor of the defendant . . . appropriate"); *see also* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1348 (1998) (reporting that relying on expert testimony in response to a no-evidence motion requires the non-movant not wait until trial in developing the reliability of the expert); Steven L. Dickerson, *When Expertise Matters*, TEX. LAW., Jan. 19, 1998, at 39 (noting that the no-evidence motion "should further accentuate the need for expert involvement at an early stage," and opining that the rule will "force plaintiffs to produce prima-facie expert evidence to withstand outright dismissal"); Noel M.B. Hensley, *Ringing out the Old Rules*, TEX. LAW., Dec. 15, 1997, at 25 (observing that the *Robinson* factors increase the demands on non-movants in no-evidence summary judgment motions). Parties relying upon expert testimony should establish the credentials of experts prior to the hearing for summary judgment. *See* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1348 (1998) (explaining that a party which establishes the qualifications of its expert prior to summary judgment has the dual advantage, if the judge determines the testimony is not reliable, of supporting the expert's credentials with supplemental affidavits or finding another expert who will satisfy the requirements of *Robinson*).

100. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6407 (Nov. 22, 1996) (on file with the *St. Mary's Law Journal*) (discussing several committee members' preference for a bright-line standard on when a party may bring a no-evidence motion instead of relying on the adequate time for discovery language). According to Judge Scott Brister, the adequate time for discovery standard would be unpredictable and difficult to apply because what one court considers an adequate period for discovery may be considered inadequate by another. *See id.* at 6413 (expressing Judge Brister's discussion that some appellate judges "will say [he] should have given more time for discovery . . . [whereas] others . . . will say that was enough time for discovery, and [that he] ha[s] no way to predict" how much time is adequate for discovery).

101. *See* TEX. R. CIV. P. 166a cmt. to 1997 change (discussing that ordinarily, "[a] discovery period set by pretrial order should be adequate opportunity for discovery").

102. *See* TEX. R. CIV. P. 166a(i); *see also* Chief Justice Thomas R. Phillips, *Texas Supreme Court Update*, 60 TEX. B.J. 858, 862 (1997) (noting that "the burden will never shift to the non-movant to establish a fact issue until there has been an adequate opportunity for discovery, which ordinarily will not occur until after the close of any court-ordered discovery period").

unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before."[103] Thus, if a court sets a discovery period, a no-evidence movant must wait until the end of the specified period before filing.[104] Even after the discovery period has elapsed, a trial court may delay the motion for summary judgment if the non-movant can show the set period did not allow for adequate discovery.[105] As such, a plaintiff/non-movant who could show the defendant delayed discovery by failing to answer the plaintiff's interrogatories would likely be entitled to further discovery.[106] However, if there "has been a full opportunity to conduct discovery," a party may not be permitted to prolong discovery even based upon the complaint that the evidence necessary to oppose the motion for summary judgment is in possession of the moving party.[107]

Due to the ambiguity in the new rule, critics of the Rule 166a(i) have expressed concern over the court's failure to adopt the advisory committee's bright-line recommendations as to when a party may bring a no-evidence motion.[108] The advisory committee proposed the rule to read: "A motion filed under the subdivision may be made only (1) after the expiration of an applicable discovery period, or (2) if there is no applicable discovery period, after a period set by the court" that allows adequate time for discovery.[109]

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103. TEX. R. CIV. P. 166a cmt. to 1997 change.

104. *See id.* (stating that "a motion under paragraph (i) would be permitted after the [discovery] period but not before").

105. *See id.* (explaining that "a discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary").

106. *See* Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 144 (5th Cir. 1987) (Rubin, J., dissenting) (noting that the adequate time for discovery requirement "certainly implies that proper discovery requests are granted").

107. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986) (discussing that the opposing party's burden is not excused by the fact that the evidence to oppose the motion is possessed by the moving party, "as long as there has been full opportunity to conduct discovery").

108. *See Bakers's Dissent*, *supra* note 21, at xxxix (arguing that the committee's recommendations are "preferable to the discretionary language" adopted by the court); *Hearing of the Supreme Court (Texas) Advisory Comm.* 6416 (Nov. 22, 1996) (statement of Judge Scott Brister) (on file with the *St. Mary's Law Journal*) (relating Judge Scott Brister's request for the advisory committee to give trial judges "a hard and fast date" as to when a party can bring a no-evidence motion). In addition to creating difficulty in trying to determine "whether a respondent has had 'an adequate time for discovery,'" Justice Baker contends the rule would present problems at the appellate level. *See Baker's Dissent*, *supra* note 21, at xxxix (expressing concern over the appellate courts' ability to determine whether a trial judge abused its discretion in "determin[ing] . . . 'an adequate time for discovery'").

109. *See* TEXAS SUPREME COURT ADVISORY COMMITTEE, PROPOSAL FOR TEXAS RULE OF CIVIL PROCEDURE 166a (on file with the *St. Mary's Law Journal*).

Under this recommendation, a party could ask the judge to set a discovery date, assuming the absence of an applicable discovery period, and no summary-judgment motions under Rule 166a(i) could be filed prior to that date.[110] This recommendation reflects the concern that the phrase, "adequate time for discovery," in Rule 166a(i) provides guidance to neither the trial courts nor the appellate courts in determining whether a nonmoving party has been afforded ample discovery.[111] However, the committee's two part approach to the timing of the no-evidence motion would be desultory in application when no applicable discovery period exists. Indeed, allowing courts to set the discovery period might result in one court giving similarly situated parties one month to conduct discovery and another party one year. Thus, although the advisory committee's recommendations provide a clearer time standard than the adopted rule, the recommendations might instill unpredictability and confusion as to when a party might anticipate a no-evidence motion.[112] In failing to heed the advisory committee's proposal on the issue of when a party may bring a no-evidence motion, the Texas Supreme Court has arguably created an environment favorable to premature summary judgment motions.[113] The threat of premature motions is potentially heightened by the court's omission of specific sanctions and safeguards against spurious motions proposed by the committee.[114]

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110. *See id.* (outlining the advisory committee's proposal as to when a no-evidence motion could be filed).

111. *See* TEX. R. CIV. P. 166a cmt. to 1997 change (claiming the ambiguous standard will result in uncertain results).

112. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6421 (Nov. 22, 1996) (statement of Judge Clarence Guittard) (on file with the *St. Mary's Law Journal*) (explaining that it is "unnecessarily complicated to have two standards").

113. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6449–50 (Nov. 22, 1996) (statement of Paul Gold) (on file with the *St. Mary's Law Journal*) (asserting that "[t]he practical effect [of the rule] is that every single defendant will file at the earliest moment a motion for summary judgment to finesse the plaintiff into . . . disgorging all of their evidence without the defendant ever having to do the same."). Nonetheless, the committee's recommendations as to when a party may file a no-evidence motion raise some practical problems as well. *See* Charles L. Babcock, To the Editor, *Summary Judgment Rule Was Misread*, TEX. LAW., Sept. 1, 1997, at 25 (claiming that the advisory committee's rigid timing guidelines would be impractical in some counties). For example, some Texas counties ordinarily cut off discovery thirty days before trial, creating difficulty in obtaining a no-evidence hearing. *See id.* (asserting that obtaining a summary judgment hearing in some urban counties would be difficult). Moreover, other courts do not have discovery deadlines; consequently, a no-evidence motion might never be permitted under the committee's recommendations. *See id.* (noting the impossibility under advisory committee's proposal of making no-evidence motion in counties that do not have discovery deadlines).

114. *See* J. Patrick Hazel, *New Summary Judgment Rule: A Critique*, 16 ADVOC. 28, 32 (1997) (expressing concerns that the "adequate time for discovery" phrase is too general and that the failure to adopt sanctions may encourage unbridled no-evidence motion fil-

Federal summary judgment practice provides guidance in the unfamiliar territory of determining when a non-movant has been afforded an adequate period for discovery.[115] Federal courts are restrained from granting summary judgments until after a sufficient period for discovery has passed.[116] Accordingly, the Fifth Circuit has held that filing a summary judgment motion shortly after an opposing party filed its answer does not allow for adequate discovery.[117] However, the Fifth Circuit found that a nine-month period constitutes sufficient time for the non-movant to conduct discovery.[118]

A non-movant who believes a summary judgment motion is premature may request a continuance, and the court may grant such motion if it determines the non-movant had insufficient discovery time. Specifically, Federal Rule of Civil Procedure 56(f) provides that a court may refuse to grant summary judgment or it may "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or make such other order is just."[119] Thus, the appropriate response to a premature no-evidence summary judgment motion in federal court is filing a motion for continuance under Federal Rule 56(f).[120] Moreover, a

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ing); Judge David Hittner & Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, K–11 (Sept. 16, 1997) (unpublished Article presented before the Houston Bar Assoc. litigation section) (on file with the *St. Mary's Law Journal*) (explaining the criticisms associated with the new rule including the vague "adequate time for discovery" standard and the lack of deterrents to frivolous summary judgment motions).

115. Justice Michol O'Connor, on the other hand, contends that due to the differences in the amount of evidence non-movants must proffer in summary judgment motions, "the federal cases should not be used as a guide for denying motions for continuance." JUSTICE MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES: CIVIL TRIALS 409 (1998).

116. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (mandating "entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial").

117. *See* Fano v. O'Neill, 806 F.2d 1262, 1266 (5th Cir. 1987) (reversing summary judgment for the Immigration and Naturalization Service after the district court denied adequate discovery period).

118. *See* Transamerica Ins. Co. v. Avenell, 66 F.3d 715, 721 (5th Cir. 1995) (finding that a district court did not abuse its discretion in denying a motion for continuance because the party "had more than sufficient time in which to develop" the evidence).

