SUMMARY JUDGMENT
IN COLLECTION CASES

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SUMMARY JUDGMENT IN COLLECTION CASES

Summary judgments are frequently used procedures for accelerated final judgments in collection cases. They are second to default judgments in the disposition of collection cases. Often, the amount of the debt is easily provable by documents; and defenses or counterclaims, if any, are illusory, sometimes disingenuous, and are skillfully surmountable. This article discusses collection actions most amenable to summary judgment.

I. COLLECTION ACTIONS MOST AMENABLE TO SUMMARY JUDGMENT.

The genres of collection actions most amenable to summary judgment are: (a) suit on sworn account; and (b) suit on written instrument (breach of contract, account stated, promissory notes, or guaranties). An action for money had and received, which is frequently available, is also a collections action amenable to summary judgment.

II. SUIT ON SWORN ACCOUNT

A suit on account under Rule 185 is commonly referred to as a suit on sworn account. Rule 185 is a procedural tool that limits the evidence necessary to establish a prima facie right to recovery on certain types of accounts. The rule provides that an open account or other claim for goods, wares or merchandise or for personal services rendered or labor done or labor or materials furnished within the scope of the rule, properly verified under the rule, establishes a prima facie case (right to recover on the account as pleaded) which, if not countered by sworn denial of the adversary, authorizes a judgment on the pleadings for the party filing the account. The claim must be for a liquidated money amount for Rule 185 to apply.[1]

Where a proper sworn denial is filed against the account under the requirements of the rule, the party pleading the account is put to proof of that account.[2] The suit on sworn account may be brought by the seller of the goods or provider material or services for which payment in full was not made; there must be a sale on one side and a purchase on the other, whereby title to personal property passes from one to the other (when goods or materials are sold); a suit on sworn account may not brought by a debt buyer. For example, a suit to collect an unpaid credit card account derived from credit extended by a financial institution that financed the sale but was not the seller of the goods or services purchased with the credit card does not come within Rule 185.[3]

Summary judgment is appropriate when a defendant fails to file a sworn denial which

1. TEX. R. CIV. P. 185; *Pine Trail Shore Owner's Ass'n v. Allen*, 160 S.W.3d 139, 144 (Tex. App. - Tyler 2005, no pet.) (Rule 185 action must be supported by sworn testimony and prove liquidated damages). *See Espinoza v. Wells Fargo Bank, N.A.*, 02-13-00111-CV (Tex. App. - Fort Worth, Nov. 14, 2013) (traditional summary judgment on sworn account; deficiency suit on automobile loan; sequestration); *Horizon 2003, LLC v. JKC & Associates, Inc.*, No. 14-08-0069-CV (Tex. App. - Houston [14th Dist.] 2011, no pet.) (Two suits on sworn account. Summary judgment denied where movant failed to present evidence on all elements of sworn account; pleadings were not competent summary judgment evidence. Altogether, the evidence merely established that amounts were charged to debtors. The evidence did not include systematic, itemized records of the accounts, nor did it contain competent testimony that the accounts were just and that all credits had been afforded. The only "evidence" of these essential elements was contained in the "Verification" of creditor's petitions, where creditor's president recited his averments. However, the pleadings do not constitute competent evidence, even if sworn or verified).

2. TEX. R. CIV. P. 185.

3. *See Unifund CCR Partners v. Laco*, No. 05-08-01575-CV (Tex. App. - Dallas 2009, no pet.), 2009 Tex. App. LEXIS 9642 (Plaintiff in suit on sworn account was not the original creditor. There was no proof the debt buyer was an assignee of the original creditor.); *Williams v. Unifund CCR Partners Assignee of Citibank*, 264 S.W.3d 231, 234 (Tex. App. - Houston 2008, no pet.) (A credit card issued by a financial institution is a special contract that does not create the sort of debtor-creditor relationship to bring a claim within the scope of Rule 185); *Tully v. Citibank (S.D.), N.A.*, 173 S.W.3d 212, 216 (Tex. App - Texarkana 2005, no pet.) (A bank cannot collect credit card debt through suit on a sworn account. Because no title to personal property passes from the bank to the cardholder, a credit card debt is not a sworn account as contemplated by Rule 185); *Bird v. First Deposit Nat'l Bank*, 994 S.W.2d 280, 282 (Tex. App. - El Paso 1999, pet. denied) (A credit card issued by a financial institution does not create the sort of debtor-creditor relationship required to bring suit under Rule 185).

meets the requirements of Rules 185 and 93(10) or files a sworn general denial.[4] An answer to a suit on sworn account can be amended and the failure to comply with Rules 185 and 93(10) can be cured. Therefore, it is advisable to state two bases for summary judgment, one that can survive a curative amended answer. The two bases should be: (1) there is no proper sworn denial; and (2) the admissible evidence accompanying the motion proves movant's claim.[5] Editors of the Texas Collections Manual state "Motions for summary judgment will help ferret out those who file answers to buy time from those with genuine defenses and are also great discovery tools. Well drawn summary judgments often require the debtors' attorneys to have serious talks with their clients about fees, resulting in serious settlement negotiations."[6]

In a collection case, a no-evidence motion for summary judgment has utility when the debtor defendant files a counterclaim, thereby raising issues for which the debtor defendant has the burden of proof at trial. Should the trial court grant the creditor plaintiff's traditional motion for summary judgment on the creditor's collection claim(s) and a debtor defendant's counterclaim is undisposed, the resulting summary judgment is partial and the creditor cannot pursue execution thereon.[7] The successful creditor plaintiff may move to sever the party, cause of action, or issue, as appropriate, so that the otherwise interlocutory summary judgment may become separate, final and enforceable.[8]

Texas Rule of Civil Procedure 185 provides that a suit on account may be proper:

> When any action or defense is founded upon an open account or other claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties, or is for personal service rendered, or labor done or labor or materials furnished, on which a systematic record has been kept ...[9]

An action brought under Rule 185 is procedural and concerns the evidence necessary to establish a prima facie case of the right to recover.[10] In a suit on account, when a defendant debtor fails to file a proper answer under Rules 185 and 93(10)[11] the plaintiff creditor may secure what is essentially a summary judgment on the pleadings. In effect, noncompliance with these rules concedes that there is no defense.[12]

4. TEX. R. CIV. P. 185 requires "… a written denial, under oath …"; Tex. R. Civ. P. 93.10 provides that certain matters should be verified by affidavit, including: "A denial of an account which is the foundation of the plaintiff's action, and supported by affidavit." Summary judgment may be entered in a suit on sworn account when the respondent fails to file a Rule 185 or Rule 93(2) verified denial to plaintiff's account. *Wimmer v. Hanna Prime, Inc.*, No. 05-08-01323-CV (Tex. App. - Dallas 2009, no pet.), 2009 Tex. App. LEXIS 8866 (The statement "to the best of my knowledge" in a corporate officer's affidavit attached to the amended original answer did not attest to the truthfulness of the facts alleged, and is not legally effective as a verification); *Cooper v. Scott Irrigation Construction, Inc.*, 838 S.W.2d 743, 746 (Tex. App. - El Paso 1992, no writ) (A defendant who fails to file a proper sworn denial is not entitled to dispute the receipt of items or services or the accuracy of the stated charges. A sworn general denial is insufficient to remove the evidentiary presumption created by a properly worded and verified suit on an account).

5. *See infra.* II.B; Para. VI.

6. Donna Brown, *Collections and Creditors' Rights 101, 2011*, State Bar of Texas (May 4, 2011*); see generally*, Daniel J. Goldberg, *Texas Collections Manual, 4th Ed., §§19.31-19.35.*

7. *North East Indep. Sch. Dist. v. Aldridge*, 400 S.W.2d 893, 895 (Tex. 1966) (final judgment required).

8. TEX. R. CIV. P. 41 (Any claim against a party may be severed and proceed separately); *Guar. Fed. Sav. Bank v. Horseshoe Op. Co.*, 793 S.W.2d 652, 658 (Tex. 1990) (A claim is properly severable if: (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues).

9. TEX. R. CIV. P. 185.

10. *Rizk, v. Fin. Guardian Ins. Agency, Inc*., 584 S.W.2d 860, 862 (Tex. 1979); *Meaders v. Biskamp*, 316 S.W.2d 75, 78 (Tex. 1958); *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 190 (Tex. App. - Houston [14th Dist.] 1993, no writ); *Achimon v. J.I. Case Credit Corp.*, 715 S.W.2d 73, 76 (Tex. App. - Dallas 1986, writ ref'd n.r.e.) (noting that assignee of retail installment contact failed to state a sworn account).

11. TEX. R. CIV. P. 93(10) (requiring a denial of an account be verified by affidavit).

12. *Enernational Corp. v. Exploitation Eng'rs, Inc.*,

If the defendant in a suit on account fails to file a written denial under oath, it will not be permitted at trial to dispute the receipt of the items or services or the correctness of the stated charges.[13] As a general rule, a sworn account is prima facie evidence of a debt and the account need not be formally introduced into evidence unless the account's existence or correctness has been denied in writing under oath.[14]

A. Requirements for the Petition.

A sworn account petition must be supported by an affidavit that the claim is, "within the knowledge of affiant, just and true."[15] "No particularization or description of the nature of the component parts of the account or claim is necessary unless the trial court sustains special exceptions to the pleadings."[16] If special exceptions are filed and sustained, the account (invoices or statements of account) should show the nature of the item(s) sold, the date(s), and the charge(s).[17] If challenged by special exceptions, then technical and unexplained abbreviations, code numbers, and the like are insufficient to identify items and terms and must be explained.[18] Also, if special exceptions are sustained, the language used in the account must have a common meaning and must not be of the sort understood only in the industry in which it is used.[19] If invoicing and billing is done with only computer numbers or abbreviations, a key to this "business shorthand" should be attached to the pleadings or be readily available if repleading is necessary.[20]

B. Answer / Denial.

The answer must consist of a written denial supported by an affidavit denying the account; a general denial is insufficient; and the supporting affidavit must be made on personal knowledge, not to be best of the affiant's knowledge or belief.[21] When a party suing on a sworn account files a motion for summary judgment on the singular ground that the non-movant's pleading is insufficient under Rules 185 and 93(10) because no proper sworn denial is filed, the non-movant may amend and file a proper sworn denial.[22] The non-movant is not precluded from

705 S.W.2d 749, 750 (Tex. App. - Houston [1st Dist.] 1986, writ ref'd n.r.e.); *see Hidalgo v. Sur. Sav. & Loan Ass'n*, 462 S.W.2d 540, 543 n.1 (Tex. 1971); *Waggoners' Home Lumber Co. v. Bendix Forest Prods. Corp.*, 639 S.W.2d 327, 328 (Tex. App. - Texarkana 1982, no writ); *see also infra* Para. V.B. (discussing pleadings as evidence).

13. *Vance v. Holloway*, 689 S.W.2d 403, 404 (Tex. 1985) (per curiam) (*citing* TEX. R. CIV. P. 185); *Airborne Freight Corp. v. CRB Mktg., Inc.*, 566 S.W.2d 573, 574 (Tex. 1978) (per curiam) (calling the rule "settled"); *Murphy v. Cintas Corp.*, 923 S.W.2d 663, 665 (Tex. App. - Tyler 1996, writ denied).

14. *See* 566 S.W.2d at 575.

15. TEX. R. CIV. P. 185; *see Andy's Sunmart # 352, Inc. v. Reliant Energy Retail*, No. 01-08-00890-CV (Tex. App. - Houston [1st Dist.] 2009, no pet.), 2009 Tex. App. LEXIS 8559 (Movant's summary judgment affidavit did not provide any testimony that the amounts charged and the outstanding account were just, i.e., that the actual prices charged by Reliant for the electrical services were in accordance with an agreement or, in the absence of an agreement, were the usual, customary, and reasonable prices for those services; movant did not present in the summary judgment record an actual agreement, which could have conclusively established the justness of the account.).

16. *Id.*; 705 S.W.2d at 750 (quoting TEX. R. CIV. P. 185).

17. *See Hassler v. Tex. Gypsum Co*., 525 S.W.2d 53, 55 (Tex. Civ. App. - Dallas 1975, no writ).

18. *See id.*

19. *See id.*

20. *See Price v. Pratt*, 647 S.W.2d 756, 757 (Tex. App. - Corpus Christi 1983, no writ).

21. *See* TEX. R. CIV. P. 185; *Espinoza v. Wells Fargo Bank, N.A.*, 02-13-00111-CV (Tex. App. - Fort Worth, Nov. 14, 2013) (Debtor failed to file a verified denial in suit on a sworn account, and creditor presented prima facie proof of its sworn account). *See also Wimmer v. Hanna Prime, Inc*., No. 05-08-01323-CV (Tex. App. - Dallas 2009, no pet.), 2009 Tex. App. LEXIS 8866; *Huddleston v. Case Power & Equip. Co.*, 748 S.W.2d 102, 103 (Tex. App. - Dallas 1988, no writ) (A sworn general denial is insufficient to rebut the evidentiary effect of a proper affidavit in support of a suit on account. The written denial, under oath mandated under Rule 185 must conform to Rule 93(10), which requires the plaintiff's claim to be put at issue through a special verified denial of the account).

22. *Requipco, Inc. v. Am-Tex Tank & Equip., Inc.*, 738 S.W.2d 299, 303 (Tex. App. - Houston [14th Dist.] 1987, writ ref'd n.r.e.) (Where the party suing on a sworn account theory files its motion for summary judgment on the sole ground that the defendant has failed to file a proper sworn denial, the defendant may file an amended answer to the suit containing a proper sworn denial as late as the day of trial, but before he announces ready for trial), *citing Magnolia Fruit & Produce Co. v. Unicopy Corp. of Tex.*, 649 S.W.2d 794, 797 (Tex. App. - Tyler 1983, writ dism'd w.o.j.). *But see Bruce v. McAdoo*, 531 S.W.2d 354, 356 (Tex. Civ. App. - El Paso 1975, no writ) (holding that an "amended answer . . . presented more than four years after

amending and filing a proper sworn denial to the suit by the time allowed under Rule 63.[23]

The sworn denial must be in the defendant's answer. This issue was addressed in *Brightwell v. Barlow, Gardner, Tucker & Garsek* where the court considered whether it was proper for the verified denial to appear only in the affidavit in response to the motion for summary judgment but not in the defendant's answer.[24] The court stated that Rules 185 and 93 (now Rule 93(10)), when read together and applied to suits on sworn accounts, mandate that the language needed to "effectively deny the plaintiff's sworn account must appear in a pleading of equal dignity with the plaintiff's petition, and [thus] must appear in the defendant's answer."[25]

The filing of a proper, verified denial overcomes the evidentiary effect of a sworn account and forces the plaintiff to offer proof of the claim.[26] This is why it is advisable to state two bases in the motion for summary judgment: (1) there is no proper sworn denial and (2) the admissible evidence accompanying the motion proves movant's claim. This principle applies to a subsequent motion for summary judgment and requires the plaintiff to submit proof of the elements of his cause in his summary judgment proof.[27] A correctly worded denial, properly verified as required by Rules 93(10) and 185, will destroy the *prima facie* effect of the verified claim and will force the plaintiff to prove his claim.[28]

C. Grounds for Summary Judgment.

There are two distinct grounds upon which a party may move for summary judgment on a sworn account: (1) the failure of the defendant to file an adequate answer; and (2) the elements of the suit are established by admissible evidence. In the first instance, the basis for the motion for summary judgment is that the defendant's answer was not a timely filed sworn pleading, verified and supported by affidavit, denying the account that is the foundation of the plaintiff's cause of action. In the second instance, the basis is that requirements of the rule are satisfied and summary judgment evidence establishes the common law elements of a suit on account.

Rule 185 requires:

> (1) a claim for goods, wares and merchandise, including any claim for a liquidated money demand based upon written contract or founded on business dealings between the parties; or
>
> (2) a claim for personal service

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the original answer and more than a year after the first amended answer" was not timely, and therefore, not proper).

23. *See Magnolia Fruit & Produce Co*., 649 S.W.2d at 797 (Rule 63's seven-day amendment limitation yields to Rule 185's authorization for filing of a sworn denial as late as the day of trial, but before announcement of "ready" by the party); see also *John C. Flood of DC, Inc. v. Supermedia, LLC*, 408 S.W.3d 465 (Tex. App. - Dallas, 2013) (Defendants filed an original answer containing a general denial and asserting plaintiff lacked capacity to sue, and that defendants were not liable in the capacity in which they were sued. Appellants, however, did not verify their answer. Less than an hour before the scheduled start of the summary judgment hearing, defendants filed an amended answer that contained a verified denial of plaintiff's lack of capacity to sue and that defendants were not liable in the capacity in which they were sued. Without leave of court late filed amended answer was not considered in summary judgment proceeding. Further, the late filed amended answer was not considered as the court stated that it considered the "pleadings timely filed", not "all of the pleadings").

24. 619 S.W.2d 249, 251 (Tex. Civ. App. - Fort Worth 1981, no writ).

25. *Id.* at 253 (*quoting Zemaco, Inc. v. Navarro*, 580 S.W.2d 616, 620 (Tex. Civ. App. - Tyler 1979, writ dism'd w.o.j.); *see Notgrass v. Equilease Corp*., 666 S.W.2d 635, 639 (Tex. App. - Houston [1st Dist.] 1984, writ ref'd n.r.e.).

26. 584 S.W.2d 860, 862 (Tex. 1979) (A defendant's verified denial of the correctness of a plaintiff's sworn account in the form required by Rule 185 destroys the evidentiary effect of the itemized account attached to the petition and forces the plaintiff to put on proof of his claim.); *J. E. Earnest & Co. v. Word*, 152 S.W.2d 325 (Tex. 1941). Despite a sworn denial, a plaintiff may properly obtain summary judgment on a sworn account claim by filing "legal and competent summary judgment proof establishing the validity of its claim as a matter of law." *Ellis v. Reliant Energy Retail Servs., L.L.C.*, 418 S.W.3d 235 , 246 (Tex. App. - Houston [14th Dist.] 2013, no pet.).

27. *Norcross v. Conoco, Inc.*, 720 S.W.2d 627, 629 (Tex. App. - San Antonio 1986, no writ).

28. *Cooper v. Scott Irrigation Construction, Inc.,* 838 S.W.2d 743, 746; *Pat Womack, Inc. v. Weslaco Aviation, Inc*., 688 S.W.2d 639, 641 (Tex. App. - Corpus Christi 1985, no writ).

rendered, or labor done or labor or materials furnished; and

(3) a systematic record.[29]

For a merchant, the necessary common law elements of a suit on account are:

(1) there was a sale and delivery of merchandise,

(2) the amount of the account is just (the prices are charged in accordance with an agreement, they are the usual, customary and reasonable prices for that merchandise or service), and

(3) the amount is unpaid.[30]

The petition must comply with the requirements of Rule 185 to qualify for summary judgment.[31] For instance, a live petition does not comply with the requirements of Rule 185 when the creditor does not include a systematic or itemized record of the parties' transaction, even though creditor's agent verifies that the account is within his knowledge and is "just and true."[32]

Sworn accounts are an exception to the general rule that pleadings are not summary judgment proof. "When a defendant fails to file a verified denial to a sworn account, the sworn account is received as prima facie evidence of the debt and the plaintiff as summary judgment movant is entitled to summary judgment on the pleadings."[33] Rule 185 also provides that a systematic record, properly verified, "shall be taken as prima facie evidence thereof, unless the party resisting such claim shall file a written denial, under oath."[34] Thus, if the affidavit supporting the sworn account petition tracks the language of Rule 185 and meets the personal knowledge requirement of Rule 166a(f), it generally has been considered proper summary judgment proof in the absence of a sufficient answer to the original petition.[35]

An affidavit, one in addition to that attached to the plaintiff's petition, should be filed in support of a motion for summary judgment on a sworn account. The supporting affidavit should repeat the statements made in affidavit attached to the sworn account petition. Strictly speaking, an affidavit supporting the motion for summary judgment is unnecessary if the answer on file is insufficient under Rules 185 and 93(10).[36] If the answer is sufficient under these rules, summary judgment is not precluded, but an affidavit supporting the motion for summary judgment must be filed to substantiate the account as a business record

29. TEX. R. CIV. P. 185. *See Pascual Madrigal P.L.L.C.. v. Commercial IT Solutions, Inc.*, No. 04-13-00742-CV (Tex. App. - San Antonio), August 27, 2014) (summary judgment granted where creditor produced verified, authenticated copies of contract between the parties, a statement of account, and copies of all unpaid invoices and the affidavit of company president who authenticated and verified the contract, statement of account, and the unpaid invoices and averred the exhibits to the motion represents a systematic record of the transactions between the parties, but debtor failed to pay creditor for the items references in the exhibits, concluding that the amount due was "just, true and past due").

30. *Id.; see also Worley v. Butler*, 809 S.W.2d 242, 245 (Tex. App. - Corpus Christi 1990, no writ) (applying these elements in a suit for attorney's fees). *See* Daniel J. Goldberg, *Texas Collections Manual, 4th Ed.*, Form 19-10.

31. *Mega Builders, Inc. v. American Door Products, Inc.*, 01-12-00196-CV (Tex. App. - Houston [1st Dist.], Mar. 19, 2013).

32. *Id.* (The only itemized statement of the amounts owed by debtor was attached to creditor's summary judgment motion, not to any of its petitions. The court of appeals declined to hold that the creditor's summary judgment evidence cured the deficiency in its sworn account petition.)

33. *Nguyen v. Short, How, Frels & Heitz, P.C.*, 108 S.W.3d 558, 562 (Tex. App. - Dallas 2003, pet. denied) (Defendant did not file a verified denial to place any of the facts in dispute and did not file a response to the motion for summary judgment.).

34. TEX. R. CIV. P. 185; *see Whiteside v. Ford Motor Credit Co.*, 220 S.W.3d 191, 194 (Tex. App. - Dallas 2007, no pet.)

35. *Id.*; TEX. R. CIV. P. 166a(f) (requiring affidavits to be made on personal knowledge). Although specifically authorized to make an affidavit under Rule 185, attorneys should do so only if they possess personal knowledge of the facts set forth in the affidavit. *Id.* 185; *e.g., Livingston Ford Mercury, Inc. v. Haley*, 997 S.W.2d 425, 430 (Tex. App. - Beaumont 1999, no pet.).

36. TEX. R. CIV. P. 93(10); *Special Marine Prods., Inc. v. Weeks Welding & Constr., Inc.*, 625 S.W.2d 822, 827 (Tex. App. - Houston [14th Dist.] 1981, no writ) (stating that it is the state of the pleadings and the defendant's failure to file a sufficient sworn denial under Rule 185 and not the plaintiff's additional sworn affidavit under Rule 166-A that provides the basis for summary judgment).

under Texas Rule of Evidence 803(6).[37]

The attorney opposing summary judgment on sworn account should immediately determine if a sworn denial in accordance with Rules 185 and 93(10) is on file. If not, he or she should file one. It is sufficient to file a sworn answer denying the account that is the "foundation of the plaintiff's action."[38] Filing an answer in strict compliance with Rules 185 and 93(10) does not preclude the need to file a written response to a motion for summary judgment.[39] As a matter of practice, attorneys should file a written response to any motion for summary judgment.[40]

III. SUIT ON WRITTEN INSTRUMENT

A suit on written instrument (breach of contract, account stated, promissory note, or guaranty) is often the subject of a motion for summary judgment.

A. Ambiguity.

The written instrument on which summary judgment is sought may not be ambiguous. [41] A summary judgment is proper in cases involving the interpretation of a written instrument when the writing is unambiguous.[42]

Contractual ambiguity is a legal issue for the trial court to decide.[43] An ambiguity in a contract may be either patent or latent.[44] To determine whether a contract is ambiguous, the court looks at the agreement as a whole in light of the circumstances present when the parties entered into the contract.[45] If a contract is worded in such a manner that it can be given a definite or certain legal meaning, it is not

37. TEX. R. EVID. 803(6).

38. TEX. R. CIV. P. 93(10); *see also id.*; Rule 185 (allowing the filing of a written denial that states each and every item that constitutes the foundation of any action or defense as either just and true or unjust and untrue).

39. *See supra* Para. V (discussing responding to and opposing a motion for summary judgment).

40. *See supra* Para. V.

41. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam) (Courts will enforce an unambiguous contract as written, and parol evidence will not be received to create an ambiguity or "to give the contract a meaning different from that which its language imports"); *SAS Inst., Inc. v. Breitenfeld*, 167 S.W.3d 840, 841 (Tex. 2005) (per curiam); *see also Mem'l Med. Ctr. of E. Tex. v. Keszler*, 943 S.W.2d 433, 434 (Tex. 1997) (per curiam) (holding that the interpretation of a release's validity or ambiguity is decided by the court as a question of law); *R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518 (Tex. 1980) ("The question of whether a contract is ambiguous is one of law for the court"). *See generally Columbia Cas. Co. v. CP Nat'l, Inc.*, 175 S.W.3d 339 (Tex. App. - Houston [1st Dist.] 2004, no pet.) (affirming a summary judgment in a case involving an unambiguous writing).

42. *Id.; Crow-Billingsley Stover Creek, Ltd. v. SLC McKinney Partners, L.P.*, No. 05-09-00962-CV (Tex. App. - Dallas 2011, no pet.), *citing Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979) (The granting of a motion for summary judgment is improper when a contract contains an ambiguity because the interpretation of the instrument becomes a fact issue).

43. *Dynegy Midstream Servs. v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009); *Lopez v. Muñoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 861 (Tex. 2000*); cf Simba Ventures Shreveport, L.L.C. v. Rainier Capital Acquisitions, L.P.*, 292 S.W.3d 173, 178 (Tex. App. - Dallas 2009, no pet.) (considering ambiguity for first time on appeal in summary judgment case and *citing Sage Street Associates v. Northdale Construction Co.*, 863 S.W.2d 438,445 (Tex. 1983) for proposition that court "may" do so).

44. *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282-83 (Tex. 1996) (per curiam) (distinguishing a patent ambiguity as one that is "evident on the face of the contract" and a latent ambiguity as one that exists not on the face of the contract but in the contract's failure "by reason of some collateral matter when it is applied to the subject matter with which it deals").

45. *Americo Life, Inc. v. Myer*, 440 S.W.3d 18, 22 (Tex. 2014) ("We may consider the facts and circumstances surrounding a contract, including "the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give context to the parties' transaction."); *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of America*, 341 S.W.3d 323, 333 54 Tex.Sup.Ct.J. *822* (Tex. 2011) ("In construing a contract, a court must ascertain the true intentions of the parties as expressed in the writing itself."); *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); s*ee Hemyari v. Stephens*, 355 S.W.3d 623 (Tex. 2011) (Texas Supreme Court construed a bankruptcy court order to avoid contradictions and incongruities, give effect to all its provisions and prevent absurdity. A bankruptcy court order conditionally terminated the automatic to allow for a sale "on August 1, 2000." As the uncontextualized terms of the order made it essentially impossible to hold a valid foreclosure on August 1, 2000, the Court construed that the plain meaning of the order allowed for a foreclosure sale on or after August 1, 2000).

ambiguous.[46] Subsequent parol evidence does not create ambiguity.[47]

An ambiguity exists only if the contract language is susceptible to two or more reasonable interpretations.[48] The court examines and considers the entire writing in an effort to harmonize and to give effect to all the provisions of the contract so that none will be rendered meaningless.[49] When a written instrument contains an ambiguity, the granting of a motion for summary judgment is improper because the interpretation of the instrument becomes a fact issue.[50]

B. Breach of Contract.

In breach of contract cases, the motion for summary judgment and supporting evidence must prove:

> (1) the existence of a valid contract,
> (2) performance or tendered performance by the plaintiff creditor,
> (3) breach of the contract by the defendant debtor, and
> (4) damages sustained by the plaintiff creditor as a result of the breach.[51]

46. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003); *Nat'lUnion Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). Conflicting interpretations of a contract are insufficient to create ambiguity. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996).

47. *Manzo V. Lone Star National Bank*, No. 13-14-00155-CV (Tex. App. - Corpus Christi 2015, no pet.).

48. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W. 3d 154, 157 (Tex. 2003); *R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980) (An instrument is ambiguous if it is reasonably susceptible to more than one meaning).

49. *Id.*

50. *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979); *Zurich Am. Ins. Co. v. Hunt Petrol. (AEC), Inc*., 157 S.W.3d 462, 465 (Tex. App. - Houston [14th Dist.] 2004, no pet.); *Donahue v. Bowles, Troy, Donahue, Johnson, Inc.*, 949 S.W.2d 746, 753 (Tex. App. - Dallas 1997, writ denied).

51. *BP Automotive, L.P. v. RML Waxahachie Dodge, L.L.C.*, No. 01-12-00085-CV, 01-12-00346-CV, (Tex. App. - Houston [1st. Dist.] September 18, 2014); *Wakefield v. Wells Fargo Bank, N.A.*, 14-12-00686-CV (Tex. App. - Houston [14th Dist.], Nov. 14, 2013) (Summary-judgment granted on motion with an affidavit from custodian of records, a copy of the cardholder account agreement, monthly statements, and a copy of the demand letter. Evidentiary support in affidavit supporting action on credit card debt did not require the credit card company to produce every monthly credit-card statement or documentation of changes made on the account throughout its history); *Legarreta v. FIA Card Services*, 412 S.W.3d 121 (Tex. App. - El Paso, 2013, no pet.) (Traditional summary judgment for breach of contract, open and stated account/debt, *quantum meruit* and unjust enrichment); *Aymett v. Citibank South Dakota N.A.*, 397 S.W.3d 876 (Tex. App. - Dallas, 2013, no pet.) (account stated claim based on credit card debt); *Castilla v. Citibank (South Dakota), N.A.*, No. 05-11-00013-CV (Tex. App. - Dallas 2012, no pet.) (Breach of contract on credit card agreement); *Wright v. Young*, No. 01-11-01101-CV (Tex. App. - Houston [1st Dist.] 2012, no pet.) (proof of damages in claim for breach of a settlement agreement); *SLT Dealer Group, Ltd. v. AmeriCredit Financial Services, Inc.*, 336 S.W.3d 822, 828 (Tex. App. - Houston [1 Dist.] 2011, no pet.) (retail installment contract for automobile purchase), *citing B & W Supply, Inc. v. Beckman*, 305 S.W.3d 10, 16 (Tex. App. - Houston [1st Dist.] 2009, pet. denied); *West v. Triple B Servs., LLP*, 264 S.W.3d 440, 446 (Tex. App. - Houston [14th Dist.] 2008, no pet.); *Winchek v. American Express Travel Related Services Co. Inc.*, 232 S.W.3d 197, 202 (Tex. App. - Houston [1st Dist.] 2007, no pet.); *Roof Sys. v. Johns Manville Corp.*, 130 S.W.3d 430 (Tex. App. - Houston [14th Dist. 2004], no pet.), *citing Renteria v. Trevino*, 79 S.W. 3d. 240 (Tex. App. - Houston [14th Dist.] 2002, no pet.); *Petras v. Criswell*, 248 S.W.3d 471, 477 (Tex. App. - Dallas 2008, no pet.); *Heinen v. Citibank (S.D.), N.A.*, No. 05-10-00003-CV, 2012 WL 12749, at *2 (Tex. App. - Dallas Jan. 4, 2012, no pet.) (mem. op.). S*ee Garcia v. State Farm Lloyds*, 287 S.W.3d 809, 825 (Tex. App - Corpus Christi 2009, pet. denied) (concurring opinion); *See* Daniel J. Goldberg, *Texas Collections Manual, 4th Ed.*, Form 19-13 (consumer credit card case). *See also Mott v. Kellar*, No. 03-14-00291-CV (Tex. App. - Austin, August 5, 2015) (breach of contract for deed) (Summary judgment reversed on appeal when maker raised a genuine issue of material fact whether he made required payments under contract for deed); *County Real Estate Venture v. Farmers and Merchants Bank*, No. 01-13-00530-CV (Tex. App. - Houston [1st Dist.] February 12, 2015, no pet.) (The bank failed to conclusively establish contract liability and damages. Bank's summary-judgment evidence failed to conclusively establish its claim for breach of contract as a matter of law for amounts owed on a credit card when attachment to bank officer's affidavit statements about ownership of the credit card debt and the amount owed were conclusory). *See Liberty Bank, F.S.B. v. Etter*, 02-12-00337-CV (Tex. App. - Fort Worth Sep. 19, 2013, no pet.) [traditional summary judgment against assigned contract that was void *ab initio* and unenforceable]. Conclusions in an affidavit as to the present balance due and owing on an account are

The universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained.[52] The most common interest protected in breach of contract cases is the expectation, or benefit-of-the-bargain, interest.[53]

The supporting evidence most often includes documents and affidavits, each of which must satisfy standards for admissibility.

C. Account Stated.

In an account stated case, the motion for summary judgment and supporting evidence must prove:

> (1) transactions between seller and buyer gave rise to the indebtedness,
> (2) an agreement, express or implied, between the parties that fixed the amount due, and
> (3) buyer made an express or implied promise to pay the indebtedness.[54]

D. Promissory Note.

In a promissory note case, the motion for summary judgment and supporting evidence must prove:

> (1) the note was executed by the defendant and delivered to the plaintiff by the defendant,
> (2) plaintiff gave value for the note to the defendant,
> (3) plaintiff was the holder and owner of the note,
> (4) the note matured,
> (5) defendant defaulted, and
> (6) the amount due.[55]

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insufficient to prove the amount of the debt. *Akins v. FIA Card Services, N.A.*, No. 07-13-00244-CV (Tex. App. - Amarillo 2015, no pet.).

52. *Qaddura v. Indo-European Foods, Inc.*, 141 S.W.3d 882, 888 (Tex. App. - Dallas 2004, pet. denied) (citing *Stewart v. Basey*, 245 S.W.2d 484, 486 (1952)).

53. *Id.* at 888-89.

54. *Walker v. Citibank*, N.A., 458 S.W.3d 689 (Tex. App - Eastland, 2015)(Account stated is a proper cause of action for a credit card collection suit); *Compton v. Citibank (South Dakota), N.A.*, 364 S.W.3d 415, 417-18 (Tex. App. - Dallas 2012, no pet.); *Hays v. Citibank (South Dakota), N.A.*, No. 05-11-00187-CV (Tex. App. - Dallas 2012, no pet.) (Credit card debt case. Summary judgment based on Citibank's account-stated claim was proper if the evidence shows account statements were sent to Hays, charges and payments were made on the account, fees and interest were charged on the account, and there is no evidence Hays ever disputed the fees or charges reflected on the statements). *See McFarland v. Citibank (S.D.), N.A.*, 293 S.W.3d 759, 763 (Tex. App. - Waco 2009, no pet.); *Dulong v. Citibank (S.D.), N.A.*, 261 S.W.3d 890, 893 (Tex. App. - Dallas 2008, no pet.). *See also Pegasus Transportation Group, Inc. v. CSX Transportation, Inc.*, 05-12-00465-CV (Tex. App. - Dallas, Aug. 14, 2013, no pet.) trial court may render judgment on less than all the relief sought. TRCP 166a(e)].

55. *Avery v. LPP Mortgage, Ltd.*, No. 01-14-01007-CV, Tex. App. - Houston [1st Dist.], October 29, 2015. (Sufficiency of proof of damages in summary judgment on promissory note); *Senegal v. Community Bank of Texas*, N.A., No. 09-14-00142-CV (Tex. App. - Beaumont, May 21, 2015); *Goad v. Bank*, No. 14-13-00861-CV (Tex. App. - Houston [14th Dist.], April 9, 2015); *Core v. Citibank, N.A.*, No. 13-12-00648-CV (Tex. App. - Corpus Christi April 9, 2015, pet. denied) (outstanding credit card balance; bank custodian of records affidavit); *Manzo v. Lone Star National Bank*, Tex. App. - (Corpus Christi), No. 13-14-00155CV, Jan. 8, 2015; *Jim Maddox Properties, LLC v. Wem Equity Capital Investments, Ltd.*, No. 01-13-00673-CV (Tex. App. - Houston [1st. Dist.], August 19, 2014; *Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 152 (Tex. App. - Houston [14th Dist.] 2014, no pet.) (movant failed to establish conclusively it was the owner and holder of the note and guarantee); *Energico Production, Inc. v. Frost National Bank*, No. 02-11-00148-CV (Tex. App. - Fort Worth, 2012), rev. denied No. 12-0280 (Tex. 2012); *Kaspar v. Patriot Bank*, No. 05-10-01530-CV (Tex. App. - Dallas 2012, no pet.) (Bank conclusively proved as a matter of law that it was entitled to collect on the promissory note because a note exists, Danpar is the maker, the Bank is the holder, and a balance is due and owing); *Morales v. JP Morgan Chase Bank, N.A.*, No. 01-10-00553-CV (Tex. App. - Houston [1st. Dist.] 2011, no pet.) (suit on a sworn account for liquidated damages under TEX. R. CIV. P. 185; default on a secured note; suit for deficiency from the sale of collateral, as well as interest and attorney's fees); *TrueStar Petroleum Corp. v. Eagle Oil & Gas Co.*, 323 S.W.3d 316, 318 (Tex. App. Dallas 2010, no pet.) (full balance of promissory note was due on the maturity date); *Rockwall Commons Assocs., Ltd. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500, 505 (Tex. App. - El Paso 2010, no pet.); *Levitin v. Michael Group, L.L.C.*, 277 S.W.3d 121, 123 (Tex. App. - Dallas 2009, no pet.); *see Clark v. Dedina*, 658 S.W.2d 293, 295 (Tex. App. - Houston [1st Dist.] 1983, writ dism'd); Goldberg, *Texas Collection Manual, 4th Ed.*, §19:35, Form 19-11; *see also Farkas v. Mortgage Electronic Registration Systems, Inc.*, 11-12-00024-CV (Tex. App. - Eastland, Jan. 9, 2014) (Distinguishing foreclosure on deed of trust. Texas law differentiates between enforcement of a promissory note and foreclosure. Foreclosure is an independent action against the collateral and may be conducted without

The supporting affidavits generally are provided by the owner and holder of the note, such as a corporate or bank officer.[56] A business records custodian's affidavit may be sufficient to support a summary judgment.[57] Failure to attach a copy of the promissory note in a summary judgment motion in a suit on that note is fatal to the summary judgment.[58] A photocopy of a note attached to the affidavit of the holder who swears that it is a true and correct copy of the note, is sufficient as a matter of law to prove the status of owner and holder of the note absent controverting summary judgment evidence.[59] Rule 166a(e) does not require the original note be attached; a sworn or certified copy of the note is sufficient.[60]

In a suit on a promissory note, the plaintiff must establish the amount due on the note.[61] Generally, an affidavit that sets forth the balance due on a note is sufficient to sustain a summary judgment.[62] Detailed proof of the balance is not required.[63] However, the summary judgment evidence must establish the amount due on a note.[64] "Where an affidavit submitted in support of summary judgment lumps the amounts due under multiple notes with varying terms and provisions, an ambiguity can arise [concerning] . . . the balance due," and preclude summary judgment.[65]

E. Guaranty.

In a suit on a guaranty, the motion for summary judgment and supporting evidence must establish:

(1) the existence and ownership of the guaranty contract;
(2) the terms of the underlying contract by the holder;
(3) the occurrence of the conditions upon which liability is based; and
(4) the failure or refusal to perform the promise by the guarantor.[66]

judicial supervision. Enforcement of the note, on the other hand, is a personal action against the signatory and requires a judicial proceeding); *Hickey v. The Huntington National Bank*, 01-12-00670-CV (Tex. App. - Houston [1st Dist.] 2013, no pet.) (proper notice of intent to accelerate must precede notice of acceleration when note has not otherwise matured).

56. *Emiabata v. National Capital Management*, No. 03-10-00373-CV (Tex. App. - Austin 2011, no pet.); *Batis v. Taylor Made Fats Inc.*, 626 S.W.2d 605 (Tex. App. - Fort Worth 1981, writ ref'd n.r.e.)

57. *Batis v. Taylor Made Fats, Inc*., 626 S.W.2d 605; *see also Jackson T. Fulgham Co. v. Stewart Title Guar. Co.*, 649 S.W.2d 128, 130 (Tex. App. - Dallas 1983, writ ref'd n.r.e.) (referring to an affidavit of the vice-president of a title company that stated the company was the holder of the note).

58. *Sorrells v. Giberson*, 780 S.W.2d 936, 937 (Tex. App. - Austin 1989, writ denied) (holding that the note cannot serve as a basis for summary judgment because the appellee failed to attach a copy of it to the affidavit filed in support of the motion for summary judgment).

59. *Life Ins. Co. v. Gar-Dal, Inc.*, 570 S.W.2d 378 (Tex. 1978); *Zarges v. Bevan*, 652 S.W.2d 368, 369 (Tex. 1983) (per curiam).

60. 570 S.W.2d 378, 380 (Tex. 1978), citing *Perkins v. Crittenden*, 462 S.W.2d 565 (Tex. 1970).

61. *See, e.g., Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz*, P.C., 99 S.W.3d 349, 354 (Tex. App. - Fort Worth 2003, no pet.).

62. *Martin v. First Republic Bank, Forth Worth, N.S.*, 799 S.W.2d 482, 485 (Tex. App. - Fort Worth 1990, writ denied).

63. *Hudspeth v. Investor Collection Servs. Ltd. P'ship*, 985 S.W.2d 477, 479 (Tex. App. - San Antonio 1998, no pet.) (A lender need not file detailed proof the calculations reflecting the balance due on a note; an affidavit by a bank employee which sets forth the total balance due on a note is sufficient to sustain an award of summary judgment); *Martin v. First Republic Bank Fort Worth*, 799 S.W.2d 482, 485 (Tex. App. - Fort Worth 1990, writ denied); *see also Thompson v. Chrysler First Bus. Credit Corp*., 840 S.W.2d 25, 28-29 (Tex. App. - Dallas 1992, no writ); *Gen. Specialties, Inc. v. Charter Nat'l Bank-Houston*, 687 S.W.2d 772, 774 (Tex. App. - Houston [14th Dist.] 1985, no writ).

64. *See Bailey, Vaught, Robertson & Co. v. Remington Invs., Inc.*, 888 S.W.2d 860, 867 (Tex. App. - Dallas 1994, no writ).

65. *FFP Mktg. Co. v. Long Lane Master Trust IV*, 169 S.W.3d 402, 411-12 (Tex. App. - Fort Worth 2005, no pet.); *see also Gen. Specialties, Inc. v. Charter Nat'l Bank-Houston*, 687 S.W.2d 772, 774 (Tex. App. - Houston [14th Dist.] 1985, no writ).

66. *Gold's Gym Financing, LLC v. Brewer*, 400 S.W.3d 156, 160 (Tex. App. - Dallas 2013, no pet.); *Lagou v. U.S. Bank National Association*, 01-13-00311-CV, Dec. 5, 2013 (Tex. App. - Houston [1st Dist.], 2013), (summary judgment on commercial loan guaranty); *Graman v. IBP Retail No. 5, L.P.*, 05-12-00565-CV (Tex. App. - Dallas July 30, 2013, no pet.) (lease payment guaranty); *Burchfield v. Prosperity Bank*, 408 S.W.3d 542 (Tex. App. - Houston [1st Dist.] 2013, no pet.) (Bank may sue a jointly-and-severally liable co-guarantor for a deficiency on

A signature followed by corporate office will result in personal liability where the individual is clearly designated within the instrument as personal surety for the principal.[67]

The fact that a person is under an agency relation to another which is disclosed does not prevent him from becoming personally liable where the terms of the contract clearly establish the personal obligation.[68] The addition of the corporate office by the signature may be construed as *descriptio personae* of the signator rather than an indication of the capacity in which he signs.[69]

"If the guaranty instrument is so worded that it can be given a certain or definite legal meaning or interpretation, it is not ambiguous and the court will construe the contract as a matter of law."[70]

F. Parol Evidence Rule.

Parol evidence of alleged contemporaneous representations allowing the defendant to modify terms of a note or contract is often submitted in defense of summary judgment.[71] The parol evidence rule will exclude extrinsic evidence of oral statements or representations relative to the making of a contractual agreement when that agreement is valid and complete on its face.[72] In general, a written instrument that is clear and express in its terms cannot be varied by parol evidence.[73] Parol evidence may be admitted to show fraud in inducement of a written contract.[74]

a note); *Lumber Co., L.P. v. David Powers*, 393 S.W.3d 299 (Tex. App. - Houston [1st Dist.] 2012, no pet.) (Corporate guaranty. Held that corporate guarantor (David Powers) is liable as guarantor for the full amount of the judgment against corporation (David Powers Homes). The guaranty language in this case specifically designates David Powers as an individual when it recites: "I am the... president... and I do unconditionally and irrevocably personally guarantee this credit account." The application specifically stated that, by his execution of the application, Powers certified that he was the owner, general partner, or president of David Powers Homes and that he "unconditionally and irrevocably personally guarantee[d]" the credit account...); *Wasserberg v. Flooring Servs. of Tex., LLC*, 376 S.W.3d 202, 205 (Tex. App. - Houston [14th Dist.]. 2012, no pet.; *Long v. Motheral Printing Co.*, 05-10-01128-CV (Tex. App. - Dallas July 17, 2012, no pet.); *Kaspar v. Patriot Bank*, 05-10-01530-CV (Tex. App. - Dallas June 8, 2012, no pet.); *Tran v. Compass Bank*, 02-11-00189-CV (Tex. App. - Fort Worth Jan. 12, 2012, no pet.) (Guaranty of debt secured by lien on real property); *Marshall v. Ford Motor Co.*, 878 S.W.2d 629, 631 (Tex. App. - Dallas 1994, writ denied); *Wiman v. Tomaszewicz*, 877 S.W.2d 1, 8 (Tex. App. - Dallas 1994, no writ). *See W. Bank-Downtown v. Carline*, 757 S.W.2d 111, 114 (Tex. App. - Houston [1st Dist.] 1988, writ denied) (In a suit on a guaranty instrument, a court may grant a summary judgment only if the right to it is established in the record as a matter of law); *Gulf & Basco Co. v. Buchanan*, 707 S.W.2d 655, 657-58 (Tex. App. - Houston [1st Dist.] 1986, writ ref'd n.r.e.) ("A signature followed by corporate office will result in personal liability where the individual is clearly designated within the instrument as personal surety for the principal"); *Baldwin v. Sec. Bank & Trust*, 541 S.W.2d 908, 910 (Tex. Civ. App. - Waco 1976, no writ); *See* Daniel J. Goldberg, *Texas Collections Manual, 4th Ed.*, Form 19-12. *But see, Morrell Masonry Supply, Inc. v. John H. Coddou, Jr.*, No. 01-13-00446-CV, Tex. App. - [1st Dist.] May 1, 2014 (summary judgment on guaranty was improper when creditor failed to prove the terms of the underlying contract). A guaranty can make the liability of the guarantor greater than the liability the borrower would face. For instance, a guarantor can waive rights to offset when the borrower has not waived those rights. *Dreiling v. Security State Bank & Trust*, No. 01-14-00257-CV (Tex. App. - Houston [1st Dist.] 2015, no pet.) (Guarantor could not claim any rights to offsets he expressly waived in his guaranty agreement, even rights to the offset permitted by Section 51.003 of the Texas Property, when the borrower had not waived those rights).

67. *Material P'ships, Inc. v. Ventura*, 102 S.W.3d 252, 259 (Tex. App. - Houston [14th Dist.] 2003, pet. denied) *(quoting Buchanan*, 707 S.W.2d at 657); *see also Am. Petrofina Co. of Tex. v. Bryan*, 519 S.W.2d 484, 487 (Tex. Civ. App. - El Paso 1975, no writ).

68. 519 S.W.2d 484, 487.

69. *Material P'Ships*, 102 S.W.3d at 259 (*quoting Buchanan*, 707 S.W.2d at 657). The terms of a guaranty agreement determine whether the lender is required to collect from the borrower or on the collateral before looking to the guarantor to satisfy the debt. *See, e.g., Berry v. Encore Bank*, No. 01-14-00246-CV (Tex. App - Houston [1st. Dist.] June 2, 2015, pet denied); *Yamin v. Conn, L.P.*, No. 14-10-00597-CV (Tex. App.-Houston [14th Dist.] Sept. 13, 2011, no pet.) (mem. op.).

70. 757 S.W.2d at 114; *see also* 650 S.W.2d at 393.

71. TEX. BUS. & COM. CODE ANN. § 2.202*; e.g., Carter v. Allstate Ins. Co.*, 962 S.W.2d 268, 270 (Tex. App. - Houston [1st Dist.] 1998, pet. denied); *Hallmark v. Port/Cooper-T. Smith Stevedoring Co.*, 907 S.W.2d 586, 590 (Tex. App. - Corpus Christi 1995, no writ) (stating that the parol evidence rule does not preclude enforcement of prior contemporaneous agreements which are collateral to, not inconsistent with, and do not vary or contradict express or implied terms or obligations thereof).

72. TEX. BUS. & COM. CODE ANN. § 2.202.

73. *Id.; see also Pan Am. Bank of Brownsville v. Nowland*, 650 S.W.2d 879, 884 (Tex. App. - San Antonio 1983, writ ref'd n.r.e.).

74. *Town N. Nat'l Bank v. Broaddus*, 569 S.W.2d

The Texas Supreme Court addressed this problem in *Town North National Bank v. Broaddus*.[75] In that case, three parties signed a note as obligors.[76] After default, the bank brought suit against the obligors.[77] The bank then moved for summary judgment against two of the co-obligors; the other party had filed for bankruptcy and was dismissed.[78] Defendants alleged that a bank officer told them that they would not be held liable on the note.[79] This misrepresentation, they argued, created fraud in the inducement.[80] The defendants argued that this alleged fraud raised a question of fact precluding a grant of summary judgment.[81] The court held that extrinsic evidence is admissible to show fraud in the inducement of a note only if, in addition to the showing that the payee represented to the maker he would not be liable on such note, there is a showing of some type of trickery, artifice, or device employed by the payee.[82] In upholding the summary judgment for the bank, the supreme court stated "a negotiable instrument which is clear and express in its terms cannot be varied by parol agreements or representations of a payee that a maker or surety will not be liable thereon."[83]

G. Statute of Limitations / Statutes of Repose.

Summary judgment may be proper in cases where the statute of limitations or statute of repose[84] is pleaded as a bar to recovery.[85] The statute of limitations is an affirmative defense for which the defendant must establish all the elements as a matter of law.[86] The movant for a summary judgment on the basis of the running of the statute of limitations assumes the burden of showing as a matter of law that the suit is barred by limitations.[87] The defendant must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered the nature of its injury.[88]

IV. MONEY HAD AND RECEIVED.

Money had and received is an equitable

489, 491 (Tex. 1978) (stating that parol evidence was admissible to show that the maker of a note was induced by fraud); *Friday v. Grant Plaza Huntsville Assocs*., 713 S.W.2d 755, 756 (Tex. App. - Houston [1st Dist.] 1986, no writ) (stating that a successful prima facie showing of fraud in the inducement is an exception to the parol evidence rule); *Albritton Dev. Co. v. Glendon Invs., Inc.*, 700 S.W.2d 244, 246 (Tex. App. - Houston [1st Dist.] 1985, writ ref'd n.r.e.) (stating that the terms of a negotiable instrument cannot be varied by parol evidence without a showing of a fraudulent scheme or trickery).

75. 569 S.W.2d 489 (Tex. 1978).

76. *Id.* at 490.

77. *Id.*

78. *Id*.

79. *See id.* at 490-91 (illustrating how the bank officer indicated that the dismissed third party would be responsible for the note).

80. *Id.* at 491.

81. *Id*. at 490.

82. *Id.* at 494.

83. *Id*. at 491.

84. *See supra* Para. IV.A.3 (discussing affirmative defenses).

85. See, e.g., *Manandhar v. Jamshed*, No. 02-11-00027-CV (Tex. App. - Fort Worth 2011, no pet.) (Statute of Limitations. Traditional summary judgment granted for defendant in breach of contract case where defense of statute of limitations was established); *Hall v. Stephenson*, 919 S.W.2d 454, 464–65 (Tex. App. - Fort Worth 1996, writ denied); *Salazar v. Amigos Del Valle, Inc.*, 754 S.W.2d 410, 412 (Tex. App. - Corpus Christi 1988, no writ) (stating that the party moving for summary judgment on the basis of the running of limitations assumed the burden of showing as a matter of law that limitations barred the suit). *Powitzky, Jr. v. Tilson Home Corporation*, No. 13-15-00137-CV, Tex. App. - Corpus Christi, October 29, 2015 (Statute of Repose. Builder proved ten year statute of repose applicable to custom home construction. Appellant did not raise a fact issue in support of an exception to the statute of repose.)

86. *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp*., 988 S.W.2d 746, 748 (Tex. 1999).

87. *Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997) (per curiam); *Delgado v. Burns*, 656 S.W.2d 428, 429 (Tex. 1983) (per curiam).

88. 988 S.W.2d at 748; *see also Jennings v. Burgess*, 917 S.W.2d 790, 793 (Tex. 1996); *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990); *Woods v. William M. Mercer, Inc*., 769 S.W.2d 515, 518 n.2 (Tex. 1988*); Capital One Bank (USA), N.A. v. Conti*, 345 S.W.3d 490 (Tex. App. - San Antonio 2011, no pet.) (Debtor, credit card holder failed to prove the four year statute of limitations commenced when he made last payment on credit card account; credit card account was an open account and a cause of action thereunder accrues on the day that the dealings in which the parties were interested together cease); *McMahan v. Greenwood*, 108 S.W.3d 467, 492 (Tex. App. - Houston [14th Dist.] 2003, pet. denied).

doctrine designed to prevent unjust enrichment.[89] This cause of action arises when a party obtains money that, in equity and good conscience, belongs to another.[90] A claim for money had and received is not based on wrongdoing; rather, the only question is whether the defendant holds money that, in equity and good conscience, belongs to another.[91]

V. PROCEDURE

A. Filing of Motion.

The summary judgment process begins with the filing of a motion for summary judgment.[92] Unless a party to the suit files a motion for summary judgment, no court has the power to render a judgment.[93] Even though it properly grants a summary judgment to one party, a court may not grant summary judgment to another party who did not move for summary judgment or join in the moving party's motion.[94]

The movant is confined to the specific grounds set forth in the motion.[95] A trial court may not grant summary judgment as a matter of law on a cause of action not addressed in the summary judgment motion; it is reversible error.[96] When a defendant moves for summary judgment on one cause of action, the trial can grant summary judgment only on that one cause of action.[97] A summary judgment is presumed to dispose of only those issues expressly presented, not all issues in the case.[98]

The grounds for summary judgment may not be raised only in an accompanying brief or memorandum in support.[99]

The time permitted for filing a motion for summary judgment depends upon whether the motion is traditional or no-evidence.

89. *London v. London,* 192 S.W.3d 6, 13 (Tex. App. - Houston [14th Dist.] 2005, pet. denied).

90. *Hunt v. Baldwin,* 68 S.W.3d 117, 132 (Tex. App. - Houston [14th Dist.] 2001, no pet.).

91. 192 S.W.3d at 13.

92. TEX. R. CIV. P. 166a(a)-(b), (i).

93. *Teer v. Duddelstein,* 664 S.W.2d 702, 704 (Tex. 1984); *Daniels v. Daniels*, 45 S.W.3d 278, 282 (Tex. App. - Corpus Christi 2001, no pet.); *Thompson v. CPN Partners, L.P.*, 23 S.W.3d 64, 68 (Tex. App. - Austin 2000, no pet.) (Litigants who are not parties to motion for summary judgment cannot have summary judgment entered for them, even when the order erroneously includes a Mother Hubbard clause. The inclusion of a Mother Hubbard clause in the summary judgment order erroneously granted summary judgment for parties who had not filed a motion therefor); *Williams v. Bank One*, 15 S.W.3d 110, 116 (Tex. App. - Waco 1999, no pet.).

94. *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 844 (Tex. App. - Dallas 2003, no pet.); *Mikulich v. Perez*, 915 S.W.2d 88 (Tex. App. - San Antonio 1996, no writ) (Summary judgment could not be rendered in favor of defendants who did not file a motion, even though a similarly situated defendant filed a motion for summary judgment that was granted).

95. *See G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011) (per curiam) (Summary judgment may be granted only upon the grounds expressly asserted in the motion. Grant of a summary judgment on a claim not addressed in the motion is, as a general rule, reversible error); *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910 (Tex. 1997); *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979).

96. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990); *Mark v. Household Fin. Corp.*, 296 S.W.3d 838 (Tex. App. - Fort Worth, 2009, no pet.) (The lender could not be granted judgment as a matter of law on a cause of action not specifically addressed in its motion for summary judgment; trial court erred by granting summary judgment for the lender on its judicial foreclosure action when the only specific ground in the summary judgment motion was the lender's right to judgment on an action on a sworn account. An action for judicial foreclosure on a lien on real property is not an action on a sworn account because it is not a claim founded upon the provision of personal property or personal services); *Lane v. State Farm Mutual Automobile Insurance Co.*, 992 S.W.2d 545 (Tex. App. - Texarkana 1999, no pet.) (The trial court erred in granting summary judgment on a breach of contract claim which was not addressed in plaintiff's motion); *Roberts v. Sw. Tex. Methodist Hosp.*, 811 S.W.2d 141, 145-46 (Tex. App. - San Antonio 1991, writ denied) ("When a motion for summary judgment asserts grounds A and B, it cannot be upheld on grounds C and D, which were not asserted, even if the summary judgment proof supports them and the responding party did not except to the motion.").

97. *Wright's v. Red River Federal Credit Union*, 71 S.W.3d 916 (Tex. App. - Texarkana 2002, reh. overruled) (Trial court could not grant defendant/movant's summary judgment with respect to plaintiff's claims for breach of contract, common law fraud and a violation of the Insurance Code as they were not mentioned in defendant's motion for summary judgment).

98. *See Springer v. Spruiell*, 866 S.W.2d 592 (Tex. 1993).

99. *Sysco Food Services, Inc. v. Trapnell*, 890 S.W.2d 796 (Tex. 1994) (Summary judgment grounds must appear in the motion presented to the trial court, and grounds merely expressed in a memorandum in support do not raise the matter); *McConnell v. Southside I.S.D.*, 858 S.W.2d 337 Tex. 1993) (Summary judgment grounds presented only in a brief in support of the motion are not sufficient. The grounds may be stated concisely, without detail and argument in the motion).

At any time after the adverse party has appeared or answered, a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move for traditional summary judgment in his favor upon all or any part thereof.[100] A movant for traditional summary judgment is not required to wait until the expiration of the date established in the pretrial scheduling order for completion of discovery.[101] At any time, a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may move for traditional summary judgment in his favor upon all or any part thereof.[102] A no-evidence motion may be filed only "after adequate time for discovery "[103]

B. Traditional Motion.

A motion for summary judgment must rest on the grounds expressly presented in the motion.[104] Unless a claim or affirmative defense is specifically addressed in the motion for summary judgment, a court cannot grant summary judgment on it.[105] The motion must state, with specificity, the grounds upon which the movant is relying.[106] The rationale for this requirement is to force the movant to define the issues and give the non-movant adequate notice for opposing the motion.[107]

In determining whether grounds are expressly presented in the motion, neither the court nor the movant may rely on supporting briefs or summary judgment evidence.[108] The trial court may not grant more relief than requested in the motion for summary judgment.[109] Omission of a claim from a motion

100. TEX. R. CIV. P. 166a(a). At least one court ruled that, in certain circumstances, summary judgment may be entered when a defendant has not filed an answer. *See Emiabata v. National Capital Management*, No. 03-10-00373-CV (Tex. App. - Austin 2011, no pet.) (Respondents did not explain how the trial court's failure to rule on their motion for additional time to file an answer prevented them from filing an answer during the 20 months the case remained pending, nor did they provide any authority for their proposition that an answer must be on file prior to a summary judgment).

101. *Preferred, LP v. Amidhara, LLC*, No. 10-08-00122-CV (Tex. App. - Waco 2010, no pet.), 2010 Tex. App. LEXIS 278 (Trial court erred in granting summary judgment for five defendants, none of whom moved for summary judgment); *Cooper v. Circle Ten Council Boy Scouts of America*, 254 S.W.3d 689 (Tex. App. - Dallas 2008. no pet.) (The trial court did not abuse its discretion by granting traditional summary judgment before the date established in the pretrial scheduling order for completion of discovery had passed. Further, respondent did not file a verified motion for continuance and his response to the motion for summary judgment stated only that he did not have adequate time for discovery and did not specifically ask for a continuance).

102. TEX. R. CIV. P. 166a(b).

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

104. 941 S.W.2d 910, 912 (Tex. 1997); 858 S.W.2d 337, 339 (Tex. 1993) (*quoting Westbrook Constr. Co. v. Fid. Nat'l Bank of Dallas*, 813 S.W.2d 752, 754 (Tex. App. - Fort Worth 1991, writ denied)); *see also City of Midland v. O'Bryant*, 18 S.W.3d 209, 218 (Tex. 2000).

105. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 204 (Tex. 2002); 941 S.W.2d at 912 (limiting summary judgment to those grounds expressly presented in the motion); *Bever Properties, L.L.C. v. Jerry Huffman Custom Builder, L.L.C.*, 355 S.W.3d 878 (Tex. App. - Dallas 2011, no pet.) (Summary judgment reversed and claims not addressed in the summary judgment motion remanded where the trial court granted more relief than the movants requested); *Luccia v. Ross*, 274 S.W.3d 140 (Tex. App. - Houston [1 Dist.] 2008, pet. denied) (Purchase Money Contract's modification of option contained in a Lease Agreement was not raised as a ground in an Amended Motion for Summary Judgment); *Cobb v. Dallas Fort Worth Med. Ctr.- Grand Prairie*, 48 S.W.3d 820, 826 (Tex. App. - Waco 2001, no pet.); *Roberts v. SW Tex. Methodist Hosp.*, 811 S.W.2d 141, 145-46.

106. 73 S.W.3d at 204; *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993). It is fundamental that the traditional summary judgment movant identify the elements of the causes of action upon which it seeks judgment and provide argument, authority, or discussion to show how the claim is conclusively established as a matter of law or the motion will be denied. *See Coastal Motorcars, Ltd v. Brown*, No. 13-14-00560-CV, Tex. App - Corpus Christi, October 29, 2015 (Summary judgment reversed when motion listed sixteen causes of action upon which appellees alleged a right of recovery but did not identify the elements of any of the causes of action and did not apply the law to the facts to establish their entitlement to summary judgment.)

107. *Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978); *RR Publ'n & Prod. Co. v. Lewisville Indep. Sch. Dist*., 917 S.W.2d 472, 473 (Tex. App. - Fort Worth 1996, no writ); *see also* 858 S.W.2d at 343–44 (stating that by requiring movant to expressly set forth grounds in the summary judgment motion, the non-movant has the grounds for summary judgment narrowly focused and does not have to argue every ground vaguely referred to in the motion).

108. 858 S.W.2d at 340-41; *Benitz v. Gould Group*, 27 S.W.3d 109, 116 (Tex. App. - San Antonio 2000, no pet.).

109. *Damron v. Citibank (S.D.) N.A.*, No. 03-09-00438-CV (Tex. App. - Austin 2010, pet. denied), 2010 Tex. App. LEXIS 7054, 10-11 (Trial court erred in granting summary judgment on counterclaim not addressed in

for summary judgment does not waive the claim, because a party can move for partial summary judgment.[110]

The basis of a motion for traditional summary judgment is that there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.[111] The basis for a no-evidence summary judgment is that there is no evidence of one or more essential elements of a claim or defense on which an adverse party will have the burden of proof at trial.[112]

A question of law may be resolved in summary judgment.[113] Whether a particular legal principle is applicable in a case or governs a case is a matter of law for the trial court.[114]

Regardless of the burden of proof at trial, either party may file a traditional motion for summary judgment by establishing each element of its claim or defense.[115] The party without the burden of proof also may file a no-evidence motion for summary judgment urging that there is no evidence to support the other party's claims or defenses.[116] However, the party with the burden of proof may never properly file a no-evidence summary judgment on its claims or defenses, nor may purely legal issues be the subject of a no-evidence summary judgment.[117]

When the movant files a no-evidence summary judgment on claims or affirmative defenses for which it has the burden of proof the non-movant need not respond to the no-evidence motion because the motion should not have been filed at all.[118]

Even though the grounds for summary judgment must appear in the motion itself, summary judgment evidence need not be set out or described in the motion to be considered.[119] Nonetheless, the usual practice, though not required by the supreme court, is to describe the summary judgment evidence.[120]

An amended or substituted motion for summary judgment supersedes any preceding motion.[121]

A ground contained in an earlier filed motion for summary judgment, but not included in a later amended motion, should not be used to grant summary judgment in the trial court and may not be used to affirm summary judgment on appeal.[122]

C. No-Evidence Motion.

"After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence on one or more essential elements of a claim or defense on which an

motion for summary judgment); *Walton v. City of Midland*, 24 S.W.3d 853, 856 (Tex. App. - El Paso 2000, pet denied), *abrogated by In re Estate of Swanson*, 130 S.W.3d 144 (Tex. App. - El Paso 2003, no pet.).

110. *McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001) (per curiam).

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

112. *Id*. 166a(i).

113. *McNamara v. Freedom Newspapers, Inc*., 802 S.W.2d 901 (Tex. App. - Corpus Christi 1991, no writ). *See City of Pinehurst v. Spooner Addition Water Co*., 432 S.W.2d 515 (Tex. 1968) (construction of written contract).

114. *See e.g. Olson v. Central Power and Light Co*., 803 S.W.2d 808, 811 (Tex. App. - Corpus Christi 1991, no writ); *Wisenbarger v. Gonzales Warm Springs Rehabilitation Hosp*., Inc**.,** 789 S.W.2d 688 (Tex. App. - Corpus Christi, 1990, no writ); *Clark v. Perez*, 679 S.W.2d 710, 714 (Tex. App. - San Antonio 1984, no writ).

115. *See infra* Para. VI.A. (discussing burden of proof for traditional summary judgment).

116. *See infra* Para. VI.B. (discussing burden of proof for no-evidence summary judgment).

117. *Burges v. Mosley*, 304 S.W.3d 623 (Tex. App. – Tyler 2010, no pet.) (Party raising the affirmative defense of lack of consideration could not properly move for no evidence summary judgment on that ground); *Marshall v. Ripkowski***,** No. 14-08-00090-CV (Tex. App. - Houston [14th Dist.] 2009, no pet.) (Movant**,** as the plaintiff, had the burden of proof on his conversion claim and consequently was not entitled to a no-evidence summary judgment on that claim); *Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 680 (Tex. App. - Houston [14th Dist.] 2003, no pet.) (explaining that "a party may never properly move for no-evidence summary judgment to prevail on its own claim or affirmative defense for which it has the burden of proof"); *Harrill v. A.J.'s Wrecker Serv., Inc*., 27 S.W.3d 191, 194 (Tex. App. - Dallas 2000, pet. dism'd w.o.j.); *see also infra* Para. VI.B.

118. *Burges v. Mosley*, 304 S.W.3d 623 (*citing Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 680).

119. *Wilson v. Burford*, 904 S.W.2d 628, 629 (Tex. 1995) (per curiam).

120. *See infra* Para. V.A.2 (discussing unfiled discovery as summary judgment evidence).

121. *Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 231 (Tex. App. - Dallas 2000, pet. denied); *see also Padilla v. LaFrance*, 907 S.W.2d 454, 459 (Tex. 1995).

122. *State v. Seventeen Thousand & No/100 Dollars U.S. Currency*, 809 S.W.2d 637, 639 (Tex. App. - Corpus Christi 1991, no writ) (explaining that an amended motion for summary judgment "supplants the previous motion, which may no longer be considered").

adverse party would have the burden of proof at trial.' [123]

A no-evidence motion that merely challenges the sufficiency of the nonmovant's case and fails to specifically state the elements for which there is no evidence is fundamentally defective and insufficient to support summary judgment as a matter of law.[124]

A plaintiff is not entitled to a no-evidence summary judgment on its own claims.[125]

A defendant may not obtain no-evidence summary judgment based on the elements of an affirmative defense.[126] In a collections case, the debtor may raise as an affirmative defense, either accord and satisfaction, failure of consideration, fraud, payment, statute of frauds or statute of limitations.[127] A defendant who pleads either of these affirmative defenses or any other affirmative defense may not use the elements of that affirmative defense as grounds for no-evidence summary judgment.

The rule does not require that discovery must have been completed, but rather that there was "adequate time."[128] The comment to rule 166a(g) provides, "A discovery period set by pre-trial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) [a no-evidence motion] would be permitted after the period but not before."[129] The time allowed for discovery in a docket control order is a strong indicator of adequate time, though the deadline for discovery is not a conclusive measure of "adequate time."[130] Depending on the facts of the case, the time allowed for discovery may be more than is necessary and, thus, an adequate time may be less than the amount the trial court allowed. Likewise, circumstances might arise after the entry of the docket control order that would render the time initially allowed for discovery inadequate. Ordinarily, however, the deadline specified in the docket control order is the best indicator.[131]

A no-evidence motion for summary judgment requires much less from the movant than a traditional motion for summary judgment.[132] The movant is required only to identify the essential elements of a claim or defense on which an adverse party would have the burden of proof at trial on which there is no evidence.[133] A motion that fails to state the elements of the respondent's causes of action as to which there is no evidence is legally insufficient as a matter of law and the non-movant is not required to object.[134] The movant is not required to produce any evidence in support of its no-evidence motion.[135] Instead, the mere filing of a proper motion shifts the burden to the non-movant to come forward with enough evidence to raise a genuine issue of material fact.[136] If the non-movant does not, the court must grant the motion.[137]

123. TEX. R. CIV. P. 166a(i). *Desrochers v. Thomas*, No. 04-12-00120-CV (Tex. App. - San Antonio March 27, 2013, no pet.) (Adequate time for discovery allowed where the case had been on file for almost three years and no-evidence motion for summary judgment did not explain how due diligence was used to obtain the discovery sought after continuance and extra time to conduct was not of some person whose identity was not known until recently as proposed deponent was a party to the lawsuit since movant filed it nearly three years prior.)

124. *Cornwell v. Dick Woodard & Assocs.*, No. 14-09-00940-CV (Tex. App. – Houston [1st Dist.] Jan. 11, 2011, no pet.), Tex. App. Lexis 138.

125. *See Burges v. Mosley*, 304 S.W.3d 623 .

126. *See Kelly v. Brown*, 260 S.W.3d 675 (Tex. App. - Dallas 2008, rev. denied) (no-evidence judgment could not be granted on defense of negligence per se).

127. TEX. R. CIV. P. 94.

128. *In re Mohawk Rubber Co*., 982 S.W.2d 494, 498 (Tex. App. - Texarkana 1998, orig. proceeding)

129. TEX. R. CIV. P. 166a(i) cmt.

130. *See Carter v. MacFadyen*, 93 S.W.3d 307, 311 (Tex. App. - Houston [14th Dist.] 2002, pet. denied).

131. *Id.*

132. TEX. R. CIV. P. 166a(i); *See infra* Para. VI.B (discussing burden of proof for no-evidence summary judgments). A traditional summary judgment is one that requires the movant to establish it is entitled to judgment as a matter of law. *See infra* Para. VI.A (discussing traditional motions for summary judgment).

133. *Binur v. Jacobo*, 135 S.W.2d 646, 650-51, n. 11 (Tex. 2004).

134. 858 S.W.2d 337, 342 (Tex. 1993) (A motion that fails to present grounds is legally insufficient as a matter of law); *Brocali v. Detroit Tigers, Inc*., 268 S.W.3d 90 (Tex. App. - Houston [14th Dist.], 2008, pet. denied) (The Movant's failure to identify challenged elements of claims renders a no-evidence motion for summary judgment legally insufficient under Rule 166a(i), the non-movant is not required to object).

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

136. *Id.; see also infra* Paras. VI.B, VII.B (discussing,

While it need not be detailed, the no-evidence summary judgment motion must meet certain requirements. First, the motion must state the elements for which there is no evidence.[138] The no-evidence motion should state the elements of the claim or defense and allege which of those elements lack evidentiary support. The motion must be specific in challenging the evidentiary support of a claim or defense.[139] A defendant's motion should state the elements of the plaintiff's cause of action and specifically challenge the evidentiary support for an element of that claim. For example, in a promissory note case, it is sufficient to state that there is no evidence of either: a note executed by the defendant that was delivered to the plaintiff; that plaintiff gave value to defendant for the note; that plaintiff is owner and holder of the note; that the note matured; that defendant defaulted; or the amount due. Second, the motion cannot be conclusory or raise a general no-evidence challenge to an opponent's case.[140] In other words, a motion that merely states that there is no evidence to support the other party's claim is insufficient. For example, a no-evidence motion is too general if it states: "[T]here is absolutely no evidence to support [plaintiff's] assertions that [defendant] committed a wrongful foreclosure…."

Even if a non-movant does not object or respond to a defective no-evidence motion for summary judgment, if it is "conclusory, general, or does not state the elements for which there is no evidence, it cannot support the judgment and may be challenged for the first time on appeal."[141]

D. Hybrid Motion.

Where a movant has traditional and no-evidence grounds for summary judgment, the better practice is to file separate motions, one for traditional summary judgment and another for no-evidence summary judgment.[142] However, the summary judgment rule does not prohibit a party from combining in a single motion a request for summary judgment that contains both traditional and no-evidence summary judgment claims.[143] If a motion clearly sets forth its grounds and otherwise meets requirements of the summary judgment rule, it is sufficient.[144] In a hybrid motion, the better practice would be to use headings that clearly delineate the basis traditional summary judgment claims from the basis for no-evidence summary judgment claims.[145] If a hybrid motion is filed, arguments and authorities for traditional and no evidence summary judgment should be clearly delineated and separate from one another. There is some authority that when a party moves for both a no-evidence and a traditional summary judgment, the motion should be considered under the no-evidence standard of Rule 166a(i) and if properly granted the court need not reach

respectively, burden of proof for no-evidence summary judgments and how to respond to them).

137. TEX. R. CIV. P. 166a(i). See *Garza v. Lone Star National Bank*, 13-11-00480-CV (Tex. App. - Corpus Christi Nov. 15, 2012, no pet.) (No evidence summary judgment was properly granted when the summary-judgment evidence did not raise a genuine issue of material fact regarding whether debtor/borrower sustained damages as a result of the alleged breach of contract.)

138. *Id.; Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).

139. *Mayes v. Goodyear Tire and Rubber Co.*, 144 S.W.3d 50, (Tex. App. - Houston [1st Dist.] 2004, no pet.); *Cruikshank v. Consumer Direct Mortg., Inc.*, 138 S.W. 3d 497 (Tex. App. - Houston [14th Dist.] 2004, pet. denied); *Hubbard v. Shankle*, 138 S.W.3d 474 (Tex. App. - Fort Worth 2004, pet. denied); *Foster v. Denton Independent School Dist.*, 73 S.W.3d 454; 982 S.W.2d 494, 497-98; TEX. R. CIV. P. 166a cmt. - 1997.

140. *See San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323 (Tex. App. - Houston [14th Dist.], 2005, no pet.) (Respondent does not meet its burden by only stating generally that a genuine issue of fact is raised) (general no-evidence challenge); *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex. App. - San Antonio 2000, pet. denied) (Motion stated that "Plaintiff's cannot by pleading, deposition, answers to interrogatories or other admissible evidence demonstrate that there is any evidence to support the declaratory judgment …") (conclusory motion).

141. *In re Estate of Swanson*, 130 S.W.3d 144, 147 (Tex. App. - El Paso 2003, no pet.) (*citing Crocker v. Paulyne's Nursing Home, Inc.*, 95 S.W.3d 416, 419 (Tex. App. - Dallas 2002, no pet.); *see also Cuyler v. Minns*, 60 S.W.3d 209, 212-14 (Tex. App. - Houston [14th Dist.] 2001, pet. denied); *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 3-4.

142. *Waldmiller v. Continental Exp., Inc*., 74 S.W.3d 116 (Tex. App. - Texarkana 2002, no pet.).

143. 135 S.W.3d 646, TEX. R. CIV. P. 166a(a), (b),(i).

144. *Id.*

145. *Id.*

arguments under the traditional motion for summary judgment.[146]

E. Pleadings.

The movant should insure that the grounds for the motion for summary judgment are supported by pleadings. Rule 166a(c) provides that the trial court should render summary judgment based on pleadings on file at the time of the hearing.[147] Where there is no live pleading urging a cause of action, there can be no summary judgment.[148] For example, a plaintiff moving for summary judgment on breach of contract should first plead breach of contract in its petition; and a defendant moving for summary judgment based on the statute of limitations should first plead the affirmative defense of statute of limitations.