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

120. *See* Wichita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992) (explaining that a continuance "provide[s] non-movants with a much needed tool to keep open the doors of discovery in order to adequately conduct a summary judgment motion").

non-movant's failure to move for a continuance in federal court waives the right to challenge the adequacy of the discovery period.[121]

A continuance is the appropriate procedural response to a premature summary judgment motion in Texas.[122] To be consistent with federal courts, obtaining a continuance in a summary judgment proceeding in Texas may require the non-movant to explain the reason it needs additional discovery and how the additional discovery will present a triable issue of fact.[123] Conversely, in seeking to avoid a continuance, a movant would likely argue the non-movant's request for additional discovery is a stalling maneuver, which will not result in the manifestation of facts necessary to create a genuine issue of material fact.[124] If a court determines

121. *See* Potter v. Delta Air Lines, Inc., 98 F.3d 881, 887 (5th Cir. 1996) (preventing a party from arguing inadequate time for discovery after failing to move for a continuance even when more discovery might be necessary).

122. *See* TEX. R. CIV. P. 166a(g) (stating that a court may either refuse to grant summary judgment or may grant a continuance to allow for further discovery if it determines that the non-moving party cannot "for reasons stated present by affidavit facts essential to justify his opposition"); *Hearing of the Supreme Court (Texas) Advisory Comm.* 6417 (Nov. 22, 1996) (on file with the *St. Mary's Law Journal*) (relating that continuances, which are liberally allowed in federal courts, act as a safety valve when a non-movant feels it has not had adequate time for discovery); Noel M.B. Hensley, *Ringing out the Old Rules*, TEX. LAW., Dec. 15, 1997, at 25 (suggesting that a non-movant who believes he or she has not been afforded adequate discovery time "should either file an affidavit explaining the need for further discovery or file a verified and properly supported motion for continuance for discovery"); Judge David Hittner & Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, K-10 (Sept. 16, 1997) (unpublished Article presented before the Houston Bar Assoc. litigation section) (on file with the *St. Mary's Law Journal*) (explaining that non-movants may "file a conventional motion under TEX. R. CIV. P. 252 if [they believe] that the motion for summary judgment is premature"). According to Judge Hittner and Ms. Liberato, the motion for continuance should state that more time is needed to conduct discovery and should indicate that the request for additional discovery is "more than a fishing expedition." *Id.* Specifically, the motion must demonstrate that additional discovery will likely lead to controverting evidence which was not readily available during the discovery period despite the non-movant's exercise of due diligence. *See id.*

123. *See* Krim v. BancTexas Group, Inc., 989 F.2d 1435, 1441-42 (5th Cir. 1993) (explaining that "to obtain a continuance of a motion for summary judgment in order to obtain further discovery, a party must indicate to the court by some statement, preferably in writing (but not necessarily in the form of an affidavit), why he needs additional discovery and *how* the additional discovery will create a genuine issue of material fact").

124. *See* Judge David Hittner & Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, K-10 (Sept. 16, 1997) (unpublished Article presented before the Houston Bar Assoc. litigation section) (on file with the *St. Mary's Law Journal*) (opining that the opposing party to a motion for continuance should "convince the court that the respondent's discovery efforts are simply a delay tactic").

that a continuance will not provide facts essential to defeating the summary judgment motion, it may decline to grant a continuance.[125]

B. *Deterrents to Frivolous No-Evidence Motions*

1. Sanctions

The Texas Supreme Court Rules Advisory Committee recommended the no-evidence motion include sanctions to prevent frivolous summary judgment motions.[126] By failing to adopt such sanctions, the court left parties to rely on existing rules for sanctions.[127] Accordingly, the new rule provides little, if any, deterrent to attorneys bringing frivolous no-evidence motions, particularly in light of the seldom utilized sanctions currently available.[128] However, one member of the advisory committee agreed with the court's rejection of the sanctions proposal, stating "[i]t

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125. *See* Cormier v. Pennzoil Exploration & Prod. Co., 969 F.2d 1559, 1561 (5th Cir. 1992) (finding that the trial court did not abuse its discretion in refusing to stay the summary judgment proceedings to allow for further discovery because the non-movant made little effort to demonstrate that further discovery would yield evidence creating an issue of triable fact); *see also* DAVID HITTNER ET AL., FIFTH CIRCUIT FEDERAL PROCEDURE BEFORE TRIAL § 14:117 (1996) (explaining that the non-movant should convince the court "that the requested discovery is more than a fishing expedition, is likely to lead to controverting evidence, and was not reasonably available beforehand despite the [non-movant's] diligence").

126. *See* TEXAS SUPREME COURT ADVISORY COMMITTEE, PROPOSAL FOR TEXAS RULE OF CIVIL PROCEDURE 166a (on file with the *St. Mary's Law Journal*) (recommending that "[i]f a motion under this subdivision is denied, and the court finds that the motion did not have an objectively reasonable basis when it was filed, the court may award reasonable attorney's fees to the respondent for defending the motion.").

127. *See* TEX. R. CIV. P. 166a cmt. to 1997 changes (stating "a motion under paragraph (i) is subject to sanctions provided by existing law in TEX. CIV. PRAC. & REM. CODE §§ 9.001–10.006 and TEX. R. CIV. P. 13"); *Hearing of the Supreme Court (Texas) Advisory Comm.* 6634–6700 (Nov. 23, 1996) (on file with the *St. Mary's Law Journal*) (discussing various committee members' concerns associated with providing sanctions for frivolous summary judgment motions under paragraph (i)); Janet Elliot, *New Summary Judgment Rule Shifts Burden to Responding Party*, TEX. LAW., Aug. 25, 1997, at 5 (noting that the supreme court failed to adopt the committee's recommendations that "the party responding to a frivolous summary judgment motion could get attorneys' fees from the party filing the motion").

128. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (asserting that courts "dislike refereeing lawyer disputes and using sanctions to punish lawyers"). Justice Baker contends the sanctions, as written by the advisory committee, would have been more effective than the rule as adopted. *See* TEX. R. CIV. P. 166a cmt. to 1997 change (stating the "recommended language is based upon an objective standard" and would avoid "the unwieldy burden facing trial judges of determining subjective intent in sanction motions hearings"). Justice Baker also noted the recommended language allowed for limited sanctions for reasonable attorney fees, unlike existing rules which offer a wide range of sanctions. *See id.*

would be unwise . . . to start singling out specific rules for sanction practice thus creating an entirely new solar system for satellite litigation."[129]

Another concern is that because the recommendations allow for sanctions when objectively unreasonable motions are denied, judges would automatically award non-movants sanctions after denials.[130] This action would render the no-evidence motion inoperative as parties might hesitate to file motions despite their fervent belief that no genuine issue of material fact exists.[131] In addition, the rule has been criticized for providing one-way sanctions to the party defending the motion.[132] However, this criticism of the recommendations is unwarranted because Rule 166a(g) expressly allows for sanctions for affidavits filed in bad faith.[133] Since a movant under Rule 166a(i) need not file affidavits in conjunction with the motion, these sanctions would typically be awarded to the movant. Notwithstanding flaws in the committee's sanctions provision, awarding sanctions to non-movants for objectively unreasonable motions would deter movants from filing no-evidence motions when the sole motivation is delay or cost.

2. Certification

In addition to the rejection of the sanctions proposal, the court refused to incorporate a recommendation that would require the movant's attorney to certify that the attorney "has reviewed discovery and that, in the attorney's opinion, the discovery reveals no evidence to support the specified elements."[134] The rationale behind this certification was to prevent

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129. Charles L. Babcock, To the Editor, *Summary Judgment Rule Was Misread*, TEX. LAW., Sept. 1, 1997, at 25.

130. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6637 (Nov. 23, 1996) (statement of Judge Scott Brister) (on file with the *St. Mary's Law Journal*) (discussing Judge Brister's opinion that "some of [his] colleagues would consider it mandatory and automatic that if you lose this motion, you pay").

131. *Cf. Hearing of the Supreme Court (Texas) Advisory Comm.* 6640 (Nov. 23, 1996) (statement of Judge David Peeples) (on file with the *St. Mary's Law Journal*) (relating Judge Peeple's concern that the sanctions should not "chill and scare people into not bringing good faith, . . . in the ballpark motions").

132. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6637 (Nov. 23, 1996) (statement of Chairman Luther Soules) (on file with the *St. Mary's Law Journal*) (discussing Chairman Soules' opinion that "there is only one sanction, attorneys' fees for the defense of the motion"); Charles L. Babcock, To the Editor, *Summary Judgment Rule Was Misread*, TEX. LAW., Sept. 1, 1997, at 25 (criticizing the sanctions provision for "running only one way—against the party moving for summary judgment").

133. *See* TEX. R. CIV. P. 166a(g) (providing sanctions for affidavits filed in bad faith).

134. TEXAS SUPREME COURT ADVISORY COMMITTEE, PROPOSAL FOR TEXAS RULE OF CIVIL PROCEDURE 166a (on file with the *St. Mary's Law Journal*).

attorneys from taking an "I-don't-want-to-know attitude toward their case or be less than forthcoming during the discovery process."[135]

Because the court did not include either the sanctions or the certification provisions in Rule 166a(i), the movant bears little risk in filing a no-evidence summary judgment motion.[136] Consequently, attorneys may use the no-evidence motion to increase the cost of discovery for their adversaries and to force the non-movant to reveal its trial strategies earlier than usual in the litigation process.[137] In short, the rule argu-

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135. Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B.