1. Amended Pleadings.

A party may file an amended pleading after it files its summary judgment motion or response.[149]

A summary judgment proceeding is considered a "trial" with respect to filing amended pleadings under Rule 63.[150] Thus, a party should file an amended answer as soon as possible and no later than seven days before the hearing.[151] If filed outside the seven-day period, no leave to file amended pleadings is necessary.[152] In computing the seven-day period, the day the party files the amended pleading is not counted, but the day of the hearing on the motion for summary judgment is counted.[153]

Leave of court must be obtained to file amended pleadings within seven days of the date of the summary judgment hearing.[154] If the motion for leave is filed within seven days of the hearing, the appellate court presumes leave was granted if "(1) the summary judgment states that all pleadings were considered, (2) the record does not indicate that an amended pleading was not considered, and (3) the opposing party does not show surprise."[155] "To properly preserve a complaint regarding a pleading that has been filed within seven days of trial, 'the complaining party must demonstrate surprise and request a continuance.'"[156]

Even though a hearing may be set and reset, "the key date for purposes of Rule 63 [is] the date of the final hearing from which the summary judgment sprang."[157] Once the hearing date on the motion for summary judgment has passed, a party may file an amended pleading before the court signs a judgment only if it secures a written order granting leave to file. [158]

For summary judgment on the entire case following an amended pleading, the movant must amend the motion for summary judgment to negate the newly pleaded theories.[159] If the plaintiff amends the petition after being served with a motion for summary judgment, the defendant must file an amended or supplemental motion for summary judgment to address the newly pleaded cause of action.[160] Amending the

146. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

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

148. *Daniels v. Daniels*, 45 S.W.3d 278, 282 (Tex. App. - Corpus Christi 2001, no pet.). *But see infra* Para. IV.E.2 (discussing unpleaded claims or defenses).

149. *Cluett v. Med. Protective Co*., 829 S.W.2d 822, 825-26 (Tex. App. - Dallas 1992, writ denied); TEX. R. CIV P. 63.

150. *Wheeler v. Yettie Kersting Mem'l Hosp*., 761 S.W.2d 785, 787 (Tex. App. - Houston [1st Dist.] 1988, writ denied); *see also Sosa v. Cent. Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam) (applying Rule 63 of the Texas Rules of Civil Procedure to the period prescribed for filings before a summary judgment hearing).

151. TEX. R. CIV. P. 63; 909 S.W.2d at 895.

152. *9029 Gateway S. Joint Venture v. Eller Media Co*., 159 S.W.3d 183, 187 (Tex. App. - El Paso 2004, no pet.).

153. 909 S.W.2d at 895 (*citing* TEX. R. CIV. P. 4).

154. *Id.*

155. *9029 Gateway S. Joint Venture*, 159 S.W.3d at 187; *see also Cont'l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276 (Tex. 1996).

156. *Fletcher v. Edwards*, 26 S.W.3d 66, 74 (Tex. App. - Waco 2000, pet. denied) (*quoting Morse v. Delgado*, 975 S.W.2d 378, 386 (Tex. App. - Waco 1998, no pet.).

157. *Cantu v. Holiday Inns, Inc*., 910 S.W.2d 113, 115 (Tex. App. - Corpus Christi 1995, writ denied).

158. TEX. R. CIV. P. 166a(c); *Hussong v. Schwan's Sales Enters., Inc*., 896 S.W.2d 320, 323 (Tex. App. - Houston [1st Dist.] 1995, no writ).

158. *Johnson v. Fuselier*, 83 S.W.3d 892 (Tex. App. - Texarkana, 2002, no pet.); *Jones v. Ray Ins. Agency*, 59 S.W.3d 739 (Tex. App. - Corpus Christi 2001, pet. denied); *Elliott v. Methodist Hosp*., 54 S.W.3d 789 (Tex. App. - Houston [1st Dist.] 2001, pet. denied).

160. *Worthy v. Collagen Corp*., 921 S.W.2d 711, 714 (Tex. App. - Dallas 1995), *aff'd*, 967 S.W.2d 360 (Tex.

motion is equally necessary for no-evidence summary judgments. If the plaintiff amends its petition adding new causes of action not addressed by the defendant's no-evidence motion for summary judgment, the defendant must file an amended motion for summary judgment identifying the elements of the newly pled theories for which there is no evidence. Otherwise, summary judgment on the entirety of the plaintiff's case will be improper, because the no-evidence motion fails to address all of the plaintiff's theories of liability.[161]

Timely filed amended pleadings that do not assert a new cause of action or defense shall not deter entry of final judgment.[162] If the amended petition only "reiterates the same essential elements in another fashion," then the original motion for summary judgment will cover the new variations.[163]

In cases with court-ordered discovery plans, the court may set the deadline for amended pleadings before the close of the discovery period.[164] In those instances, a movant who waits to move for summary judgment until after the time expires for pleading amendments will not have to amend the summary judgment motion to address amended pleadings.

"A plaintiff may take a nonsuit at anytime before the trial court grants a [motion for] summary judgment."[165] However, as a dispositive motion, a partial summary judgment survives a nonsuit.[166]

2. Unpleaded Claims or Defenses.

Unpleaded claims or defenses may form the basis for summary judgment if the non-movant does not object.[167] In its review of an unpleaded affirmative defense stated in response to a motion for summary judgment, the supreme court held:

> (A)n unpleaded affirmative defense may … serve as the basis for a summary judgment when it is raised in the summary judgment motion, and the opposing party does not object to the lack of a rule 94 pleading in either its written response or before the rendition of judgment.[168]

When a non-movant relies on an unpleaded affirmative defense or an unpleaded matter constituting a confession and avoidance the movant must object.[169] Otherwise, the issue will be tried by consent.[170]

If the non-movant objects to an unpleaded claim or defense, the movant must amend its pleadings to conform to the motion.[171]

3. Pleading Deficiencies and Special Exceptions.

Summary judgment motions are not a proper vehicle to attack pleading deficiencies.[172]

1998); *Johnson v. Rollen*, 818 S.W.2d 180, 182-83 (Tex. App. - Houston [1st Dist.] 1991, no writ).

161. 909 S.W.2d 893, 894-95; *see also Welch v. Coca-Cola Enters., Inc*., 36 S.W.3d 532, 541-42 (Tex. App. - Tyler 2000, pet. dism'd by agr.); *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 147-48 (Tex. App. - Houston [14th Dist.] 2000, pet. denied).

162. *Reyes v. Credit Based Asset Servicing and Securitization*, 190 S.W.3d 736 (Tex. App. - San Antonio, 2005, no pet.).

163. 29 S.W.3d at 147 (*quoting Lampasas v. Spring Ctr., Inc*., 988 S.W.2d 428, 437 (Tex. App. - Houston [14th Dist.] 1999, no pet.).

164. TEX. R. CIV. P. 190.4(b)(4).

165. *Cook v. Nacogdoches Anesthesia Group, L.L.P.*, 167 S.W.3d 476, 482 (Tex. App. - Tyler 2005, no pet.).

166. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995) (per curiam).

167. *Roark v. Stallworth Oil & Gas, Inc*., 813 S.W.2d 492, 495 (Tex. 1991) ("(U)npleaded claims or defenses that are tried by express or implied consent of the parties are treated as if they (were) raised by the pleadings"); *Patterson v. First Nat'l Bank of Lake Jackson*, 921 S.W.2d 240, 244 (Tex. App. - Houston [14th Dist.] 1996, no writ) ("An unpleaded affirmative defense, however, cannot be the basis for summary judgment unless appellee fails to object to the lack of a pleading in either its written response or before the rendition of judgment").

168. *Roark*, 813 S.W.2d at 494; *see also Finley v. Steenkamp*, 19 S.W.3d 533, 541 (Tex. App. - Fort Worth 2000, no pet.); *Webster v. Thomas*, 5 S.W.3d 287, 288-89 (Tex. App. - Houston [14th Dist.] 1999, no pet.).

169. *Id.*

170. *Id.*

171. *See Natividad v. Alexis, Inc*., 875 S.W.2d 695, 699 (Tex. 1994).

172. *In re B.I.V.*, 870 S.W.2d 12, 13-14 (Tex. 1994) (per curiam); *Massey v. Armco Steel Co.*, 652 S.W.2d 932,

Texas has no equivalent of a Federal Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.[173] "A summary judgment [motion] should not be based on a pleading deficiency that could be cured by amendment."[174] However, a non-movant must raise a complaint that summary judgment was granted without opportunity to amend or it is waived.[175]

a. Special Exceptions.

If the non-movant seeks to challenge the plaintiff's failure to state a cause of action, filing special exceptions is the appropriate method to attack that failure.[176] The protective features of the special exception procedure should not be circumvented by a motion for summary judgment on the pleadings where the plaintiff's pleadings fail to state a cause of action.[177] The trial court must give the pleader an adequate opportunity to amend its pleading to state a viable cause of action after a special exception has been sustained.[178] Special exceptions allow the non-movant an opportunity to amend before dismissal.[179] There is no general demurrer in Texas.[180] Nonetheless, special exceptions can identify and set up conditions to make a case for summary judgment. Subject to challenges to jurisdiction and venue, a party should file special exceptions identifying and objecting to non-jurisdictional defects apparent on the face of the opponent's pleadings.[181] If identification of the defect depends on information extrinsic to the pleadings themselves, special exceptions are not appropriate.[182] Special exceptions must be directed at the plaintiff's live pleadings.[183] If the trial court sustains the special exceptions, the offending party may replead or the party may elect to stand on the pleadings and test the trial court's order on appeal.[184] The right to amend is absolute.[185] However, summary judgment may be granted when a party is ordered to replead and fails to do so.[186]

934 (Tex. 1983); *Tex. Dep't of Corr. v. Herring*, 513 S.W.2d 6, 9-10 (Tex. 1974) (concluding that the protective features of the special exception procedure should not be circumvented by summary judgment where the pleadings fail to state a cause of action).

173. *Centennial Ins. Co. v. Commercial Union Ins. Cos*., 803 S.W.2d 479, 482-83 (Tex. App. - Houston [14th Dist.] 1991, no writ); *see also* TEX. R. CIV. P. 90-91 (providing for special exceptions for defects in pleadings and waiver of defects for failure to specially except).

174. 870 S.W.2d at 13.

175. *San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209-10 (Tex. 1990) (per curiam) (holding that a trial court's judgment may not be reversed where party does not present a timely request, objection, or motion to the trial court); *Ross v. Arkwright Mut. Ins. Co.*, 933 S.W.2d 302, 305 (Tex. App. - Houston [14th Dist.] 1996, writ denied) (citing *San Jacinto River Auth*., 783 S.W.2d at 209-10).

176. TEX. R. CIV. P. 91; *see also Lavy v. Pitts*, 29 S.W.3d 353, 356 (Tex. App. - Eastland 2000, pet. denied).

177. *Tex. Dept. of Corrections v. Herring*, 513 S.W.2d 6 (Tex. 1974).

178. *Pietila v. Crites*, 851 S.W.2d 185, 186 n2 (Tex. 1993).

179. 803 S.W.2d at 483.

180. TEX. R. CIV. P. 90; *see also Tex. Dep't of Corr. v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974) (Texas Rule of Civil Procedure 90 discarded the general demurrer). A general demurrer is "(a)n objection pointing out a substantive defect in an opponent's pleading, such as the insufficiency of the claim or the court's lack of subject-matter jurisdiction; an objection to a pleading for want of substance." BLACK'S LAW DICTIONARY 583 (7th ed. 1999).

181. *Agnew v. Coleman County Elec. Coop., Inc.*, 272 S.W.2d 877, 879 (Tex. 1954) (stating that if a party desires more specific allegations, it is entitled to enter special exceptions to the general pleading), *overruled by Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981); *Fort Bend County v. Wilson*, 825 S.W.2d 251, 253 (Tex. App. - Houston [14th Dist.] 1992, no writ) (asserting that special exceptions should be used to force clarification of vague pleadings and question the sufficiency in law of the party's petition).

182. *Fernandez v. City of El Paso*, 876 S.W.2d 370, 373 (Tex. App. - El Paso 1993, writ denied) (stating special exceptions must only address matters on the face of the other party's pleading); *O'Neal v. Sherck Equip. Co*., 751 S.W.2d 559, 562 (Tex. App. - Texarkana 1988, no writ) (concluding defendants may not seek relief by excepting to a pleading based on facts not apparent in the plaintiff's petition).

183. *Transmission Exch. Inc. v. Long*, 821 S.W.2d 265, 269 (Tex. App. - Houston [1st Dist.] 1991, writ denied). The defendants' statement in their special exceptions, that plaintiff's pleading did not advise them of the amounts claimed for fraud damages, was taken as an indication that defendants were aware of and, therefore, on notice of plaintiff's fraud allegations. *Id.* That fact, coupled with the absence of any special exceptions to the vague allegations of fraud in plaintiff's third amended petition and the defendants' failure to object to the submission of special issues on fraud, constituted waiver of any complaint that the judgment for fraud did not conform to the pleadings. Id.

184. *D.A. Buckner Constr., Inc. v. Hobson*, 793 S.W.2d 74, 75 (Tex. App. - Houston [14th Dist.] 1990, no writ).

185. *Massey v. Armco Steel Co*., 652 S.W.2d 932, 934 (Tex. 1983).

186. *Haase v. Glazner*, 62 S.W.3d 795, 800 (Tex. 2001); *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex.

Special exceptions are also the method to force a movant for summary judgment to clarify its position if its motion for summary judgment is unclear or ambiguous.[187] "To complain that summary judgment grounds are unclear, a non-movant must (specially) except to the motion."[188]

b. Effect of the Failure to Amend or of a Defective Amendment.

A motion for summary judgment should not be based on a pleading deficiency that could be cured by amendment (subject to a special exception). Yet, if the opportunity to amend is given, and no amendment is made or instead a further defective pleading is filed, then summary judgment may be proper.[189] If a pleading deficiency is a type that cannot be cured by an amendment, then a special exception is unnecessary and summary judgment is proper if the facts alleged "establish the absence of a right of action or [create] an insuperable barrier to a right of recovery."[190]

The review of summary judgment differs when based on the failure of a party to state a claim after either special exceptions or an amendment because review focuses on the pleadings of the non-movant.[191] Review of the sufficiency of the amended pleadings is de novo.[192] The appellate court must take "all allegations, facts, and inferences in the pleadings as true and view them in a light most favorable to the pleader."[193] The court will reverse the motion for summary judgment if the pleadings, liberally construed, support recovery under any legal theory.[194] On the other hand, "[t]he reviewing court will affirm the summary judgment only if the pleadings are legally insufficient."[195]

When a defendant attacks plaintiff's pleadings by motion for summary judgment instead of special exception and the plaintiff does not request an opportunity to amend its pleadings to state a cognizable cause of action, the plaintiff waives reliance on any complaint premised on the absence of special exceptions.[196]

1998).

187. *See infra* Para. VII.A. (discussing the necessity to respond to a summary judgment motion).

188. *Lavy v. Pitts*, 29 S.W.3d 353, 356 (Tex. App. - Eastland 2000, pet. denied) (citing *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 175 (Tex. 1995)).

189. 875 S.W.2d 695, 699 (Tex. 1994); *see also Friesenhahn*, 960 S.W.2d at 659; *Tex. Dep't of Corr. v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974).

190. *Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972) (noting that cases where summary judgment is proper rather than utilizing the special exception are limited); *see, e.g., Helena Lab. Corp. v. Snyder*, 886 S.W.2d 767, 768-69 (Tex. 1994) (No cause of action exists for negligent interference with familiar relationships.); *White v. Bayless*, 32 S.W.3d 271, 275-76 (Tex. App. - San Antonio 2000, pet. denied) (No cause of action exists against opposing party's attorney); *Trail Enters. v. City of Houston*, 957 S.W.2d 625, 632-33 (Tex. App. - Houston [14th Dist.] 1997, pet. denied) (finding that the statute of limitations ran and plaintiff did not plead discovery rule).

191. *See Russell v. Tex. Dep't of Human Res*., 746 S.W.2d 510, 513 (Tex. App. - Texarkana 1988, writ denied) (explaining that after amendment, the focus shifts to the answers in the response).

192. *See* 875 S.W.2d at 699; *Hall v. Stephenson*, 919 S.W.2d 454, 467 (Tex. App. - Fort Worth 1996, writ denied).

193. 875 S.W.2d at 699. *Accord Hall*, 919 S.W.2d at 467; *see also Aranda v. Ins. Co. of N. Am*., 748 S.W.2d 210, 213 (Tex. 1988) (concluding that the reviewing court will accept as true all factual allegations in the plaintiff's petition to determine whether the petition states a factual basis for plaintiff's claim); *Havens v. Tomball Cmty. Hosp*., 793 S.W.2d 690, 691 (Tex. App. - Houston [1st Dist.] 1990, writ denied) (stating that "the court must take as true every allegation of the pleading against which the motion is directed").

194. *Gross v. Davies*, 882 S.W.2d 452, 454 (Tex. App. - Houston [1st Dist.] 1994, writ denied) (stating that if liberal construction of petition shows a valid claim, summary judgment should be reversed); *Anders v. Mallard & Mallard, Inc.*, 817 S.W.2d 90, 93 (Tex. App. - Houston [1st Dist.] 1991, no writ) (arguing that a motion for summary judgment must be overruled if liberal construction of the pleading reveals a fact issue); *Greater Sw. Office Park, Ltd. v. Tex. Commerce Bank Nat'l Ass'n*, 786 S.W.2d 386, 388 (Tex. App. - Houston [1st Dist.] 1990, writ denied) (explaining that summary judgment must be reversed if the pleadings would support "a recovery under any theory of law"); *Bader v. Cox*, 701 S.W.2d 677, 686 (Tex. App. - Dallas 1985, writ ref'd n.r.e.) (discussing the "fair notice" requirement of pleadings).

195. 875 S.W.2d at 699.

196. *Higbie Roth Constr. Co. v. Houston Shell & Concrete*, 1 S.W.3d 808, 811 (Tex. App. - Houston [1st Dist.] 1999, pet. denied) (Defendant's improper attack on the pleadings by motion for summary judgment instead of by special exceptions triggered a responsibility in plaintiff to request leave to amend, to the extent its pleading defects were curable by amendment).

F. Time for Filing.

1. Motion for Traditional Summary Judgment.

Rule 166a(a) provides that the party seeking affirmative relief in the lawsuit may file a motion for traditional summary judgment at any time after the adverse party answers the suit.[197] However, a summary judgment may not be granted for a plaintiff against a defendant who has no answer on file.[198] A defendant may file a motion for summary judgment at any time,[199] even before answering the lawsuit.[200]

Nonetheless, seldom is a motion for summary judgment appropriate immediately after the defendant has answered. In fact, Rule 166a(g) provides that the court "may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as may be just."[201] Occasions for proper early-filed motions for summary judgment would arise when the case hinges exclusively on the interpretation of a statute, the construction of an unambiguous contract or application of the statute of limitations when the discovery rule does not apply. Generally, the non-movant will have grounds for a continuance to conduct some discovery.[202]

2. Motion for No-Evidence Summary Judgment.

The rule provides that a no-evidence motion for summary judgment may be filed "after adequate time for discovery" [203] The term "after adequate time for discovery" is a legal term of art without precise definition. Neither the rule nor the Official Comment defines the term.[204] The Comment offers limited guidance. It provides that "A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before."[205] The rule does not require that discovery be completed.[206] The rule does not appear to require that any discovery actually be conducted. The language of the rule provides only that sufficient time expire for discovery to have been conducted.[207]

Whether a non-movant had an adequate time for discovery for purposes of Rule 166a(i) is "case specific."[208] Although some lawsuits that present only questions of law may require no or minimal discovery, other actions may require extensive discovery.[209] An adequate time for discovery is determined by the nature of the cause of action, the nature of the evidence necessary to controvert the no-evidence motion, and the length of time the case has been active in the trial court.[210] A court may also look to factors such as the amount of time the no-evidence motion has been on file and the amount of discovery that has already taken place.[211]

The addendum to the rule made no mention of how to proceed in the absence of a pretrial order. The revised discovery rules filled that gap because all cases now have a rule-imposed or court-imposed discovery plan with discovery periods.[212] Rule 190 provides three discovery plans, each of which has a "discovery period" for respective civil cases filed after January 1, 1999.[213] Therefore, an "adequate time for discovery" may be measured against the "discovery period" assigned to a given case. The

197. TEX. R. CIV. P. 166a(a).
198. *Hock v. Salaices*, 982 S.W.2d 591, 592 (Tex. App. - San Antonio 1998, no pet.).
199. TEX. R. CIV. P. 166a(b).
200. *Zimmelman v. Harris County*, 819 S.W.2d 178, 181 (Tex. App. - Houston [1st Dist.] 1991, no writ).
201. TEX. R. CIV. P. 166a(g); *see infra* Para. IV.K. (discussing motions for continuance).
202. *See infra* Para. IV.K.
203. TEX. R. CIV. P. 166a(i).
204. *Id.*
205. TEX. R. CIP. 166a(i) cmt. - 1997.
206. *Lattrell v. Chrysler Corp*., 79 S.W.3d 141, 146 (Tex. App. - Texarkana 2002, pet. denied); 29 S.W.3d 140, 145.
207. *Id.*
208. *McClure v. Attebury*, 20 S.W.3d 722, 729 (Tex. App. - Amarillo 1999, no pet.).
209. *Id.*
210. 29 S.W.3d 140, 145.
211. *Id.*
212. *Id.* 190 cmt - 1999.
213. *Id.* 190.1; *see also* Tex. Sup. Ct. Order of Nov. 9, 1998, Approval of Revisions to the Texas Rules of Civil Procedure, Misc. Docket No. 98-9136, reprinted in 61 TEX. B.J. 1140, 1140 (Dec. 1998).

comment to Rule 166a(i) covers what now is called a "Level 3" case, which has a court-imposed discovery plan.[214] Levels 1 and 2 have rule-imposed discovery periods.[215] Thus, if the no-evidence motion for summary judgment is filed after the expiration of the discovery periods, presumptively there will have been an adequate time for discovery.

An adequate time for discovery would be satisfied by the time permitted in the applicable discovery period. For Level 1 cases, an adequate time for discovery would be satisfied thirty days before trial.[216] The practical effect of this cutoff date is that since the case is so far along procedurally and the damages are comparably smaller many defendants may forego filing a no-evidence motion for summary judgment in the last thirty days before trial. Further, the movant may not be able to schedule a hearing on the motion or the trial court may not rule on the motion for summary judgment in the limited time before trial. For Level 2 cases, an adequate time for discovery would be satisfied thirty days before the date set for trial or nine months after the first oral deposition is taken or the answers to the first written discovery are due, whichever is earlier.[217] For Level 3 cases, an adequate time for discovery would be satisfied by the time permitted in the court-ordered discovery control.[218]

The time permitted by a discovery period is not the absolute determinant of adequate time for discovery. A party may move for no-evidence summary judgment before the expiration of the discovery period. Filing a no-evidence motion for summary judgment before the end of the discovery period may enhance judicial economy. Arguments against the early filing of motions for summary judgment support the opportunity for a full discovery period before trial.

In appropriate cases, a movant could show an adequate time for discovery was satisfied even though the discovery period has not expired, by convincing the court that the non-movant's claimed need for discovery is unfounded.[219] The non-movant opposing an early-filed no-evidence motion for summary judgment should attempt to have it denied as premature by convincing the court that remaining discovery is likely to lead to controverting evidence and, in any event, that he or she is entitled to the additional time under the discovery plan.

Even if the no-evidence motion for summary judgment is filed after the close of discovery,[220] Rule 190.5 may provide a basis for a request for continuance of the motion for summary judgment. Rule 190.5 allows for a continuance in obtaining additional discovery after the close of the discovery period.[221]

When a non-movant contends he or she has not had an adequate time for discovery, he or she must file an affidavit or a verified motion for continuance explaining the need for further discovery.[222] The court may deny the motion for summary judgment, continue the hearing to allow additional discovery, or "make such other order as is just."[223]

The "adequate time for discovery" standard applies only to no-evidence motions for summary judgment.[224]

G. Filing Deadlines.

A motion for summary judgment shall be filed and served at least twenty-one days before the time set for hearing or submission.[225] If

214. TEX. R. CIV. P. 190.4.
215. *Id.* 190.2-.3.
216. *Id.* 190.2(c)(1); *see also id.* 190.2(d).
217. *Id.* 190.3(b)(1)(B).
218. *Id.* 190.4(b)(2).

219 *See* 29 S.W.3d 140, 145 (detailing factors to be considered in granting a continuance); *see also* HON. DAVID HITTNER ET AL., FEDERAL CIVIL PROCEDURE BEFORE TRIAL: 5TH CIRCUIT EDITION § 14:117 (The Rutter Group 2005).

220. *See infra* Para. IV.K. (discussing motions for continuance).

221. TEX. R. CIV. P. 190.5.

222. *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996).

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

224. *See id.* 166a(a), (b); *Allen v. United of Omaha Life Ins. Co.*, 236 S.W.3d 315 (Tex. App. - Fort Worth, 2007, pet. denied) (Adequate time for discovery provision of summary judgment rule did not apply to traditional motion for summary judgment).

225. *Id*. 166a(c). The notice of summary judgment must include a specific submission date. *Ready v. Alpha Building Corp.*, 467 Tex. App. 580 (Houston [1st Dist.],

different parties on the same side of the lawsuit file separate summary judgment motions, each movant should comply with the notice provisions of the rule.[226] Periods governing summary judgment procedures are counted in the same manner as for other procedural rules.[227] The day of service of a motion for summary judgment is not to be included in computing the minimum twenty-one day notice for hearing.[228] However, the day of hearing is included in the computation.[229] If the motion is served by mail three days are added to the twenty-one day notice period required prior to the hearing.[230] Thus, a hearing on a motion for summary judgment may be set as early as the twenty-first day after the motion is served when the motion is served either in person or by agent or by courier receipted delivery, or the twenty-fourth day after the motion is served when the motion is served by mail or facsimile.[231]

The twenty-one day requirement is strictly construed by the courts and should be carefully followed.[232] "Summary judgment evidence may be filed late, but only with leave of court."[233] The party filing the late evidence must obtain a written order granting leave to file.[234] Rule 166a(c) authorizes the court to accept materials filed after the hearing so long as those materials are filed before judgment.[235] If a summary judgment hearing is reset, the twenty-one day requirement does not apply to the resetting.[236] The non-movant need only be given a reasonable time in which to prepare and file a response.[237] "Reasonable notice … means at least seven days before the hearing on the motion [for summary judgment] because a non-movant may only file a response to a motion for summary judgment not later than seven days prior to the date of the hearing . . . ."[238]

2015, no pet.). (Notices stating the motion would be submitted "after" a date certain contained indefinite language that did not inform respondent of a specific submission date or establish a deadline for his response. *Citing Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex.1998) [A trial court must give notice of the submission date for a motion for summary judgment, because this date determines the date the nonmovant's response is due]. The clerk of court is not required to send notice of submission to the respondent. *Edwards v. Phillips*, No. 04-13-00725-CV (Tex. App. - San Antonio, April 29, 2015); *see also Cronen v. City of Pasadena*, 835 S.W.2d 206, 209 (Tex. App. - Houston [1st Dist.] 1992, no writ) (applying Texas Rule of Civil Procedure 21a and finding that "a certificate of service creates a rebuttable presumption that the requisite notice [of the hearing] was [given]"), *overruled* by *Lewis v. Blake*, 876 S.W.2d 314 (Tex. 1994) (per curiam); *Krchnak v. Fulton*, 759 S.W.2d 524, 528 (Tex. App. - Amarillo 1988, writ denied) (holding that the rule regarding certificate of service "creates a presumption that the requisite notice was served and . . . has the force of a rule of law"). A certificate of service is sufficient when it is sent to the address the respondent used on all pleadings; no proof of non-receipt is required. *Morris v. Sand Canyon Corp.*, No. 14-13-00931-CV (Houston [14th Dist.] May 14, 2015, no pet.).

226. *See Wavell v. Caller-Times Publ'g Co*., 809 S.W.2d 633, 637 (Tex. App. - Corpus Christi 1991, writ denied) (emphasizing that the notice provisions for summary judgment are strictly construed), *abrogated* by *Cain v. Hearst Corp*., 878 S.W.2d 577 (Tex. 1994).

227. 876 S.W.2d at 315-16 (disapproving of a series of court of appeals' decisions that did not add the extra three days for service by mail or telephonic document transfer) (citing TEX. R. CIV. P. 4).

228. *Id.*

229. *Id.*

230. *Id.*, effective January 1, 2014.

231. *Id.*

232. *Dixon v. E.D. Bullard Co.*, 138 S.W.3d 373, 375-76 (Tex. App. - Houston [14th Dist.] 2004, pet. granted, judgm't vacated w.r.m.); *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 582 (Tex. App. - Austin 1995, no writ); *Wavell v. Caller-Times Publ'g Co*., 809 S.W.2d 633, 637 (Tex. App. - Corpus Christi 1991, writ denied), *abrogated* by *Cain v. Hearst Corp*., 878 S.W.2d 577 (Tex. 1994).

233. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996).

234. *Id.* (finding no order in the record granting the party leave to file an affidavit late and therefore, holding that the affidavit was not properly before the court and could not be considered for summary judgment).

235. *Beavers v. Goose Creek Consol. I.S.D.*, 884 S.W.2d 932, 935 (Tex. App. - Waco 1994, writ denied) (citing TEX. R. CIV P. 166a(c)) (finding that a trial court can accept evidence after the hearing on the motion and before summary judgment is rendered); *Diaz v. Rankin*, 777 S.W.2d 496, 500 (Tex. App. - Corpus Christi 1989, no writ) (holding that the trial court has discretion to allow late filing); *Marek v. Tomoco Equip. Co*., 738 S.W.2d 710, 713 (Tex. App. - Houston [14th Dist.] 1987, no writ) (concluding that a trial court may consider affidavits filed after the hearing and before judgment when the court gives permission).

236. *Birdwell v. Texins Credit Union*, 843 S.W.2d 246, 250 (Tex. App. - Texarkana 1992, no writ) ("The twenty-one-day requirement from notice to hearing does not apply to a resetting of the hearing, provided that the non-movant received notice twenty-one days before the original hearing").

237. *See id.*

238. *LeNotre v. Cohen*, 979 S.W.2d 723, 726 (Tex. App. - Houston [14th Dist.] 1998, pet. denied) (quoting *Int'l Ins. Co. v. Herman G. West, Inc*., 649 S.W.2d 824,

A party waives its challenge for failure to receive twenty-one days notice if "the party received notice of the hearing, appeared at it, filed no controverting affidavit, and did not ask for a continuance."[239] "An allegation that a party received less notice than required by statute does not present a jurisdictional question and therefore may not be raised for the first time on appeal."[240] It is error for the trial judge to grant a summary judgment without notice of the setting.[241] However, for the error to be reversible, the non-movant must show harm.[242]

No additional notice is required for the trial court to rehear a previously denied motion for summary judgment.[243]

H. Response Deadlines.

Rule 166a(c) provides that "[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response."[244] The three-day rule for mailing does not apply to the response. A response is timely if it is mailed seven days before the hearing date.[245] If the trial court imposes a shorter deadline to file a response, the non-movant must object to preserve that error for appeal.[246] The seven-day rule applies equally to responses to cross-motions for summary judgment.[247] Any special exception to a lack of clarity or ambiguity in the motion for summary judgment is likewise subject to the seven-day deadline.[248] Amended pleadings may be filed without leave of court up to seven days before the hearing.[249]

A borrower's late filed response is not properly before the court when there is no leave of the court permitting the filing of that untimely response; and the trial court may grant the lender summary judgment without considering the borrower's untimely summary judgment response.[250]

Courts may allow a late response.[251] The non-movant must obtain leave of court to file a

825 (Tex. App. - Fort Worth 1983, no writ) (holding all that is required is reasonable notice of the reset hearing)).

239. *Negrini v. Beale*, 822 S.W.2d 822, 823 (Tex. App. - Houston [14th Dist.] 1992, no writ); *see also Ajibade v. Edinburg Gen. Hosp*., 22 S.W.3d 37, 40 (Tex. App. - Corpus Christi 2000, reh'g overruled).

240. 822 S.W.2d at 823.

241. *Milam v. Nat'l Ins. Crime Bureau*, 989 S.W.2d 126, 129 (Tex. App. - San Antonio 1999, no pet.).

242. *Id*.

243. *Winn v. Martin Homebuilders, Inc*., 153 S.W.3d 553, 556 (Tex. App. - Amarillo 2004, pet. denied).

244. TEX. R. CIV. P. 166a(c); 909 S.W.2d 893.

245. *Holmes v. Ottawa Truck, Inc.,* 960 S.W.2d 866 (Tex. App. - El Paso, 1997, pet. denied); *Clendennen v. Williams*, 896 S.W.2d 257, 259 (Tex. App.- Texarkana 1995, no writ).

246. *See Richardson v. Johnson & Higgins of Tex., Inc.*, 905 S.W.2d 9, 12 (Tex. App. - Houston [1st Dist.] 1995, writ denied) (holding that error must be reflected in the appellate record).

247. *Murphy v. McDermott Inc*., 807 S.W.2d 606, 609 (Tex. App. - Houston [14th Dist.] 1991, no writ).

248. 858 S.W.2d 337, 343 n.7 (Tex. 1993) (finding that any confusion regarding an exception must be responded to in written form, filed, and served at least seven days before the hearing).

249. 909 S.W.2d 893, 895; *see supra* Para. II.B (discussing pleadings).

250. *Clarksville Oil and Gas Co., Ltd. v. Carroll*, No. 06-11-00017-CV (Tex. App. - Texarkana 2011, no pet.) (Respondent presented no evidence in response to a no-evidence motion for summary judgment when it filed response on the of hearing date); *Cooper v. Litton Loan Servicing, LP*, 325 S.W.3d 766 (Tex. App. - Dallas 2010, no pet.) (Defendant's response to traditional and no-evidence summary judgment motions was untimely and not properly before the court when it was filed the date of the summary judgment hearing and there was no indication in the record that appellant requested or was granted leave to file a late response); *Winchek v. American Express Travel Related Services Co. Inc.*, 232 S.W.3d 197 (Tex. App. - Houston [1st Dist.] 2007, no pet.) (Trial court struck as untimely a response to the motion for summary judgment with appended affidavit as evidentiary support filed on December 27, 2005 for a December 30, 2005 summary judgment hearing). *See O'Donald ex rel. Estate of O'Donald v. Texarkana Mem'l Hosp.*, No. 06-04-00121-CV, 2005 WL 3191999, at *1–2 (Tex. App. - Texarkana Sept. 28, 2005, pet. denied) (mem. op.) ("Because the [Plaintiffs] did not timely respond to [Defendant's] no-evidence summary judgment motion or timely point the trial court to any summary judgment evidence raising an issue of fact on the challenged elements, the trial court properly rendered summary judgment in favor of [Defendant]").

251. *Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171, 176 (Tex. App. - Fort Worth 1996, no writ) (finding that the trial court has discretion to accept late-filed summary judgment evidence); *Sullivan v. Bickel & Brewer*, 943 S.W.2d 477, 486 (Tex. App. - Dallas 1995, writ denied) (noting that late filing of opposing proof is "entirely" discretionary); *Ossorio v. Leon*, 705 S.W.2d 219, 221 (Tex. App. - San Antonio 1985, no writ) (holding that the court may specifically grant leave to file a late response and consider those documents as proper support for a summary judgment motion).

late response.[252] Refusal to permit late filing is discretionary.[253] The standard for allowing a late filed summary judgment response is a showing of good cause and no undue prejudice.[254] If a court allows late filing of a response to a motion for summary judgment, the court "must affirmatively indicate in the record acceptance of the late filing."[255] The affirmative indication may be by separate order, by recitation in the summary judgment itself, or an oral ruling contained in the reporter's record of the summary judgment hearing.[256] A Rule 11 agreement[257] may alter the deadline for filing a response.[258] A docket entry may be sufficient to show leave was granted.[259] The better practice is to obtain a separate order or have the summary judgment order state that late filing was permitted. Although an oral order recorded in a reporter's record (formerly "statement of facts") from the hearing may not be sufficient, one court has held that it was sufficient.[260] In the absence of such indication, the appellate court will presume that the judge refused the late filing, even if the response appears as part of the appellate transcript.[261]

I. Movant's Reply.

Rule 166a does not specify when the movant's reply to the non-movant's response should be filed. Case law indicates that the movant may file a reply up until the day of the hearing.[262] Local rules may govern the timing of the reply.[263] Any special exception by the movant concerning vagueness or ambiguity in the non-movant's response must be made at least three days before the hearing.[264] A no-evidence summary judgment may not rely on its reply to non-movant's response to provide the requisite specificity (to state the elements of the claim for which there is no evidence) required by Rule 166a(i).[265] The reply should make challenges

252. *Neimes v. Ta*, 985 S.W.2d 132, 139 (Tex. App. - San Antonio 1998, pet. dism'd by agr.).

253. *White v. Independence Bank*, 794 S.W.2d 895, 900 (Tex. App. - Houston [1st Dist.] 1990, writ denied) (holding that the trial court may refuse affidavits that are filed late); *Folkes v. Del Rio Bank & Trust Co*., 747 S.W.2d 443, 444 (Tex. App. - San Antonio 1988, no writ) (denying permission to file a late response was not abuse of discretion).

254. *Carpenter v. Cimarron Hydrocarbons Corp*., 98 S.W.3d 682, 687-88 (Tex. 2002); *Southeast Texas Environmental, L.L.C. v. Wells Fargo Bank, N.A.*, No. 01-10-00076-CV (Tex. App. - Houston [1st Dist.] 2011, no pet.) (In motion for leave to file late supplemental response (evidence)**,** respondent failed to demonstrate good cause for its failure to timely file an adequate summary judgment response. Respondent failed to contend (and the record did not reflect) that the attached summary judgment evidence was unavailable to it before the trial court rendered judgment; there was no evidence that a calendaring error resulted in respondent's failure to timely file summary judgment evidence; and there was no evidence that respondent's failure was not the result of conscious indifference).

255. 919 S.W.2d at 176; *see also Goswami v. Metro. Sav. & Loan Ass'n*, 751 S.W.2d 487, 490 (Tex. 1988) (holding an amended petition that is part of the record raises a presumption that leave of court was granted); *K-Six Television, Inc. v. Santiago*, 75 S.W.3d 91, 96 (Tex. App. - San Antonio 2002, no pet.).

256. *See, e.g.*, 919 S.W.2d at 176 (finding that a lack of indication in the record showing that leave was obtained leads to a presumption that leave was not obtained); *Neimes*, 985 S.W.2d at 139.

257. Rule 11 provides in part: "(N)o agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11.

258. *Fraud-Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366, 377 (Tex. App. - Fort Worth 2003, pet. denied).

259. *Shore v. Thomas A. Sweeney & Assocs*., 864 S.W.2d 182, 184-85 (Tex. App. - Tyler 1993, no writ) (holding that the docket entry appeared on the record and thus satisfied Texas Rule of Civil Procedure 166a). *But see Energo Int'l Corp. v. Modern Indus. Heating, Inc.*, 722 S.W.2d 149, 151-52 (Tex. App. - Dallas 1986, no writ) (stating that a docket entry is inadequate indication of acceptance).

260. *Woodbine Elec. Serv., Inc. v. McReynolds*, 837 S.W.2d 258, 261 (Tex. App. - Eastland 1992, no writ) ("It would be exalting form over substance to shut our eyes to the recorded proceedings which occurred in open court …"); *see also Neimes*, 985 S.W.2d at 139.

261. *Waddy v. City of Houston*, 834 S.W.2d 97, 101 (Tex. App. - Houston [1st Dist.] 1992, writ denied) (finding nothing in the record indicated the trial court granted leave for a late filing, giving rise to a presumption that the court did not consider the late response and thus, the appellate court could not consider the response).

262. *See, e.g., Wright v. Lewis*, 777 S.W.2d 520, 522 (Tex. App. - Corpus Christi 1989, writ denied) (concluding that there was no harm in allowing objections to be filed before or even on the day of the hearing).

263. *See, e.g.*, HARRIS COUNTY CIV. DIST. CT. LOC. R. 3.3.3 (requiring a reply be filed "at least three . . . working days before the date of submission, except on leave of court").

264. 858 S.W.2d 337, 343 n.7 (Tex. 1993) (citing TEX. R. CIV. P. 21).

265. *Sanchez v. Mulvaney, 274 S.W.3d 708* (Tex. App.

available to the non-movant's summary judgment evidence.[266] The seven-day limit before submission in which a non-movant may submit summary judgment evidence does not apply to the movant's reply.[267]

J. Service.

Notice of hearing or submission on the motion for summary judgment should be served promptly on opposing counsel; and, a certificate of service should be included in the notice. If notice is not given, the judgment may be reversed on appeal.[268] The non-movant is entitled to receive specific notice of the hearing or submission date for the motion for summary judgment so that he or she is aware of the deadline for the response.[269] Thus, the non-movant is entitled to an additional twenty-one days notice of hearing for amended motions for summary judgment.[270] A certificate of service is prima facie proof that proper service was made.[271] To establish a lack of notice, the non-movant must introduce evidence to controvert the certificate of service.[272]

One court held that the record need not reflect receipt of notice by the non-movant.[273] Constructive notice is imputed when the evidence indicates "that the intended recipient engaged in instances of selective acceptance/refusal of certified mail related to the case."[274]

To preserve a complaint of inadequate notice, a party must object and ask for a

- San Antonio 2008, reh'g overruled) (The court should not consider any arguments raised in movant's reply and should consider only those grounds specifically raised in movant's motion for summary judgment in order to determine the basis on which he moved for judgment); *Meru v. Huerta*, 136 S.W.3d 383, 390 n.3 (Tex. App. - Corpus Christi 2004, no pet.).

266. *See Alaniz v. Hoyt*, 105 S.W.3d 330, 339 (Tex. App. - Corpus Christi 2003, no pet.); *see also* TEX. R. CIV. P. 166a(c) ("No oral testimony shall be received at the hearing").

267. *Durbin v. Culberson County*, 132 S.W.3d 650, 656 (Tex. App. - El Paso 2004, no pet.).

268. A certificate of service is sufficient when it is sent to the address the respondent used on all pleadings. *Morris v. Sand Canyon Corp.*, No. 14-13-00931-CV (Houston [14th Dist.], May 14, 2015, no pet.). The clerk of court is not required to send notice of submission to the respondent. *Edwards v. Phillips*, No. 04-13-00725-CV (Tex. App. - San Antonio, April 29, 2015). *See Nutall v. American Express Centurion Bank*, 357 S.W.3d 809 (Tex. App. - Houston [14th Dist.] 2011, no pet.) (Summary judgment was reversed when respondent was never served with motion for summary judgment); *Aguirre v. Phillips Props., Inc*., 111 S.W.3d 328, 332–33 (Tex. App. - Corpus Christi 2003, pet. denied); *Smith v. Mike Carlson Motor Co*., 918 S.W.2d 669, 672 (Tex. App. - Fort Worth 1996, no writ) ("Absence of actual or constructive notice violates a party's due process rights under the Fourteenth Amendment to the federal constitution."); *Rozsa v. Jenkinson*, 754 S.W.2d 507, 509 (Tex. App. - San Antonio 1988, no writ) (concluding that notice was sent to an incorrect address and therefore the summary judgment was invalid); "(A)n allegation that a party received less notice (of a summary judgment hearing) than required by statute does not present a jurisdictional question and therefore may not be raised for the first time on appeal"); *Davis v. Davis*, 734 S.W.2d 707, 712 (Tex. App. - Houston [1st Dist.] 1987, writ ref' d n.r.e.). Because the issue of notice may not be raised for the first time on appeal, there must be an objection in the trial court. *See id*.

269. *Martin v. Martin, Martin & Richards, Inc*., 989 S.W.2d 357, 359 (Tex. 1998) (per curiam) (A trial court must give notice of the submission date for a motion for summary judgment, because this date determines the date the nonmovant's response is due); *Okoli v. Tex. Dept. of Human Servs.*, 117 S.W.3d 477, 479 (Tex. App. - Texarkana 2003, no pet.) (Reversed because plaintiff was not notified of hearing on summary judgment.); *Aguirre v. Phillips Props., Inc.*, 111 S.W.3d 328, 332 (Tex. App. - Corpus Christi 2003, pet. denied) ("The failure to give notice of the submission date for a motion for summary judgment constitutes error"). Notices stating the motion would be submitted "after" a date certain contained indefinite language that did not inform respondent of a specific submission date or establish a deadline for his response. *Ready v. Alpha Building Corp*., 467 S.W.3d 580).

270. *Sams v. N.L. Indus., Inc*., 735 S.W.2d 486, 488 (Tex. App. - Houston [1st Dist.] 1987, no writ).

271. TEX. R. CIV. P. 21(a) ("A certificate by a party . . . showing service of a notice shall be prima facie evidence of the fact of service."); *see also Cliff v. Huggins*, 724 S.W.2d 778, 779–80 (Tex. 1987); *Morris v. Sand Canyon Corp.*, No. 14-13-00931-CV (Houston [14th Dist.] May 14, 2015, no pet.). (Proof of receipt not required; respondents offered no evidence to rebut the presumption of notice based on the certificates of service).

272. 724 S.W.2d at 780 (holding that an offer of proof must be made to rebut the presumption that notice was received); *Wilson v. Gen. Motors Acceptance Corp.*, 897 S.W.2d 818, 820 (Tex. App. - Houston [1st Dist.] 1994, no writ) (stating that the non-movant must introduce evidence that notice was not received to defeat the prima facie case of service).

273. *Gonzales v. Surplus Ins. Servs*., 863 S.W.2d 96, 101 (Tex. App. - Beaumont 1993, writ denied) ("It is not required that the record reflect receipt of notice by non-Nmovant").

274. *Id.* at 102 (complying with TEX. R. CIV. P. 21a is sufficient for constructive notice in such circumstances).

continuance. Otherwise, a party may waive the twenty-one day notice requirement.[275] For example, in *Davis v. Davis*, two parties filed separate motions for summary judgment directed against the appellant.[276] One motion gave the appellant twenty-one days notice, but the other motion did not.[277] The trial court considered both motions simultaneously.[278] The appellate court found that the appellant waived any objection to the inadequacy of the notice period because he participated in the hearing without objection and failed to ask for a continuance, rehearing, or new trial.[279] "To hold otherwise would allow a party who participated in the hearing to lie behind the log until after the summary judgment is granted and then raise the complaint of late notice for the first time in a post-trial motion."[280]

Conversely, if a party has not given notice of the hearing or "is deprived of its right to seek leave to file additional affidavits or other written response, ... it may preserve error in a post-trial motion."[281] For example, in *Tivoli Corp. v. Jewelers Mutual Insurance Co.* a motion for new trial was sufficient to preserve error because the trial judge signed the summary judgment before the date set for submission and the non-movant had no opportunity to object.[282]

If the motion and notice of hearing are served by mail, Rule 21a adds three days to the notice period and the hearing may not be held until twenty-four days after the date of service.[283] In *Chadderdon v. Blaschke*, the court held that even though a motion for summary judgment was filed two months before the hearing on the motion, the fact that a notice of hearing was mailed twenty-one days before the hearing was reversible error because the notice of hearing was not mailed twenty-four days in advance.[284]

As amended effective Jan. 1, 2014, Rule 21a(c) does not add three days to service by fax.[285] If service is made by fax, service must completed by 5:00 p.m. recipient's local time or service will be deemed made on the following day.[286]

Time requirements for service may be altered by agreement of the parties[287] and by court order.[288]

K. Continuance.

The summary judgment rule, in two subsections, addresses continuance of the hearing or submission of a motion for summary judgment.

Rule 166a(g) permits a continuance in a traditional or in a no-evidence summary judgment:

> Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for

275. *Negrini v. Beale*, 822 S.W.2d 822, 823 (Tex. App. - Houston [14th Dist.] 1992, no writ) (explaining that a party waives the twenty-one day requirement "where the party received notice of the hearing, appeared at it, filed no controverting affidavit, and did not ask for a continuance"); *Brown v. Capital Bank*, 703 S.W.2d 231, 234 (Tex. App. - Houston [14th Dist.] 1985, writ ref'd n.r.e.) (finding that non-movant's presentation of facts essential to oppose summary judgment in an oral submission, absent an affidavit stating such reasons, was not sufficient cause for continuance); *Delta (Del.) Petroleum & Energy Corp. v. Houston Fishing Tools Co.*, 670 S.W.2d 295, 296 (Tex. App. - Houston [1st Dist.] 1983, no writ) (finding a waiver of notice when appellant "made no motion for continuance, did not appear at the hearing, and made no post-trial motion complaining of lack of notice"); *Lofthus v. State*, 572 S.W.2d 799, 800 (Tex. Civ. App. - Amarillo 1978, writ ref'd n.r.e.) (explaining that if counsel, who appeared on day of the hearing, was given an opportunity to file affidavits opposing the motion for summary judgment and failed to do so, and failed to move for additional time, then he waived the objection to inadequate notice).

276. 734 S.W.2d 707, 708 (Tex. App. - Houston [1st Dist.] 1987, writ ref'd n.r.e.).

277. *Id*. at 712.

278. *Id*.

279. *Id.; see also* 822 S.W.2d at 823; *Nguyen v. Short, How, Frels & Heitz, P.C*, 108 S.W.3d 558, 560-61 (Tex. App. - Dallas 2003, pet. denied).

280. *May v. Nacogdoches Mem'l Hosp.*, 61 S.W.3d 623, 626 (Tex. App. - Tyler 2001, no pet.).

281. *Id.*

282. 932 S.W.2d 704, 710 (Tex. App. - San Antonio 1996, writ denied).

283. 876 S.W.2d at 315.

284. 988 S.W.2d 387, 388 (Tex. App. - Houston [1st Dist.] 1999, no pet.).

285. TEX. R. CIV. P. 21a(c), amended Dec. 13, 2013.

286. TEX. R. CIV. P. 21a(b)(2).

287. *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 91 (Tex. 1996).

288. *Hall v. Stephenson*, 919 S.W.2d 454, 461 (Tex. App. - Fort Worth 1996, writ denied).

> reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.[289]

Rule 166a(i) permits a continuance in a no-evidence summary judgment when there has not been "an adequate time for discovery."[290]

Thus, "[w]hen a [non-movant] contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance."[291] Failure to do so waives the contention on appeal that the non-movant did not have an adequate time for discovery.[292] Rule 166a(g) specifically provides that the trial court may deny the motion for summary judgment, continue the hearing to allow additional discovery, or "may make such other order as is just."[293]

When a party receives notice of the summary judgment hearing in excess of the twenty-one days required by Rule 166a, denial of a motion for continuance based on a lack of time to prepare is not generally an abuse of discretion,[294] although sympathetic trial judges frequently grant them. Absent a showing that the trial court acted arbitrarily and unreasonably, the decision will not be reversed.[295] In *Thomson v. Norton*, an appellate court found no abuse of discretion when the trial court refused to grant a continuance to a newly appointed attorney who sought additional time to become familiar with the law and facts in the case.[296] The court supported its decision on the grounds that the client was represented by a lawyer at all times before the hearing.[297]

On the other hand, in *Verkin v. Southwest Center One, Ltd.*, an appellate court found abuse of discretion when the trial court refused to grant a motion for continuance in a case that had been on file less than three months, when the motion stated sufficient good cause, was uncontroverted, and was the first motion for continuance.[298]

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

290. *Id.* 166a(i).

291. *Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *Nanda v. Huniker*, No. 13-13-00615-CV, Tex. App. - Corpus Christi, September 24, 2015 (A party cannot simply complain that additional discovery is required and describe in a conclusory fashion the additional discovery he believes is needed; the party must also explain the substance of the requested discovery and how the discovery would aid him in responding to the summary judgment motion); *Expert Tool & Machine, Inc. v. Petras*, No. 05-14-00605-CV (Tex. App. - Dallas, August 28, 2015) (insufficient statement of particularity in motion for continuance); *Lagou v. U.S. Bank National Association*, 01-13-00311-CV (Motion was not verified or supported by affidavit as required by Tex. R. Civ. P. 251); *Rocha v. Faltys*, 69 S.W.3d 315, 319 (Tex. App. - Austin 2002, no pet.) (The affidavit or motion must describe the evidence sought, state with particularity the diligence used to obtain the evidence, and explain why the continuance is necessary); *Emanuel v. Citibank (South Dakota), N.A.*, No. 01-10-00768-CV (Tex. App. - Houston [1st Dist.] 2011, no pet.) (Motion for continuance denied when it was not verified and was not supported by an attached affidavit); *see* Tex. R. Civ. P. 251 ("No application for a continuance shall be heard before the defendant files his defense, nor shall any continuance be granted except for sufficient cause supported by affidavit, or consent of the parties, or by operation of law"); Tex. R. Civ. P. 252 (providing, among other things, that if motion for continuance is filed on ground of "want of testimony," movant must present affidavit "showing the materiality" of such testimony and that he "used due diligence to procure such testimony" and "stating such diligence, and the cause of failure, if known"); *see also Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 450-51 (Tex. App. - Dallas 2002, no pet.). Oral motion for continuance was properly denied. *Poonjani V. Kamaluddin*, No. 02-14-00193-CV (Tex. App. - Fort Worth, June 4, 2015, no pet.).

292. *RHS Interests Inc. v. 2727 Kirby Ltd*., 994 S.W.2d 895, 897 (Tex. App. - Houston [1st Dist.] 1999, no pet.); *Jaimes v. Fiesta Mart, Inc.*, 21 S.W.3d 301, 304 (Tex. App. - Houston [1st Dist.] 1999, pet. denied).

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

294. *See Medford v. Medford*, 68 S.W.3d 242, 248 (Tex. App. - Fort Worth 2002, no pet.); *Hatteberg v. Hatteberg*, 933 S.W.2d 522, 527 (Tex. App. - Houston [1st Dist.] 1994, no writ); *Cronen v. Nix*, 611 S.W.2d 651, 653 (Tex. Civ. App. - Houston [1st Dist.] 1980, writ ref'd n.r.e.).

295. 68 S.W.3d at 247-48.

296. 604 S.W.2d 473, 477 (Tex. Civ. App. - Dallas 1980, no writ).

297. *Id.* at 478.

298. 784 S.W.2d 92, 96 (Tex. App. - Houston [1st Dist.] 1989, writ denied). *Accord Levinthal v. Kelsey-Seybold Clinic, P.A.*, 902 S.W.2d 508, 510 (Tex. App. -

A non-movant seeking additional time for discovery 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."[299] A non-movant must state what specific depositions or discovery products are material and show why they are material.[300] A movant, when appropriate, should seek to convince the court that the non-movant's discovery efforts are simply a delay tactic. For example, the motion may be based on incontrovertible facts, involve pure questions of law, or request discovery that relates to immaterial matters.[301]

Rule 166a(i) provides that a motion for summary judgment may be filed "[a]fter adequate time for discovery."[302] Non-movants will argue in their motions for continuance that if they have more time, they will be able to produce enough evidence to defeat the motion. Whether a non-movant has had adequate time for discovery is "case specific."[303] As discussed above, an adequate time for discovery is determined by the nature of the cause of action, the nature of the evidence necessary to controvert the no-evidence motion, and the length of time the case had been active in the trial court.[304] A court may also look to factors such as the amount of time the no-evidence motion has been on file, whether the movant has [asked for] stricter time deadlines for discovery, the amount of discovery that has already taken place, and whether the discovery deadlines that are [already] in place are specific or vague.[305]

A non-movant in a no-evidence summary judgment may argue that it is entitled to the entire period allowed by the rule or court-imposed discovery deadlines. Yet, courts have held that the court or rule imposed discovery cut-off does not control the decision of whether an adequate time for discovery has elapsed.[306] For traditional motion summary judgments, the discovery deadline generally has no impact on the trial court's decision to grant a summary judgment.[307]

In a collections case, a non-movant would be hard pressed to establish that it did not have an adequate time to conduct discovery during the discovery period as the facts and documents necessary to develop a defense should be subject to diligent efforts during the discovery period. A torts case, typically more factually complex, would furnish the non-movant a better circumstance to argue successfully that it did not have adequate time to conduct discovery.[308]

If the trial court grants a continuance in a summary judgment proceeding, the minimum twenty-one day notice requirement for submission or hearing does not begin again because the notice period is measured from the date of service of the motion.[309]

L. Hearing.

Although Tex. R. Civ. P. 166a(c) calls for a hearing on a motion for summary judgment, not every hearing called for under every rule of civil procedure necessarily requires an oral hearing.[310]

Houston [1st Dist.] 1994, no writ).

299. *See* FEDERAL CIVIL PROCEDURE BEFORE TRIAL: 5TH CIRCUIT EDITION § 14:117.

300. *Perrotta v. Farmers Ins. Exch*., 47 S.W.3d 569, 576 (Tex. App. - Houston [1st Dist.] 2001, no pet.).

301. *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995) (stating that in a contract dispute, "discovery sought by [the plaintiff] is not necessary for the application of the contract to its subject matter, but rather goes to the issue of the parties' interpretation of the 'absolute pollution exclusion'").

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

303. *McClure v. Attebury*, 20 S.W.3d 722, 729 (Tex. App. - Amarillo 1999, no pet.).

304. 29 S.W.3d 140, 145.

305. *Id.*

306. *See Branum v. Nw. Tex. Healthcare Sys., Inc.*, 134 S.W.3d 340, 343 (Tex. App. - Amarillo 2003, pet. denied).

307. *Karen Corp. v. Burlington N. & Santa Fe Ry. Co.*, 107 S.W.3d 118, 124 (Tex. App. - Fort Worth 2003, pet. denied) (citing *Clemons v. Citizens Med. Ctr.*, 54 S.W.3d 463, 466 (Tex. App. - Corpus Christi 2001, no pet.)).

308. *E.g., In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App. - Texarkana 1998, reh'g overruled) (A mass-tort case holding that the plaintiffs enjoyed adequate time for discovery when the case had been pending for ten years, extensive discovery had been conducted, interrogatories had long been served, nearly 200 plaintiff's depositions had been completed, plaintiff's personal and employment records had been obtained, and the plaintiffs had had almost a year after the filing of the no-evidence motion to conduct additional discovery).

309. 876 S.W.2d at 315-16 (discussing the calculation of the twenty-one day notice requirement) (citing TEX. R. CIV. P. 4); see also supra Para. II.D (discussing deadlines for filing motions for summary judgment).

310. 989 S.W.2d 357.

Unless required by the express language or context of the particular rule, the term "hearing" does not necessarily contemplate either a personal appearance before the court or an oral presentation to the court.[311] An oral hearing on a motion for summary judgment may be helpful to the parties and the court, but since oral testimony cannot be adduced in support of, or in opposition to, a motion for summary judgment, an oral hearing is not mandatory.[312] There is no right to present argument for or against a motion for summary judgment; all party participation necessary in a summary judgment proceeding occurs prior to the date set for hearing.[313] The trial court is not required to conduct an oral hearing on a motion for summary judgment and may rule on the motion based solely on written submission.[314]

The day of submission of a motion for summary judgment has the same meaning as the day of hearing.[315] A hearing or submission date must be set because the time limits for responding are keyed to the hearing or submission date. Unless there is a hearing or submission date, the non-movant cannot calculate its response due date and its due process rights are violated.[316]

A motion for summary judgment is submitted on written evidence. Thus, a hearing on motion for summary judgment is a review of the written motion, response, reply, if any, and attached evidence.[317] If a hearing is granted, a reporter's record of the hearing is not necessary.[318]

Ordinarily, no oral testimony will be allowed at the hearing on a motion for summary judgment.[319] Furthermore, the court may not consider, at the hearing, oral objections to summary judgment evidence that are not a part of the properly filed, written summary judgment pleadings.[320] However, in one case a court of appeals considered the reporter's record of the summary judgment hearing to determine that the trial court did not rule on written evidentiary objections.[321]

When a trial court is faced with "overlapping and intermingling" motions for summary judgment and other matters that allow oral testimony, the trial court should conduct separate hearings.[322] At the summary judgment hearing, counsel should strenuously oppose any attempt to use oral testimony to deviate from the written documents on file, and the court should not permit nor consider such testimony.[323] Parties may restrict or expand the

311. *Id. See Lewis v. Ally Financial Inc.*, Tex. App. - (11th Dist.), No. 11-12-00290-CV.

312. *Id.*

313. *Bowles v. Cook*, 894 S.W.2d 65, 67 (Tex. App. - Houston [14th Dist.] 1995, no writ); *Thacker v. Thacker*, 496 S.W.2d 201, 204 (Tex. Civ. App. - Amarillo 1973, no writ).

314. *Guereque v. Thompson*, 953 S.W.3d 458, 464 (Tex. App. - El Paso 1997, pet. denied) (No right to present oral argument at hearing); *Adamo v. State Farm Lloyds Co.*, 853 S.W.2d 673 (Tex. App. - Houston [14th Dist.] 1993), writ den. per curiam, 864 S.W.2d 491 (Tex. 1993), cert. denied, 511 U.S. 1053, 114 S.Ct. 1613, 128 L.Ed.2d 340 (1994). (Because an oral hearing on summary judgment is "little more than argument of counsel," it is not reversible error for the trial court to deny a request for hearing. The decision to grant an oral hearing on a summary judgment motion is purely within the discretion of the trial judge. A Court of Appeals cannot mandate that the trial court hold an oral hearing on summary judgment).

315. *Rorie v. Goodwin*, 171 S.W.3d 579, 583 (Tex. App. - Tyler 2005, no pet.).

316. *See Aguirre v. Phillips Props., Inc*., 111 S.W.3d 328, 332 (Tex. App. - Corpus Christi 2003, pet. denied); *Courtney v. Gelber*, 905 S.W.2d 33, 34-35 (Tex. App. - Houston [1st Dist.] 1995, no writ) (holding that even if all assertions in the motion for summary judgment are true, none justify the trial court's ruling on the motion without setting a hearing or submission date); *see also Mosser v. Plano Three Venture*, 893 S.W.2d 8, 12 (Tex. App. - Dallas 1994, no writ) ("The failure to give adequate notice violates the most rudimentary demands of due process of law").

317. *Nguyen v. Short, How, Frels & Heitz, P.C*, 108 S.W.3d 558, 561 (Tex. App. - Dallas 2003, pet. denied).

318. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343, n.7 (Tex. 1993).

319. TEX. R. CIV. P. 166a(c); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269 n.4 (Tex. 1992); *Richards v. Allen*, 402 S.W.2d 158, 160 (Tex. 1966) (detailing the only matters which may be considered as a basis for summary judgment as pleadings, depositions, admissions on file, and affidavits).

320. *But see Aguilar v. LVDVD, L.C.*, 70 S.W.3d 915, 917 (Tex. App. - El Paso 2002, no pet.) (suggesting that review of reporter's record would be helpful in ascertaining if a ruling can be implied).

321. *Id.*

322. *Liberty Mut. Fire Ins. Co. v. Hayden*, 805 S.W.2d 932, 935 (Tex. App. - Beaumont 1991, no writ); *see also infra* Para. V.H.1.c. (discussing procedural issues in expert opinion testimony).

323. *See El Paso Assocs., Ltd. v. J.R. Thurman & Co.*, 786 S.W.2d 17, 19-21 (Tex. App. - El Paso 1990, no writ), *citing City of Houston*, 589 S.W.2d 671, 677 (affirming the sustaining of an objection to oral testimony at a summary judgment hearing and declaring that in compliance with the law, no oral testimony was received); *Nash v. Corpus Christi Nat'l Bank*, 692 S.W.2d 117, 119 (Tex. App. - Dallas 1985, writ ref'd n.r.e.) (concluding that it is improper for trial court to hear testimony of witness at summary judgment hearing).

issues "expressly presented" in writing if the change meets the requirements of Rule 11.[324] "An oral waiver or agreement made in open court satisfies [R]ule 11 if it is described in the judgment or an order of the court."[325] In *Clement v. City of Plano*, the court noted that "the order granting the motion for summary judgment [did] not reflect any agreement . . . [and t]herefore, counsel's statements at the hearing, standing alone, did not amount to a [R]ule 11 exception and did not constitute a narrowing of the issues."[326]

It is neither necessary nor appropriate for a court reporter to record a summary judgment hearing if one is granted and conducted.[327] To "permit 'issues' to be presented orally would encourage parties to request that a court reporter record summary judgment hearings, a practice neither necessary, nor appropriate to the purposes of such hearing."[328]

M. Judgment.

A trial court may grant or deny a motion for summary judgment before the date noticed by the Clerk of Court for hearing on that motion.[329]

The order granting summary judgment is not required to state specific grounds. Formerly, when a trial court granted a summary judgment on a specific ground, the practice on appeal was to limit consideration to the grounds upon which summary judgment was granted and affirmed. The summary judgment could only be affirmed if the theory relied on by the trial court was meritorious, otherwise the case would be remanded. [330] Now, if any theory advanced in a motion for summary judgment supports the granting of summary judgment, a court of appeals may affirm regardless of whether the trial court specified the grounds on which it relied.[331] The court of appeals should consider all the grounds on which the trial court rules and may consider all the grounds the trial court does not rule upon.[332] Nonetheless, numerous opinions continue to recite that their consideration of all issues is based on the fact that the trial court did not specify its reason for its ruling.

An order granting final summary judgment must unequivocally state that it is final and appealable. In *Lehmann v. Har-Con Corp*., the supreme court opined that the inclusion of the following language in an order granting summary judgment is sufficient:

> "This judgment finally disposes of all parties and all claims and is appealable."[333]

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324. Rule 11 provides in part: "(N)o agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as a part of the record, or unless it be made in open court and entered of record." TEX. R. CIV. P. 11; *see City of Houston*, 589 S.W.2d 671, 677.

325. *Clement v. City of Plano*, 26 S.W.3d 544, 549 (Tex. App. - Dallas 2000, no pet.), *overruled on other grounds by Crooks v. Moses*, 138 S.W.3d 629 (Tex. App. - Dallas 2004, no pet.).

326. *Id.*

327. 589 S.W.2d 671, 677.

328. 786 S.W.2d at 19.

329. *Devine v. American Express Centurion Bank*, No. 09-10-00166-CV (Tex. App. - Beaumont 2011, no pet.) (Suit on a credit card debt; breach of contract. Trial court granted summary judgment more than twenty-one days after movant filed and gave notice of the motion, even though the summary judgment was considered without hearing before the scheduled submission date. Motion for summary judgment and supporting affidavits were served on Nov. 24, 2010; submission day was Jan. 8, 2011; answer was filed on Jan. 1, 2011; and court granted summary judgment without hearing on Jan. 6, 2011 (38 days after service, but 2 days before scheduled submission day. Respondent was provided twenty-one days' notice of the movant's motion and supporting affidavits as required by Rule 166a(c).)

330. *State Farm Fire & Cas. Co. v. S.S. & G.W.*, 858 S.W.2d 374, 380 (Tex. 1993) (If the trial court specifies the reasons for granting judgment, then proving that theory unmeritorious would cause a remand); *Delaney v. University of Houston*, 835 S.W.2d 56, 58 (Tex. 1992).

331. *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995) (finding that because the trial court granted the defendant's motion for summary judgment without specifying any grounds, the motion would be upheld if any theories advanced by the defendant were meritorious); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996); *see Harwell*, 896 S.W.2d at 173.

332. 927 S.W.2d at 626 (allowing alternative theories would be in the interest of judicial economy).

333. *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 206 (Tex. 2001) (When there has not been a conventional trial on the merits, an order or judgment is not final for purposes of appeal unless it actually disposes of every pending claim and party or unless it clearly and unequivocally states that it finally disposes of all claims and all parties). Most courts of appeal dismissed for want of jurisdiction summary judgments that did not dispose of all claims and parties. *Kauffman v. Direct Interior Decorating, Inc.*, No. 05-12-00302-CV (Tex. App. - Dallas June 12, 2012, pet. denied) (Summary judgment order that disposed of claims against only one of three defendants was interlocutory because it

This is now called "Lehman language."

Inaction by the trial court in ruling on a pending summary judgment motion is problematic.[334] There is no rule of civil procedure by which a litigant can compel the trial judge to rule on a pending motion for summary judgment. The general rule is that an appeals court may mandamus a trial court to rule on a traditional motion for summary judgment.[335] Relief may be available from a court of appeals. Mandamus, to require the trial judge to "dispose promptly of the business of the court" as required by the Code of Judicial Conduct, is an extraordinary remedy available only in limited circumstances. [336] The remedy of mandamus is available only when the record conclusively demonstrates that a judge has a clear legal duty to act *and* has refused to do so.[337] For instance, a trial court's refusal to rule on a motion for summary judgment within a reasonable time after it is filed and heard may amount to an abuse of discretion, and entitle the complaining party to a writ of mandamus compelling the trial judge to rule.[338] If mandamus is sought and granted by a court of appeals on this ground, the victory may be pyrrhic or illusory. Should a court of appeals issue a writ of mandamus and the trial court thereafter considers the motion for summary judgment and denies it, the order denying summary judgment is interlocutory and non-appealable; and the case will proceed to conventional trial. In another instance, a trial court's refusal to rule on a timely submitted motion for summary judgment for the express purpose of precluding statutory interlocutory appeal was a clear abuse of discretion and

failed to dispose of all claims and all parties appeal; dismissed for want of jurisdiction); *Alliantgroup, L.P. v. Solanji*, No. 01-11-00097-CV (Tex. App. - Houston [1st Dist.] May 12, 2012, no pet.) (record revealed that no final judgment had been entered in the pending case; dismissed for want of jurisdiction); *Rice v. Philip Lane Homes, LLC*, No. 09-11-00664-CV (Tex. App. - Beaumont Mar. 8, 2012, appeal dismissed) (The order granting summary judgment did not dispose of movant's claims against all parties. Claims remained unresolved in the trial court. The trial court's order was not appealable as a final judgment. Appeal dismissed for lack of jurisdiction); *Wheeler &. Wheeler v. C & L Investment Co., Inc.*, No. 12-11-00249-CV (Tex. App. - Tyler May 16, 2012, dism. w.o.j.) (Summary judgment order that did not dispose of counterclaim was interlocutory and appeal was dismissed for want of jurisdiction. The trial court's order granting summary judgment did not specifically address Appellees' counterclaims for damages. The order did not dispose of all pending claims in the record); *Hill v. HSBC Bank USA, N.A.*, No. 02-11-00435-CV (Tex. App. - Fort Worth Feb. 23, 2012, no pet.) (per curiam) ("Final Summary Judgment" did not appear to dispose of all parties.) A judgment that purports to be final, is not even when entitled "Final Judgment" when it does not dispose of all parties and all claims. An appeal of judgment entitled "FINAL JUDGMENT " that did not dispose of all parties and all claims was abated by a court of appeals pursuant to Tex. R. App. P. 27.2 to permit the trial court to render a final judgment. *Neidert v. Collier*, No. 11-10-00007-CV (Tex. App. - 11th Dist. August 11, 2011, appeal abated) (Judgment that purported to be final was not as it did not dispose of all parties and all claims. The court of appeals did not have jurisdiction to entertain an appeal because the trial court did not dispose of all the claims before it). *See Salih v. JPMorgan Chase Bank, N.A.*, No. 01-10-00813-CV (Tex. App. - Houston [1st Dist.] May 19, 2011, pet denied), No. 11-0525 (Tex., September 2, 2011 (summary judgment was not a final and appealable judgment because it did not dispose of all the parties; one order granted summary judgment against guarantors; second order struck debtor's answer). Summary judgment that order does not dispose of counterclaim(s) is not final and appealable. *Lewis v. Hickman*, No. 01-09-01005-CV (Tex. App. - Houston [1st Dist.] March 3, 2011, dism. w.o.j.) (per curiam).

334. Timothy Patton, Summary Judgments in Texas § 7.04 (3rd ed. 2002).

335. *In re Croft*, No. 14-12-00551-CV (Tex. App. - Houston [14th Dist.] July 19, 2012, no pet.) (relator's petition for writ of mandamus to compel ruling on motion for summary judgment was denied) (per curiam); *In re Dupuy*, No. 01-12-00057-CV (Tex. App. - Houston [1st Dist.] February 9, 2012, no pet.) (per curiam) (Court of Appeals denied petition for writ of mandamus complaining that the trial court abused its discretion by failing to timely rule on and grant applicant's motions for summary judgment); *In re Dupuy, P.C.*, No. 01-11-00850-CV (Tex. App. - Houston [1st Dist.] October 28, 2011, no pet.) (per curiam).

336. *Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304, 305 (Tex. 1994).

337. *Zalta v. Tennant*, 789 S.W.2d 432, 433 (Tex. App. - Houston [1st Dist.] 1990, orig. proceeding).

338. *In re Mission Consol. Independent School Dist*., 990 S.W.2d 459 (Tex. App. - Corpus Christi 1999, no pet.) (School district was entitled to mandamus relief to compel trial court to rule on pending motion when eight months had elapsed from the time a no-evidence motion for summary judgment was filed, no response was filed, and seven months had elapsed since the trial court's hearing; but the Court of Appeals had no authority by mandamus to require the trial court to grant motion).

mandamus relief was granted.[339] It is not likely that statutory interlocutory appeal grounds are available in a collections case.[340]

Occasionally, a trial judge will receive a request to file findings of fact and conclusions of law after the granting of a motion for summary judgment.[341] This request should be denied.[342] Findings of fact, conclusions of law, and statements of facts have no place in summary judgment proceedings as the judge has no factual disputes to resolve.[343] A request for them will not extend the appellate timetable in a summary judgment case.[344]

N. Partial Summary Judgment.

Motions for partial summary judgments are used frequently to dispose of some claims or some parties. They present certain opportunities and problems. A problem arises when a summary judgment granted for one defendant becomes final even though it does not specifically incorporate a partial summary judgment granted in favor of the only other defendant.[345] An order granting summary judgment on one claim or party but that does not dispose of all claims and parties is interlocutory.[346]

The issues determined on a motion for partial summary judgment are final, even though the judgment is interlocutory.[347] After an interlocutory, partial summary judgment is granted, the issues it decides cannot be litigated further, unless the trial court sets the partial summary judgment aside or the summary judgment is reversed on appeal.[348]

A partial judgment should refer to those specific issues addressed by the partial judgment. A partial summary judgment can be made final by requesting a severance of the issues or parties disposed by the motion for partial summary judgment from those issues or parties remaining.[349] "A severance splits a single suit into two or more independent actions, each action resulting in an appealable final judgment."[350] "Severance of claims under the Texas Rules of Civil Procedure rests within the sound discretion of the trial court."[351]

A claim is properly severable if:

> (1) the controversy involves more than one cause of action,
> (2) the severed claim is one that would be the proper subject of a lawsuit if independently

339. *Grant v. Wood*, 916 S.W.2d 42, 46 (Tex. App. - Houston [1st Dist.] 1995, no pet.).

340. TEX. CIV. PRAC & REM. CODE §51.014(a)(5) (interlocutory appeal on claims of official immunity); TEX. CIV. PRAC. & REM. CODE §51.014(a)6) (interlocutory appeal on media first amendment rights).

341. *See, e.g., W. Columbia Nat'l Bank v. Griffith*, 902 S.W.2d 201, 203 (Tex. App. - Houston [1st Dist.] 1995, writ denied) (noting that the appellant complained that the trial court did not file findings of fact and conclusions of law).

342. *Id.* at 204.

343. *IKB Indus. (Nig.) Ltd. v. Pro-Line Corp*., 938 S.W.2d 440, 441 (Tex. 1997) ("[I]f summary judgment is proper, there are no facts to find, and the legal conclusions have already been stated in the motion and response*"); see Cotton v. Ratholes, Inc*., 699 S.W.2d 203, 204 (Tex. 1985) (per curiam) (noting the trial court erroneously made findings of fact and that the appeals court correctly disregarded those findings); *Starnes v. Holloway*, 779 S.W.2d 86, 90 (Tex. App. - Dallas 1989, writ denied).

344. 938 S.W.2d at 443; *see Linwood v. NCNB Tex*., 885 S.W.2d 102, 103 (Tex. 1994) (per curiam). Texas appellate procedure provides that the usual thirty days for perfecting an appeal is extended to ninety days upon the filing of findings of fact and conclusions of law, if they are either required by the rules of civil procedure, or if not required, could properly be considered by the appellate court. TEX. R. APP. P. 26.1(a)(4).

345. *Ramones v. Bratteng*, 768 S.W.2d 343, 344 (Tex. App. - Houston [1st Dist.] 1989, writ denied).

346. *Chase Manhattan Bank v. Lindsay*, 787 S.W.2d 51, 52 (Tex. 1990) (per curiam).

347. *Martin v. First Republic Bank, Fort Worth, N.S.*, 799 S.W.2d 482, 488 (Tex. App. - Fort Worth 1990, writ denied); *Linder v. Valero Transmission Co.*, 736 S.W.2d 807, 810 (Tex. App. - Corpus Christi 1987, writ ref'd n.r.e.) (clear purpose of former version of Texas Rule of Civil Procedure 166a(e) is to make issues determined in motion for summary judgment final).

348. *Martin*, 799 S.W.2d at 488–89; *Linder*, 736 S.W.2d at 810 (issues decided cannot be further litigated unless interlocutory summary judgment set aside by trial court or reversed on appeal).

349. *Harris County Flood Control Dist. v. Adam*, 66 S.W.3d 265, 266 (Tex. 2001) (per curiam); *see Hunter v. NCNB Tex. Nat'l Bank*, 857 S.W.2d 722, 725 (Tex. App. - Houston [14th Dist.] 1993, writ denied) (defining a claim as "properly severable if: (1) the controversy involves more than one cause of action; (2) the severed claim is one that would be the proper subject of a lawsuit if independently asserted; and (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues").

350. *Van Dyke v. Boswell, O'Toole, Davis & Pickering*, 697 S.W.2d 381, 383 (Tex. 1985).

351. *Liberty Nat'l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996) (orig. proceeding).