136. *See Baker's Dissent*, *supra* note 21, at xxxix–xl (asserting that the advisory committee's recommendations would have provided disincentives, not found in the adopted rule, to bring frivolous no-evidence motions). Prior to the adoption of the no-evidence motion, a defendant's only real disincentive to moving for summary judgment was expense. *See* Dean M. Swanda, *Summary Judgment Practice*, 46 BAYLOR L. REV. 721, 722 (1994) (noting that "[a] movant does not risk a take-nothing summary judgment if the trial court denies its motion."). Furthermore, with an improved chance of obtaining summary judgment under the no-evidence motion, the expense of filing and arguing a summary judgment becomes less of a disincentive. *See* Janet Elliot, *A Matter of Judgment*, TEX. LAW., Sept. 8, 1997, at 1 (discussing Lynne Liberato's opinion that summary judgments will likely be filed in virtually every case and reviewing the advisory committee's proposal which would have provided deterrents to this type of summary judgment filing).

137. *See* J. Patrick Hazel, *New Summary Judgment Rule: A Critique*, 16 ADVOC. 28, 31 (1997) (explaining that the movants' motives for filing a no-evidence motion may include forcing non-movants to do movants' discovery, and might be based on "the movant's belief that the [non-movant] will somehow fail . . . to come forward with the correct summary judgment evidence"); Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 110 (1990) (explaining that "[t]he availability to defendants of cost-free summary judgment encourages strategic use of the device to force plaintiff revelation of her trial strategy."). According to some commentators, the lack of a deterrent in bringing frivolous no-evidence summary judgment motions amounted to "a wealth transfer from plaintiffs to defendants" in federal courts. Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 109 (1990). Because the movant faces no sanctions apart from traditional sanctions, and does not have to file a certificate, defendants will likely file no-evidence motions in a majority of cases. *See* Jack H. Friedenthal, *Cases on Summary Judgment: Has There Been a Material Change in Standards?*, 63 NOTRE DAME L. REV. 770, 776 (1988) (discussing "if [a] party could, merely by filing an unsupported motion, force an opponent to make a substantial showing, there would be a strong incentive to make such a filing, if for no other reason than to harass"). *But see* Chief Justice Thomas R. Phillips, *Supreme Court Update*, 60 TEX. B.J. 860, 862 (1997) (opining that "parties who invoke [Rule 166a(i)] merely to harass their opponents or increase the cost of litigation should and will be subject to sanctions"). Frivolous no-evidence motions, in turn, would hamper judicial efficiency, the supposed objective of the no-evidence motion. *See* TEX. R. CIV. P. 166a cmt. to 1997 change (asserting that the new rule "will also increase the need for extensive discovery, adding to already skyrocketing litigation costs").

ably increases the already prevalent favoritism towards defendants in Texas.[138]

IV. The Texas Constitution and the Right to Trial by Jury

Because the Seventh Amendment to the United States Constitution does not apply to the states,[139] the Texas Constitution is the lone protector of litigants' rights to a jury trial in Texas state courts. The Texas Constitution provides that a plaintiff or defendant has a right to trial by jury which "shall remain inviolate."[140] Courts have jealously guarded the right to a jury trial in Texas.[141] While the United States Constitution places great weight on individual rights, the Texas Constitution provides more protection of its citizens' rights[142] as evidenced by the fact that the Texas Constitution includes two provisions protecting the right to a jury trial.[143]

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138. *See* David F. Bragg & Michael Curry, DTPA Forms & Practice Guide, 1995 Special Legislative Supp. i (1995) (revealing that tort reform measures in Texas have further shifted the balance of power to the defendant and are related to changes in the composition of the Texas Supreme Court); Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, San Antonio Express-News, May 22, 1997, at 9B (opining that "[a]nyone who has found it necessary to sue someone in the Texas courts in the last five years knows that the legal system is badly skewed in favor of defendants").

139. *See* Wooten v. Dallas Hunting & Fishing Club, 427 S.W.2d 344, 346 (Tex. 1968) (discussing that "[t]he Seventh Amendment to the Constitution of the United States does not apply to proceedings in state courts."); White v. White, 180 Tex. 570, 579, 196 S.W. 508, 511 (1917) (explaining that the Seventh Amendment does not protect the right to trial by jury in state civil actions).

140. Tex. Const. art. I, § 15; *see* Tex. Const. art. V, § 10 (enumerating the "right of trial by jury").

141. *See White*, 108 Tex. at 580, 196 S.W. at 512 (describing the right to jury as "sacred," and a "bulwark of human liberty"); James C. Harrington, The Texas Bill of Rights: In the Mainstream of the Movement to Protect Individual Rights 9–7 (2d ed. 1994) (expressing that "Texas courts have been extraordinarily solicitous in protecting the right to trial by jury, at law and, unlike most other jurisdictions, at equity").

142. *See* David Richards & Chris Riley, *Developing a Coherent Due-Course-of-Law Doctrine*, 68 Tex. L. Rev. 1649, 1650 (1990) (explaining that in light of the "Texas Bill of Rights and its history," the Texas Constitution is probably more protective of individual autonomy than the United States Constitution). As one scholar has noted, "Texas judges often have found constitutional protection for the people of the Lone Star State greater than that accorded by the federal courts for Americans generally." James C. Harrington, The Texas Bill of Rights: In the Mainstream of the Movement to Protect Individual Rights 1–2 (2d ed. 1994). Similarly, one court stated that the Texas Constitution "embod[ies] a . . . right to a jury trial which is greater than its federal counterpart." Trapnell v. Sysco Food Servs., Inc., 850 S.W.2d 529, 544 (Tex. App.—Corpus Christi, 1993), *aff'd*, 890 S.W.2d 796 (Tex. 1994).

143. *See* Tex. Const. art. I, § 15 (stating that the right to trial by jury "shall remain inviolate"); Tex. Const. art. V, § 10 (extending the right to trial by jury to all causes). Devout protection of individual liberties, specifically, jury trials in the constitution stems

A. *Degradation of the Texas Jury Trial*

By adopting the no-evidence motion, which purportedly conforms Texas to federal summary judgment standards, Texas judges may usurp the role of the jury[144] in gauging the "quantum and quality of proof" at a

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from, *inter alia*, a reaction to the absence of jury trials in the Mexican judicial system and a distrust of centralized government by the framers of the Texas Constitution of 1876. *See* JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS: IN THE MAINSTREAM OF THE MOVEMENT TO PROTECT INDIVIDUAL RIGHTS 3–5 (2d ed. 1994) (stating that contrary to some popular historical views, the 1875 constitutional convention reflected less a reaction to Reconstruction and more a part of the movement away from empowered government exemplified by the federal Constitution); *see also Trapnell*, 850 S.W.2d at 544 (explaining that "[o]ne of the principal grievances the citizens of Texas held against the Mexican Government was the abridgment of the right to trial by jury."). Debates of the Texas Convention of 1846 underscore Texas's faith in the jury system. *See* John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 TEX. TECH L. REV. 1089, 1167–71 (1995) (discussing Thomas Jefferson Rusk's plea for the right to trial by jury to encompass equitable proceedings, and noting that Rusk echoed Alexis de Tocqueville's belief that "juries . . . make all men feel that they have duties toward society and that they take a share in its government" (citing WILLIAM F. WEEKS, DEBATES OF THE TEXAS CONVENTION 468 (1846))). The framers of the 1876 Texas Constitution viewed the United States Constitution "as protecting the privileged and moneyed minorities from the democratic majority and the Texas Constitution as shielding the democratic majority from the economically advantaged minorities." JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS: IN THE MAINSTREAM OF THE MOVEMENT TO PROTECT INDIVIDUAL RIGHTS 3–6 (2d ed. 1994).

144. In his dissent to *Anderson v. Liberty Lobby*, Justice Brennan articulated that the weighing of evidence in a summary judgment motion raises constitutional issues involving the right to trial by jury. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 267 (1986) (stating that "if the judge on motion for summary judgment really is to weigh the evidence, then in my view grave concerns are raised concerning the constitutional right of civil litigants to a jury trial"); *see also* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 85 (1990) (explaining that judges, in determining the quality and quantum of proof may preclude trial by jury and invade the territory of the jury). In contrast to federal summary judgment procedure under *Anderson*, Texas courts have precluded judges from evaluating the quality of summary judgment evidence, preserving the role of the jury system. *See* Gulbenkian v. Pennsylvania, 151 Tex. 412, 415, 252 S.W.2d 929, 931 (1952) (relating that "[t]he duty of the court hearing the motion for summary judgment is to determine if there are any issues of fact to be tried, and not to weigh the evidence or determine its credibility and thus try the case on the affidavits."). Proponents of the *Celotex* Trilogy assert that summary judgments do not usurp the right to trial by jury, as the "assessment of the evidence does not involve the court in jury functions, such as credibility determinations and the weighing of evidence." William A. McCormack & Maureen B. Hogan, *Summary Judgment: A Strengthened Focus*, 36 BOSTON B.J. 9, 9 (1992). At the same time, not allowing a judge to weigh evidence is difficult to reconcile with the requirement that a judge grant summary judgment if evidence "is merely colorable or is not significantly probative." *Anderson*, 242 U.S. at 254; *see also* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 115–16 (1988) (pondering how a judge can conclude a party's evidence is significantly probative without weighing the evidence).

summary judgment hearing.[145] In addition, with the uncertain "adequate time for discovery" standard and the omission of procedural safeguards to deter parties from filing frivolous motions, plaintiffs may be further denied their day in court.[146]

B. *Constitutionality of the No-Evidence Rule*

Supporters of the new no-evidence motion counter that the intent of the framers of the Texas Constitution was not to allow all claims, regardless of merit, to proceed to a jury determination.[147] Indeed, Texas summary judgments have survived similar constitutional attacks under the

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145. *See Anderson*, 477 U.S. at 254 (explaining that in determining whether a party has demonstrated the existence of a genuine issue of material fact requires "a trial judge [to] bear in mind the actual quantum and quality of proof necessary to support liability"). Though the majority in *Anderson* claimed that gauging the "quantum and quality of proof" did not involve a weighing of evidence, Justice Brennan pointed out the inconsistency in the Court's reasoning. *See id.* at 249 (finding that the "judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). According to Justice Brennan the requirement that a judge "bear in mind the 'quantum' of proof" cannot be reconciled with the notion that "the judge is not himself to weigh the evidence." *Id.* As Justice Brennan further articulated, "a determination of the 'caliber and quantity,' i.e., the importance and value, of the evidence in light of the 'quantum,' *i.e.*, amount 'required,' could only be performed by weighing the evidence." *Id.* The liberalization of summary judgment standards and the role of the judge in interpreting the probative value of evidence is particularly troubling in employment discrimination cases, where the primary issue often involves credibility and intent. *See* Anne C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 208 (1993) (explaining that a jury should more properly decide questions of intent with the assistance of live witnesses).

146. *See Spector's Dissent*, *supra* note 6, at xxxvii (opining that "any marginal benefit of the new rule" does not outweigh "the constitutional rights of aggrieved citizens to seek redress" (citing TEX. CONST. art. I, § 15 and art. V, § 10)); *Hearing of the Supreme Court (Texas) Advisory Comm.* 6441–42 (Nov. 22, 1996) (on file with the *St. Mary's Law Journal*) (relating one committee member's concern that the ambiguous adequate time for discovery standard "is indefensible as a premise for a legal system because the question of what right you have to have evidence and to have a jury . . . is going to be judged by a floating standard"); Janet Elliot, *A Matter of Judgment*, TEX. LAW., Sept. 8, 1997, at 1 (contending that the no-evidence motion may allow "some culpable defendants to avoid being judged by a jury").

147. *See Gulbenkian*, 151 Tex. at 416, 252 S.W.2d at 931 (holding that summary judgments are designed to eliminate unmeritorious claims or defenses and are not "intended to deprive litigants of their right to a full hearing on the merits of any real issue of fact"); Carrabba v. Employers Casualty Co., 742 S.W.2d 709, 717 (Tex. App—Houston [14th Dist] 1987, no writ) (restating the principle that, absent "controverted material issues, the grant of summary judgment does not deny the losing party its constitutional rights to a jury trial"); Judge Scott A. Brister, *Lonesome Docket: Using the Texas Rules to Shorten Trial and Delay*, 46 BAYLOR L. REV. 525, 537 (1994) (explaining that the right to trial by jury is "subject to various procedural rules . . . such as summary judgments"). In discussing the right to trial by jury, albeit in the context of the Seventh Amendment to the United States

right to trial by jury as preserved in the Texas Constitution.[148] Notably, the Texas Supreme Court has upheld the procedural rule on the basis that summary judgments do not foreclose an individual's right to trial by jury, but merely serve to ensure that some fact issue exists for jurors to consider.[149] Other states have recognized summary judgment practice as preserving the traditional role of the jury in resolving genuine disputes of material facts while concomitantly precluding juries from rendering verdicts based on "sympathy, bias or illogical and unlawful inferential leaps."[150] As expressed by one commentator, "Access to the courts is important. But once a party gains access, its claim should not necessarily go untested until trial."[151]

The new rule also finds protection under the notion that the court is constitutionally and statutorily authorized to promulgate rules of procedure. Under Article V, Section 31 of the Texas Constitution, the supreme court may draft rules of procedure "not inconsistent with the laws of the state."[152] Furthermore, Section 22.004 of the Government Code permits the court to create rules that do not "abridge, enlarge, or modify the substantive rights of [a] litigant."[153] In light of the foregoing precedent and the court's constitutional and statutory authority to promulgate rules of procedure, a constitutional challenge that Rule 166a(i) deprives a litigant of his right to a jury trial would likely fail. However, a historical analysis of the framer's intent coupled with the problem areas of the new sum-

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Constitution rather than the Texas Constitution, Justice McKenna captured the role of summary judgments in relation to the right to trial by jury by stating:

> If it were true that the rule deprives the plaintiff in error of the right to trial by jury, we should pronounce it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues.

Fidelity & Deposit Co. v. United States, 187 U.S. 315, 320 (1902).

148. *See* Schroeder v. Texas & Pac. Ry. Co., 243 S.W.2d 261, 263 (Tex. Civ. App.—Dallas 1951, no writ) (finding that Rule 166a did not violate the right to trial by jury under the Texas Constitution).

149. *See id.* (noting that the summary judgment does not deprive litigants of the right to trial by jury, but merely "prescribes the means of making an issue" (citing *Fidelity*, 187 U.S. at 319)). The right to trial by jury is not absolute, and may be limited by certain procedural rules. *See* Mills v. Rice, 441 S.W.2d 290, 291–92 (Tex. Civ. App.—El Paso 1969, no writ) (affirming that summary judgment does not violate the right to trial by jury in Texas); Wooten v. Dallas Hunting & Fishing Club, 427 S.W.2d 344, 346 (Tex. Civ. App.—Dallas 1968, no writ) (explaining that "[t]he right to trial by jury in Texas is not an absolute right in civil cases but is subject to certain procedural rules").

150. Stephen J. Fortunato, Jr., *Summary Judgment in Rhode Island: Is It Time to Wrap the Mantra in* Celotex?, 2 ROGER WILLIAMS U.L. REV. 153, 167 (1997).

151. Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 20 ST. MARY'S L.J. 243, 305 (1989).

152. TEX. CONST. art. V, § 31.

153. TEX. GOV'T CODE ANN. § 22.004 (Vernon 1997).

mary judgment rule may lead to the inescapable conclusion that, in its present condition, Rule 166a(i) is likely to limit a claimant's opportunity to present legitimate grievances before a panel of his or her peers.[154]

V. JUDICIAL INEFFICIENCY UNDER THE NO-EVIDENCE MOTION

If Texas summary judgment practice under the no-evidence motion is modeled after federal summary judgment practice, courts will likely grant substantially more summary judgment motions.[155] The new rule may ease the burden on court dockets[156] by eliminating those claims brought by plaintiffs who know they do not have a valid claim, yet sue hoping that the defendant will choose to settle rather than endure a lengthy and costly lawsuit.[157] However, as expressed by Justice Spector, the rule may "increase expense in many cases in order to save expenses in very few cases."[158]

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154. *See Spector's Dissent*, *supra* note 6, at xxxvii (advancing the argument that Rule 166a(i) violates the Texas Constitution and arguing that the rule "creates a serious risk that meritorious lawsuits will be summarily dismissed"). Responding to the argument that summary judgment does not infringe on the right to trial by jury in the federal context, one commentator asserts that when the nature of summary judgment changes to allow judicial assessment of evidence, "the rock on which these cases was built begins to crumble." Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 164 (1988).

155. *See* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 99 (1988) (explaining that the Trilogy caused the federal courts "to more readily grant summary judgment," and opining that the Trilogy will have a trickle down effect on the states which have rules of procedure based on the federal rules); Noel M.B. Hensley, *Ringing out the Old Rules*, TEX. LAW., Dec. 15, 1997, at 25 (opining that "[i]f the rule functions as expected, we can expect many more summary judgments entered in Texas courts based on no-evidence motions and for these judgments to be upheld on appeal."); *cf.* Gregory A. Gordillo, *Summary Judgment and Problems in Applying the* Celotex *Trilogy Standard*, 42 CLEV. ST. L. REV. 263, 278–79 (1994) (explaining that while federal courts granted 59% of defendant's summary judgment motions prior to *Celotex*, they have granted 79% of defendant's motions for summary judgment after *Celotex*).

156. *See* William M. Lafferty & W. Leighton Lord III, *Towards a Relaxed Standard for the Delaware Court of Chancery: A New Weapon Against "Strike" Suits*, 15 DEL. J. CORP. L. 921, 923 (1990) (advocating that a more relaxed summary judgment standard would help eliminate spurious litigation).

157. *See id.* at 940–41 (explaining that "[i]n a typical 'strike' suit, if a corporate defendant's motion for summary judgment is denied, the corporate defendant is often likely to purchase a res judicata effect by settling the matter."). Furthermore, "the corporate defendant may enter a settlement more as a prudent business decision than as an acknowledgment that the plaintiff's claims were meritorious." *Id.*

158. *Spector's Dissent*, *supra* note 6, at xxxvii. Several commentators have articulated the concern that the no-evidence motion may cause greater expense, at least for plaintiffs. *See* TEX. R. CIV. P. 166a cmt. to 1997 change (anticipating that the new rule will increase the need for in-depth discovery, thereby defeating its purpose to reduce litigation costs).