> asserted, and
> (3) the severed claim is not so interwoven with the remaining action that they involve the same facts and issues.[352]

Severance of a partial summary judgment does not automatically result in a final, appealable order. In *Diversified Financial Systems, Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, the severance order stated that the separate action should "proceed as such to final judgment or other disposition in this Court."[353] The supreme court determined the order clearly precluded a final judgment until the later judgment was signed.[354] A trial court may not withdraw a partial summary judgment after the close of evidence in such a manner that the party is precluded from presenting the issues decided in the partial summary judgment.[355] A partial summary judgment that is not vacated survives a subsequent nonsuit.[356] The nonsuit results in a dismissal with prejudice as to the issues decided in the partial summary judgment.[357]

O. Motion for Rehearing.

Occasionally, a party in a summary judgment proceeding will file a motion for rehearing or new trial following the granting of a motion for summary judgment.[358] A motion for new trial is unnecessary to preserve complaints directed at the summary judgment because a motion for new trial is not a prerequisite for an appeal of a summary judgment proceeding.[359] Unless the movant on rehearing shows that the evidence could not have been discovered through due diligence prior to the ruling on the summary judgment motion, additional evidence may not be considered on rehearing.[360]

However, a motion for new trial is necessary to preserve error concerning complaints lost due to physical absence from the summary judgment hearing.[361] Another reason to file a motion for new trial is to extend appellate timetables. Just as for an appeal from a jury trial, a motion for new trial following a grant of summary judgment extends appellate timetables.[362] While not technically a request for a new trial, the safe practice is to title a motion for rehearing as a "Request for Rehearing and Motion for New Trial" so that there is no issue concerning whether the pleading is sufficient to extend the timetables.

The *Craddock* rule[363] concerning default judgments does not apply to summary judgment proceedings in default summary judgments where the non-movant fails to respond to the motion when it had the opportunity to seek a continuance or obtain permission to file a late response[364] The Texas Supreme Court, in *Carpenter v. Cimarron Hydrocarbons Corp.*,[365] emphasized that it was not deciding whether *Craddock* would apply when the "non-movant discovers its mistake after the summary-judgment hearing or rendition of judgment."[366]

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352. *Guar. Fed. Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990).
353. 63 S.W.3d 795, 795 (Tex. 2001) (per curiam).
354. *Id.; see also Thompson v. Beyer*, 91 S.W.3d 902, 904 (Tex. App. - Dallas 2002, no pet.).
355. *Bi-Ed, Ltd. v. Ramsey*, 935 S.W.2d 122, 123 (Tex. 1996) (per curiam).
356. *See Newco Drilling Co. v. Weyand*, 960 S.W.2d 654, 656 (Tex. 1998) (per curiam); *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995) (per curiam).
357. *Newco Drilling*, 960 S.W.2d at 656. *But see Frazier v. Progressive Cos.*, 27 S.W.3d 592, 594 (Tex. App. - Dallas 2000, pet. dism'd by agr.).
358. *Nail v. Thompson*, 806 S.W.2d 599, 602 (Tex. App. - Fort Worth 1991, no writ) ("motion for rehearing" is the equivalent of a "motion for new trial."); *Hill v. Bellville Gen. Hosp.*, 735 S.W.2d 675, 677 (Tex. App. - Houston [1st Dist.] 1987, no writ).
359. *Lee v. Braeburn Valley W. Civic Ass'n*, 786 S.W.2d 262, 263 (Tex. 1990) (per curiam).
360. *McMahan v. Greenwood*, 108 S.W.3d 467, 500 (Tex. App. - Houston [14th Dist.] 2003, pet. denied).
361. 786 S.W.2d at 262-63.
362. *See Padilla v. LaFrance*, 907 S.W.2d 454, 458-59 (Tex. 1995).
363. Under *Craddock*, the trial court abuses its discretion if it denies a motion for a new trial after a default judgment if the non-movant establishes: (1) "the failure of the defendant to answer before judgment was not intentional, or the result of conscious indifference on his part, but was due to a mistake or an accident[;]" (2) "the motion for a new trial sets up a meritorious defense;" and (3) the motion "is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff." *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939).
364. *See id.* at 126; *Huffine v. Tomball Hosp. Auth.*, 979 S.W.2d 795, 798-99 (Tex. App. - Houston [14th Dist.] 1998, no pet.).
365. 98 S.W.3d 682 (Tex. 2002).
366. *Id.* at 686.

On two recent occasions, the supreme court considered cases in which deemed admissions formed the basis for a summary judgment and were challenged first in a motion for new trial.[367] In these cases, the court determined that when a party uses deemed admissions to attempt to preclude presentation for the merits of the case, the same due process concerns arise as in merits preclusive sanctions.[368] The court held that under the facts in these cases, the trial court should have granted a motion for new trial and allowed the deemed admissions to be withdrawn.[369] These cases have been followed recently.[370]

Additionally, in *Nickerson v. E.I.L. Instruments, Inc*., the Houston First Court of Appeals held that the trial court's action in granting the non-movant's motion for new trial, immediately reconsidering the motion for summary judgment, and again granting judgment, could not cure a defect in notice of the hearing.[371] Once the motion for new trial was granted, the non-movant should have been given reasonable notice of the hearing.[372] The court decided that seven days notice of the hearing after granting a motion for new trial was reasonable notice.[373]

If a court denies a summary judgment motion, it has the authority to reconsider and grant the motion for summary judgment[374] or change or modify the original order.[375]

P. Sanctions.

A motion for summary judgment asserting that there is no genuine issue of material fact is not groundless merely by the filing of a response that raises an issue of fact.[376] This tenet is true even if the response was or could have been anticipated by the movant.[377] Also, denial of a summary judgment alone is not grounds for sanctions.[378]

Rule 166a has its own particular sanctions provision concerning affidavits filed in bad faith. If a trial court concludes that an affidavit submitted with a motion for summary judgment was presented "in bad faith or solely for the purpose of delay," the court may impose sanctions on the party employing the offending affidavits.[379] Such sanctions include the reasonable expenses incurred by the other party, including attorney's fees, as a result of the filing of the affidavits.[380] Sanctions for submitting affidavits in bad faith may also include holding an offending party or attorney in contempt.[381] No-evidence motions for summary judgment are subject to sanctions provided for under existing law.[382]

367. *Marino v. King*, 355 S.W.3d 629 (Tex. 2011) (Good cause for withdrawal of deemed admissions. Pro se defendant filed verified denial to plaintiff's claims. Thereafter, plaintiff served requests for admissions asking defendant admit to the validity of plaintiff's claims and concede her defenses. Defendant's response to the requested admissions denied liability, but was one day late. The sole basis for motion for summary judgment was defendant's failure respond timely to plaintiff's requests for admission. Plaintiff asserted that defendant's answers to admissions were deemed admitted because they were one day late. There was no evidence of flagrant bad faith or callous disregard for the rules and nothing to justify a presumption that the defense lacked merit); *Wheeler v. Green*, 157 S.W.3d 439, 441-443 (Tex. 2005) (per curiam).

368. *Id.*

369. *Id*. at 444.

370. *In re American Gunite Management Co., Inc.*, 02-11-00349-CV (Tex. App. - Fort Worth October 3, 2011, no pet.) (The trial could erred when it declined to permit withdrawal of deemed admissions that plaintiff, the trial court and the defendant recognized were "merits-preclusive" and no evidence was presented to the trial court of flagrant bad faith or callous disregard for the rules in plaintiff's failing to respond timely respond to request for admissions); *Thomas v. Select Portfolio Servicing, Inc.*, 293 S.W.3d 316, 318, 321 (Tex. App. - Beaumont 2009, no pet.) (Trial court erred in granting summary judgment on deemed admissions without providing respondent an opportunity to withdraw the deemed admissions and supplement his responses).

371. 817 S.W.2d 834**,** 836 (Tex. App. - Houston [1st Dist.] 1991, no writ).

372. *Id.*

373. *Id.* (The court should give "at least seven days notice" of the summary judgment hearing).

374. *Bennett v. State Nat'l Bank*, 623 S.W.2d 719, 721 (Tex. Civ. App. - Houston [1st Dist.] 1981, writ ref'd n.r.e.).

375. *R.I.O. Sys., Inc. v. Union Carbide Corp*., 780 S.W.2d 489, 492 (Tex. App. - Corpus Christi 1989, writ denied).

376. *GTE Commc'ns Sys. Corp. v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993).

377. *Id.*

378. *Id.*

379. TEX. R. CIV. P. 166a(h).

380. *Id.; Martinez v. City of San Antonio*, 768 S.W.2d 911 (Tex. App. - San Antonio 1989, no writ).

381. *Id.*

382. TEX. CIV. PRAC. & REM. CODE Secs. 9.001-10.006; TEX. R. CIV. P. 166a cmt. -1997.

V. SUMMARY JUDGMENT EVIDENCE

Admissible evidence is critical in summary judgment. The burden to produce evidence depends upon the type of proceeding, whether it is a traditional motion or a no-evidence motion. Evidence to support or oppose a summary judgment motion must be provided by affidavit or by sworn or authenticated copies of other documentary evidence.[383] The trial court's only duty in a traditional motion is to determine if a material question of fact exists and in a no-evidence motion whether there is evidence to support an identified element of a claim alleged to be without evidentiary support.[384] The trial courts must not weigh the evidence.[385]

A. General Provisions.

The Texas Supreme Court, in *Fort Brown Villas III Condominium Ass'n, Inc. v. Gillenwater*, held not long ago that Rule 193.6 excludes discovery not timely disclosed and witnesses, including expert witnesses, not timely identified in summary judgment proceedings just as they would be in a conventional trial.[386] Rule 195.2 permits a plaintiff to satisfy the designation requirement by furnishing the information listed in Rule 194.2(f) in response to a request for disclosure.[387] Following *Fort Brown Villas*, the court in *Mancuso v. Cheaha Land Servs., LLC* held that a party's failure to serve any response to a request for disclosure will bar that party from introducing the requested information in response to a motion for summary judgment.[388]

Summary judgment evidence must be presented in a form that would be admissible in a conventional trial proceeding.[389] Neither the motion for summary judgment, nor the response, even if sworn, is ever proper summary judgment proof.[390] "When both parties move for summary judgment, the trial court may consider the combined summary-judgment evidence [of both parties] to decide how to rule on the motions."[391] "The proper scope for a trial court's review of evidence for a summary judgment encompasses all evidence on file at the time of the hearing or filed after the hearing and before judgment with the permission of the court."[392] Evidence need not be attached to the motion itself, but rather may be attached to the brief in support.[393] "The weight to be given a witness' testimony is a matter for the trier of fact, and a summary judgment cannot be based on an attack on a witness's credibility."[394] The standard of appellate

383. TEX. R. CIV. P. 166a(f).

384. *See Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952) (traditional motion); see TEX. R. CIV. P. 166a(i) (no-evidence motion).

385. *Id.*

386. *Fort Brown Villas III Condominium Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879 (Tex. 2009) (Because we have already held that evidentiary rules apply equally in trial and summary judgment proceedings, *Longoria v. United Blood Services*, 938 S.W.2d 29, 30 (Tex. 1995), we also hold that the evidentiary exclusion under Rule 193.6 applies equally… Because Rule 193.6 provides for the exclusion of an untimely expert affidavit, we hold that the trial court did not abuse its discretion in striking it.). However, where a party fails to permit discovery by failing to answer interrogatories or produce documents, a trial court must consider lesser sanctions before it imposes death penalty sanctions in the first instance under Tex. R. Civ. P. 215, even when the record reflects intentional discovery abuse. *Primo v. Rothenberg*, Nos. 14-13-00794-CV, 14-13-00997-CV (Tex. App. - Houston [14th Dist.], June 18, 2015).

387. TEX. R. CIV. P. 193.6, 194.2(f), 195.2.

388. *Mancuso v. Cheaha Land Services., LLC*, 2-09-241-CV (Tex. App. – Fort Worth Aug. 12, 2010, no pet.), 2010 Tex. App. LEXIS 6567.

389. *See* 462 S.W.2d 540, 545 (requires "in summary judgment proceedings that trial be on independently produced proofs, such as admissions, affidavits and depositions"); *Hou-Tex Printers, Inc. v. Marbach*, 862 S.W.2d 188, 191 (Tex. App. - Houston [14th Dist.] 1993, no writ) (*citing Hidalgo*, 462 S.W.2d at 545).

390. *See* 462 S.W.2d at 545 ("(W)e refuse to regard pleadings, even if sworn, as summary judgment evidence"); *see also Webster v. Allstate Ins. Co.*, 833 S.W.2d 747, 749 (Tex. App. - Houston [1st Dist.] 1992, no writ); *Keenan v. Gibraltar Sav. Ass'n*, 754 S.W.2d 392, 394 (Tex. App. - Houston [14th Dist.] 1988, no writ) (stating that an affidavit that simply adopts a pleading is insufficient to support a summary judgment motion); *Nicholson v. Mem'l Hosp. Sys*., 722 S.W.2d 746, 749 (Tex. App. - Houston [14th Dist.] 1986, writ ref' d n.r.e.) (holding that responses do not constitute summary judgment evidence); *Trinity Universal Ins. Co. v. Patterson*, 570 S.W.2d 475, 478 (Tex. Civ. App. - Tyler 1978, no writ) (expanding the *Hidalgo* decision to apply to summary judgment motions).

391. *Jon Luce Builder, Inc. v. First Gibraltar Bank*, 849 S.W.2d 451, 453 (Tex. App. - Austin 1993, writ denied).

392. *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 503 (Tex. App. - Houston [1st Dist.] 1995, no writ).

393. 904 S.W.2d 628, 629.

394. *State v. Durham*, 860 S.W.2d 63, 66 (Tex. 1993).

review of the trial court's admission of summary judgment evidence is abuse of discretion.[395] "All [summary judgment] evidence favorable to the non-movant will be taken as true."[396] "To obtain reversal of a judgment based on error in the admission or exclusion of evidence, an appellant must show that the trial court's ruling was in error and that the error probably caused the rendition of an improper judgment."[397]

1. Time for Filing.

Summary judgment evidence must be filed by the same deadline as the motion or response it supports. Evidence may be filed late only with leave of court. If evidence is filed late without leave, it will not be considered.[398] "Summary judgment evidence must be submitted, at the latest, by the date [the] summary judgment was [signed]."[399] Evidence filed after the signing of the summary judgment is not part of the record.[400]

2. Unfiled Discovery.

The Rules of Civil Procedure no longer require the filing of most discovery with the trial court. The discovery material that is not filed is specified in Rule 191.4(a).[401] Discovery material that must be filed is specified in Rule 191.4(b).[402]

A subsection to the summary judgment rule, Rule 166a(d), requires that a party either attach the evidence to the motion or response or file a notice containing specific references to the unfiled material to be used, as well as a statement of intent to use the unfiled evidence as summary judgment proof.[403] Rule 166a(d) provides:

> (d) Appendices, References and Other Use of Discovery Not Otherwise on File. Discovery products not on file with the clerk may be used as summary judgment evidence if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the

395. *Wolfe v. C.S.P.H., Inc*., 24 S.W.3d 641, 646 (Tex. App. - Dallas 2000, no pet.).

396. *Tex. Commerce Bank v. Grizzle*, 96 S.W.3d 240, 252 (Tex. 2002).

397. *Patrick v. McGowan*, 104 S.W.3d 219, 221 (Tex. App. - Texarkana 2003, no pet.); *see also* TEX. R. APP. P. 44.1(a)(1).

398. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). If the movant files late summary judgment evidence and no order appears in the record granting leave to file, the trial court should not consider the evidence regardless of whether the non-movant failed to object to the evidence. *Luna v. Estate of Rodriguez*, 906 S.W.2d 576, 582 (Tex. App. - Austin, no writ). There is no requirement to obtain a ruling on an objection that summary judgment evidence was filed late because there is no requirement to object. *Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150.

399. *Priesmeyer v. Pac. Sw. Bank, F.S.B*., 917 S.W.2d 937, 939 (Tex. App. - Austin 1996, no writ) (per curiam).

400. *Valores Corporativos, S.A. de C.V. v. McLane Co*., 945 S.W.2d 160, 162 (Tex. App. - San Antonio 1997, writ denied).

401. Rule 191.4(a) provides:

> *(a)* Discovery Materials Not to Be Filed. The following discovery materials must not be filed:
>
> (1) discovery requests, deposition notices, and subpoenas required to be served only on parties;
>
> (2) responses and objections to discovery requests and deposition notices, regardless on whom the requests or notices were served;
>
> (3) documents and tangible things produced in discovery; and
>
> (4) statements prepared in compliance with Rule 193.3(b) or (d).

TEX. R. CIV. P. 191.4(a).

402. Rule 191.4(b) provides:

> *(b)* Discovery Materials to Be Filed. The following discovery materials must be filed:
>
> (1) discovery requests, deposition notices, and subpoenas required to be served on nonparties;
>
> (2) motions and responses to motions pertaining to discovery matters; and
>
> (3) agreements concerning discovery matters, to the extent necessary to comply with Rule 11.

403. *Id;* TEX. R. CIV. P. 166a(d).

> hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment.

Thus, Rule 166a(d) provides three methods to present unfiled discovery before the trial court in a summary judgment. First, a party may file the discovery with the trial court. Second, a party may file an appendix containing the evidence. Finally, a party may simply file a notice with specific references to the unfiled discovery. "Nowhere does the rule require that the proponent of the evidence provide specific references to the discovery, if the actual documents are before the trial court, in order for the trial court to consider it."[404] Despite the language of the rule that makes it appear that a "statement of intent" may be sufficient without the actual proof attached, some courts of appeals have refused to consider such proof if the appellate record does not demonstrate that the evidence was filed with the trial court when the motion summary judgment order was entered.[405]

3. Objections to Evidence.

The requirement to object to summary judgment evidence depends upon whether the defect is formal or substantive. A defect is formal if the summary judgment proof is competent, but inadmissible.[406] Failure to object to evidence at the trial court level waives any defects concerning form (such as hearsay, speculation, and competence).[407] A defect is substantive if the summary judgment proof is incompetent.[408] A substantive defect supporting or opposing a motion for summary judgment cannot be waived by failing to bring it to the trial court's attention.[409] There are inconsistencies among the courts concerning whether certain defects are formal or substantive. The safest practice is to present all objections in writing.

The objection must be specific.[410] For example, in *Womco, Inc. v. Navistar International Corp*., the court held that an individual paragraph of an affidavit that contains unsubstantiated legal conclusions is itself conclusory because it fails to identify which statements in individual paragraphs are objectionable or offer any explanation concerning the precise bases for objection.[411]

The objecting party must also obtain a ruling on the objections.[412] If such objections are made, the adverse party must seek an opportunity to amend its summary judgment

404. *Barraza v. Eureka Co*., 25 S.W.3d 225, 228 (Tex. App. - El Paso 2000, pet. denied).

405. *See, e.g., Gomez v. Tri City Cmty. Hosp*., Ltd., 4 S.W.3d 281, 283 - 84 (Tex. App. - San Antonio 1999, no writ).

405. *See Page v. State Farm Lloyds*, 259 S.W.3d 257 (Tex. App. - Waco 2008), rev'd in part, 315 S.W.3d 525 (Tex. 2010).

407. Failure to object to the form of an affidavit results in a waiver of the complaint. *See, e.g., Alphaville Ventures, Inc. v. First Bank*, 429 S.W.3d 150, 152; *In re Evolution Petroleum Co.*, 359 S.W.3d 710, 713 n.2 (Tex. App. - San Antonio 2001, orig. proceeding). An objection that an affidavit contains hearsay is an objection to the form of the affidavit. *See Wakefield v. Wells Fargo Bank, N.A.,* 14-12-00686-CV (Tex. App. - Houston [14th Dist.] Nov. 14, 2013, no pet.) (Objection that affidavit was not based on personal knowledge was a form defect that must be raised in the trial court and the objecting party should seek a ruling on the objection to preserve the right on appeal); *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 374 (Tex. App. - Dallas 2011, no pet.); *Hou-Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App. - Houston [14th Dist.] 2000, no pet.); *Dolcefino v. Randolph*, 19 S.W.3d 906, 925 (Tex. App. - Houston [14th Dist.] 2000, pet. denied); *Harris v. Spires Council of Co-Owners*, 981 S.W.2d 892, 896 (Tex. App. - Houston [1st Dist.] 1998, no pet.). Similarly, an objection to the lack of personal knowledge is an objection to form. *See Washington DC Party Shuttle, LLC v. IGuide Tours, LLC*, 406 S.W.3d 723, 732 (Tex. App. - [14th Dist.] 2013, pet denied). S*ee also infra* Para. VII. (discussing responding to a motion for summary judgment).

408. *See* 259 S.W.3d 257.

409. "... any objections relating to substantive defects (such as lack of relevancy, conclusory) can be raised for the first time on appeal and are not waived by the failure to obtain a ruling from the trial court." *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App. - Houston [14th Dist.] 2003, pet. denied). "A complete absence of authentication is a defect of substance that is not waived by a party failing to object and may be urged for the first time on appeal." *See Blanche v. First Nationwide Mortgage Corp*., 74 S.W.3d 444, 451 (Tex. App. - Dallas 2002, no pet.); *Medford v. Medford*, 68 S.W.3d 242, 247 (Tex. App. - Fort Worth 2002, no pet.).

410. *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App. - Dallas 2005, no pet.); *Garcia v. John Hancock Variable Life Ins. Co*., 859 S.W.2d 427, 434 (Tex. App. - San Antonio 1993, writ denied).

411. 84 S.W.3d 272, 281 n.6 (Tex. App. - Tyler 2002, no pet.).

412. *Dolcefino v. Randolph*, 19 S.W.3d at 925.

proof.[413]

To be effective and preserve error for appeal, most courts of appeals have held that an order of a trial court sustaining an objection to summary judgment evidence must be reduced to writing, signed by the trial court, and entered of record.[414] A docket sheet entry does not meet this requirement.[415] Absent a proper order sustaining an objection, all of the summary judgment evidence, including any evidence objected to by a party, is proper evidence that will be considered on appeal.[416]

An exception to the requirement for a written ruling on an evidentiary objection may occur if there is an implicit ruling on the evidentiary objection.[417] For there to be an implicit ruling, there must be something in the summary judgment order or the record to indicate that the trial court ruled on the objections, other than the mere granting of the summary judgment.[418] For example, the Corpus Christi Court of Appeals held that the trial court implicitly ruled on objections to summary judgment evidence where the appellant complained in his motion for new trial following the court's refusal to act on his objections.[419] There is dispute among the courts of appeals concerning what constitutes an implicit holding, and even if an objection may be preserved under Texas Rule of Civil Procedure 33.1(a)(2)(a) by an implicit ruling.[420]

Texas Rule of Evidence 802 provides that "[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."[421] As applied to summary judgment evidence, Rule 802 has been held to mean that a hearsay objection is a defect in form that must be raised in a response or reply to a response.[422] Whether an affiant has personal knowledge and is competent are also objections to form and this must be raised and ruled upon at the trial level.[423]

413. *Chance v. Elliott and Lilly*, 462 S.W.3d 276 (Tex. App. - El Paso 2015, no pet.) (Ruling required on objection for failure to produce under TRCP 193.6); *Trusty v. Strayhorn*, 87 S.W.3d 756, 763-64 (Tex. App. - Texarkana 2002, no pet.). There is a split of authority regarding whether, pursuant to Tex. R. App. P. 33.1(a)(2)(A), an objection to summary judgment evidence can be preserved by an implicit ruling in the absence of a written, signed order. *See Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 206 (Tex. App. - Dallas 2005, no pet.). The better practice is to procure an order from the trial court on all evidence, especially the objections to hearsay evidence, before the time it enters the order granting or denying summary judgment. *See Hewitt v. Biscaro*, 353 S.W.3d 304 (Tex. App. - Dallas 2011, no pet.) (Where the trial court declined to disclose its rulings in writing the court of appeals declined to conclude that the trial court implicitly ruled on appellees' objections to an affidavit allegedly containing hearsay); *Hogan v. J. Higgins Trucking, Inc.*, 197 S.W.3d, 879, 883 (Tex. App. - Dallas 2006, no pet.) (*quoting Broadnax v. Kroger Tex., L.P.*, 05-04-01306-CV (Tex. App. - Dallas 2005, no pet.), 2005 WL 2031783, at *1-2).

414. *Strachan v. FIA Card Servs.*, 2011 Tex. App. LEXIS 1652 (Tex. App. - Houston [14th Dist.] Mar. 8, 2011, pet. denied) (Where the record reflects that the respondent raised objections to the form of summary judgment affidavits in the trial court in his response to the motion, and the record did not reflect that the respondent obtained a ruling or that the trial court refused to rule on his objections to this evidence, the respondent did not preserve error on his complaints about the form of affidavits); *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 316-17 (Tex. App. - San Antonio 2000, no pet.); *Nugent v. Pilgrim's Pride Corp.*, 30 S.W.3d 562, 567 (Tex. App. - Texarkana 2000, pet. denied); *Hou-Tex, Inc.*, 26 S.W.3d at 112; *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App. - Houston [14th Dist.] 2000, pet. denied); *Harris*, 981 S.W.2d at 897; *Contra Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App. - Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823-24 (Tex. App. - Fort Worth 1998, no pet.).

415. *Utils. Pipeline Co. v. Am. Petrofina Mktg.*, 760 S.W.2d 719, 723 (Tex. App. - Dallas 1988, no writ).

416. *Id.* at 722-23 (holding that where the appellate record contained no written and filed order sustaining an objection to a report as summary judgment evidence, the report was proper evidence included in the record).

417. TEX. R. APP. P. 33.1(a)(2)(A).

418. *In re Estate of Schiwetz*, 102 S.W.3d 355, 360-61 (Tex. App. - Corpus Christi 2003, pet. denied).

419. *Alejandro v. Bell*, 84 S.W.3d 383, 388 (Tex. App. - Corpus Christi 2002, no pet.).

420. *Sunshine Mining & Refining Co. v. Ernst & Young, L.L.P.*, 114 S.W.3d 48, 51 (Tex. App. - Eastland 2003, no pet.) (and cases cited therein); *see also Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 206-07 (Tex. App. - Dallas 2005, no pet.).

421. TEX. R. EVID. 802.

422. *Wilson v. Gen. Motors Acceptance Corp.*, 897 S.W.2d 818, 822 (Tex. App. - Houston [1st Dist.] 1994, no writ); 786 S.W.2d 17, 19 (holding that where an affidavit was hearsay, but not properly objected to in writing prior to entry of judgment, it became admissible evidence); *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App. - Dallas 1987, writ denied) (concluding that where a party did not object to affidavits that contained inadmissible hearsay, the party "waived any complaint as to consideration of inadmissible evidence as part of the summary judgment record").

423. 156 S.W.3d at 207; *Rizkallah v. Conner*, 952 S.W.2d 580, 585-86 (Tex. App. - Houston [1st Dist.] 1997, no writ).

4. Attachment of Summary Judgment Evidence Not Independently on File.

In a traditional motion for summary judgment, proof may be attached to the summary judgment motion, a brief in support of the motion or to the response.[424] In a no-evidence motion for summary judgment, proof may be attached to the response or to a brief in support of the response.[425]

B. Pleadings.

Generally, factual statements in pleadings, even if verified, do not constitute summary judgment evidence.[426] However, this rule is not as absolute as it appears. A plaintiff may not use its pleadings as "proof" to defeat an otherwise valid motion for summary judgment. However, the defendant may use the plaintiff's pleadings to obtain a summary judgment when the pleadings affirmatively negate the plaintiff's claim.[427] Sworn account cases are also an exception to the rule that pleadings are not summary judgment evidence.[428] When the defendant files no proper verified denial of a suit on a sworn account, the pleadings can be the basis for summary judgment.[429] Also, an opponent's pleadings may constitute summary judgment proof if they contain judicial admissions, which are statements admitting facts or conclusions contrary to a claim or defense.[430] In *Hidalgo v. Surety Savings & Loan Ass'n*, the supreme court delineated when a summary judgment could be granted on the pleadings.[431] The court stated:

> We are not to be understood as holding that summary judgment may not be rendered, when authorized, *on the pleadings*, as, for example, when suit is on a sworn account under Rule 185, Texas Rules of Civil Procedure, and the account is not denied under oath as therein provided, or when the plaintiff's petition fails to state a legal claim or cause of action. In such cases summary judgment does not rest on proof supplied by pleading, sworn or unsworn, but on deficiencies in the opposing pleading.[432]

A party may not rely on factual allegations in its motion or response as summary judgment evidence. Those allegations must be supported by separate summary judgment proof. In some instances, it may rely on its opponent's pleadings.

C. Depositions.

If deposition testimony meets the standards for summary judgment evidence, it will support a valid summary judgment.[433] Deposition

424. 904 S.W.2d 628.

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

426. 589 S.W.2d 671, 678; 462 S.W.2d 540, 545; *A.J.P. Oil Company, LLC v. Velvin Oil Company, Inc.*, No. 06-15-00061-CV (Tex. App. - Texarkana), February 5, 2016. Verified information in a suit on sworn account is not summary judgment evidence. Movant failed to establish it was entitled to judgment as a matter of law when it offered no evidence in support of its motion); *Watson v. Frost Nat'l Bank*, 139 S.W.3d 118, 119 (Tex. App. - Texarkana 2004, no pet.).

427. *Washington v. City of Houston*, 874 S.W.2d 791, 794 (Tex. App. - Texarkana 1994, no writ) (stating that where party's pleadings themselves show no cause of action or allege facts, that if proved, establish governmental immunity, the pleadings alone will justify summary judgment); *Saenz v. Family Sec. Ins. Co. of Am.*, 786 S.W.2d 110, 111 (Tex. App. - San Antonio 1990, no writ) (concluding that where a plaintiff pleads facts affirmatively negating his cause of action, he can "plead himself out of court"); *Perser v. City of Arlington*, 738 S.W.2d 783, 784 (Tex. App. - Fort Worth 1987, writ denied) (determining appellants effectively pleaded themselves out of court by affirmatively negating their cause of action).

428. *See, e.g., Andrews v. E. Tex. Med. Ctr.-Athens*, 885 S.W.2d 264, 267 (Tex. App. - Tyler 1994, no writ).

429. 885 S.W.2d at 267; 705 S.W.2d 749, 750 (Tex. App. - Houston [1st Dist.] 1986, writ ref'd n.r.e.); *Waggoners' Home Lumber Co. v. Bendix Forest Prods. Corp.*, 639 S.W.2d 327, 328 (Tex. App. - Texarkana 1982, no writ).

430. *Lyons v. Lindsey Morden Claims Mgmt., Inc*., 985 S.W.2d 86, 92 (Tex. App. - El Paso 1998, no pet.); *Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 504 (Tex. App. - Houston [1st Dist.] 1995, no writ); *see infra* Para. V.D.

431. 462 S.W.2d at 543-45.

432. *Id.* at 543 n.1.

433. *Rallings v. Evans*, 930 S.W.2d 259, 262 (Tex. App. - Houston [14th Dist.] 1996, no writ); *Wiley v. City of Lubbock*, 626 S.W.2d 916, 918 (Tex. App. - Amarillo 1981, no writ) (stating that since the deposition testimony was "clear, positive, direct, otherwise free from contradictions and inconsistencies," it met the standards for summary

testimony is subject to the same objections that might have been made to questions and answers if the witness had testified at trial.[434] Depositions only have the force of an out of court admission and may be contradicted or explained in a summary judgment proceeding.[435] Deposition testimony may be given the same weight as any other summary judgment evidence. Such testimony has no controlling effect as compared to an affidavit, even if the deposition is more detailed than the affidavit.[436] Thus, if conflicting inferences may be drawn from two statements made by the same party, one in an affidavit and the other in a deposition, a fact issue is presented.[437] Several courts of appeals have held that a party cannot file an affidavit that contradicts that party's own deposition testimony, without explanation, to create a fact issue to avoid summary judgment.[438] If an affidavit contradicts earlier testimony, the affidavit must explain the reason for the change.[439] Without an explanation, the court assumes that the sole purpose of the affidavit is to avoid summary judgment, and as such, the affidavit merely presents a sham fact issue.[440] Thus, an affidavit may not be considered as evidence where it conflicts with the earlier sworn testimony. Deposition excerpts submitted as summary judgment evidence need not be authenticated.[441] Copies of the deposition pages alone are sufficient.[442]

D. Answers to Interrogatories and Requests for Admissions.

1. Evidentiary Considerations.

To be considered summary judgment proof, answers to interrogatories and requests for admissions must be otherwise admissible into evidence.[443] Answers to interrogatories should be carefully examined for conclusions, hearsay, and opinion testimony. Objections thereto in writing must be filed in the trial court to prevent those statements from being admitted into evidence; and an order should be entered on the objections. Answers to requests for admissions and answers to interrogatories may be used only against the party giving the answer.[444] Because summary judgment evidence must meet general

judgment evidence).

434. *See* TEX. R. CIV. P. 199.5(e) (stating that certain objections may be made to questions and answers in a deposition).

435. *Molnar v. Engels, Inc.*, 705 S.W.2d 224, 226 (Tex. App. - San Antonio 1985, writ ref'd n.r.e.); *Combs v. Morrill*, 470 S.W.2d 222, 224 (Tex. Civ. App. - San Antonio 1971, writ ref' d n.r.e.).

436. *Bauer v. Jasso*, 946 S.W.2d 552, 556 (Tex. App. - Corpus Christi 1997, no writ); *Cortez v. Fuselier*, 876 S.W.2d 519, 521-22 (Tex. App. - Texarkana 1994, writ denied); *Jones v. Hutchinson County*, 615 S.W.2d 927, 930 n.3 (Tex. Civ. App. - Amarillo 1981, no writ).

437. *Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988) (per curiam).

438. *First State Bank of Mesquite v. Bellinger & Dewolf, LLP*, 342 S.W.3d 142 (Tex. App. - El Paso 2011, no pet.) (Trial court properly struck portions of the summary judgment affidavit of bank executive vice president that contradicted his deposition testimony in certain respects without explanation for the change in his testimony; trial court properly found that the summary judgment affidavit was submitted in bad faith to create a fact issue and avoid summary judgment); *Cantu v. Peacher*, 53 S.W.3d 5, 10-11 (Tex. App. - San Antonio 2001, pet. denied); *Burkett v. Welborn*, 42 S.W.3d 282, 286 (Tex. App. - Texarkana 2001, no pet.); *Farroux v. Denny's Rests., Inc.*, 962 S.W.2d 108, 111 (Tex. App. - Houston [1st Dist.] 1997, no pet.).

439. 962 S.W.2d at 111.

440. *Id.*

441. *McConathy v. McConathy*, 869 S.W.2d 341, 342 (Tex. 1994) (per curiam); *Cobb v. Dallas Fort Worth Med. Ctr.-Grand Prairie*, 48 S.W.3d 820, 823 (Tex. App. - Waco 2001, no pet.).

442. 869 S.W.2d at 341-42 (reasoning that deposition excerpts submitted for summary judgment can be easily verified so that authentication is unnecessary). Any authentication requirement such as that articulated in *Deerfield Land Joint Venture v. Southern Union Realty Co.*, 758 S.W.2d 608, 610 (Tex. App. - Dallas 1988, writ denied), which requires that the entire deposition be attached to the motion along with the original court reporter's certificate to authenticate, has been specifically superseded by TEX. R. CIV. P. 166a(d).

443. *See Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171, 175 (Tex. App. - Fort Worth 1996, no writ).

444. TEX. R. CIV. P. 197.3 (Answers to interrogatories may be only used against the responding party); *Yates v. Fisher*, 988 S.W.2d 730, 731 (Tex. 1998) (per curiam) (answers to interrogatories); *see Thalman v. Martin*, 635 S.W.2d 411, 414 (Tex. 1982); *FDIC v. Moore*, 846 S.W.2d 492 (Tex. App. - Corpus Christi 1993, writ denied) (answers to requests for admissions and answers to interrogatories); *see Nguyen v. Citibank N.A.*, 403 S.W.3d 927 (Tex. App. - Houston [14th Dist.] 2013, pet. denied) (denials in response to requests for admissions are generally not proper summary judgment evidence; alleged denial of debt).

admissibility standards, a party may not use its own answers to interrogatories[445] or its denials to requests for admissions as summary judgment evidence.[446]

2. Deemed Admissions.

An unanswered admission concerning any matter within the scope of discovery is automatically deemed admitted.[447] Deemed admissions that are purely questions of law, however, are not proper summary judgment evidence.[448]

An unanswered admission is deemed admitted without the necessity of a court order, and any matter admitted is conclusively established against the party making the admission unless the court, on motion, allows the withdrawal of the admission.[449] Thus, when a party fails to answer requests for admissions, that party will be precluded from offering summary judgment proof contrary to those admissions.[450] "Admissions, once made or deemed by the court, may not be contradicted by any evidence, whether in the form of live testimony or summary judgment affidavits."[451] However, to be considered as proper summary judgment evidence, the requests must be on file with the court at the time of the hearing of the motion for summary judgment.[452] Furthermore, the requests must meet the same time constraints as the motion for summary judgment and the response.[453]

Any matter established under Rule 198 is conclusively established for the party making the admission unless it is withdrawn by motion or amended with permission of the court.[454] "[T]he standards for withdrawing deemed admissions and for allowing a late summary judgment response are the same."[455] "Either is proper upon a showing of (1) good cause, and (2) no undue prejudice."[456] Deemed admissions may be withdrawn for good cause.[457] In *Marino*

445. TEX. R. CIV. P. 197.3; *Barragan v. Mosler*, 872 S.W.2d 20, 22 (Tex. App. - Corpus Christi 1994, no writ).

446. 872 S.W.2d at 22; *CKB & Assocs., Inc. v. Moore McCormack Petrol., Inc*., 809 S.W.2d 577, 584 (Tex. App. - Dallas 1991, writ denied); see TEX. R. CIV. P. 198.3.

447. TEX. R. CIV. P. 198.2(c) (including statements of opinion or of fact or of the application of law to fact, or the genuineness of any document served with the request or otherwise made available for inspection of copying). *See Legarreta v. FIA Card Services*, 412 S.W.3d 121 (Tex. App. - El Paso 2013, no pet.) (summary judgment relying upon twenty-four deemed admissions and the affidavit of a custodian of records and authorized officer for credit card servicer).

448. *Cedyco Corp. v. Whitehead*, 253 S.W.3d 877 (Tex. App. - Beaumont 2008, pet. denied) (Deemed admissions concerning "sole current legal owner of the Judgment " and "the current legal owner of the Judgment" were purely legal questions and not proper summary judgment evidence).

449. *Id.; Hartman v. Trio Transp., Inc*., 937 S.W.2d 575, 580 (Tex. App. - Texarkana 1996, writ denied); *Wenco of El Paso/Las Cruces, Inc. v. Nazario*, 783 S.W.2d 663, 665 (Tex. App. - El Paso 1989, no writ) (*citing* TEX. R. CIV. P. 169).