A. *Vigorous No-Evidence Filing*

Although debateable, Texas defendants will likely engage in vigorous no-evidence motion filing because of a more liberalized summary judgment rule and a lack of deterrents to offensive motion filing.[159] In fact, one commentator suggests that a defense attorney who fails to file a no-evidence motion might have committed legal malpractice.[160] Nonetheless, due to the potential increase in summary judgment motions, courts will conduct substantially more hearings, incur greater cost, and consume additional time.[161] In his dissent to the revised rule, Justice Baker of the Texas Supreme Court expounded:

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159. *Cf.* Kent Sinclair & Patrick Hanes, *Summary Judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 WM. & MARY L. REV. 1633, 1659 (1995) (proffering statistics which indicate an increase in the filing of summary judgment motions in federal courts from 4,334 in 1985 to 8,078 in 1993). The increase in motion filing after *Celotex* should be qualified by the fact that summary judgment motion filing has steadily increased since the 1950s. *See id.* (discussing growth in summary judgment filings). Furthermore, summary judgment filing has traditionally increased along with the total number of cases filed in federal courts. *See id.* at 1659 (providing statistical information regarding summary judgments and case filings in federal courts). Notably from 1985 to 1992 total case filing fell by 20%, yet summary judgment filing continued its rapid growth. *See id.* at 1659, 1662 (relating that between 1985 and 1992 case filings dropped from 273,670 to 229,119, showing that the filing of summary judgments doubled between 1985 and 1993). Thus, relative to total case filing litigants increasingly utilized the summary judgment motion between 1985 and 1993. *See id.* (discussing summary judgment statistics).

160. *See* J. Patrick Hazel, *New Summary Judgment Rule: A Critique*, 16 ADVOC. 28, 31 (1997) (proposing that it might "be negligence on the part of a defense lawyer" to fail to file a no-evidence motion).

161. *See Spector's Dissent*, *supra* note 6, at xxxvii (expressing the concern that the no-evidence motion will "increase the need for extensive discovery, adding to already skyrocketing litigation costs"); *cf.* D. Michael Risinger, *Another Step in the Counter Revolution: A Summary Judgment on the Supreme Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 41 n.27 (1988) (opining that liberalized summary judgment standards in federal courts will promote inefficient adjudication and "routinely [create] the necessity for two trials . . . the first one on paper as a precondition to obtaining the one to a jury"); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 171 (1988) (noting that the time needed to prepare for summary judgment may not differ substantially from trial preparation and relating that "whatever the time and cost savings to litigants, the motion requires more judicial time than otherwise consumed by pretrial procedures"). In addressing a motion for summary judgment, judges as well as their law clerks must conduct research, read, hold a hearing, reflect, "and often must draft, revise, and issue a lengthy written opinion." *Id.* Moreover, sitting over a jury trial may not consume any more of a judge's time than deciding a summary judgment motion. *See id.* (opining that liberalized summary judgment practice may not increase judicial efficiency because summary judgment motions may consume as much of the judge's time as a jury trial). In addition, though a summary judgment might save time when granted, when denied, the motion adds to pretrial procedure "without reducing the work required at and after trial." *Id.* at 172.

> Given the costs of an appeal relative to the costs of a no-evidence motion, disincentives in the form of the committee's recommended language should be included in Rule 166a(i). To do so would prevent a flood of no-evidence motions that would further burden our already overburdened trial and intermediate appellate courts.[162]

B. *Litigation Costs*

Aside from the increased expenditures to courts, Texas plaintiffs will arguably be required to expend more capital in defeating no-evidence motions.[163] For example, the fear of having a case decided on a no-evidence motion may trigger plaintiffs to come forth with every piece of evidence at the summary judgment stage.[164] Furthermore, ambiguity regarding when a party may obtain a no-evidence summary judgment may also encourage plaintiffs to expend substantial capital up front on discovery to prevent summary judgment, particularly in light of the notion that the opposing party has no deterrent from bringing such a motion and the evidence must be in admissible form.[165]

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162. *See Baker's Dissent*, *supra* note 21, at xxxviii. Similarly, Justice Brennan in *Anderson v. Liberty Lobby*, anticipated a possible transformation of "what is meant to provide an expedited 'summary' procedure into a full blown paper trial on the merits." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 266–67 (1986) (Brennan, J. dissenting).

163. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (claiming the new rule will "allow defendants to dismiss cases for lack of evidence even when they know evidence exists, and make it easier for defense lawyers to 'starve out' plaintiffs who must bear the expense of developing the suit"); *cf.* D. Michael Risinger, *Another Step in the Counter Revolution: A Summary Judgment on the Court's New Approach to Summary Judgment*, 54 BROOK. L. REV. 35, 41 (1988) (noting that in federal courts after *Celotex*, "something close to a one page form motion by defendant can throw on the plaintiff the responsibility to dredge, structure, collate and cross-reference all materials in the files," and that the task of organizing materials to contest summary judgment motions "can sometimes take as long or longer than actually trying the case").

164. *See Anderson*, 477 U.S. at 267 (explaining that in light of liberalized summary judgment standards, any responsible counsel would not "risk either moving for or responding to a summary judgment motion without coming forth with all of the evidence he can muster in support of his client's case").

165. *See* Noel M.B. Hensley, *Ringing out the Old Rules*, TEX. LAW., Dec. 15, 1997, at 25 (explaining that the "rule may impose a new impetus on respondents to carefully and promptly marshall appropriate deposition excerpts, affidavits, opponent's answers to interrogatories and requests for admissions, stipulations, certified public records, [and] authenticated documents, for they may be vital to surviving a no-evidence motion"); *cf.* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 172 (1988) (explaining that because parties would be unwise in relying on inadmissible evidence in summary judgment, the non-movant is required to completely develop its case before trial).

By increasing initial expenditures for plaintiffs, the new rule discourages those parties with legitimate claims yet little at stake in pursuing grievances.[166] Consequently, parties represented by attorneys with limited resources may be inhibited from bringing their claims because of the initial discovery costs.[167] More specifically, the new rule may have the unintended effect of preventing suits from being filed because the anticipated recovery is too small to justify action,[168] especially for plaintiffs lacking in financial resources.[169] Therefore, the shortcomings of the no-evidence motion arguably contribute to a system that only administers justice to the rich.[170]

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166. *See* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 206–08 (1993) (discussing that summary judgment under *Celotex* increases plaintiffs' costs and discards many legitimate lawsuits); *see also* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 102 (1990) (noting that summary judgment places substantial up-front expenses on the plaintiff). The inundation of no-evidence motions by plaintiffs may decrease the value of lawsuits to plaintiffs as they can expect to incur legal expenses in defending a predictable no-evidence motion. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 104 (1990) (reporting that "summary judgment will never increase, and will often decrease, the value of the suit for plaintiffs and will correspondingly benefit defendants for any award amounts, probabilities, and levels of legal expenditures").

167. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (explaining that the no-evidence will allow "defense lawyers to 'starve out' plaintiffs who must bear the expense of developing the suit"); *see also* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 106 (1990) (describing the effect of increased up-front costs on plaintiffs as "allowing defendants to force poorly capitalized plaintiffs to incur expenses early in the case while themselves incurring no reciprocal obligation").

168. *See* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 105 (1990) (indicating the cost of summary judgment may deter the filing of valid claims when the "anticipated reward is too small to justify suit").

169. *Cf.* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 105 (1990) (expressing that "[f]or cases of limited economic claims, the broad-scale increase in plaintiff's up-front expenditures effectively dooms the prospect of enforcing viable legal claims."); Janet Elliot, *A Matter of Judgment*, TEX. LAW., Sept. 8, 1997, at 14 (declaring that the no-evidence motion may "keep plaintiffs' lawyers from taking low damage cases because of the increased cost of fighting summary judgment motions").

170. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (asserting that the no-evidence motion will allow defense lawyers to force out plaintiffs by increasing discovery expenses); *cf.* Jeffrey S. Brand, *The Second Front in the Fight for Civil Rights: The Supreme Court, Congress, and Statutory Fees*, 69 TEX. L. REV. 291, 381 (1990) (discussing that economic factors are often determinative in the administration of justice); Gregory A. Gordillo, Note, *Summary Judgment and Problems in Applying the* Celotex *Trilogy Standard*, 42 CLEV. ST. L. REV. 263, 279–80 n.110 (1994) (opining that the shift in federal summary judgment practice under *Celotex*

1. Trial Strategies

Another defect in the revised summary judgment rule relates to the practicalities of trial strategies. Plaintiffs often choose not to conduct discovery on particular elements that have not been seriously contested with the knowledge that they can obtain evidence to prove the element during trial.[171] Plaintiffs avoid such discovery to save time and money, to refrain from revealing trial strategy early in the proceeding, and to avoid unnecessary discovery and depositions.[172] Under the new rule, a defendant may bring a no-evidence motion attacking the previously uncontested element, and because the non-movant has not engaged in discovery on the particular element, the non-movant may be unable to produce evidence that qualifies as summary judgment evidence.[173] In such a situation, the court would summarily dismiss a case in which the plaintiff might have presented a genuine issue of fact to a jury had the case been allowed to go to trial.[174]

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represents "increased protection from the merchant class," which consists of "banks, insurance companies, railroads, business organizations, governments and government agencies").

171. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6426–27 (Nov. 22, 1996) (on file with the *St. Mary's Law Journal*) (explaining that plaintiffs "may very well choose to do no discovery on some element" because they know they can obtain the evidence at trial); DAVID E. KELTNER, PRACTICE GUIDE: TEXAS DISCOVERY § 4:2 (The Rutter Group 1997) (noting that "[i]n simple cases where witnesses are available at the time of trial, discovery may not need to be conducted.").

172. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6426 (Nov. 22, 1996) (on file with the *St. Mary's Law Journal*) (explaining that plaintiffs often choose not to conduct discovery to save resources, time, evidence, and trial strategy when they know they can obtain the evidence subsequently at trial); DAVID E. KELTNER, PRACTICE GUIDE: TEXAS DISCOVERY § 4:2 (The Rutter Group 1997) (discussing that the "expenditure of time and money" plays an important role in discovery decisions); *cf.* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 110 (1990) (noting that under *Celotex* defendants used summary judgments to force plaintiffs to reveal trial strategy).

173. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6427 (Nov. 22, 1996) (on file with the *St. Mary's Law Journal*) (expressing that a point which has previously been uncontested may become the basis for a no-evidence motion, and a non-movant may be unable to proffer summary judgment evidence because the non-movant felt no need to conduct discovery on the particular element and thought he could prove the issue at trial).

174. *Cf.* Celotex Corp. v. Catrett, 477 U.S. 317, 319–20 (1986) (explaining the circumstances surrounding the summary judgment granted by the trial court in favor of the defendant). In *Celotex*, the trial court granted summary judgment for the defendant because the plaintiff failed to show the existence of a fact issue on proximate causation. *See id.* at 320 (explaining the grounds for summary judgment). The trial court apparently disregarded evidence tending to establish causation because it was inadmissible for trial. *See id.* (explaining that the plaintiff produced three documents, including "a transcript of a deposition of the decedent, a letter from an official of one of the decedent's former employers whom petitioner planned to call as a trial witness, and a letter from an insurance company

2. Settlements

The possibility of unbridled no-evidence motion filing may also discourage settlements or increase the price of settlements.[175] Because the denial of summary judgments may adversely impact the likelihood of settlements, a substantial increase in summary judgments would have a negative effect on judicial efficiency in Texas. For example, a defendant who would have been willing to settle in the past may now bring a no-evidence motion and ummary judgments may adversely impact the likelihood of settlements, a substantial increase in summary judgments would have a negative effect on judicial efficiency in Texas. For example, a defendant who would have been willing to settle in the past may now bring a no-evidence motion and force the plaintiff to reveal his case, placing the plaintiff in the position of incurring expenses early in the litigation.[176] If the defendant loses on its no-evidence motion, the plaintiff may gain confidence in his claim and choose to go to trial or increase his settling price.[177] Moreover, because a substantial number of cases in Texas are settled before trial, increasing the expense of settlements may have a harsh impact on overall judicial expenses.[178] Finally, by liberalizing sum-

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to respondent's attorney"). Thus, the trial court dismissed an arguably genuine claim because the plaintiff did not conduct extensive discovery before trial. *See id.* (stating that the trial court granted the defendant's motion for summary judgment because the plaintiff made no showing of proximate causation).

175. *Cf.* Harold A. Segall, *An Executive's Lesson in the Law from a Typical Business Encounter*, 23 FORDHAM URB. L.J. 257, 264–65 (1996) (noting that when summary judgment motions are denied, the price of settlements is drastically affected).

176. *Cf.* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 105 (1990) (opining that relaxed summary judgment standards permit defendants to reveal their cases early in the litigation and "force additional costs onto plaintiffs at an earlier stage of the litigation and increase the likelihood of summary judgment being granted").

177. *See* Harold A. Segall, *An Executive's Lesson in the Law from a Typical Business Encounter*, 23 FORDHAM URB. L.J. 257, 264–65 (1996) (stating that "[t]he denial of summary judgment drastically alters the negotiating position of the parties and the dollar figure in settlement talks.").

178. *Cf.* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 100 (1990) (noting that settlement is the primary method of clearing crowded dockets, and "[t]hus, changes that facilitate judicial disposition of cases but impede settlement may fail to relieve, if not exacerbate, court congestion."); *see also* Frank E. A. Saner et al., *Alternative Dispute Resolution: An ADR Primer* (observing that between 90 and 95% of cases filed are settled), *in* 1989 A.B.A. STANDING COMMITTEE ON DISPUTE RESOLUTION 1; George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 541 (1989) (reporting that approximately 5% of cases filed in federal court result in trial); Angela Wenniham, *Lets Put the Contingency Back in the Contingency Fee*, 49 SMU L. REV. 1639, 1657 (1996) (discussing that most suits settle before reaching trial and consequently, plaintiff attorneys risk little in assuming a contingency fee).

mary judgment standards, the new rule may discourage parties from bringing novel legal causes due to the low probability of success.[179]

VI. PROPOSED ALTERNATIVES TO RULE 166a(i)

A. *An Argument for Reconsideration of the Advisory Committee's Proposals*

Requiring the party bearing the burden of proof at trial to raise an issue of fact in response to a no-evidence motion for summary judgment appears to be a reasonable step toward the promotion of judicial efficiency.[180] If a party cannot proffer any evidence to support his claim, a trial is a waste of time and money.[181] However, because the Texas Supreme Court has chosen to adopt the *Celotex* burden shift without including measures intended to protect the non-movant,[182] Rule 166a(i) falls short in both judicial efficiency and neutrality.[183]

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179. *Cf.* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 105 (1990) (explaining that the anticipation of increased cost due to a liberalized summary judgment standard "will deter the filing of novel legal claims").

180. *See* J. Patrick Hazel, *New Summary Judgment Rule: A Critique*, 16 ADVOC. 28–29 (State Bar Litig. Sec. Rep., Austin, Tex.), Spring 1997 (discussing that "[a]t first glance the proposed rule seems quite reasonable and has some good rationale to support it."); Judge David Hittner & Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, K–11 (Sept. 16, 1997) (unpublished Article presented before the Houston Bar Assoc. litigation section) (on file with the *St. Mary's Law Journal*) (reporting the opinion that the party with the burden of proof at trial should also carry that burden in a hearing for summary judgment). Professor Hazel notes that after parties have engaged in adequate discovery, and have a good idea of the issues and evidence which will be presented at trial, the non-movant should reasonably be required "to come forward to show that some" evidence exists. J. Patrick Hazel, *New Summary Judgment Rule: A Critique*, 16 ADVOC. 28, 29 (State Bar Litig. Sec. Rep., Austin, Tex.), Spring 1997.

181. *Cf.* Sheila A. Leute, Comment, *The Effective Use of Summary Judgment: A Comparison of Federal and Texas Standards*, 40 BAYLOR L. REV. 617, 640 (1988) (asserting that claims which lack merit place economic burdens on the Texas judicial system and waste time).

182. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (explaining that when the supreme court signed an April 16 order proposing a new summary judgment rule, it discarded the recommendations of the advisory committee).

183. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6450 (Nov. 22, 1996) (statement of Paul Gold) (on file with the *St. Mary's Law Journal*) (relating committee member Paul Gold's concern that adopting federal summary judgment practice will create problems because the Texas rules of procedure vary from federal rules). Gold suggested that if the court is going to adopt the *Celotex* standard, it should do so in its entirety. *See id.* (stating, "I think we need to look at the differences between our system and the federal system and how the thing is balanced in the federal system and how it would be out of balance in [the] Texas system.").

Specifically, requiring non-movants to produce summary judgment evidence rather than mere discovery product forces plaintiffs to expend substantial up-front capital and creates a more onerous evidentiary standard for non-movants than federal summary judgment practice.[184] Next, the amorphous "adequate time for discovery" standard may prompt premature summary judgments resulting in arbitrary and inconsistent decisions.[185] Finally, by promulgating a rule that purports to adopt the federal practice of placing the burden on the non-movant without including a sanctions provision, the Texas Supreme Court opens the door for extensive no-evidence motion filing in Texas courts.[186] Taken together, these shortcomings create a rule that favors the defense in a summary judgment motion and may actually discourage efficiency.[187]

While the supreme court should not ignore the national trend of embracing the *Celotex* burden-shifting standard, it should restructure the rule to provide fairness and balance to both parties. Given that Texas now requires the non-movant to produce summary judgment evidence in a no-evidence motion, the court should adopt accompanying standards associated with federal summary judgment practice and the protections included in the advisory committee's proposal. To do otherwise is to create a summary judgment rule more harsh than its federal counterpart.

The supreme court should amend Rule 166a to include provisions specified in the advisory committee's proposal. First, the court should adopt

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184. *See* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1361 (1998) (noting that "unsworn witness statements, expert's reports or unauthenticated documents produced in discovery" are not evidence that can raise a fact issue and defeat a no-evidence summary judgment motion in state court and also observing that non-movants in federal courts are not required to produce summary judgment evidence).

185. *See* Judge David Hittner & Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, K–11 (Sept. 16, 1997) (unpublished Article presented before the Houston Bar Assoc. litigation section) (on file with the *St. Mary's Law Journal*) (discussing the concern that the "adequate time for discovery standard is so vague that it will be a battleground in the appellate [courts]").

186. *See id.* (relating the concern that no-evidence motions will be brought in every case).

187. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (opining that the rule creates "more imbalance in a legal system that over the past seven years has increasingly favored defendants and their lawyers at the expense of injured consumers"); *see also Spector's Dissent*, *supra* note 6, at xxxvii (asserting that the no-evidence motion may increase overall judicial expenditures); *cf.* Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 375–76 (1990) (opining that the new summary judgment practice in federal courts has shifted the balance of power to defendants and created an unfavorable environment for minority plaintiffs and discussing federal summary judgment practice as "unabashedly prodefendant" and a "terrible trap for the unwary" plaintiff).

the committee's recommendation as to when a movant may bring a no-evidence motion.[188] This recommendation states that a party should not be able to file a no-evidence motion before the expiration of "an applicable discovery period," or before a date set by the court which provides for adequate discovery time.[189] While this bright-line test may be rigid in application and may not apply a consistent standard to all cases,[190] it pro-

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188. *See* TEXAS SUPREME COURT ADVISORY COMMITTEE, PROPOSAL FOR TEXAS RULE OF CIVIL PROCEDURE 166a (on file with the *St. Mary's Law Journal*) (proposing guidelines for when a no-evidence motion could be filed).