450. *State v. Carrillo*, 885 S.W.2d 212, 214 (Tex. App. - San Antonio 1994, no writ) (stating that deemed admissions may not be contradicted by any evidence, including summary judgment affidavits); *see Velchoff v. Campbell*, 710 S.W.2d 613, 614 (Tex. App. - Dallas 1986, no writ).

451. *Smith v. Home Indem. Co*., 683 S.W.2d 559, 562 (Tex. App. - Fort Worth 1985, no writ). *Accord Henke Grain Co. v. Keenan*, 658 S.W.2d 343, 347 (Tex. App. - Corpus Christi 1983, no writ).

452. *Vaughn v. Grand Prairie Indep. Sch. Dist*., 784 S.W.2d 474, 478 (Tex. App. - Dallas 1989), *rev'd on other grounds*, 792 S.W.2d 944 (Tex. 1990) (per curiam); *see also Longoria v. United Blood Servs*., 907 S.W.2d 605, 609 (Tex. App. - Corpus Christi 1995), *rev'd on other grounds*, 938 S.W.2d 29 (Tex. 1997) (per curiam).

453. TEX. R. CIV. P. 166a(d) (specifying the time requirements for filing and serving discovery products as summary judgment proofs).

454. 885 S.W.2d at 214; 710 S.W.2d at 614 (explaining that the party never moved to reply properly); 683 S.W.2d at 562 (referring to former TEX. R. CIV. P. 169).

455. *Wheeler v. Green* 157 S.W.3d 439, 442 (Tex. 2005) (per curiam).

456. *Id.* at 442, 443 (Good cause "is established by showing the failure involved was an accident or mistake, not intentional or the result of conscious indifference." Undue prejudice depends "on whether withdrawing an admission or filing a late response will delay trial or significantly hamper the opposing party's ability to prepare for it").

457. *Marino v. King*, 355 S.W.3d 629 (Good cause for the withdrawal of the deemed admissions existed where defendant respondent was pro se, requests asked essentially that defendant admit to the validity of his claims and concede her defenses, responses to the requested admissions were marginally late (one day) but were received before the other party moved for summary judgment on deemed admissions, sole basis for motion for summary judgment was defendant's failure to timely respond to his admission requests; and there was no evidence of flagrant bad faith or callous disregard for the rules; there was nothing to justify a presumption that defendant's defense lacked merit; and the pro se litigant did

v. King, recently decided, the Texas Supreme Court held that "Good cause for the withdrawal of the deemed admissions existed because there was no evidence of flagrant bad faith or callous disregard for the rules and nothing to justify a presumption that respondent's defense lacked merit. Moreover, there was nothing to suggest that movant was unable to prepare for trial without the admissions and thus no evidence that their withdrawal will cause him undue prejudice; rather, "the presentation of the merits of the action will be subserved by permitting respondent to withdraw the admission[s]."[458] And, in *In re American Gunite Management Co., Inc.*, the Fort Worth Court of Appeals held that a trial could erred when it declined to permit withdrawal of deemed admissions that plaintiff, the trial court and the defendant recognized were "merits-preclusive" and no evidence was presented to the trial court of flagrant bad faith or callous disregard for the rules in plaintiff's failing to respond timely respond to request for admissions.[459]

E. Documents.

Documents are another type of potential summary judgment proof that is not filed with the clerk of the court during the course of the pretrial proceedings.[460]

1. Evidentiary Considerations.

Documents relied on to support a summary judgment must have sound evidentiary value. For instance, in *Dominguez v. Moreno*,[461] a trespass to try title case, the plaintiff attached to the summary judgment motion a partial deed from the common source to his father.[462] The "deed" contained no signature, no date, and supplied nothing more than a granting clause and a description of the land.[463] The court held, in essence, that the writing was not a deed and was not a type of evidence that would be admissible at a trial on the merits.[464]

When using an affidavit to authenticate business records, the party offering the records must comply with Texas Rules of Civil Evidence 803(6) and 902(10).[465]

2. Authentication of Documents.

Rule 193.7 represents a significant departure from the former requirements to authenticate documents. Documents produced by the opposing party need not be authenticated.

a. Authentication of Producing Parties Documents.

Rule 193.7 provides that documents produced by the opposing party in response to written discovery are self-authenticating.[466] A party's production of documents in response to written discovery presumptively authenticates that document for use against that party in a pretrial proceeding or at trial.[467] This rule is designed to reduce the need for discovery merely to establish the often incontrovertible proposition that a document is what it appears to be.[468] The rule is a powerful tool for the party

not formally respond to the summary judgment motion but attended the summary judgment hearing believing that was the time for response); *Thomas v. Select Portfolio Servicing, Inc.*, 293 S.W.3d 316, 318, 321 (Tex. App. - Beaumont 2009, no pet.) (Trial court erred in granting summary judgment on deemed admissions without providing respondent an opportunity to withdraw the deemed admissions and supplement his responses).

458. *Id.*

459. *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996) (The true purpose of requests for admissions is to enable parties to eliminate uncontroverted matters); *In re American Gunite Management Co., Inc.*, No. 02-11-00349-CV (Tex. App. - Fort Worth Oct. 3, 2011, no pet.) (Requests for admissions were "never intended to be used as a demand upon a plaintiff or defendant to admit that he had no cause of action or ground of defense").

460. TEX. R. CIV. P. 166a(d) (describing the use of summary judgment evidence not on file).

461. 618 S.W.2d 125 (Tex. Civ. App. - El Paso 1981, no writ).

462. *Id.* at 126.

463. *Id.*

464. *Id.*

465. *Norcross v. Conoco, Inc.*, 720 S.W.2d 627, 632 (Tex. App - San Antonio 1986, no writ) (holding that invoices attached to the affidavit in support of the motion for summary judgment were not competent proof because they were not authenticated as required by TEX. R. EVID. 803(6) (Records of Regularly Conducted Activity) and 902(10) (Business Records Accompanied by Affidavit)).

466. TEX. R. CIV. P. 193.7.

467. *Id.*

468. Hon. Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions, G-14 (1998),*

making the request for production of documents; it relieves the party making the request from independently authenticating documents produced. Rule 193.7 states:

> **Production of Documents Self-Authenticating**. A party's production of a document in response to written discovery authenticates the document for use against that party in any pretrial proceeding or at trial unless - within ten days or a longer or shorter time ordered by the court, after the producing party has actual notice that the document will be used - the party objects to the authenticity of the document, or any part of it, stating the specific basis for objection. An objection must be either on the record or in writing and must have a good faith factual and legal basis. An objection made to the authenticity of only part of a document does not affect the authenticity of the remainder. If objection is made, the party attempting to use the document should be given a reasonable opportunity to establish its authenticity.[469]

Thus, a document produced in response to written discovery authenticates that document for use against the producing party.[470] Conversely, a party cannot authenticate a document for its own use by merely producing it in response to a discovery request.

No objection to failure to authenticate (or obtain a ruling on such an objection) is necessary because the complete absence of authentication is a defect of substance that is not waived by the failure to object and may be urged for the first time on appeal.[471]

Rule 166a(d), which provides different ways for parties to submit summary judgment proof for the record,[472] does not eliminate the requirement for a producing party to authenticate documents offered as summary judgment evidence.

b. Copies Allowed.

Rule 196.3 allows the producing party to offer a copy of the document unless the authenticity of the document is under scrutiny or because fairness under the circumstances of the case requires production of the original.[473] Rule 196.3 states:

> **(b) Copies**. The responding party may produce copies in lieu of originals unless a question is raised as to the authenticity of the original or in the circumstances it would be unfair to produce copies in lieu of originals. If originals are produced, the responding party is entitled to retain the originals while the requesting party inspects and copies them.[474]

This rule's allowance of the production of copies seems to be "[i]n response to the proliferation of reading rooms and other modern practicalities of documents discovery."[475]

c. Effect on Summary Judgment Practice.

Self-authentication eliminates the burden of authenticating documents produced by the opposing party in discovery that are offered as summary judgment evidence. Such documents are presumed authentic, unless timely argued

http://www.supreme.courts.state.tx.us/rules/tdr/disccle37.pdf (last visited Feb. 25, 2014).

469. *Id.*

470. *Id.*

471. *Blanche v. First Nationwide Mortgage Corp*., 74 S.W.3d 444, 451 (Tex. App. - Dallas 2002, no pet.).

472. TEX. R. CIV. P. 166a(d).

473. *Id.* 196.3(b).

474. *Id.*

475. See Tex. R. Evid. 902(4) for Certified Copies of Public Records; Tex. R. Evid. 902(10) for Business Records Accompanied by Affidavit.

otherwise by the producing party. The producing party, however, must prove the document's authenticity if he or she wants to offer it as summary judgment evidence.

Because the objection to authenticity must be made within ten days after "actual notice that the document will be used,"[476] and the response to the motion for summary judgment is due seven days before the summary judgment submission,[477] the objection to authenticity may need to be made before filing the response to the motion for summary judgment. Until the appellate courts clarify this issue, the safer course will be to object to lack of authentication within ten days after the motion for summary judgment is filed and not wait until filing the response. The same problem exists for attempts to regain access to documents a party claims were inadvertently disclosed.[478]

As is true at trial, authentication does not establish admissibility.[479] Authentication is but one condition precedent to admissibility.[480] However, a party challenging the admissibility of evidence in a summary judgment proceeding must make a written objection to the evidence.[481]

3. Copies.

In collection cases, original documents often are not available or may not be located readily. This is particularly true when the debt has been purchased or assigned. Copies of documents may be offered as summary judgment evidence. Copies of original documents are acceptable if accompanied by a properly sworn affidavit that states that the attached documents are "true and correct" copies of the originals.[482] A copy of a letter, which is unauthenticated, unsworn, and unsupported by affidavit, is not proper summary judgment evidence.[483]

In *Norcross v. Conoco, Inc*.,[484] the court reversed a summary judgment on a sworn account because the affiants merely stated that the attached copies of invoices and accounts were correct copies of the original documents.[485] No reference was made concerning the affiant's personal knowledge of the information contained in the attached invoice records.[486] The affiants did not state that the invoice or accounts were just and true, or correct and accurate.[487] Thus, the court concluded that the invoices were not competent summary judgment proof.[488]

4. Judicial Notice of Court Records.

A trial court may take judicial notice of its own records in a case involving the same subject matter between the same or nearly identical parties.[489] However, on motion for summary judgment, certified copies of court records from a different case, even if pending in the same court, should be attached to the motion in the second case.[490] The failure of the movant to attach the records precludes summary judgment.[491]

F. Affidavits.

Affidavits, which are sworn statements of facts signed by competent witnesses,[492] are the

476. TEX. R. CIV. P. 193.7.
477. *Id.* 166a(c).
478. *See id.* 193.3(d).
479. *See* TEX. R. EVID. 901(a).
480. *Id*.
481. 589 S.W.2d 671, 677.
482. *Republic Nat'l Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam); *Hall v. Rutherford*, 911 S.W.2d 422, 425 (Tex. App. - San Antonio 1995, writ denied).
483. 911 S.W.2d at 425.
484. 720 S.W.2d 627 (Tex. App. - San Antonio 1986, no writ).
485. *Id.* at 632.
486. *Id.*
487. *Id.*
488. *Id.*
489. *Gardner v. Martin*, 345 S.W.2d 274, 276 (Tex. 1961); *cf Trevino v. Pemberton*, 918 S.W.2d 102, 103 n.2 (Tex. App. - Amarillo 1996, orig. proceeding).
490. *Gardner*, 345 S.W.2d at 276-77 (indicating because the records referred to in the affidavit supporting the motion for summary judgment were court records of another case, it was reversible error not to attach certified copies of the records to the motion).
491. *Id.* at 277; *Chandler v. Carnes Co*., 604 S.W.2d 485, 487 (Tex. Civ. App. - El Paso 1980, writ ref'd n.r.e.).
492. TEX. GOV'T CODE ANN. § 312.011(1) (Vernon 2005) ("Affidavit" means a statement in writing of a fact or facts signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office). Effective Sep. 1, 2013, Tex. Civ. Prac. & Rem. Code

most common form of summary judgment proof. Rule 166a provides that a party may move for summary judgment with or without supporting affidavits.[493] However, before the adoption of the no-evidence summary judgment provision, it was unusual for a summary judgment to be granted without supporting affidavits. No-evidence summary judgment motions do not require supporting evidence.[494] In traditional summary judgments affidavits are the form of evidence most often used to show the court that there are no genuine issues of material fact. Similarly, affidavits are frequently used by the non-movant to produce evidence on an identified element of a claim or defense in response to a no-evidence motions or to raise a fact issue in a traditional summary judgment motion.

The Texas Supreme Court recently held that Rule 193.6 excludes the testimony of witnesses not timely identified in summary judgment proceedings just as they would be in a conventional trial.[495] The pretrial discovery rules were last amended to include evidentiary exclusions under Rule 193.6. Rule 193.6(a) provides that a party who fails to make, amend, or supplement a discovery response in a timely manner may not offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that: (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.[496] Since the pretrial discovery rules were amended, most courts of appeals have applied Rule 193.6 to summary judgment.[497] A party may satisfy this disclosure requirement by furnishing the information listed in Rule 194.3(e) or (f), as applicable, in response to a request for disclosure.[498]

1. Form, generally.

An affidavit must show affirmatively that it is based on personal knowledge and that the facts sought to be proved would be "admissible in evidence" at a conventional trial.[499]

§132.001 authorizes use of a written unsworn declaration subscribed as true under penalty of perjury with jurat in lieu of an affidavit required by statute or required by a rule.

493. TEX. R. CIV. P. 166a(a), (b); *Kilpatrick v. State Bd. of Registration for Prof'l Eng'rs*, 610 S.W.2d 867, 871 (Tex. Civ. App. - Fort Worth 1980, writ ref'd n.r.e.) ("There is no requirement under [Rule 166a] making affidavits indispensable to rendition of summary judgment").

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

495. 285 S.W.3d 879; *Johnson v. Fuselier*, 83 S.W.3d 892; TEX. R. CIV. P 166a(i), 196.3, amended eff. Jan. 1. 1999.

496. TEX. R. CIV. P. 193.6(a).

497. *See e.g. Blake v. Dorado*, 211 S.W.3d 429, 432 (Tex. App. - El Paso 2006, no pet.) (Evidence that would be inadmissible at trial due to the proponent's failure to timely answer or supplement a request for production is also inadmissible in a summary judgment proceeding); *F.W. Indus., Inc. v. McKeehan*, 198 S.W.3d 217, 220 (Tex. App. - Eastland 2005, no pet.) (The "date certain" deadline for designating experts applies to summary judgment proceedings and the trial court can strike a summary judgment affidavit of an expert submitted after the discovery rule's deadline for designating experts); *Cunningham v. Columbia/St. David's Healthcare System, L.P.*, 185 S.W.3d 7, 10-11 (Tex. App. - Austin 2005, reh. overruled) (Although plaintiff may have supplied some information about its expert by filing an expert report, the filing of such a report does not satisfy the procedural requirement of "designating an expert").

498. *See* 185 S.W.3d at 10 (applying rule to expert witness testimony).

499. TEX. R. CIV. P. 166a(f); *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (quoting Rule 166a(f)); *Avery v. LPP Mortgage, Ltd.*, No. 01-14-01007-CV, Tex. App. - Houston [1st Dist.], October 29, 2015 (Sufficient demonstration of affiant's personal knowledge of statements when he identified himself as a Portfolio Manager for loan servicer of legal owner and holder of notes, because of that position, as well as his position as its custodian of records. Affiant was aware of authorized loan servicer for note owner and holder); *Rose Core v. Citibank, N.A.*, No. 11-13-00040-CV (Tex. App. - 11th Dist. February 15, 2015, no pet.) (The affiant must affirmatively state in the affidavit how he gained personal knowledge in the scope of his employment of the statements concerning the debt. The mere statement in an affidavit that the affiant is a representative of the creditor (bank, lender, credit card issuer) is not sufficient to establish that the affiant has personal knowledge of the statement concerning the debt made therein); *Marc Core v. Citibank, N.A.*, No. 13-12-00648-CV (Tex. App. - Corpus Christi April 9, 2015, no pet.) (Account-stated claim in which appellee bank sued appellant debtor asserting that debtor owed an outstanding credit card balance. Summary judgment on bank's claim for account stated was proper. Bank custodian of records affidavit stating that he was a Document Control Officer and custodian of records with respect to accounts owned by bank and that he had "knowledge of, and access to, account

A verification, attached to the motion or response, that the contents are within the affiant's knowledge and are both true and correct does not constitute a proper affidavit in support of summary judgment under Rule 166a(f).[500] "For an affidavit to have probative value, an affiant must swear that the facts presented in the affidavit reflect his [or her] personal knowledge."[501] "[T]he affidavit must itself set forth facts and show the affiant's competency, and the allegations contained [in the affidavit] must be direct, unequivocal and such that perjury is assignable."[502]

While affidavits customarily state the facts recited therein are "true and correct," that recitation is not necessarily required. For instance, when an affidavit is based on personal knowledge and is subscribed to and sworn before a notary public, it is not defective if, when considered in its entirety, its obvious effect is that the affiant is representing that the facts stated therein are true and correct.[503] This is a subjective determination that may be avoided by making the customary recitation that the recitations in the affidavit are "true and correct."

The requirement of Rule 166a(f) that the affidavit affirmatively show the affiant is

information and records concerning debtor's bank account was sufficient to establish that custodian had personal knowledge of debtor's relationship with bank and the events relating thereto as acquired through his position as document control officer. Custodian of Records' affidavit was based on personal knowledge with respect to his status as a custodian of business records. He outlined the source of his knowledge and the information contained in those records. And the attached account records were not hearsay under the business records hearsay exception); *Brown v. Mesa Distrbs., Inc.*, 414 S.W.3d 279, 287 (Tex. App. - Houston [1st Dist.] 2013, no pet.) (An affidavit from a company officer claiming personal knowledge of the issue and the company's records is sufficient evidence for summary judgment); *Espinoza v. Wells Fargo Bank, N.A.*, 02-13-00111-CV (Tex. App. - Ft. Worth Nov. 14, 2013, no pet.) (Bank records custodian's statement in her affidavit that explained her relationship to the bank and averred that her duties as a records custodian included the handling and management of this particular note was sufficient to show her personal knowledge of the transaction); *Vince Poscente International, Inc. v. Compass Bank*, No. 05-11-01645-CV (Tex. App. - Dallas March 28, 2013, no pet.) (Affidavit was incompetent for failure to establish of personal knowledge. Affidavit did not establish how affiant obtained personal knowledge of the facts to which she testified. The affidavit did not demonstrate affiant was employed by the Bank, what her job position and responsibilities were, or how her job duties gave her personal knowledge of the facts); *Morales v. JP Morgan Chase Bank, N.A.*, No. 01-10-00553-CV (Tex. App. - Houston [1st. Dist.] June 30, 2011, no pet.) (Suit on a sworn account. Position as bank vice-president as the person with care, custody and control of the records demonstrates a sufficient basis for his personal knowledge, absent controverting evidence); *Singh v. Citibank (South Dakota), N.A.*, No. 03-10-00408-CV (Tex. App. - Austin March 24, 2011, no pet.) (Vice President of service company that was a subsidiary of bank sufficiently demonstrated her personal knowledge and competence to testify regarding the facts she asserted in her affidavit). *Compare Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994) (per curiam) (finding that an affidavit that does not positively represent the facts as disclosed in the affidavit as true and within the affiant's personal knowledge is legally insufficient). An affidavit is legally insufficient when contains conclusions as to the present balance due and owing. *Akins v. FIA Card Services, N.A.*, No. 07-13-00244-CV (Tex. App. - Amarillo 2015, no pet.).

500. *Am. Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994) (*citing Keenan v. Gibraltar Sav. Ass'n*, 754 S.W.2d 392, 394 (Tex. App. - Houston [14th Dist.] 1988, no writ) (referring to what was then Rule 166a(e)).

501. *Kerlin v. Arias*, 274 S.W.3d 666 (Tex. 2008) (Affidavit was legally insufficient for lack of personal knowledge of affiant where nothing in the affidavit affirmatively shows how the affiant could possibly have personal knowledge about events occurring more than one hundred and sixty years before it was executed); *In re E.I. Dupont de Nemours & Co.*, 136 S.W.3d 218, 224 (Tex. 2004).

502. *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371 (Tex. App. - Dallas 2011, no pet.) (The affidavit failed to explain how affiant's job duties and responsibilities during the relevant time period afforded him knowledge about the execution of the Partnership Agreement and the Guaranty, obligations under those documents, performance of obligations, or defaults under those documents. Further, the affidavit failed to substantiate availability of Midland's business and account records to support the affiant's attestation of personal knowledge regarding calculations of amounts owed under the documents. The affidavit lacked underlying information to show the affiant had personal knowledge of the facts stated in his affidavit, and his statements, therefore, amounted to no evidence); 754 S.W.2d at 394.

503. *See Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 361 (Tex. App. - Dallas 2007, pet. denied), *citing Fed. Fin. Co. v. Delgado*, 1 S.W.3d 181, 184 (Tex. App. - Corpus Christi 1999, no pet.); *see also Huckin v. Connor*, 928 S.W.2d 180, 183 (Tex. App. - Houston [14th Dist.] 1996, writ denied); *Connor v. Waltrip*, 791 S.W.2d 537, 539 (Tex. App. - Dallas 1990, no writ) (cases holding that an affidavit which does not specifically recite that the facts set forth therein are true, but does set out that it was made upon the affiant's personal knowledge, satisfies the requirements of Rule 166a).

competent to testify to the matters contained in the affidavit is not satisfied by an averment that the affiant is over twenty-one years of age, of sound mind, capable of making this affidavit, never convicted of a felony, and personally acquainted with the facts herein stated. Rather, the affiant should detail those particular facts that demonstrate that he or she has personal knowledge.[504]

The rules of evidence do not require that the qualified witness who lays the predicate for the admission of business records be their creator or have personal knowledge of the contents of the record; the witness is required only to have personal knowledge of the manner in which the records were kept.[505]

Affiant's testimony about out-of-court sources is hearsay.[506] For example, the Texas Supreme Court, in *Kerlin v. Arias*, held that an affiant was not competent to make an affidavit when he recited that he "heard testimony" in a court case, "reviewed documents" claims, and "read historical accounts."[507]

Phrases such as "I believe" or "to the best of my knowledge and belief" should not be used in a supporting affidavit; they do not establish the affiant's personal knowledge. Statements based upon the "best of his knowledge" have been held insufficient to support a response raising fact issues.[508] Such statements are "no evidence at all."[509] "A person could testify with impunity that to the best of his knowledge, there are twenty-five hours in a day, eight days in a week, and thirteen months in a year. Such statements do not constitute factual proof in a

504. *Wolfe v. C.S.P.H., Inc*., 24 S.W.3d 641, 646 (Tex. App. - Dallas 2000, no pet.); *Coleman v. United Sav. Ass'n*, 846 S.W.2d 128, 131 (Tex. App. - Fort Worth 1993, no writ) (holding that a sufficient affidavit must show affirmatively how the affiant became personally familiar with the facts); *Fair Woman, Inc. v. Transland Mgmt. Corp*., 766 S.W.2d 323, 323-24 (Tex. App. - Dallas 1989, no writ) (explaining that summary judgment failed despite the lack of a response because affiant did not state how she had personal knowledge).

505. *Gabriel v. Associated Credit Union of Texas*, No. 14-12-00349-CV (Tex. App. - Houston [14th Dist.] March 7, 2013, pet. denied) (Lender's general counsel's review of the loan materials and personal interactions with debtor demonstrated knowledge of the circumstances surrounding debtor's loan. Although some of the facts recited in the affidavit occurred before affiant (lender's general counsel) became general counsel his position and his work on the loan demonstrate how he learned these facts. As a result, the affidavit satisfied the personal knowledge requirement); *Rockwall Commons Assocs. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500 (Tex. App. - El Paso, 2010, no pet.) (Affidavit on purchased debt. Assignee may properly execute a business records affidavit concerning record keeping on assigned accounts. Once a successor was assigned the rights to the contracts in a case, it was not necessary that the predecessor verify those records through a separate custodian of records affidavit); *Nice v. Dodeka, L.L.C.*, No. 09-10-00014-CV (Tex. App. - Beaumont Nov. 10, 2010, no pet.), 2010 Tex. App. LEXIS 8922, 12-13 (In an affidavit on purchased debt, the assignee properly executed a business records affidavit concerning record keeping on assigned credit card accounts. Affidavits further stated she was the custodian of assignee's records, and that she was familiar with how these records were prepared and maintained. The custodian of records' affidavits explained how the assignee acquired the debtor's account, and her affidavits indicate that the assignee's records, which include the debtor's credit account, were "made at or near the time or reasonably soon after the act" by an employee "with knowledge of the act [or] event"); *Damron v. Citibank (S.D.) N.A.*, No. 03-09-00438-CV (Tex. App. - Austin August 25, 2010, pet. denied), 2010 Tex. App. LEXIS 7054, 10-11 (An assignee properly executed a business records affidavit concerning record keeping on assigned credit card accounts when the assignee had personal knowledge of the manner in which the records were kept). Affiant's failure to establish personal knowledge is a formal defect that must be raised in the trial court. *Hill v. Tootsies, Inc.*, No. 14-11-00260-CV (Tex. App. - Houston [14th Dist.] May 15, 2012, no pet.) (Complaint of personal knowledge is a challenge to the form of creditor's affidavit, which debtor waived by failing to obtain a ruling on the objection advanced in her summary-judgment response. Assertion that Affiant is Chief Operating Officer and an authorized agent of creditor was insufficient to demonstrate personal knowledge when affiant failed to explain how he gained personal knowledge of his averments).

506. *Kerlin v. Arias*, 274 S.W.3d 666 (Tex. 2008) (An affiant is not competent to make an affidavit when he recites that he "heard testimony" in a court case, "reviewed documents" claims, and "read historical accounts").

507. *Id*. at 668.

508. *Roberts v. Davis*, 160 S.W.3d 256, 262-63 (Tex. App. - Texarkana 2005, no pet.) (holding the affidavit in a defamation case that was based on information - "to the best of my knowledge and belief" - insufficient to support summary judgment on the basis of the truth of the statement, but holding it may be evidence the statement was made without malice); *Shindler v. Mid-Continent Life Ins. Co*., 768 S.W.2d 331, 334 (Tex. App. - Houston [14th Dist.] 1989, no writ); *see* 833 S.W.2d 747, 749 (holding that the sworn statement made by the plaintiff's attorney that all information was true and correct was insufficient as a summary judgment affidavit).

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

summary judgment proceeding."[510]

In contrast, a court of appeals suggests that the requirement that the affiant have personal knowledge does not preclude the use of the words "I believe" in a supporting affidavit, if the content of the entire affidavit shows that the affiant has personal knowledge.[511] That court of appeals noted, however, that "when the portions of the affidavits containing hearsay are not considered, the remaining statements in the affidavits contain sufficient factual information to sustain the burden of proving the allegations in the motion for summary judgment."[512]

The Texas Supreme Court, in *Grand Prairie Independent School District v. Vaughan*, considered a witness's affidavit, in which the words "on or about" were used to refer to a critical date.[513] The court found that "on or about" meant a date of approximate certainty, with a possible variance of a few days, and that the non-movant never raised an issue of the specific dates.[514]

An affidavit must be in substantially correct form. The absence of a jurat is a substantive defect and not a simple defect in form.[515] When a plaintiff attaches affidavits that are not signed by a notary public or any other person authorized to administer an oath[516] the jurat is an integral part of the rule's proscription for the form of an affidavit, and its absence makes the plaintiff's affidavit fundamentally defective.[517] An affidavit may not be used to authenticate a copy of another affidavit.[518] A purely formal deficiency in an affidavit, however, can be waived if it is not properly raised at the trial level.[519]

It is generally not advisable for the attorney representing the movant to make the affidavit, since the affidavit must be based on personal knowledge and not on information or belief.[520] And, it may open the attorney to compromise or cross-examination, neither of which is advised.

2. Business Records Affidavit.

Business records affidavits under Tex. R. Evid. 902(1) are frequently used in collections cases to prove up the debt. Rule of Evidence 902(10)(b) sets out a form of affidavit for use when business records are introduced under Rule 803(6). The form is exemplary, not exclusive.[521] The rule provides that a business records affidavit "shall be sufficient if it follows [the prescribed form] though the [prescribed form] shall not be exclusive, and an affidavit which substantially complies with [the rule] shall suffice.[522] An affidavit must only substantially comply with the sample provided within the rule.[523] Consequently, a business records affiant is not required to recite the exact

510. *Id.*

511. *Moya v. O'Brien* 618 S.W.2d 890, 893 (Tex. Civ. App. - Houston [1st Dist.] 1981, writ ref'd n.r.e.) (noting a close reading of the affidavits left no doubt that the affiants were speaking from personal knowledge); *see also Krueger v. Gol*, 787 S.W.2d 138, 141 (Tex. App. - Houston [14th Dist.] 1990, writ denied) (finding a failure to state personal knowledge specifically is not fatal if it is clearly shown that the affiant was speaking from personal knowledge).

512. 618 S.W.2d at 893.

513. 792 S.W.2d 944, 945 (Tex. 1990).

514. *Id.*

515. *Sturm Jewelry, Inc. v. First National Bank, Franklin* 593 S.W.2d 813, 814 (Tex. Civ. App. - Waco 1980, no writ); *see also Hall v. Rutherford*, 911 S.W.2d 422, 425 (Tex. App. - San Antonio 1995, writ denied) (holding that without notarization, a statement is not an affidavit and is not competent summary judgment proof); *Elam v. Yale Clinic*, 783 S.W.2d 638, 643 (Tex. App. - Houston [14th Dist.] 1989, no writ) (noting that absence of a jurat is a substantive defect).

516. 593 S.W.2d at 814.

517. *Id. (citing Perkins v. Crittenden*, 462 S.W.2d 565, 568 (Tex. 1970)); Tex. R. Civ. P. 166(a).

518. *See* 911 S.W.2d at 425.

519. 593 S.W.2d at 814 (*citing Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 234 (Tex. 1962)).

520. *Wells Fargo Constr. Co. v. Bank of Woodlake*, 645 S.W.2d 913, 914 (Tex. App. - Tyler 1983, no writ) (indicating that an affidavit made on information and belief of the attorney is not factual proof in a summary judgment proceeding).

521. TEX. R. CIV. EVID. 902(10)(b); *see Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 360-61 (Tex. App. - Dallas 2007, pet. denied); *Fullick v. City of Baytown*, 820 S.W.2d 943, 944 (Tex. App. - Houston [1st Dist.] 1991, no writ).

522. *Id*.

523. *Kyle v. Countrywide Home Loans, Inc.*, 232 S.W.3d 355, 360-61 (Affiant was not required to recite the exact words that appear in Rule 902(10)(b)); *Fullick v. Baytown*, 820 S.W.2d 943, 944 (Tex. App. - Houston [1st Dist.] 1991, no writ) (Rule 902(10) of the Texas Rules of Civil Evidence sets out a form of affidavit to be used with business records under rule 803(6). Rule 902(10) provides that the form set out in the rule is not exclusive, and that an affidavit which substantially complies with the affidavit set out in the rule will suffice).

words that appear in Rule 902(10)(b).

The rules of evidence do not require that the qualified witness who lays the predicate for the admission of business records be their creator or have personal knowledge of the contents of the record; the witness is required only to have personal knowledge of the manner in which the records were kept.[524]

Once a successor is assigned the rights to contracts in a case, it is not necessary that the predecessor verify those records through a separate custodian of records affidavit.[525]

3. Substance.

The affidavit must set forth facts as would be admissible in evidence.[526] It cannot be conclusory.[527] Nor can it be based on subjective beliefs.[528] The line separating admissible statements of fact and inadmissible opinions or conclusions is difficult to draw precisely. One of the policy considerations supporting the prohibition against conclusory affidavits is that they are not subject to being controverted readily.[529]

A court of appeals reviewing a conclusory affidavit[530] held that an affidavit supporting the creditor's motion for summary judgment merely recited a legal conclusion in stating that certain collateral was disposed of "'at public sale in conformity with reasonable commercial practices . . . in a commercially reasonable manner.'"[531] Summary judgment was precluded, absent facts concerning the sale of the collateral in question.[532]

Texas courts have considered a number of other evidentiary issues for summary judgment affidavits. First, affidavits may not be based on hearsay.[533] However, "[i]nadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay."[534] Second, "affidavits that violate the parol evidence rule are not competent summary judgment evidence."[535] Third, if the requirements of Texas Rule of Evidence 803(6) for business records are not met, business

524. *See Tex. R. Evid.* 803(6), 902(10); *Singh v. Citibank (South Dakota), N.A.*, No. 03-10-00408-CV (Tex. App. - Austin March 24, 2011, no pet.); *Jones v. Citibank (S.D.), N.A.*, 235 S.W.3d 333, 337 (Tex. App. - Fort Worth 2007, no pet.).

525. *See Rockwall Commons Assocs. v. MRC Mortg. Grantor Trust I*, 331 S.W.3d 500 (Tex. App. - El Paso, 2010, no pet.) (Affidavit on purchased debt. Assignee may properly execute a business records affidavit concerning record keeping on assigned accounts); *Ltd. Logistics Servs. v. Villegas*, 268 S.W.3d 141, 146 (Tex. App. - Corpus Christi 2008, no pet.) (Signed instruments that create legal rights, such as contracts, are not hearsay because they have legal effect independent of the truth of any statement contained within them); *Cockrell v. Republic Mortgage Ins. Co.*, 817 S.W.2d 106, 112-13 (Tex. App. - Dallas 1991, no writ).

526. *Aldridge v. De Los Santos*, 878 S.W.2d 288, 296 (Tex. App. - Corpus Christi 1994, writ dism'd w.o.j.) (holding affidavits unsupported by facts and consisting of legal conclusions do not establish an issue of fact); *Cuellar v. City of San Antonio*, 821 S.W.2d 250, 252 (Tex. App. - San Antonio 1991, writ denied).

527. *Burrow v. Arce*, 997 S.W.2d 229, 235-36 (Tex. 1999); *In re Am. Home Prods. Corp.*, 985 S.W.2d 68, 74 (Tex. 1998); 924 S.W.2d 120, 122 ("Conclusory affidavits are not enough to raise fact issues."); *Del Mar Capital, Inc. and James D. Butcher v. Prosperity Bank*, No. 01-14-00028-CV, (Tex. App. - Houston [1st Dist.] Nov. 6, 2014), (Bank officer's affidavit was conclusory when it divided the total amount owed on a delinquent promissory note into three categories, principal, interest and late charges and fees, but did not contain any factual support or additional evidence how the affiant reached that determination.) A statement is conclusory if it provides a conclusion but no underlying facts in support of the conclusion. *See Hou-Tex., Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App. - Houston [14th Dist.] 2000, no pet.).

528. *Tex. Div.-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994) (per curiam) (stating that subjective beliefs are nothing more than conclusions).

529. 924 S.W.2d at 122.

530. *Schultz v. General Motors Acceptance Corp.*,704 S.W.2d 797, 798 (Tex. App. - Dallas, 1985, no writ).

531. *Id.* (quoting the movant's affidavit).

532. *Id.*

533. *Einhorn v. LaChance*, 823 S.W.2d 405, 410 (Tex. App. - Houston [1st Dist.] 1992, writ dism'd w.o.j.); *Lopez v. Hink*, 757 S.W.2d 449, 451 (Tex. App. - Houston [14th Dist.] 1988, no writ); *Butler v. Hide-A-Way Lake Club, Inc.*, 730 S.W.2d 405, 411 (Tex. App. - Eastland 1987, writ ref' d n.r.e.).

534. TEX. R. EVID. 802; *see Dolenz v. A.B.*, 742 S.W.2d 82, 83 n.2 (Tex. App. - Dallas 1987, writ denied).

535. *Fimberg v. FDIC*, 880 S.W.2d 83, 86 (Tex. App. - Texarkana 1994, writ denied) (holding an affidavit to be impermissible parol evidence where the note at issue was not ambiguous) (citing *Rosemont Enters., Inc. v. Lummis*, 596 S.W.2d 916, 923-24 (Tex. Civ. App. - Houston [14th Dist.] 1980, no writ) (holding an affidavit alleging a prior contradicting agreement was barred by the parol evidence rule)).

records may not be proper summary judgment proof.[536]

4. Effect of Improper Affidavits.

Affidavits that do not meet the requirements of Rule 166a will neither sustain nor preclude a summary judgment,[537] and will not be entitled to evidentiary consideration.[538] If a deficiency in an affidavit is substantive, the opponent's right to argue the deficiency on appeal is not waived by failure to except during the permissible time limits.[539] However, "defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend."[540] The objecting party must also obtain a ruling on the objections. Failure to obtain a ruling on an objection to form does not preserve the complaint for appellate consideration.[541]

The personal knowledge requirement for affidavits is not met by a statement based upon the affiant's "own personal knowledge and/or knowledge which he has been able to acquire upon inquiry."[542] Such a statement "provide[s] no representation whatsoever" that the facts contained in the affidavit are true.[543]

5. Affidavits by Counsel.

The personal knowledge requirement of Rule 166a(f) has plagued attorneys signing summary judgment affidavits on behalf of their clients. Under Rule 14, "[w]henever it may be necessary or proper for any party to a civil suit or proceeding to make an affidavit, it may be made by either the party or his agent or his attorney."[544] While this seemingly approves counsel as an appropriate affiant for all purposes, courts have held consistently that the

536. TEX. R. EVID. 803(6); *see also Travelers Constr., Inc. v. Warren Bros. Co*., 613 S.W.2d 782, 785-86 (Tex. Civ. App. - Houston [14th Dist.] 1981, no writ) (holding an affidavit was defective because it did not satisfy the then existing requirements for admission of a business record).

537. *See Box v. Bates*, 346 S.W.2d 317, 319 (Tex. 1961) (noting after rejecting an affidavit as conclusory, there was no other evidence on file); *see also Aldridge v. De Los Santos*, 878 S.W.2d 288, 296 (Tex. App. - Corpus Christi 1994, writ dism'd w.o.j.).

538. *Clendennen v. Williams*, 896 S.W.2d 257, 260 (Tex. App. - Texarkana 1995, no writ*); Kotzur v. Kelly*, 791 S.W.2d 254, 255-56 (Tex. App. - Corpus Christi 1990, no writ) (finding that the evidence was unauthenticated and therefore not summary judgment proof).

539. *Progressive County Mut. Ins. Co. v. Carway*, 951 S.W.2d 108, 117 (Tex. App - Houston [14th Dist.] 1997, writ denied); *Ramirez v. Transcon. Ins. Co.*, 881 S.W.2d 818, 829 (Tex. App. - Houston [14th Dist.] 1994, writ denied); *Habern v. Commonwealth Nat'l Bank of Dallas*, 479 S.W.2d 99, 101 (Tex. Civ. App. - Dallas 1972, no writ) (holding the failure to object to a substantive defect did not constitute waiver); *see also De Los Santos v. Sw. Tex. Methodist Hosp.*, 802 S.W.2d 749, 754-55 (Tex. App. - San Antonio 1990, no writ) (holding that the affidavit signed by an attorney on behalf of the affiant, even with the affiant's permission, is substantively defective and the objection was made in open court), overruled on other grounds by *Lewis v. Blake*, 876 S.W.2d 314 (Tex. 1994) (per curiam).

540. TEX. R. CIV. P. 166a(f); *see also* 833 S.W.2d 747, 749 (quoting TEX. R. CIV. P. 166a(f)). A specific objection is one that enables the trial court to understand the precise grounds so as to make an informed ruling and affords the offering party an opportunity to remedy the defect, if possible. *McKinney v. Nat'l Union Fire Ins. Co.*, 772 S.W.2d 72, 74 (Tex. 1990). *Clef Construction, Inv. v. CCV Holdings, LLC,* No. 14-13-00569-CV (Tex. App. - Houston [14th Dist.], August 26, 2014) (Objections were not preserved where respondent failed to make complaint with specificity that the affiant lacked personal knowledge or that the affidavit contained hearsay. The objection presented no grounds for disregarding the affidavit. The only reason offered for the affidavit being conclusory was that it was not supported by business records).

541. *Lopez v. Sonic Rests., Inc.*, 04-10-00318-CV (Tex. App. - San Antonio, Oct. 13, 2010, pet. denied), 2010 Tex. App. LEXIS 8235 (Because the record in this case did not show that the trial court ruled on the objections made by the appellant, the complaint that the affidavits were not based on personal knowledge was not preserved for appellate review); *Clarendon Nat'l Ins. Co. v. Thompson*, 199 S.W.3d 482, 490 n.7 (Tex. App. - Houston [1st Dist.] 2006, no pet.) (Appellant lodged a hearsay objection to appellee's affidavit testimony and objected that many statements in all three affidavits were not based on personal knowledge; the record did not show that appellant obtained a ruling on these objections); *Thompson v. Curtis*, 127 S.W.3d 446, 450 (Tex. App. - Dallas 2004, no pet.) (Appellants' objection that all three of appellee's summary judgment affidavits fail to state how the affiant had personal knowledge was waived on appeal because the appellants failed to obtain a ruling on this objection in the trial court).

542. 888 S.W.2d 469, 470 (Tex. 1994) (per curiam); *see* 274 S.W.3d 666.

543. 888 S.W.2d 469, 470 (holding affidavits used in a privilege dispute were defective because they failed to show they were based on personal knowledge and did not represent that the disclosed facts were true).

544. TEX. R. CIV. P. 14.

rule does not obviate the need for personal knowledge of the facts in an affidavit.[545] Merely swearing that the affiant is the attorney of record for a party, and that the facts stated in the motion for summary judgment are within his or her personal knowledge and are true and correct, does not meet the personal knowledge test.[546] This type of affidavit is ineffectual to oppose a motion for summary judgment or support a motion for summary judgment on the merits, except concerning attorney's fees.[547] Unless the summary judgment involves attorney's fees, the attorney's affidavit should explicitly state that the attorney has personal knowledge of the facts in the affidavit and should recite facts that substantiate the lawyer's alleged personal knowledge.

If counsel is compelled to file an affidavit on the merits of a client's cause of action or defense, one court has suggested the proper procedure:

> While Rule 14 of the Texas Rules of Civil Procedure permits an affidavit to be made by a party's attorney or agent, this rule does not obviate the necessity of showing that the attorney has personal knowledge of the facts, as distinguished from information obtained from the client. Ordinarily, an attorney's knowledge of the facts of a case is obtained from the client. Consequently, if the attorney must act as affiant, the better practice is to state explicitly how the information stated in the affidavit was obtained.[548]

However, an attorney may authenticate documents offered as summary judgment evidence.[549]

6. Unsworn Declarations.

A recent applicable amendment to the Texas Civil Practices and Remedies Code authorizes the use of an unsworn declaration in lieu of an "affidavit required by statute or required by rule, order, or requirement adopted as provided by law." Tex. Civ. Prac. & Rem. Code §132.001, Amended by Acts 2013, 83rd Leg. - Regular Session, Ch. 515, Sec. 1, eff. September 1, 2013. There is no "requirement" that a motion for summary judgment be supported by an affidavit. Observe that Tex. R. Civ. P. 166a(a) authorizes a claimant to file a traditional motion for summary judgment "with or without supporting affidavits"; Tex. R. Civ. P. 166a(b) authorizes a defending party to file a motion for summary judgment "with or without supporting affidavits"; and Tex. R. Civ. P. 166a(i) authorizes a no-evidence motion for summary judgment against a claim or defense on which an adverse party would have the burden of proof at trial but does not require the support

545. *E.g., Cantu v. Holiday Inns, Inc*., 910 S.W.2d 113, 116 (Tex. App. - Corpus Christi 1995, writ denied) ("A party's attorney may verify the pleading where he has knowledge of the facts, but does not have authority to verify based merely on his status as counsel"); *Webster*, 833 S.W.2d at 749 (holding the attorney's verification of a summary judgment response was inadmissible as summary judgment proof both because pleadings, even if verified, are incompetent proof, and because the attorney's verification contained no factual recitals and contained no facts showing the attorney's competency to make the affidavit); *Soodeen v. Rychel*, 802 S.W.2d 361, 365 (Tex. App. - Houston [1st Dist.] 1990, writ denied) (holding attorney's affidavit, attached to the summary judgment response, was ineffectual to oppose summary judgment because the affidavit failed to demonstrate how the attorney was competent to testify on the decisive issue).

546. 833 S.W.2d at 749 (holding sworn statement by defendant's attorney that alleged the statements contained in the motion were correct was improper summary judgment evidence); *Carr v. Hertz Corp.*, 737 S.W.2d 12, 13-14 (Tex. App - Corpus Christi 1987, no writ) (holding attorney's affidavit ineffectual as summary judgment evidence because it did not show the affiant's competence as a witness to testify regarding the facts alleged).

547. 737 S.W.2d at 13–14; *see, e.g., Webster*, 833 S.W.2d at 749; 802 S.W.2d at 365 (rejecting attorney's affidavit because it did not demonstrate attorney's competence to testify regarding negligent entrustment); *Harkness v. Harkness*, 709 S.W.2d 376, 378 (Tex. App. - Beaumont 1986, writ dism'd) (requiring an attorney who makes an affidavit to show personal knowledge of the facts); *Landscape Design & Constr., Inc. v. Warren*, 566 S.W.2d 66, 67 (Tex. Civ. App. - Dallas 1978, no writ) (disallowing attorney's affidavit as not stating personal knowledge of the facts).

548. 566 S.W.2d at 67.

549. *Leyva v. Soltero*, 966 S.W.2d 765, 768 (Tex. App. - El Paso 1998, no pet.) (documents sworn to as "true and correct" copies of the originals by plaintiff's attorney were properly authenticated) .

of an affidavit. Tex. R. Civ. P.166a (as amended through September 1, 2015) has not yet been amended to address unsworn declarations authorized by Tex. Civ. Prac. & Rem. Code §132.001.

The unsworn declaration must be (1) in writing; (2) subscribed by person making the declaration as true under penalty of perjury; and (3) must include a jurat in prescribed form. The substantial form of the required jurat is set forth in Tex. Civ. Prac. & Rem. Code §132.001(d).

The second requirement (subscription as true under penalty of perjury) appears to supplant an affidavit's requirements showing affirmatively that it is based on personal knowledge, that the facts sought to be proved would be "admissible in evidence" at a conventional trial, and that the facts recited therein are "true and correct."

Attorneys should not sign an unsworn declaration under Tex. Civ. Prac. & Rem. Code §132.001 in support of a motion for summary judgment for the same reasons stated above concerning affidavits.

G. Other Evidence.

Summary judgment proof is not limited to affidavits and discovery materials. Parties can, and have, introduced a variety of additional forms of proof, including stipulations,[550] photographs,[551] testimony from prior trials,[552] transcript from administrative hearings,[553] court records from other cases,[554] the statement of facts from an earlier trial (now called the reporter's record),[555] and judicial notice.[556]

H. Expert and Interested Witness Testimony.

With the exception of attorney's fee affidavits, it is infrequent that an expert witness' affidavit is required in support of a motion for summary judgment in a collections case. Special considerations in subparagraphs 1.b. and c. below are largely inapplicable to collections cases, but are helpful in understanding requirements that may apply to use of expert affidavits in other causes.

For many years, Texas courts held that interested or expert witness testimony would not support a summary judgment motion or response.[557] However, the 1978 amendment to Rule 166a specifically permits the granting of a motion for summary judgment based on the uncontroverted testimonial evidence of an expert witness, or of an interested witness, if the trier of fact must be guided solely by the opinion testimony of experts as to a subject matter.[558] The evidence must meet the following criteria:

(1) it is clear, positive, and direct;

(2) it is otherwise credible and

550. *Kinner Transp. & Enters., Inc. v. State*, 614 S.W.2d 188, 189 (Tex. Civ. App. - Eastland 1981, no writ).

551. *Langford v. Blackman*, 790 S.W.2d 127, 132-33 (Tex. App. - Beaumont 1990), *rev'd on other grounds*, 795 S.W.2d 742 (Tex. 1990) (per curiam).

552. *Murillo v. Valley Coca-Cola Bottling Co.*, 895 S.W.2d 758, 761-62 (Tex. App. - Corpus Christi 1995, no writ); *Kazmir v. Suburban Homes Realty*, 824 S.W.2d 239, 244 (Tex. App. - Texarkana 1992, writ denied) (accepting pleadings from other lawsuits as proper summary judgment evidence).

553. *Vaughn v. Burroughs Corp.*, 705 S.W.2d 246, 247 (Tex. App. - Houston [14th Dist.] 1986, no writ).

554. *Gilbert v. Jennings*, 890 S.W.2d 116, 117 (Tex. App. - Texarkana 1994, writ denied); *see also Murillo*, 895 S.W.2d at 761.

555. *Austin Bldg. Co. v. Nat'l Union Fire Ins. Co*., 432 S.W.2d 697, 698-99 (Tex. 1968) (affirming the lower court's remand because the plaintiff's submission of a statement of facts (reporter's record) from a previous case was proper); 895 S.W.2d at 761 (holding prior trial testimony from different proceedings may be summary judgment evidence); *Executive Condos., Inc. v. State*, 764 S.W.2d 899, 901 (Tex. App. - Corpus Christi 1989, writ denied).

556. *Settlers Vill. Cmty. Improvement Ass'n v. Settlers Vill. 5.6, Ltd.*, 828 S.W.2d 182, 184 (Tex. App. - Houston [14th Dist.] 1992, no writ) (taking judicial notice of the definition of the term "mill").

557. *See, e.g., Lewisville State Bank v. Blanton*, 525 S.W.2d 696, 696 (Tex. 1975) (per curiam) (holding the affidavit of an interested party will not support a summary judgment but may raise a question of fact); *Gibbs v. Gen. Motors Corp.*, 450 S.W.2d 827, 828-29 (Tex. 1970) (finding expert testimony by affidavit does not establish facts as a matter of law).

558. TEX. R. CIV. P. 166a(c); *see also Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam); *Republic Nat'l Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam) (holding affidavit was admissible as proper summary judgment evidence because it was readily controvertible); *Duncan v. Horning*, 587 S.W.2d 471, 472-73 (Tex. Civ. App. - Dallas 1979, no writ) (approving affidavit as competent summary judgment evidence under Tex. R. Civ. P. 166a(c).

free from contradictions and inconsistencies; and
(3) it could have been readily controverted.[559]

1. Expert Opinion Testimony.

The law concerning use of expert witnesses' testimony is complex and evolving.[560]

a. Requirements for Expert Witness Testimony.

1. Content of Testimony

Experts are considered interested witnesses and their testimony is subject to the requirement of being clear, positive, direct, credible, free from contradictions, and susceptible to being readily controverted.[561] An expert's opinion testimony can defeat a claim as a matter of law, even if the expert is an interested witness. Indeed, summary judgment evidence in the form of expert testimony might be necessary to survive a no-evidence summary judgment.[562]

"But it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness."[563]

Expert testimony must be comprised of more than conclusory statements and must be specific.[564] For example, affidavits that recite that the affiant "estimates," "believes," or has an "understanding" of certain facts are not proper summary judgment evidence.[565] "Such language does not positively and unqualifiedly represent that the 'facts' disclosed are true."[566] Likewise, legal conclusions of an expert are not probative to establish proximate cause.[567] "Bare opinions alone" will not suffice to defeat a claim as a matter of law.[568] Experts must link their conclusions to the facts.[569] Opinions in other than collections cases are instructive. In one case, an affidavit that did not include the legal basis or reasoning for an attorney's expert opinion that he did not commit malpractice was "simply a sworn denial of [plaintiff's] claims."[570] Because it was conclusory, the court found it to be incompetent summary judgment evidence.[571] Similarly, a conclusory statement by a Maryland doctor that a Texas doctor was entitled to be paid (and therefore not covered by the Good Samaritan statute) was not sufficient to create a fact issue.[572] In another example, the Waco Court of Appeals held that an expert's statement that a ramp was unreasonably dangerous was a conclusory statement and, as such, was insufficient to defeat a summary judgment.[573]

The test for admissibility of an expert's testimony is whether the proponent established that the expert possesses knowledge, skill, experience, training or education regarding the specific issue before the court that would qualify the expert to give an opinion on that particular subject.[574] Mere conclusions of a lay witness are

559. TEX. R. CIV. P. 166a(c); *see Trico Techs. Corp.*, 949 S.W.2d at 310.

560. *See generally* Harvey Brown, *Daubert Objections to Public Records: Who Bears the Burden of Proof* ?, 39 HOUS. L. REV. 413 (2002) (reviewing the burden of proof issues and Texas Rule of Evidence 803(8)); Harvey G. Brown & Andrew Love, *Tips on Expert Witness Practice*, 3 ADVOC., Winter 2005, at 34 (discussing the various aspects of expert witness testimony in civil litigation).

561. *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam).

562. 198 S.W.3d 217 (affirming no evidence summary judgment because the non-movant did not present any expert evidence on causation).

563. 997 S.W.2d 229, 235 (Tex. 1999).

564. *See* 198 S.W.3d 217; *Wadewitz*, 951 S.W.2d at 466-67; *Lara v. Tri-Coastal Contractors, Inc*., 925 S.W.2d 277, 278-79 (Tex. App. - Corpus Christi 1996, no writ).

565. 924 S.W.2d 120, 122 (citing *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984)).

566. *Id.*

567. *Barraza v. Eureka Co*., 25 S.W.3d 225, 230 (Tex. App. - El Paso 2000, pet. denied).

568. 997 S.W.2d at 235.

569. *See id.; Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999).

570. *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991) (per curiam).

571. *Id.; see also Lampasas v. Spring Ctr., Inc*., 988 S.W.2d 428, 434-35 (Tex. App. - Houston [14th Dist.] 1999, no pet.).

572. *McIntyre v. Ramirez*, 109 S.W.3d 741, 745-46 (Tex. 2003) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.001(b)(1) (Vernon 2005)).

573. *Alger v. Brinson Ford, Inc.*, 169 S.W.3d 340, 344 (Tex. App. - Waco 2005, no pet.).

574. *Roberts v. Williamson*, 111 S.W.3d 113, 120-21 (Tex. 2003); *Downing v. Larson*, 153 S.W.3d 248, 253

not competent evidence for the purpose of controverting expert opinion evidence.[575] However, on subject matter in which the fact-finder would not be required to be guided solely by the opinion testimony of experts, lay testimony may be permitted.[576] Lay testimony may be accepted over that of experts.[577] Thus, in a situation where lay testimony is permitted, it can be sufficient to raise a fact issue.[578] Also, an expert's affidavit that is based on assumed facts that vary from the actual undisputed facts has no probative force.[579]

Reasonableness of attorney's fees is a question of fact. However, expert testimony that is clear, direct, and uncontroverted may establish fees as a matter of law.[580] "'To constitute proper summary judgment evidence . . . an affidavit [supporting attorney's fees] must be made on personal knowledge, set forth facts that would be admissible in evidence, and show the affiant's competence.'"[581]

2. Designation of Expert Witness

Rule 193.6 excludes expert witnesses not timely identified in summary judgment proceedings just as they would be in a conventional trial.[582] Rule 195.2 permits a plaintiff to satisfy this designation requirement by furnishing the information listed in Rule 194.2(f) in response to a request for disclosure.[583]

(Tex. App. - Beaumont 2004, no pet.).

575. *Nicholson v. Mem'l Hosp. Sys*., 722 S.W.2d 746, 751 (Tex. App. - Houston [14th Dist.] 1986, writ ref'd n.r.e.); *see also Hernandez v. Lukefahr*, 879 S.W.2d 137, 142 (Tex. App. - Houston [14th Dist.] 1994, no writ); *White v. Wah*, 789 S.W.2d 312, 318 (Tex. App. - Houston [1st Dist.] 1990, no writ).

576. *See McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986).

577. *Id.*

578. *See id.*

579. *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995).

580. *Ragsdale v. Progressive Voters League*, 801 S.W.2d 880, 881-82 (Tex. 1990) (per curiam).

581. *Collins v. Guinn*, 102 S.W.3d 825, 837 (Tex. App. - Texarkana 2003, pet. denied) (*quoting Merchandise Ctr., Inc. v. WNS, Inc*., 85 S.W.3d 389, 397 (Tex. App. - Texarkana 2002, no pet.).

582. 285 S.W.3d 879; *see infa* Para. V.I.

583. TEX. R. CIV. P. 193.6, 194.2(f), 195.2.

b. Sufficiency of Expert Opinion

An expert's testimony must be based upon a reliable foundation and be relevant.[584]

The genesis of the standards of reliability and relevance concerning expert testimony was the United States Supreme Court case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[585] It held that under the Federal Rules of Evidence, the trial court must ensure that all scientific evidence is not only "relevant," but also "reliable."[586] *In Kumho Tire Co. v. Carmichael*, the Supreme Court held that the *Daubert* factors apply to engineers and other experts who are not scientists.[587] The court must determine, pursuant to Federal Rule of Evidence 702, whether the expert opinion is "scientifically valid," based on factors such as: (1) whether the theory or technique has been subjected to peer review and publication, (2) the known or potential rate of error of the technique, and (3) whether the theory or technique is "generally accepted" in the scientific community.[588]

Similarly, Texas Rule of Evidence 702 states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise."[589]

The other relevant evidentiary rule, Texas Rule of Evidence 705, provides that "[i]f the court determines that the underlying facts or data do not provide a sufficient basis for the expert's opinion under Rule 702 or 703, the opinion is inadmissible."[590]

These rules impose a gatekeeping obligation on the trial judge to ensure the reliability of all expert testimony.[591] The trial

584. *E.I. du Pont de Nemours & Co. v. Robinson* , 923 S.W.2d 549, 556 (Tex. 1995).

585. *See generally* 509 U.S. 579 (1993) (establishing standards of reliability and relevance for expert testimony).

586. *Id.* at 589.

587. 526 U.S. 137, 147.

588. 509 U.S. at 592-94.

589. TEX. R. EVID. 702.

590. *Id.* 705(c).

591. *Gammill v. Jack Williams Chevrolet, Inc*., 972 S.W.2d 713, 726 (Tex. 1998).

judge fulfills this obligation by determining as a precondition to admissibility that: (1) the putative expert is qualified as an expert, (2) the expert's testimony has a reliable basis in the knowledge and experience of the relevant discipline, and (3) the testimony is relevant.[592]

Use of experts in summary judgment practice requires meeting these standards for experts through summary judgment evidence. Many *Daubert/Robinson* battles are causation battles fought at the summary judgment stage. They are a unique mixture of trial and summary judgment practice. Generally, the defendant does one of two things: (1) moves for summary judgment on the grounds that its own expert testimony conclusively disproves causation and the plaintiff's expert testimony does not raise a fact issue on causation because he or she does not pass the *Daubert/Robinson* test; or more simply, (2) moves for summary judgment on the grounds that there is no evidence of causation because the plaintiff's causation expert testimony does not pass *Daubert/Robinson*.

The possible results of failure to meet the *Daubert/Robinson* tests are demonstrated by *Weiss v. Mechanical Associated Services, Inc*.[593] In *Weiss*, the San Antonio Court of Appeals determined that the trial court did not abuse its discretion in effectively excluding the plaintiff's expert testimony on causation by granting the defendant's motion for summary judgment.[594] The appellate court rejected any evidence by the expert on the grounds that it failed to meet the *Robinson* tests.[595]

This ruling carries the following implications: (1) in a summary judgment proceeding, the movant challenging the expert's testimony need not request a ***Robinson*** hearing and secure a formal ruling from the trial court; and (2) the granting of the summary judgment, even if the order does not mention the expert challenge, in effect, is a ruling sustaining the movant's expert challenge.[596] Conversely, the El Paso Court of Appeals has held that if a trial court agrees an expert's testimony is admissible, the expert's opinion constitutes more than a scintilla of evidence to defeat a no-evidence summary judgment.[597] Other courts have implicitly ruled on the reliability of expert testimony at summary judgment.[598]

The Texarkana court in *Bray v. Fuselier*,[599] however, refused to rule that the trial court's granting of summary judgment was an implicit ruling on the *Robinson* challenge, because defendant had made numerous other objections to Bray's summary judgment evidence, and it could be argued that the court's granting of summary judgment was an implicit ruling on any one of these other objections.[600]

An expert's opinion that is unsupported and speculative on its face can be challenged for the first time on appeal.[601]

2. Nonexpert, Interested Witness Testimony

In addition to expert testimony, nonexpert, interested party testimony may provide a basis for summary judgment.[602] The interested party's

592. *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995); *see also Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 904 (Tex. 2004).

593. 989 S.W.2d 120, 125-26.

594. *Id.*

595. *Id.* at 125.

596. *Id.* at 124 n.6.

597. *Barraza v. Eureka Co*., 25 S.W.3d 225, 232 (Tex. App. - El Paso 2000, pet. denied).

598. *See Emmett Props., Inc. v. Halliburton Energy Servs., Inc*., 167 S.W.3d 365, 374 (Tex. App. - Houston [14th Dist.] 2005, pet. denied) (affirming the no-evidence summary judgment against the plaintiff because its expert failed to consider alternative causes of the damages and the plaintiffs failed to respond with any evidence raising a genuine fact issue on the element of causation*); Martinez v. City of San Antonio*, 40 S.W.3d 587, 595 (Tex. App. - San Antonio 2001, pet. denied) (affirming grant of a no-evidence summary motion and holding that the plaintiffs' expert testimony constituted no evidence the defendant caused the plaintiffs' injuries because the expert failed to rule out alternative sources of lead contamination in arriving at his lead calculation).

599. 107 S.W.3d 765.

600. *Id.* at 770.

601. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp*., 136 S.W.3d 227, 233 (Tex. 2004) (allowing expert challenge following jury trial).

602. *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam) (allowing the uncontroverted affidavit of a human resources manager in a workers compensation case because the plaintiff made no attempt to controvert it); *Republic Nat'l Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986) (per curiam); *Danzy v. Rockwood Ins. Co*., 741 S.W.2d 613, 614-15 (Tex. App. - Beaumont 1987, no writ) (admitting affidavit of interested

testimony must also be "clear, positive and direct, otherwise credible . . . and could have been readily controverted."[603] This determination is made on a case-by-case basis.[604]

The Texas Supreme court, in reviewing the competence of interested party testimony,[605] found that, in a retaliatory discharge action under the workers compensation law, interested party testimony by supervisory and administrative personnel established a legitimate, non-discriminatory reason for the discharge.[606] The court explained that the affidavit testimony could have been readily controverted by facts and circumstances belying the employer's neutral explanation and thereby raising a material issue of fact.[607]

Statements of interested parties, testifying about what they knew or intended, are self-serving and do not meet the standards for summary judgment proof.[608] Issues of intent and knowledge are not susceptible to being readily controverted and therefore, are not appropriate for summary judgment proof.[609] Nonetheless, the mere fact that summary judgment proof is self-serving does not necessarily make the evidence an improper basis for summary judgment.[610] However, if the affidavits of interested witnesses are detailed and specific, those affidavits may be objective proof sufficient to establish the witnesses' state of mind as a matter of law.[611]

I. Response to Requests for Disclosure [Effect of Failure to Respond Timely].

The failure to respond timely to requests for disclosure under TRCP 194 will result in a denial of introduction of requested information. TRCP 193.6(a) provides that a party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or information that was not timely disclosed, or offer the testimony of a witness (other than a named party) who was not timely identified, unless the court finds that (1) there was good cause for the failure to timely make, amend, or supplement the discovery response; or (2) the failure to timely make, amend, or supplement the discovery response will not unfairly surprise or unfairly prejudice the other parties.[612]

VI. BURDEN OF PROOF

When considering a motion for summary judgment, "the trial court's duty is to determine [whether] there are any material fact issues to try, not to weigh the evidence or determine its credibility and try the case on affidavits."[613] Review of a summary judgment under either a traditional standard or no-evidence standard requires that the evidence be viewed in the light most favorable to the non-movant disregarding all contrary evidence and inferences.[614] With the

party, the owner of the defendant insurance company, which stated its policy regarding appellee's workers compensation policies).

603. TEX. R. CIV. P. 166a(c); *Great American Reserve Insurance Co. v. San Antonio Plumbing Co*., 391 S.W.2d 41, 47 (Tex. 1965); *McMahan v. Greenwood*, 108 S.W.3d 467, 480 (Tex. App. - Houston [14th Dist.] 2003, no pet.).

604. *Lukasik v. San Antonio Blue Haven Pools, Inc.*, 21 S.W.3d 394, 399 (Tex. App. - San Antonio 2000, no pet.) (citing TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE AND REVIEW § 6.03[9][a] (2d ed. 1995)).

605. *Texas Division-Tranter, Inc. v. Carrozza,* 876 S.W.2d 312, 313-14 (Tex. 1994).

606. *Id.*

607. *Id*. at 313.

608. *Grainger v. W. Cas. Life Ins. Co*., 930 S.W.2d 609, 615 (Tex. App. - Houston [1st Dist.] 1996, writ denied) (disallowing affidavits in medical insurance case about the intention to repay the premiums of the appellants); *Clark v. Pruett*, 820 S.W.2d 903, 906 (Tex. App - Houston [1st Dist.] 1991, no writ).

609. *Allied Chem. Corp. v. DeHaven*, 752 S.W.2d 155, 158 (Tex. App - Houston [14th Dist.] 1988, writ denied) (disallowing affidavits showing that there was an intent to form a partnership); *see also* 820 S.W.2d at 906.

610. *Trico Techs. Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997) (per curiam).

611. *See Channel 4, KGBT v. Briggs*, 759 S.W.2d 939, 942 (Tex. 1988).

612. 285 S.W.3d 879, 882; *see Mancuso v. Cheaha Land Services, LLC*, 2-09-241-CV (Tex. App. - Fort Worth Aug. 12, 2010, no pet.), 2010 Tex. App. Lexis 6567.

613. *Richardson v. Parker*, 903 S.W.2d 801, 803 (Tex. App. - Dallas 1995, no writ); *see also Spencer v. City of Dallas*, 819 S.W.2d 612, 615 (Tex. App. - Dallas 1991, no writ).

614. *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002); *Morgan v. Anthony*, 27 S.W.3d 928, 928-29 (Tex. 2000) (per curiam); *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995) (per curiam).

advent of no-evidence summary judgments in Texas, the burden of proof on summary judgment is now allocated in the same manner for defendants and plaintiffs in both state and federal court.[615] "[T]he party with the burden of proof at trial will have the same burden of proof in a summary judgment proceeding."[616]

A plaintiff may move for summary judgment in the following ways:

1. Traditional motion.
   a. By establishing there is no genuine issue of material fact and it is entitlement to judgment as a matter of law on each element of a cause of action, except unliquidated damages; or
   b. By demonstrating the lack of a genuine issue of material fact concerning a counterclaim.

2. No-evidence motion. By asserting there is no evidence on one or more essential elements of defendant's counterclaim.

A defendant may move for summary judgment in the following ways*:*

1. Traditional motion.
   a. By establishing that there is a genuine issue of material fact concerning one or more essential element of the plaintiff's claims;
   b. By establishing all the elements of its affirmative defense; or
   c. By proving each element of its counterclaim as a matter of law.

2. No-evidence motion. By asserting there is no evidence on one or more essential elements of plaintiff's claim.

615. *See* TEX. R. CIV. P. 166a cmt. - 1997.

616. *Barraza v. Eureka Co*., 25 S.W.3d 225, 231 (Tex. App. - El Paso 2000, pet. denied).

A. Traditional Motion.

The standard for determining whether a movant for a traditional motion for summary judgment has met its burden is whether the movant has shown that there is no genuine issue of material fact and judgment should be granted as a matter of law.[617] The party with the burden of proof must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the non-movant's claim or defense as a matter of law.[618]

1. Plaintiff as Movant on Affirmative Claims.

When the plaintiff moves for traditional summary judgment on affirmative claims it is in much the same position as a defendant. The plaintiff must show entitlement to prevail on each element of the cause of action,[619] except unliquidated damages. Unliquidated damages are specifically exempted by Rule 166a(a).[620]

617. 988 S.W.2d 746, 748 (Tex. 1999).

618. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam); *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222 (Tex. 1999); *Wande v. Pharia, L.L.C.*, No. 01-10-00481-CV (Tex. App. - Houston [1st Dist.] Aug. 25, 2011, no pet.) (summary judgment denied when movant failed to present admissible evidence of damages (outstanding debt) in breach of contracts case).

619. *See, e.g., Estate of Todd v. International Bank of Commerce*, No. 01-12-00742-CV (Tex. App. - Houston [1st Dist.] Apr. 18, 2013, no pet.) (Movant in traditional summary judgment on suit against guarantors for deficiency in foreclosure action was not entitled to judgment when it presented no competent evidence of the fair market value of property that was foreclosed (as required by Tex. Prop. Code §51.003 et seq.) and respondent asserted that the fair market value of the properties "exceeded the entire indebtedness" and "eliminate[d] all deficiency against him); *Fry v. Comm'n for Lawyer Discipline*, 979 S.W.2d 331, 334 (Tex. App. - Houston [14th Dist.] 1998, pet. denied); *Green v. Unauthorized Practice of Law Comm*., 883 S.W.2d 293, 297 (Tex. App. - Dallas 1994, no writ); *Brooks v. Sherry Lane Nat'l Bank*, 788 S.W.2d 874, 876 (Tex. App. - Dallas 1990, no writ); *Bergen, Johnson & Olson v. Verco Mfg. Co*., 690 S.W.2d 115, 117 (Tex. App. - El Paso 1985, writ ref'd n.r.e.).

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

The plaintiff meets the burden if he or she produces evidence that would be sufficient to support an instructed verdict at trial.[621] The opponent's silence never improves the quality of a movant's evidence.[622] Even if the non-movant does not file a response and the motion for summary judgment is uncontroverted, the movant must still carry the burden of proof.[623]

The plaintiff is not under any obligation to negate affirmative defenses.[624] The mere pleading of an affirmative defense, without supporting proof, will not defeat an otherwise valid motion for summary judgment.[625]

Where the plaintiff is the movant on its affirmative claims, the plaintiff must affirmatively demonstrate by summary judgment evidence that there is no genuine issue of material fact concerning each element of its claim for relief;[626] and, if the defendant filed a counterclaim, the plaintiff must (1) establish the elements of its cause of action as matter of law, and (2) disprove at least one element of the defendant's counterclaim as a matter of law.[627] Once the movant defendant conclusively establishes the elements of its affirmative defense, the burden is shifted to the plaintiff/non-movant to raise a genuine issue of material fact.[628]

2. Defendant as Movant.

A defendant who moves for traditional summary judgment must show that an essential element of the plaintiff's cause does not exist or he must establish his affirmative defense as a matter of law.[629] If a defendant filed a counterclaim, it

may be proved up at a later date. Unliquidated damages are damages that cannot be determined by a fixed formula and must be established by a judge or jury. BLACK'S LAW DICTIONARY 419 (8th ed. 2004).

621. *Fed. Deposit Ins. Corp. v. Moore*, 846 S.W.2d 492, 494 (Tex. App. - Corpus Christi 1993, writ denied); *Ortega-Carter v. Am. Int'l Adjustment Co*., 834 S.W.2d 439, 441 (Tex. App. - Dallas 1992, writ denied); *Braden v. New Ulm State Bank*, 618 S.W.2d 780, 782 (Tex. Civ. App. - Houston [1st Dist.] 1981, writ ref' d n.r.e.).

622. 488 S.W.2d 64, 67.

623. *See* 589 S.W.2d 671, 678

624. *See infra* Para. VI.A.3 (discussing affirmative defenses).

625. *Hammer v. Powers*, 819 S.W.2d 669, 673 (Tex. App. - Fort Worth 1991, no writ).

626. TEX. R. CIV. P. 166a cmt - 1997.

627. *Newman v. Firstmark Credit Union*, No. 03-14-00315-CV (Tex. App. - Austin, August 21, 2015) (affirmative defenses of equitable estoppel, waiver, and quasi-estoppel were waived when not expressly presented by written answer to the motion or by other written response to the motion); *Taylor v. GWR Operating Co*., 820 S.W.2d 908, 910 (Tex. App. - Houston [1st Dist.] 1991, writ denied); *Adams v. Tri-Cont'l Leasing Corp*., 713 S.W.2d 152, 153 (Tex. App. - Dallas 1986, no writ).

628. *Nichols v. Smith*, 507 S.W.2d 518, 521 (Tex. 1974); *HRN, Inc. v. Shell Oil Co*., 102 S.W.3d 205, 215 (Tex. App. - Houston [14th Dist.] 2003), *rev'd on other grounds*, 144 S.W.3d 429 (Tex. 2004) (finding plaintiffs failed to raise a genuine issue of material fact on duress after defendants had established an affirmative defense).

629. The non-movant must produce sufficient summary judgment evidence to either conclusively prove or raise a material issue of fact as to each element of an affirmative defense. *See Elliot-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex. 1999); *Bienes Raices Ventures, LP v. First Financial Bank, N.A.*, No. 02-14-00365-CV (Tex. App. - Fort Worth June 18, 2015, no pet.) (Respondent bank established statute of limitations affirmative defense); *Bank of America, N.A. v. Alta Logistics, Inc.*, No. 05-13-01633-CV (Tex. App. - Dallas, Feb. 6, 2015, no pet.) (Guarantor conclusively established limitations defense. Bank failed to adduce summary judgment proof raising a fact issue in avoidance of the statute of limitations. Summary judgment granted against bank when it failed to prove it filed its action on guaranty within four year limitations period); *Williams v. Wachovia Mortgage Corp.*, 407 S.W.3d. 391 (Tex. App. - Dallas 2013, pet. denied) (statute of limitations, judicial estoppel, and ratification); *Bosch v. Braes Woods Condominium Association*, No. 01-12-01114-CV (Tex. App. - Houston [1st Dist.] July 11, 2013, pet. denied) (A party may obtain summary judgment based on an affirmative defense that it did not plead, if the nonmoving party does not object to its absence in the moving party's response to the motion); *Garza v. Robinson*, No. 13-11-00015-CV (Tex. App. - Corpus Christi June 27, 2013, no pet.) (statute-of-frauds affirmative defense); *Educap, Inc. v. Sanchez*, No. 01-12-01033-CV (Tex. App. - Houston [1st. Dist.], June 25, 2013, no pet.) (statute of limitations affirmative defense); *Gabriel v. Associated Credit Union of Texas*, No. 14-12-00349-CV (Tex. App. - Houston [14th Dist.] Mar. 7, 2013, pet. denied) (Trial court properly granted traditional summary judgment against debtor's wrongful repossession claim when lender's summary judgment evidence conclusively established the vehicle was security for the loan, the loan was in default (its right to repossess the vehicle), and the vehicle was repossessed without breach of the peace of violation of any statute); *Wells Fargo Bank, N.A. v. Ballestas*, 355 S.W.3d 187 (Tex. App. - Houston [1st Dist.] 2011, no pet.) (bank's claims barred by res judicata and collateral estoppel); 891 S.W.2d 640 (A defendant who conclusively establishes each element of an affirmative defense is entitled to summary judgment); 813 S.W.2d 492 (Summary judgment may be

may file a motion for summary judgment on its counterclaim.

(a) Defeating Plaintiff's Prima Facie Case.

A summary judgment is proper for a defendant as movant only if the defendant establishes that no genuine issue of material fact exists concerning one or more essential elements of the plaintiff's claims and that it is entitled to judgment as a matter of law.[630] The movant has the burden of proof and all doubts are resolved in favor of the non-movant.[631]

(b) Affirmative Defense.

Rule 94 sets forth defenses that must be affirmatively pleaded.[632] The defendant urging summary judgment on an affirmative defense is in much the same position as a plaintiff urging summary judgment on an affirmative claim. The movant defendant must come forward with summary judgment evidence for each element of the affirmative defense.[633] Unless the movant conclusively establishes the affirmative defense, the non-movant plaintiff has no burden to present summary judgment evidence to the contrary.[634] Even so, it is a wise practice to file a response to every summary judgment motion. An "unpleaded affirmative defense may also serve as the basis for a summary judgment when it is raised in the summary judgment motion, and the opposing party does not object to the lack of a [R]ule 94 pleading in either its written response or before the rendition of judgment."[635]

granted on an affirmative defense alone); TEX. R. CIV. P. 166a(c).

630. *See* TEX. R. CIV. P. 166a(c); 988 S.W.2d at 748; *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam); 891 S.W.2d at 644; *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex. 1984); 488 S.W.2d 64, 67 (Tex. 1972).

631. *Roskey v. Tex. Health Facilities Comm'n*, 639 S.W.2d 302, 303 (Tex. 1986) (per curiam).

632. TEX. R. CIV. P. 94 (accord and satisfaction, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense). The right to an offset is an affirmative defense. *See F-Star Socorro, L.P.*, 281 S.W.3d 103, 108 (Tex. App. - El Paso 2008, no pet.). An affirmative defense must be pleaded in a responsive pleading, or the defense will be waived. *Newman v. Firstmark Credit Union*, No. No. 03-14-00315-CV (Tex. App. - Austin, August 21, 2015); *Id.* A preferred method to challenge the amount of a debt is to file a plea of payment under TRCP 95 in addition to an affirmative defense of payment under TRCP 94.