The sanctioning provisions and time requirements proposed by the Advisory Committee would result in the following version of Rule 166a(i), originally drafted by the members of the Texas Supreme Court Advisory Committee:

> In addition to motions that may be brought under subdivisions (a) and (b), without presenting summary judgment evidence a party may seek summary judgment in compliance with this subdivision on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. A motion filed under this subdivision may be made only [(1) after the expiration of any applicable discovery period, or (2) if there is no applicable discovery period,] after a period set by the court which allows adequate time for discovery. A motion filed under this subdivision must state that there is no evidence to support one or more specified elements of claims or defenses, identify the discovery that has been completed as to the specified elements, and bear a certificate that the movant's attorney has reviewed discovery and that, in the attorney's opinion, the discovery reveals no evidence to support the specified elements. The court must grant the motion unless the respondent produces summary judgment evidence or discovery product or other material that can be reduced to summary judgment evidence raising a genuine issue of material fact. If a motion under this subdivision is denied, and the court finds that the motion did not have an objectively reasonable basis at the time it was filed, the court may award reasonable attorneys' fees to the respondent for defending the motion.

Id.

189. *See* TEX. R. CIV. P. 166a(i) (providing a dual framework in which a party may not bring a motion before an applicable discovery period, or if no such period exists, before a time specified by the court).

190. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6406–07 (Nov. 22, 1996) (statement of Judge Sarah Duncan) (on file with the *St. Mary's Law Journal*) (explaining Judge Duncan's opinion that a bright line test for determining when a no-evidence motion may be filed would not work, and the rule should allow judges greater discretion); Charles L. Babcock, To the Editor, *Summary Judgment Rule Was Misread*, TEX. LAW., Sept. 1, 1997, at 25 (relating an opinion of a member of the Supreme Court Advisory Committee that the Texas Supreme Court was wise in rejecting the committee's recommendation for determining when a no-evidence motion may be filed). According to Charles Babcock, member of the advisory committee, the proposed time period for filing was rigid and would have been difficult to apply in some counties. *See id.* (noting that "obtaining a hearing on the summary judgment motion prior to trial would have been especially difficult in some urban counties where discovery typically cuts off [thirty] days before trial").

vides certainty in requiring courts to set specific dates as to when a party may bring a motion for summary judgment for want of evidence.[191]

The committee's formalistic approach to the timing requirement would facilitate appellate review by providing judges with a clear standard. Further, this approach would avoid the quagmire of evaluating the denial of a continuance from a summary judgment motion under the arbitrary "adequate time for discovery" standard.[192] Moreover, the standard prevents plaintiffs from being "railroaded" by no-evidence motions shortly after filing cases, a danger that is more likely to occur under the ambiguous "adequate time for discovery standard."[193] Thus, by setting a specific date or relying on an applicable discovery period, courts would provide notice to litigants of the available discovery period and avoid the surprise of unexpected, premature no-evidence motions.[194]

The court should also adopt the sanctions and certificate provision listed in the advisory committee's proposal.[195] The committee's proposal provides that: "If a motion under this subdivision is denied, and the court finds that the motion did not have an objectively reasonable basis at the time it was filed, the court may award reasonable attorneys' fees to the respondent for defending the motion."[196] While it is true that sanctions

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191. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6419 (Nov. 22, 1996) (statement of Judge David Peeples) (on file with the *St. Mary's Law Journal*) (relating Judge David Peeples' concern that the rule set a specific period so that attorneys are not "faced with a rule that [does not] tell them one thing about when [it is] okay to file [their] motion, beyond 'adequate discovery'").

192. *See Baker's Dissent*, *supra* note 21, at xxxviii (expressing that the committee's proposed rule would avoid "the uncertainty that would result from the appellate courts' frequently unpredictable application of the abuse of discretion standard to a trial judge's determination of an adequate time for discovery'").

193. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6421 (Nov. 22, 1996) (on file with the *St. Mary's Law Journal*) (explaining William Dorsaneo's preference for a specific time period to serve "as an indication to a defendant that [it is] not appropriate to file these motions right at the threshold on the chance that [he] might be able to get a hearing"); *cf.* Robert M. Bratton, *Summary Judgment Practice in the 1990s: A New Day Has Begun—Hopefully*, 14 AM. J. TRIAL ADVOC. 441, 476–77 (1991) (discussing the tendency in federal court for defendants to file "out-of-the-starting-gate" summary judgment motions).

194. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6637 (Nov. 23, 1996) (statement of Judge Scott A. Brister) (on file with the *St. Mary's Law Journal*) (relating Judge Scott A. Brister's opinion that some of his colleagues would impose mandatory sanctions if someone loses their motion).

195. *See* TEXAS SUPREME COURT ADVISORY COMMITTEE, PROPOSAL FOR TEXAS RULE OF CIVIL PROCEDURE 166a (on file with the *St. Mary's Law Journal*) (describing the required certificate signed by the movant's attorney and outlining the availability of sanctions if the court determines the "motion did not have an objectively reasonable basis at the time it was filed").

196. *Id.*

are already available pursuant to Rule 13 and Sections 9.001 to 10.006 of the Texas Civil Practice and Remedies Code,[197] courts rarely impose these sanctions.[198] Because the sanctions drafted by the Supreme Court Advisory Committee are narrowly tailored to the circumstances of the no-evidence motion, courts might be more willing to utilize these sanctions.[199] Therefore, including a sanctions provision would send a message that movants should employ the no-evidence motion in a pragmatic, nonabusive manner.[200]

Finally, the supreme court should permit the non-movant to counter a no-evidence motion with "discovery product or other material that can be reduced to summary judgment evidence."[201] In requiring the non-movant to produce summary judgment evidence, or evidence in admissible form, Texas Rule of Civil Procedure 166a(i) sets forth a more arduous evidentiary burden than that of federal courts, which merely require the non-movant to "come forward and indicate that proof can be obtained."[202] The restrictive evidentiary burden placed on the non-movant increases the probability of trial courts granting summary judgments due to technical failures.[203] Correspondingly, the requirement to produce summary judgment evidence may increase pretrial expenses for plaintiffs and prompt these plaintiffs to conduct extensive discovery early in the

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197. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 9.001–10.006 (Vernon Supp. 1998) (discussing sanctions).

198. *See* Walter Borges, Editorial, *Rule Puts Plaintiffs in Tougher Spot*, SAN ANTONIO EXPRESS-NEWS, May 22, 1997, at 9B (opining that the Texas Supreme Court Justices "dislike refereeing lawyer disputes and using sanctions to punish lawyers").

199. *See Baker's Dissent*, *supra* note 21, at xxxviii (noting that "[p]lacing the sanction authority in the Rule itself clearly establishes the standard that applies to the trial court's exercise of its discretion."); *Hearing of the Supreme Court (Texas) Advisory Comm.* 6639 (Nov. 23, 1996) (on file with the *St. Mary's Law Journal*) (explaining that the sanctions would only apply to paragraph (i) of Rule 166a and not to paragraphs (a) through (h)).

200. *See Baker's Dissent*, *supra* note 21, at xxxviii (contending that the certificate and sanctions provisions in the advisory committee's proposal would "curb the filing of frivolous no-evidence motions"); *Hearing of the Supreme Court (Texas) Advisory Comm.* 6505 (Nov. 22, 1996) (statement of Tommy Jack) (on file with the *St. Mary's Law Journal*) (relating committee member Tommy Jack's statement that Rule 166a(i) needs a "punishment mechanism" such as sanctions to prevent abuse).

201. TEXAS SUPREME COURT ADVISORY COMMITTEE, PROPOSAL FOR TEXAS RULE OF CIVIL PROCEDURE 166a (on file with the *St. Mary's Law Journal*).

202. Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1361 (1998). The authors explain that federal evidentiary summary judgment requirements are less restrictive than Texas standards because they do not require the production of summary judgment evidence. *See id.*

203. *See id.* (expressing the concern that "technical failure of the respondent's summary judgment evidence will defeat an otherwise meritorious claim").

litigation process.[204] The advisory committee's proposal avoids these problems by implementing a more lenient evidentiary standard.

B. *An Alternative Proposal*

Although the Advisory Committee's recommendations provide a more balanced summary judgment rule than the present version, several provisions in the recommendations might be amended to avoid potential difficulties. As aforementioned, the advisory committee's two-part approach to when a party may bring a no-evidence motion might be inconsistent in practice and prevent parties from anticipating when no-evidence motions would be filed. Moreover, the committee's sanctions provision might encourage judges to award non-movants sanctions any time a motion is denied, causing a chilling effect on no-evidence motion filing. To avoid the inconsistent application of the timing standard, rather than requiring a court to specify a period allowing for adequate discovery, the rule could provide: "A motion under this subdivision may only be filed following the expiration of 180 days from the first filing of an answer by a defendant in the case."[205] This proposal would provide litigants and judges with certainty as to when no-evidence motions can be properly filed.[206] The problem, however, with this bright-line approach would lie in its inflexibility. In some cases one or two months may be enough time for plaintiffs to conduct discovery, and waiting until the 180 day period to file a no-evidence motion would be a waste of time. On the other hand, more complex litigation may require extensive discovery. Consequently, a no-evidence motion six months after the defendant's answer might be premature.[207] By implementing a fixed timing provision, however, the Texas

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204. *See Spector's Dissent*, *supra* note 6, at xxxvii (opining that the rule "will increase the need for extensive discovery"); Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1361 (1998) (explaining the concern that "trial by discovery will become an expensive, drawn-out substitute for trial by jury").