633. *Am. Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994) (involving the fraudulent concealment affirmative defense); *Colony Flooring & Design, Inc. v. Regions Bank*, No. 01-13-00210-CV (Tex. App. - Houston [1st Dist.], May 15, 2014, mem. op.) (Summary judgment denied when evidence raised a fact issue on amount due bank by providing specific factual details about credits and offsets allegedly due); *Lujan v. Navistar Fin. Corp.*, No. 01-12-00740-CV, Tex. App. - Houston [1st. Dist.] April 3, 2014, no pet. (non-movant must do more than merely plead an affirmative defense); *Nichols*, 507 S.W.2d at 520 (stating that "the pleading of an affirmative defense will not, in itself, defeat a motion for summary judgment by a plaintiff whose proof conclusively establishes his right to an instructed verdict if no proof were offered by his adversary in a conventional trial on the merits"); *National Football League Players Association v. Blake's Bar-B-Q, Inc.*, No.01-10-00149-CV (Tex. App. - Houston [1st Dist.] July 21, 2011, no pet.) (fraud claim barred by res judicata. To be entitled to summary judgment on the affirmative defense of res judicata, the movant must establish: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) the same parties or those in privity with them; and (3) a second action based on the same claims as were raised or could have been raised in the first action. C*iting Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010)); *Winchek v. American Express Travel Related Services Co. Inc.*, 232 S.W.3d 197 (Tex. App. - Houston [1st Dist.] 2007, no pet.) (Winchek answered but failed to prove 25 defenses, including release; accord and satisfaction; compromise and settlement; waiver; estoppel; excuse; usury; fraud; failure of conditions precedent; failure to mitigate; lack of consideration, capacity, and notice; and that the claims were barred by the statute of frauds and statute of limitations); 988 S.W.2d 746, 748; 891 S.W.2d 640.

634. *Torres v. W. Cas. & Sur. Co*., 457 S.W.2d 50, 52 (Tex. 1970) (finding that while the plaintiff would suffer a directed verdict at a trial based on the record for failing to carry the burden of proof, the plaintiff has no such burden on defendant's motion for summary judgment); *Bassett v. Am. Nat'l Bank*, 145 S.W.3d 692, 696 (Tex. App. - Fort Worth 2004, no pet.) (A party who opposes a summary judgment by asserting an affirmative defense must offer competent summary judgment proof to support the allegations); *see Keenan v. Gibraltar Sav. Ass'n,* 754 S.W.2d 392, 393 (Tex. App. - Houston [14th Dist.] 1988, no writ)*; see also Deer Creek Ltd. v. N. Am. Mortgage Co.*, 792 S.W.2d 198, 200-01 (Tex. App. - Dallas 1990, no writ) (noting when the mortgage company sufficiently pleaded and proved release, the burden shifted to debtor to raise a fact issue concerning a legal justification for setting aside the release).

635. 813 S.W.2d 492, 494 (noting that petitioner sued for specific performance of contracts; in the summary

A defendant seeking summary judgment on the statute of limitations faces a dual burden.[636] The defendant must prove when the cause of action accrued[637] and negate the discovery rule by proving as a matter of law that there is no genuine issue of fact about when the plaintiff discovered or should have discovered the nature of the injury.[638] Thus, when the non-movant interposes a suspension statute, the burden is on the movant to negate the applicability of the tolling statute.[639] This burden does not apply to a party seeking to negate the discovery rule when the non-movant has not pleaded or otherwise raised the discovery rule.[640]

A plaintiff who has conclusively established the absence of disputed fact issues in its claim for relief will not be prevented from obtaining summary judgment because the defendant merely pleaded an affirmative defense.[641] The plaintiff is not under any obligation to negate affirmative defenses. The mere pleading of an affirmative defense, without supporting proof, will not defeat an otherwise valid motion for summary judgment.[642] An affirmative defense will prevent the granting of a summary judgment only if the defendant supports each element of the affirmative defense by summary judgment evidence.[643]

A party raising an affirmative defense in opposition to a motion for summary judgment must either:

> (1) present a disputed fact issue on the opposing party's failure to satisfy his or her own burden, or
> (2) establish at least the existence of a fact issue on each element of his or her own affirmative defense by summary judgment proof.[644]

(c) Counterclaim.

A defendant seeking summary judgment on a counterclaim has the same burden as a plaintiff. It must prove each element of its counterclaim as a matter of law.[645]

B. No-Evidence Motion.

The no-evidence summary judgment rule

judgment motion, the non-movant relied upon an affirmative defense that was not included in earlier pleadings).

636. *See infra* Para. III.F. (discussing Statutes of Limitations/Statutes of Repose).

637. *Burns v. Thomas*, 786 S.W.2d 266, 267 (Tex. 1990).

638. *Id.* The discovery rule essentially states that the statute of limitations does not begin to run until discovery of the wrong or until the plaintiff acquires knowledge that, in the exercise of reasonable diligence, would lead to the discovery of the wrong; *see also Moreno v. Sterling Drug, Inc*., 787 S.W.2d 348, 351 (Tex. 1990); *Gaddis v. Smith*, 417 S.W.2d 577, 578 (Tex. 1967).

639. *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 891 (Tex. 1975) (per curiam) (finding the burden was on the movant to prove the affirmative defense of limitations by conclusively establishing lack of diligence and the inapplicability of the tolling statute).

640. *In re Estate of Matejek*, 960 S.W.2d 650, 651 (Tex. 1997) (per curiam).

641. *Kirby Exploration Co. v. Mitchell Energy Corp*., 701 S.W.2d 922, 926 (Tex. App. - Houston [1st Dist.] 1985, writ ref'd n.r.e.) (noting the mere recitation of facts is not sufficient to raise the affirmative defenses of equitable or statutory estoppel); *Clark v. Dedina*, 658 S.W.2d 293, 296 (Tex. App. - Houston [1st Dist.] 1983, writ dism'd).

642. *"Moore" Burger, Inc. v. Phillips Petrol. Co.*, 492 S.W.2d 934, 936-37 (Tex. 1972) (Estoppel. A party raising an affirmative defense in opposition to a motion for summary judgment must either (1) present a disputed fact issue on the opposing party's failure to satisfy its own burden of proof or (2) establish at least the existence of a fact issue on each element of its affirmative defense by summary judgment proof); *Baxley v. PS Group*, LLC, 2-09-217-CV (Tex. App. – Fort Worth Mar. 25, 2010, no pet.) (Defendant pleaded lack of consideration and fraudulent inducement as affirmative defenses but failed to come forward with competent summary judgment proof raising a genuine issue of material fact on each element of her defenses. At most, defendant presented only legal conclusions, which do not constitute competent summary judgment proof.); *Valdez v. Pasadena Healthcare Mgmt., Inc*., 975 S.W.2d 43, 45 (Tex. App. - Houston [14th Dist.] 1998, pet. denied) (Non-movant must urge defense in its response and provide summary judgment proof to create a fact issue as to each element of the defense); Judge David Hittner and Lynne Liberato, *Summary Judgments in Texas, State and Federal Practice*, 46 Hous. L. Rev. 1379, 1456, 57 (2010), *citing Hammer v. Powers*, 819 S.W.2d 669, 673 (Tex. App. - Fort Worth 1991, no writ.

643. *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (holding that an affidavit supporting affirmative defense was conclusory, and therefore, not sufficient summary judgment evidence); *Valdez v. Pasadena Healthcare Mgmt., Inc*., 975 S.W.2d 43, 45.

644. *See "Moore" Burger, Inc. v. Phillips Petroleum Co*., 492 S.W.2d at 936-37.

645. *See Daniell v. Citizens Bank*, 754 S.W.2d 407, 409-10 (Tex. App. - Corpus Christi 1988, no writ).

states:

> 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.[646]

The movant must specify the elements of the claim on which there is no evidence.[647] The movant is required only to illustrate by reference to the record claimant's failure to introduce evidence in support of an essential element of the claim. An adequate response to a no-evidence motion for summary judgment must, at a minimum, provide some discussion raising issues of material fact on the challenged elements for which the respondent has the burden of proof.[648] A global no evidence claim that "there is no evidence of one or more essential elements of each of the claims made" is wholly deficient to put the respondent on notice which element(s) the motion attacks. The rule is unequivocal; "(t)he motion must state the elements as to which there is no evidence." [649]

The movant is not required to negate affirmatively an element of a claim for which evidence is lacking.[650]

In determining a "no-evidence" issue, the courts consider only the evidence and inferences that tend to support the finding and disregard all evidence and inferences to the contrary.[651]

A party may not properly urge a no-evidence summary judgment on the claims or defenses on which it has the burden of proof.[652]

A no-evidence summary judgment is proper when:

> (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.[653]

The thrust of the no-evidence summary judgment rule is to require evidence from the

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

647. TEX. R. CIV. P. 166a(i); *Morris v. JTM Materials, Inc*., 78 S.W.3d 28 (Tex. App. - Fort Worth 2002, no pet.); *Lampasas v. Spring Center, Inc*., 988 S.W.2d 428, 436 (Tex. App. - Houston [14th Dist.] 1999, no pet.).

648. *Holloway v. Texas Elec. Utility Const., Ltd.*, 282 S.W.3d 207, 212 (Tex. App. - Tyler 2009, no pet.), *citing Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207-08 (Tex. 2002) (non-movant's response was adequate because it provided argument, authorities and evidence to the challenged element of its claims).

649. TEX. R. CIV. P. 166a(i); *Torres v. Saylor Marine, Inc*., 13-10-00566-CV (Tex. App. - Corpus Christi Aug. 31, 2011, no pet.) (The contention that there is no genuine issue as to any material fact does not, by itself, constitute a "specific ground" for summary judgment as required by rule 166a(c)); *Cornwell v. Dick Woodward & Assocs.*, No. 14-09-00940-CV (Tex. App. - Houston [14th Dist.] Jan. 11, 2011, no pet.), Tex. App. LEXIS 138 (A no-evidence motion that merely challenges the sufficiency of the non-movant's case and fails to state specifically the elements for which there is no evidence is fundamentally defective and insufficient to support summary judgment as a matter of law).

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

651. *Bradford v. Vento*, 48 S.W.3d 749, 754 (Tex. 2001).

652. *Id.* at 752 (Tex. 2003); *Wortham v. Dow Chemical Co*., 179 S.W.3d 189 (Tex. App. - Houston [14th Dist.] 2005, no pet.); *Keszler v. Mem'l Med. Ctr. of E. Tex*., 105 S.W.3d 122, 125 (Tex. App. - Corpus Christi 2003, no pet.); *see Barraza v. Eureka Co*., 25 S.W.3d 225, 231 (Tex. App. - El Paso 2000, pet. denied).

653. *Lampasas v. Spring Ctr., Inc*., 988 S.W.2d 428, 432 (Tex. App. - Houston [14th Dist.] 1999, no pet.) (*quoting Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). *See USCR v. Spencer*, No. 05-14-01150-CV, Tex. App. - Dallas, November 13, 2015 (No-evidence judgment repealed in part and affirmed in part. No-evidence summary judgment reversed on appeal when appellant presented at trial summary judgment evidence raising a genuine issue of material of fact on breach of contract claim (that there was an oral agreement for work beyond scope of written repair contract) and on *quantum meruit* claim (that appellant requested appellee to perform, and expected to be charged for, additional painting of the interior of the Building); No-evidence summary judgment affirmed when there was no evidence supporting appellant's claims for damages relating to overhead, profit, and its sales tax obligation resulting from the work).

non-movant.[654] Potentially, a no-evidence motion for summary judgment could be two pages long and the response two feet thick. The movant need not produce any evidence in support of its no-evidence claim.[655] Instead, '"the mere filing of [a proper] motion shifts the burden to the [non-movant] to come forward with enough evidence to take the case to a jury."'[656] If the non-movant does not come forward with such evidence, the court must grant the motion.[657]

A no-evidence summary judgment is essentially a pretrial directed verdict.[658] The amount of evidence required to defeat a no-evidence motion for summary judgment parallels the directed verdict and the no-evidence standard on appeal of jury trials.[659] Thus, if the non-movant brings forth more than a scintilla of evidence, that will be sufficient to defeat a no-evidence motion for summary judgment.[660]

C. Both Parties as Movants.

Both parties may move for summary judgment.[661] When both parties move for summary judgment, each party must carry its own burden, and neither can prevail because of the failure of the other to discharge its burden.[662]

654. *See* 988 S.W.2d 428, 432.

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

656. *Roventini v. Ocular Scis., Inc.*, 111 S.W.3d 719, 722 (Tex. App. - Houston [1st Dist.] 2003, no pet.) (*quoting Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1356. Once an appropriate no-evidence motion for summary judgment is filed, the non-movant must produce summary judgment evidence raising a genuine issue of material fact to defeat the summary judgment. *Wallace v. Amtrust Ins. Co.*, No. 10-14-00209-CV (Tex. App. - Tenth District), January 14, 2016.

657. TEX. R. CIV. P. 166a(i). Without any responsive evidence to consider, the trial court is required to grant movant's no-evidence motion for summary judgment. *McCollum v. The Bank of New York Mellon Trust Co.*, No. 08-13-00318-CV (Tex. App. - El Paso), November 18, 2015, no pet.); *Melton v. Wells Fargo Bank, N.A.*, No. 02-11-00512-CV (Tex. App. - Fort Worth, July 19, 2012, no pet.) (Fraud and conversion action. Appellant filed a response to Appellees' motion for summary judgment, but did not attach any evidence in support of the response, nor did he direct the trial court to any evidence located elsewhere in the record, including the evidence that Appellees attached to their motion for summary judgment. Because Appellant's arguments contained in his response are not summary judgment evidence, he did not meet his burden to produce evidence raising a genuine issue of material fact as to any of the elements of his claims challenged by Appellees. Held that the trial court did not err by granting Appellees' no-evidence motion for summary judgment on each of Appellant's claims); *Campbell v. Mortgage Electronic Registration Systems, Inc.*, No. 03-11-00429-CV (Tex. App. - Austin, May 18, 2012, pet. denied) (No-evidence summary judgment was proper because there was no evidence of specifically identified elements of plaintiff's cause of action); *Zaffirini v. United Water Services, LLC*, No. 04-11-00544-CV (Tex. App. - Austin Apr. 18, 2012, pet. denied) (No evidence summary judgment properly entered when Respondent did not meet his burden of producing summary judgment evidence raising a genuine issue of material fact on a challenged element of his fraud claim); *American Express Bank, FSB v. Bearden*, No. 02-11-00030-CV (Tex. App. - Fort Worth Mar. 22, 2012, no pet.) (Breach of contract case; credit agreement. No-evidence summary judgment affirmed when outside of conclusory assertions in American Express's summary judgment affidavits to the effect that Defendant entered into the Card Member Agreement with American Express and that American Express made cash advances to Defendant, there is no evidence that Defendant below, appellee in this appeal, is the person who requested this credit card account with American Express or took any action consistent with having requested the credit card account); *Ware v. Cyberdyne Systems, Inc.*, No. 05-10-01080-CV (Tex. App. - Dallas Feb. 7, 2012, no pet.) (Breach of contract case; stock purchase agreement. Because Ware failed to provide evidence of a promise that could be the basis for a contract or fraud claim and failed to identify evidence that supported her claim of a duty arising from a relationship between her and Cyberdyne, she failed to meet her burden of bringing forth probative evidence raising a genuine issue of material fact as to each essential element of each claim Cyberdyne challenged in its summary judgment motion). No-evidence motion is properly granted when an answer is filed late.

658. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572 (Tex. 2006); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003), *cert. denied*, 541 U.S. 1030, 124 S.Ct. 2097; *Aleman v. Ben E. Keith Co.*, 227 S.W.3d 304 (Tex. App. - Houston [1st Dist.] 2007, no pet.); *Jimenez v. Citifinancial Mortgage Co.*, 169 S.W.3d 423, 425 (Tex. App. - El Paso 2005, no pet.), *citing Summary Judgments in Texas*, 34 HOUS. L. REV. 1303, 1356; *Hubbard v. Shankle*, 138 S.W.3d 474, 480 (Tex. App. - Fort Worth 2004, pet. denied); *cf.* 477 U.S. at 250 (discussing the federal standard for summary judgment and concluding that it mirrors the directed verdict standard).

659. 18 S.W.3d 742, 750-51.

660. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004).

661. TEX. R. CIV. P. 166a(a), (b).

662. *See Guynes v. Galveston County*, 861 S.W.2d 861, 862 (Tex. 1993); *Dallas Indep. Sch. Dist. v. Finlan*, 27 S.W.3d 220, 226 (Tex. App. - Dallas 2000, pet. denied).

When both parties move for summary judgment and one motion is granted and the other is overruled, all questions presented to the trial court may be presented for consideration on appeal, including whether the losing party's motion should have been overruled.[663] "On appeal, the party appealing the denial of [the] motion for summary judgment must properly preserve [this] error by raising as a point of error [or issue presented] the failure of the trial court to grant the appellant's motion."[664]

The appeal should be taken from the summary judgment granted, not from the motion denied.[665]

In the absence of cross-motions for summary judgment, an appellate court may not reverse an improperly granted summary judgment and render summary judgment for the nonmoving party.[666] Cross-motions should be considered by the responding party, when appropriate, to secure on appeal a final resolution of the entire case (i.e., "reversed and rendered" rather than "reversed and remanded").[667]

There are advantages to filing a cross-motion for summary judgment; an opposing erroneously granted summary judgment may be reversed.[668]

VII. RESPONSE AND OPPOSITION

Both the reasons for the summary judgment and the objections to it must be in writing and before the trial judge at the hearing.[669] Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.[670] A late filed response is inadmissible without leave of court.[671] Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.[672]

A. Necessity for Response.

The necessity for a response is much more dramatic when the movant has filed a proper no-evidence motion for summary judgment. If the non-movant fails to produce summary judgment evidence raising a genuine issue of material fact, the court must grant the motion.[673] In other

663. *Comm'rs Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997); *Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988) (per curiam); *Tobin v. Garcia*, 159 Tex. 58, 316 S.W.2d 396, 400-01 (Tex. 1958).

664. *Truck Ins. Exch. v. E.H. Martin, Inc*., 876 S.W.2d 200, 203 (Tex. App. - Waco 1994, writ denied); *see also Buckner Glass & Mirror Inc. v. T.A. Pritchard Co*., 697 S.W.2d 712, 714-15 (Tex. App. - Corpus Christi 1985, no writ); *Holmquist v. Occidental Life Ins. Co. of Ca.*, 536 S.W.2d 434, 438 (Tex. Civ. App. - Houston [14th Dist.] 1976, writ ref' d n.r.e.).

665. *Adams v. Parker Square Bank*, 610 S.W.2d 250, 250 (Tex. Civ. App. - Fort Worth 1980, no writ) (Both parties moved for summary judgment, but the appellant limited his appeal to the denial of his own summary judgment, rather than appealing from the granting of his opponent's summary judgment. The court held that the appellant should have appealed from the order granting appellee's motion for summary judgment because an appeal does not lie solely from an order overruling a motion for summary judgment).

666. *Herald-Post Publ'g Co. v. Hill*, 891 S.W.2d 638, 640 (Tex. 1994) (per curiam); *CRA, Inc. v. Bullock*, 615 S.W.2d 175, 176 (Tex. 1981) (per curiam); *City of W. Tawakoni v. Williams*, 742 S.W.2d 489, 495 (Tex. App. - Dallas 1987, writ denied).

667. *See Hall v. Mockingbird AMC/Jeep, Inc*., 592 S.W.2d 913, 913-14 (Tex. 1979) (per curiam).

668. *Id.* (The trial court granted a summary judgment for the plaintiff. The court of appeals reversed the trial court's judgment and rendered judgment for the defendant. The supreme court reversed and remanded the cause, stating that judgment could not be rendered for the defendant because the defendant did not move for summary judgment).

669. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 677; *see also Cent. Educ. Agency v. Burke*, 711 S.W.2d 7, 8-9 (Tex. 1986) (per curiam) (holding that the court of appeals improperly reversed summary judgment based on grounds not properly before the court).

670. 589 S.W.2d at 676 (emphasis added) (quoting TEX. R. CIV. P. 166a(c)).

671. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996) (concluding summary judgment evidence was not properly before the trial court when it was filed two days before the hearing and the record contained no order granting leave to file the late evidence); *Desrochers v. Thomas*, No. 04-12-00120-CV (Tex. App. - San Antonio March 27, 2013, no pet.) (concluding summary judgment evidence was not properly before the trial court when it was filed three days before the hearing and the record contained no order granting leave to file the late evidence).

672. TEX. R. CIV. P. 166a(f).

673. *Id*. 166a(i); *Thornton v. Oprona Inc.*, 14-10-00511-CV (Tex. App. - Houston [14th Dist.] July 12, 2011, no pet.) (No evidence summary judgment was properly granted against a respondent given proper notice of the time and date for the summary-judgment hearing that failed to file a pleading or evidence responsive to the motion

words, the non-movant must file a response or suffer entry of summary judgment by default.

1. No-Evidence Motion.

Responding to a no-evidence summary judgment motion is virtually mandatory.[674] A trial court may render a summary judgment by default on a no-evidence motion for summary judgment when there is a late filed response without leave of court or when there is no response even when the respondent appears at the hearing and attempts to present evidence, provided the movant's motion warranted rendition of a final summary judgment based on lack of evidence to support the respondent's claim or defense. [675]

2. Traditional Motion.

Responding to a traditional motion for summary judgment is not mandatory.[676] Failing to file a response is not lying behind a log, but declining to raise your arms to the ready position. Once the movant with the burden of proof has established the right to a summary judgment on the issues presented, the non-movant's response should present to the trial court a genuine issue of material fact that would preclude summary judgment.[677] If the movant does not establish the right to summary judgment on the issues presented, the burden of proof does not shift and the non-movant is not required to respond.[678] Failure to file a response does not authorize summary judgment by default in a traditional motion for summary judgment.[679] Even if the non-movant does not file a response and the motion for summary judgment is uncontroverted, the movant must still carry the burden of proof.[680] As a matter of practice, the non-movant who receives a traditional motion for summary judgment should always file a written response, even though technically no response to may be necessary.[681]

judgment prior to the hearing but appeared at the hearing and attempted to present responsive evidence); *Landers v. State Farm Lloyds*, 257 S.W.3d 740, 745 (Tex. App. - Houston [1st Dist.] 2008, no pet.) (response to the no-evidence motions for summary judgment was untimely filed. Respondents did not present the trial court with proof of "a legible postmark affixed by the United States Postal Service" or an affidavit establishing that their response to the motions for summary judgment was timely mailed; and, the Respondents did not file a motion for leave to file their untimely response); *Roventini v. Ocular Sciences, Inc.*, 111 S.W.3d 719, 722-23 (Tex. App. - Houston [1 Dist.] 2003, no pet.) (The traditional prohibition against summary judgment by default is inapplicable to motions filed under Rule 166a(i)).

674. *Id.*

675. *Kuntner v. Wells Fargo Bank, N.A.*, No. 02-14-00238-CV (Tex. App. - Fort Worth, June 4, 2015, no pet.) (No evidence motion for summary judgment was properly granted when respondents filed their response to the motion on the date of hearing, attached no summary judgment evidence responding to the elements identified in the motion and asked for a 10-day extension of time "to file a more complete response" and alternatively for the response to be deemed timely filed); *Guishard v. Money Management International, Inc.*, No. 14-14-000362-CV (Tex. App - Houston [14th Dist.] August 20, 2015, no pet.) (Rule applied to pro-se litigant). *See Trevino & Associates Mechanical, L.P. v. The Frost National Bank*, 400 S.W.3d 139 (Tex. App. - Dallas 2013, no pet.) (Grant of no-evidence summary judgment was proper when non-movant failed to file a response. Partial no-evidence summary judgment on counterclaims); *Roventini v. Ocular Sciences, Inc.*, 111 S.W.3d 719, 722-23 (Tex. App. - Houston [1 Dist.] 2003, no pet.) (The traditional prohibition against summary judgment by default is inapplicable to motions filed under Rule 166a(i)).

676. *Id.* 166a(c).

677. *Affordable Motor Co., Inc. v. LNA, LLC*, 351 S.W.3d 515 (Tex. App. - Dallas, 2011, no pet.) (respondent established genuine issue of material fact precluding summary judgment when its response included a controverting affidavit in opposition for movant's claim for attorney's fees); *Abdel-Fattah v. PepsiCo, Inc.*, 948 S.W.2d 381, 383 (Tex. App. - Houston [14th Dist.] 1997, no writ).

678. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam*); Cove Invs., Inc. v. Manges*, 602 S.W.2d 512, 514 (Tex. 1980) (noting that technically, no response is required when the movant's proof is legally insufficient); s*ee Rhone-Poulenc, Inc.,* 997 S.W.2d at 222-23; *Oram v. General Am. Oil Co.*, 513 S.W.2d 533, 534 (Tex. 1974); 589 S.W.2d at 678 (In the absence of competent summary judgment proof by the movant, no burden shifts to the non-movant).

679. *Wheeler v. Green*, 157 S.W.3d 439, 442 (Tex. 2005) (per curiam); *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999); *Cotton v. Ratholes, Inc*., 699 S.W.2d 203, 205 (Tex. 1985) (per curiam) (stating *Clear Creek Basin Authority* did not shift the burden of proof and thus, the trial court cannot grant summary judgment by default).

680. *See* 589 S.W.2d 671, 678.

681. 28 S.W.3d at 23*;* 602 S.W.2d at 514; *see Vela v. Vela*, No. 14-12-00822-CV (Tex. App. - Houston [14th Dist.], Sep. 24, 2013, no pet.) (summary judgment granted where defendant / respondent did not file a response to the

If the movant's grounds are unclear or ambiguous, the non-movant should specially except and assert that the grounds relied upon by the movant are unclear or ambiguous.[682] The party filing special exemptions should ask for a signed order overruling or sustaining the special exceptions at or before the hearing.[683] A court will not infer a ruling on the special exception from the disposition of the summary judgment alone.[684]

The non-movant must expressly present to the trial court any reasons for avoiding the movant's right to a summary judgment.[685] In the absence of a response raising such reasons, these matters may not be raised for the first time on appeal.[686] This requirement applies even if the constitutionality of a statute is being challenged.[687]

B. Response to a No-Evidence Motion.

A non-movant must respond to a no-evidence motion for summary judgment by producing summary judgment evidence raising a genuine issue of material fact[688] or the motion must be granted.[689] Recently reported decisions opine that, in addition, an adequate response to a no-evidence motion for summary judgment must, at a minimum, provide some discussion raising issues of material fact on the challenged elements for which the respondent has the

motion for summary judgment, did not file any objections to the summary judgment evidence, did not file any controverting summary judgment evidence, and did not appear for the set hearing or participate by counsel; summary judgment affirmed on restricted appeal).

682. 858 S.W.2d 337, 342-43 (Tex. 1993) (stating that the failure to specially except runs the risk of having the appellate court find another basis for summary judgment in the vague motion).

683. *See* 858 S.W.2d at 343.

684. *See Franco v. Slavonic Mut. Fire Ins. Ass'n*, 154 S.W.3d 777, 784 (Tex. App. - Houston [14th Dist.] 2004, no pet.); *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 317 (Tex. App. - San Antonio 2000, no pet.).

685. *See Khan v. Firstmark Credit Union*, 04-12-00465-CV (Tex. App. - San Antonio May 22, 2013, no pet.) (Rule 166a requires a response in writing that fairly appraises the movant and the trial court of the issues the non-movant contends defeat the motion. *Citing Clear Creek Basin Auth.*, 589 S.W.2d at 678); *Affordable Motor Co., Inc. v. LNA, LLC*, 351 S.W.3d 515; *McConnell v. Southside I.S.D.*, 858 S.W.2d at 343.

686. *State Bd. of Ins. v. Westland Film Indus.*, 705 S.W.2d 695, 696 (Tex. 1986) (per curiam); *see also Griggs v. Capitol Mach. Works, Inc.*, 701 S.W.2d 238, 238 (Tex. 1985) (per curiam).

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

688. TEX. R. CIV. P. 166a(i); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). *See Sanders v. American Home Mortgage Servicing, Inc.*, No. 04-13-00845-CV (Tex. App. - San Antonio 2015, no pet.) (response insufficient where respondents wholly failed to address or provide evidence for any of the challenged elements of the breach of contract claim but set forth an amalgam of complaints against movant as well as excerpts from complaints filed in other jurisdictions against movant); *Preyear v. Kadasamy*, No. 01-11-01093-CV (Tex. App. - Houston [1st. Dist,] Aug. 22, 2013, no pet.) (Respondent was not entitled to no-evidence summary judgment on quantum meruit claim when movant produced more than a scintilla of evidence demonstrating that he provided valuable services or materials as required to establish a claim in quantum meruit.)

689. *Ramey and Associates v. TBE Group, Inc.*, No. 05-13-01711-CV (Tex. App. - Dallas May 19, 2015, no pet.) (No evidence summary judgment on breach of contract. Respondent to motion for no-evidence motion for summary judgment failed to produce more than a scintilla of probative evidence to raise a fact issue with respect to its performance or tendered performance); *Gabriel v. Associated Credit Union of Texas*, No. 14-12-00349-CV (Tex. App. - Houston [14th Dist.] Mar 7, 2013, no pet.) (Lender's (movant's) no-evidence motion for summary judgment was properly granted when the borrower (respondent) failed to produce a scintilla of damage evidence in the form of economic loss, damage to his credit, wrongful repossession, mental anguish damages, and damages stemming from the mistakenly assessed late fees); *Pourmemar v. Chase Home Finance, L.L.C.*, No. 01-10-00474-CV (Tex. App. - Houston [1st Dist.] Oct. 20, 2011, no pet.); *Thornton v. Oprona Inc.*, No. 14-10-00511-CV (Tex. App. - Houston [14th Dist.] June 12, 2011, no pet.); *Flores v. Charles I. Appler and Bennett, Weston & Lajone, P.C.*, No. 05-09-01523-CV (Tex. App. - Dallas May 24, 2011, no pet.) (No-evidence summary judgment was granted when respondent did not attach any evidence to his response to the motion for summary judgment and did not direct the trial court to any evidence attached to the motion for summary judgment that asserted both traditional and no-evidence grounds); *Preston Nat'l Bank v. Stuttgart Auto Ctr. Inc.*, No. 05-09-00020-CV (Tex. App. - Dallas Aug. 24, 2010, no pet.) (No-evidence summary judgment was granted when bank did not offer any evidence of the challenged elements of breach of duty and causation in its response); *Patino v. Complete Tire, Inc.*, 158 S.W.3d 655, 658 (Tex. App. - Dallas 2005, pet. denied); *Yard v. Daimlerchrysler Corp.*, 44 S.W.3d 238 (Tex. App. - Fort Worth 2001, no pet.); TEX. R. CIV. P. 166a(i).

burden of proof.[690] The trial court must grant summary judgment when the non-movant produces no summary judgment evidence in response to a no-evidence motion.[691] The same principles used to evaluate the evidence for a directed verdict[692] or for the "no-evidence" standard applied to a jury verdict are used to evaluate the evidence presented in response to a no-evidence summary judgment.[693] The non-movant raises a genuine issue of material fact by producing "more than a scintilla of evidence" establishing the challenged elements existence and may use both direct and circumstantial evidence in doing so.[694] More than a scintilla exists when the evidence is such that it "'would enable reasonable and fair-minded people to differ in their conclusions.'"[695] Preexisting summary judgment law applies to evaluate evidence presented in response to a no-evidence summary judgment. If the non-movant's evidence provides a basis for conflicting inferences, a fact issue will arise.[696] Also, the presumption applies equally for no-evidence and traditional motions for summary judgment that evidence favorable to the non-movant will be taken as true, every reasonable inference will be indulged in favor of the non-movant, and any doubts will be resolved in the non-movant's favor.[697]

The comment to Rule 166a(i) provides that "[t]o defeat a motion made under paragraph (i), the [non-movant] is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements."[698] "To marshal one's evidence is to arrange all of the evidence in the order that it will be presented at trial."[699] "A party is not required to present or arrange all of its evidence in response to a summary judgment motion."[700]

However, the non-movant must specifically identify the supporting material he seeks to have considered by the trial court. When attaching entire documents and depositions to a response, the party must point out to the trial court where in the documents the issues set forth in the response are raised and cannot reference them documents generally.[701] Global reference so voluminous summary judgment evidence is insufficient.[702]

Respondent must bring forth more than a scintilla of probative evidence to raise a genuine issue of material fact.[703] More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions."[704] Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create

690. 282 S.W.3d at 212, *citing Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d at 207-08.

691. *Metropolitan Christian Methodist Episcopal Church v. Vann*, No. 01-12-00332-CV (Tex. App. - Houston [1st Dist.] May 9, 2013, no pet.); *Watson v. Frost Nat'l Bank*, 139 S.W.3d 118, 119 (Tex. App. - Texarkana 2004, no pet.).

692. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003), *cert. denied*, 541 U.S. 1030, 124 S.Ct. 2097.

693. 118 S.W.3d 742, 750-751; *see Universal Servs. Co. v. Ung*, 904 S.W.2d 638, 640-42 (Tex. 1995) (reversing a denial of a directed verdict on a "no-evidence" standard).

694. 135 S.W.3d at 600-01; *Investment Retrievers, Inc. v. Fisher*, No. 03-13-00510-CV (Tex. App. - Austin June 25, 2015, no pet.) (Credit card, debt collection case; suit by assignor of credit card debt. No-evidence motion for summary judgment reversed where creditor responded to debtor's no evidence motion for summary judgment and produced evidence on elements identified in the no-evidence motion, raising genuine issue of material fact as to the elements of breach of contract, account stated, and open account. The court sustained assignor's issues as to those claims).

695. *Id.* at 601 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

696. 752 S.W.2d 4, 5 (Tex. 1988) (per curiam).

697. 690 S.W.2d 546, 548-49 (Tex. 1985).

698. TEX. R. CIV. P. 166a cmt. - 1997; *see also* 73 S.W.3d 193, 207 (Tex. 2002).

699. 982 S.W.2d 494, 498 (Tex. App. - Texarkana 1998, orig. proceeding).

700. *Id.*

701. *See TFO Realty, LLC v. Smith*, No. 05-13-01596-CV (Tex. App - Dallas Dec. 14, 2014, pet denied).

702. *See Guevara v. Lackner*, 447 S.W.3d 566 (Tex. App. - Corpus Christi 2014, no pet.). Neither the trial court nor the court of appeals is required to wade through a voluminous record to marshal respondent's proof. *See Rogers v. Ricane Enters., Inc*., 772 S.W.2d 76, 81 (Tex. 1989); *Arredondo v. Rodriguez*, 198 S.W.3d 236 (Tex. App. - San Antonio 2006, no pet.) [While respondent filed 355 pages of exhibits in support of his response, the court considered only the evidence specifically cited).

703. 118 S.W.3d 742, 751; *Moore v. K Mart Corp*., 981 S.W.2d 266, 269 (Tex. App. - San Antonio 1998, pet. denied).

704. *Forbes Inc. v. Granada Bioscis., Inc.*, 124 S.W.3d 167, 172 (Tex. 2003); 907 S.W.2d 497, 499.

a mere surmise or suspicion of a fact.[705] Determining how much evidence is sufficient to defeat a no-evidence summary judgment may involve significant strategic decisions. However, "Rule 166a(i) explicitly provides that, in response to a no-evidence summary judgment motion, the [non-movant] must present some summary judgment evidence raising a genuine issue of material fact on the element attacked, or the motion must be granted."[706]

The non-movant must come forward with evidence that would qualify as "summary judgment evidence," which is evidence that meets the technical requirements for summary judgment proof.[707]

A non-movant retains the right to nonsuit even after a hearing on a no-evidence motion for summary judgment, so long as the trial court has not ruled.[708]

C. Inadequate Responses.

Neither the trial court nor the appellate court has the duty to sift through the summary judgment record to see if there are other issues of law or fact that could have been raised by the non-movant, but were not.[709] For example, a response that merely asserts that depositions on file and other exhibits "effectively illustrate the presence of contested material fact[s]" will not preclude summary judgment.[710] Further, a motion for summary judgment is not defeated by the presence of an immaterial fact issue,[711] nor does suspicion raise a question of fact.[712] Generally, an amended answer by itself will not suffice as a response to a motion for summary judgment.[713]

Absent a written response to a motion for summary judgment, prior pleadings raising laches and the statute of limitations are insufficient to preserve those issues for appeal.[714]

705. *Kindred v. Con/Chem, Inc*., 650 S.W.2d 61, 63 (Tex. 1983).

706. *Id.*

707. TEX. R. CIV. P. 166a(i); *See Smooth Solutions Limited Partnership v. Light Age, Inc.*, No. 04-11-00677-CV (Tex. App. - San Antonio June 26, 2013, reh'g denied). No evidence summary judgment should not be entered when the respondent presents evidence on the challenged issue(s); *see supra* Para. V. (discussing summary judgment evidence);

708. *Pace Concerts, Ltd. v. Resendez*, 72 S.W.3d 700, 702 (Tex. App. - San Antonio 2002, no pet.).

709. *Walton v. City of Midland*, 24 S.W.3d 853, 858 (Tex. App. - El Paso 2000, no pet.); *Holmes v. Dallas Int'l Bank*, 718 S.W.2d 59, 60 (Tex. App. - Dallas 1986, writ ref'd n.r.e.); *Wooldridge v. Groos Nat'l Bank*, 603 S.W.2d 335, 344 (Tex. Civ. App. - Waco 1980, no writ).

710. *I.P. Farms v. Exxon Pipeline Co*., 646 S.W.2d 544, 545 (Tex. App. - Houston [1st Dist.] 1982, no writ) (quoting the defendant's response to the motion for summary judgment).

711. *Marshall v. Sackett*, 907 S.W.2d 925, 936 (Tex. App. - Houston [1st Dist.] 1995, no writ); *Austin v. Hale*, 711 S.W.2d 64, 68 (Tex. App. - Waco 1986, no writ); *Borg-Warner Acceptance Corp. v. C.I.T. Corp*., 679 S.W.2d 140, 144 (Tex. App. - Amarillo 1984, writ ref'd n.r.e.).

712. 73 S.W.3d 193, 210.

713. *Hitchcock v. Garvin*, 738 S.W.2d 34, 36 (Tex. App. - Dallas 1987, no writ); *Meineke Disc. Muffler Shops, Inc. v. Coldwell Banker Prop. Mgmt. Co*., 635 S.W.2d 135, 137 (Tex. App. - Houston [1st Dist.] 1982, writ ref'd n.r.e.).

714. *See Johnson v. Levy*, 725 S.W.2d 473, 476-77 (Tex. App. - Houston [1st Dist.] 1987, no writ) (reversing summary judgment even though no response was filed by non-movant because movant failed to make a proper showing that the findings of the bankruptcy court precluded disposition of later suit in state court); *Barnett v. Houston Natural Gas Co*., 617 S.W.2d 305, 306 (Tex. Civ. App. - El Paso 1981, writ ref'd n.r.e.).

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