205. Similar timing proposals were considered in the advisory committee hearings. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6369 (Nov. 22, 1996) (statement of Richard Orsinger) (on file with the *St. Mary's Law Journal)* (recording committee member Richard Orsinger's disdain with the vague timing rule and his preference for a set time period, such as nine months); *Hearing of the Supreme Court (Texas) Advisory Comm.* 6411, 6412–16 (Nov. 22, 1996) (statement of Judge Scott A. Brister) (on file with the *St. Mary's Law Journal*) (discussing Judge Brister's proposal for the discovery period for no-evidence motions to cut off at 120 days prior to trial).

206. *See id.* at 6438, 6439 (relating Chairman Soule's opinion that a filed date would give litigants notice as to when a no-evidence motion might be filed and would allow them to prepare better for such motions).

207. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6419 (Nov. 22, 1996) (statement of Judge David Peeples) (on file with the *St. Mary's Law Journal*) (explaining Judge Peeple's concern that a specified time period for no-evidence motions would create

Supreme Court would merely be following the actions of other states.[208] For example, the California legislature revised its summary judgment statute to conform to the *Celotex* burden-shifting standard with the inclusion of a specific time period before which a summary judgment motion may not be brought.[209] Specifically, the California statute prevents a party from moving for summary judgment prior to sixty days after the filing of the general appearance or prior to an earlier time specified by the court.[210] In short, a six-month time line would substantially reduce the confusion and number of reversals because of an inadequate time for discovery.

To avoid a chilling of no-evidence motion filings and to ameliorate the sanctions provision for defendants, the rule could also be amended to provide: "If the court determines that a motion for summary judgment or a motion for continuance filed under this subdivision is groundless and has been filed in bad faith, the court may award reasonable attorney's fees to the opposing party for responding to the motion." Requiring the motion to be groundless and made in bad faith in lieu of the objectively unreasonable standard decreases the likelihood that judges will make it a practice to grant sanctions to non-movants after no-evidence motions have been denied. Instead, the judge could only award sanctions in those situations when a motion is truly frivolous. Although this language mirrors Section 9–10 of the Texas Civil Practice and Remedies Code and may seem redundant in Rule 166a(i), it would place movants on notice that their motions should be filed only under appropriate circumstances. Moreover, this provision applies sanctions to either the movant or non-movant in the event of a bad faith, groundless motion

Finally, to ensure that meritorious claims are not dismissed because of technical evidentiary requirements, the rule might provide: "The court must grant a continuance and allow discovery for a period of thirty days upon a showing that the non-movant possesses information that, if in the form of admissible evidence, would raise a genuine issue of material fact." This standard would preserve the summary judgment evidence criteria while allowing non-movants to use discovery products such as un-

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a "rigid, unbending" rule because in some cases the discovery time would be too much, while in others it would be inadequate).

208. *See* CAL. CIV. PROC. CODE § 437c (West 1995) (including sanctions and a specific time requirement in the California summary judgment statute).

209. *See* CAL. CIV. PROC. CODE § 437c (outlining California's summary judgment procedure).

210. *See* CAL. CIV. PROC. CODE § 437c(a) (providing that a motion for summary judgment may not be filed until sixty days after the general appearance "or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct").

sworn witness statements and unauthenticated documents to extend discovery time. Furthermore, this modification would eliminate the truly frivolous cases in which plaintiffs could not come forward with any information to substantiate their claims. At the same time, this provision would allow plaintiffs with legitimate claims further discovery time to reduce the information to summary judgment evidence. In this process, allowing the non-movant to come forth with "information" rather than summary judgment evidence to gain further discovery time would ameliorate the rigid six-month discovery period.[211]

Together, these provisions would create the following no-evidence summary judgment rule:

> Without providing summary judgment evidence, a party may move for summary judgment on the basis that no evidence exists as to one or more of the essential elements of a claim or defense on which an adverse party would have the burden of proof during trial. A motion under this subdivision may only be filed following the expiration of 180 days from the first filing of an answer by a defendant in the case. The court must grant a continuance and allow discovery for a period of thirty days upon a showing that the non-movant possesses information that, if in the form of admissible evidence, would raise a genuine issue of material fact. The motion must specify the elements as to which there is no evidence. The court must grant the motion unless the respondent provides summary judgment evidence raising a genuine issue of material fact. If the court determines that a motion for summary judgment or a motion for continuance filed under this subdivision is groundless and has been filed in bad faith, the court may award reasonable attorney's fees to the opposing party for responding to the motion.

The Texas Supreme Court's motivations for revising Rule 166a to include paragraph (i)[212] contradicts the framer's view of the Texas Consti-

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211. Committee member Thomas Jacks articulated a similar point but in the context of a nine month discovery window. *See Hearing of the Supreme Court (Texas) Advisory Comm.* 6375, 6376 (Nov. 22, 1996) (statement of Tommy Jacks) (on file with the *St. Mary's Law Journal*) (discussing the plausibility of a nine month discovery period). Mr. Jacks opined that if the committee were to adopt a specified discovery time, such as nine months, litigants should "be able to show that even though nine months have gone by there still hasn't been adequate discovery." *Id.*

212. *See* J. Patrick Hazel, *New Summary Judgment Rule: A Critique*, 16 ADVOC. 28, 32–34 (State Bar Litig. Sec. Rep., Austin, Tex.) Spring 1997 (discussing that the Texas Supreme Court adopted the new rule after threat by the legislature to enact a summary judgment statute replacing Rule 166a). Professor Hazel notes that the legislative version of the no-evidence motion would have provided even fewer safeguards for non-movants. *See id.* (explaining that the legislature omitted any requirement that a movant wait until

tution as protecting "the democratic majority from the economically advantaged minorities."[213] In seeking to further the objectives of judicial economy, the Texas Supreme Court has drafted a rule that increases expenses for plaintiffs and arguably places greater constraints on Texas dockets.[214] Moreover, by broadening the requirements of pretrial disposition, the no-evidence motion may usurp the role of the jury trial in Texas.[215] Anticipating these problems, the advisory committee, through lengthy debate, proposed that Rule 166a(i): (1) allow the non-movant to produce discovery product rather than summary judgment evidence; (2) include sanctions to deter frivolous no-evidence motion filing; and (3) set a specific time period before which a no-evidence motion cannot be filed.[216] To better serve the interests of efficiency and impartial adjudication, the supreme court should further revise Rule 166a(i) to include these provisions.[217] Alternatively, the court might rewrite the rule to include: (1) a six-month period before which a no-evidence motion could not be filed; (2) sanctions which could only be awarded if a party filed a groundless no-evidence motion, or continuance in response thereto, in bad faith; and (3) further discovery time if the non-movant could provide "information" raising a genuine issue of material fact.

VII. CONCLUSION

The Texas Rule of Procedure 166a(i) no-evidence motion equips litigants with an effective tool for eliminating unsubstantiated claims by re-

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after adequate time for discovery to bring a motion or be specific in the motion as to which issue lacks evidence). However, Professor Hazel insists that while the present rule is better than the legislative proposals, the Texas Supreme Court should have adopted the recommendations of the advisory committee. *See id.* at 34 (relating that just because the legislative version of the revised summary judgment rule would have been worse than the present rule, it does not make it better than the rule which their own advisory committee recommended).

213. JAMES C. HARRINGTON, THE TEXAS BILL OF RIGHTS: IN THE MAINSTREAM OF THE MOVEMENT TO PROTECT INDIVIDUAL RIGHTS 3–6 (Elaine Carlson ed., The Rutter Group 1994); *see also Spector's Dissent*, *supra* note 6, at xxxvii (opining that "any marginal benefit of the new rule" is outweighed by constitutional interests in the right of "aggrieved citizens to seek redress").

214. *See Spector's Dissent*, *supra* note 6, at xxxvii (opining that the revised rule will increase discovery costs, as well as overall judicial expenditures).

215. *See id.* (asserting that "meritorious lawsuits will be summarily dismissed" under the no-evidence motion and contending that the new rule infringes upon the constitutional rights of Texas citizens).

216. *See* TEXAS SUPREME COURT ADVISORY COMMITTEE, PROPOSAL FOR TEXAS RULE OF CIVIL PROCEDURE 166a (copy on file with the *St. Mary's Law Journal*) (outlining the committee's proposals).

217. *See* TEX. R. CIV. P. 1 (stating that the function of the rules of civil procedure is to balance the interests of impartial adjudication with the interests of efficiency).

quiring the non-movant to provide summary judgment evidence creating a genuine issue of fact. Unfortunately, in the haste of revising Rule 166a to prevent the legislature from usurping the judicial rule-making authority, the Texas Supreme Court drafted a rule lacking procedural safeguards for non-movants. As a result, the court may have created a summary judgment rule that works against the goal of judicial efficiency. Moreover, in ignoring the recommendations of its advisory committee, the supreme court drafted a summary judgment rule that favors defendants. Because procedural rules should serve both the interests of dispatch and justice, the court should revise Rule 166a(i) to include the recommendations of its advisory committee. In so doing, the court should consider the modifications to the committee's proposal found in this Comment. Providing sanctions for objectively unreasonable motions or groundless motions made in bad faith affords reasonable deterrents to offensive motion filing. In addition, allowing the non-movant to produce discovery product to defeat a no-evidence motion or at least allowing more discovery time if the non-movant possesses information that would raise a genuine issue of material fact ensures that meritorious claims are not dismissed for technical failures. Finally, creating a bright-line test as to when a party may file a no-evidence motion affords predictability and uniformity in a novel and murky area of Texas procedure. Although no plaintiff should be permitted to proceed in a case devoid of evidentiary support, Rule 166a(i), in its current form, threatens to minimize the role of the jury system in Texas and may create greater judicial inefficiency in attempting to ease summary judgment standards.