

# **SUMMARY JUDGMENT APPELLATE ISSUES IN TEXAS**

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## SUMMARY JUDGMENT APPELLATE ISSUES IN TEXAS

### I. INTRODUCTION

Summary judgment motions are common place in almost any civil suit in Texas. Whether seeking dismissal of the entire case or seeking the dismissal of some (but not all) claims or defenses, parties routinely file motions for summary judgment. Therefore, almost all attorneys will eventually find themselves asking an appellate court to either affirm or reverse a summary judgment. When in that position, an attorney needs to be aware of a multitude of issues that can drastically affect the fate of the summary judgment on appeal. This article attempts to address some of the common issues that arise in an appeal of a summary judgment.

### II. FINALITY OF SUMMARY JUDGMENT ORDERS

The first step in appealing a summary judgment is determining whether the order is a final judgment that can be appealed. Generally, Texas appellate courts may review only final judgments, and there can be only one final judgment in any case. *See Colquitt v. Brazoria County*, 324 S.W.3d 539 (Tex. 2010); *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985). Further, an appellate court must determine if it has jurisdiction to review an appeal, even if it must be done *sua sponte*. *See New York Underwriters Ins. Co. v. Sanchez*, 799 S.W.2d 677, 678 (Tex. 1990); *see also Di Ferrante v. Georgiades*, No. 14 96-01199-CV, 1997 WL 213844, at \*6 (Tex. App.—Houston [14th Dist.] May 1, 1997, writ denied) (not designated for publication); *Welch v. McDougal*, 876 S.W.2d 218, 220 (Tex. App.—Amarillo 1994, writ denied). If an appellate court rules without jurisdiction to do so, then any judgment entered by the appellate court is void and of no effect. *See Di Ferrante*, 1997 WL 213844, at \*2 n.2; *see also Johnson v. State*, 747 S.W.2d 568, 569 (Tex. App.—Houston [14th Dist.] 1988, no writ).

A judgment rendered after a trial on the merits is presumed final and appealable, even absent clear language so stating. *See Vaughn v. Drennon*, 324 S.W.3d 560 (Tex. 2010); *John v. Marshall Health Serv., Inc.*, 58 S.W.3d 738, 740 (Tex. 2001); *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 312 (Tex. 1994). But “when there has been no traditional trial on the merits, no presumption arises regarding the finality of a judgment.” *Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009) (per curiam). For example, summary judgments are not afforded the finality presumption; rather, they are presumed to be interlocutory and not appealable. *See Hood v. Amarillo Nat’l Bank*, 815 S.W.2d 545, 547 (Tex. 1991). Ordinarily, the order granting summary

judgment must expressly dispose of all parties and all issues in the case in order for it to be a final, appealable judgment. *See Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 27677 (Tex. 1996); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995); *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1994). If the order does not dispose of all issues and all parties, it normally will be considered interlocutory and not appealable. *See Park Place Hosp.*, 909 S.W.2d at 510; *see also Mafrige*, 866 S.W.2d at 591.

#### A. *Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993).

A problem arises when a trial court’s order does not expressly dispose of all issues and parties but includes a Mother Hubbard clause. “A Mother Hubbard clause generally recites that all relief not expressly granted is denied.” *Mafrige*, 866 S.W.2d at 590 n.1. Is the order final and appealable, which starts the appellate timetable running, or is the order interlocutory?

In *Mafrige v. Ross*, the trial court granted several of the defendant’s summary judgment motions. 866 S.W.2d at 590-91. In each of the orders, the trial court used essentially the following language, “It is . . . therefore, ORDERED, ADJUDGED and DECREED that the Motion for Summary Judgment of Defendant . . . should in all things be granted and that Plaintiff . . . take nothing against Defendant.” *Id.* (alteration in original). The plaintiffs appealed the summary judgments and argued that they were final orders because of the Mother Hubbard language. *See id.* The court of appeals held that the summary judgment orders were interlocutory because they failed to address one or more of the causes of action asserted by the plaintiffs. *See id.* Therefore, the court of appeals dismissed the appeal for want of jurisdiction. *See id.*

The Texas Supreme Court reversed the judgment of the court of appeals. *See id.* at 590. The court stated:

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

*Id.* at 592.

The court reversed and remanded the case for further proceedings on the merits because the trial court's order was final and the plaintiffs correctly appealed it. *See id.* Further, the court held that if the Mother Hubbard language in a summary judgment order has the effect of granting more relief than was requested, the appellate court should reverse and remand the summary judgment, but not dismiss the appeal. *See id.* If the plaintiffs had failed to timely appeal the apparently interlocutory summary judgment order, they would have lost their appeal. The Mother Hubbard language turned what clearly appeared to be an interlocutory judgment into a final, appealable one.

The Texas Supreme Court reinforced *Mafrige* and its bright line rule in *English v. Union State Bank*, 945 S.W.2d 810, 811 (Tex. 1997). The court ruled that a summary judgment was final because it included Mother Hubbard-type language, which purported to be final. *See id.* The court stated, "to avoid waiver, [the plaintiff] was required either to ask the trial court to correct the first summary judgment while the court retained plenary power or to perfect a timely appeal of that judgment." *English*, 945 S.W.2d at 811. Since the plaintiff did neither, the court of appeals had no jurisdiction to decide the merits of the appeal. *See English*, 945 S.W.2d at 811. The court dismissed the plaintiff's appeal, reversed the judgment of the court of appeals, and rendered judgment dismissing the appeal for want of jurisdiction. *See English*, 945 S.W.2d at 811.

### B. Reversal of *Mafrige*

In 2001, the Texas Supreme Court reversed *Mafrige* and held that Mother Hubbard language did not make an otherwise interlocutory judgment a final appealable judgment. *See Lehmann v. HarCon Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). The court stated:

[I]n cases in which only one final appealable judgment can be rendered, a judgment issued without a conventional trial is final for purposes of appeal if and only if either it actually disposes of all claims and parties then before the court, regardless of its language, or it states with unmistakable clarity that it is a final judgment as to all claims and all parties.

*Id.* at 192-93. Apparently, the court found that Mother Hubbard language, in general, did not state "with unmistakable clarity" that the judgment was final:

Much confusion can be dispelled by holding, as we now do, that the inclusion of a Mother Hubbard clause – by which we

mean the statement, "all relief not granted is denied," or essentially those words – does not indicate that a judgment without a conventional trial is final for purposes of appeal. We overrule *Mafrige* to the extent it states otherwise.

*Id.* at 203-04. Accordingly, Mother Hubbard language like "all relief not expressly granted is denied" no longer makes an otherwise interlocutory order final and appealable. *See id.* *See also Parking Company of America, Fort Worth, Inc. v. Wilson*, 58 S.W.3d 742 (Tex. 2001); *Bobbitt v. Strain*, 52 S.W.3d 734 (Tex. 2001); *Clark v. Pimienta*, 47 S.W.3d 485 (Tex. 2001); *Guajardo v. Conwell*, 46 S.W.3d 862 (Tex. 2001). The court stated that language such as "this judgment finally disposes of all parties and all claims and is appealable" is unmistakably clear and does make an order final and appealable even if the order does not dispose of all parties and all claims. *Lehmann*, 39 S.W.3d at 206. But where the order does not contain finality language, state that it is a final order, or dispose of all claims and parties, then it is not final and appealable. *See Bison Bldg. Materials, Ltd v. Aldridge*, 2012 Tex. LEXIS 642 (Tex. 2012).

Since *Lehman*, the Texas Supreme Court has continued to discuss finality of summary judgment orders. In *In re Daredia*, a plaintiff obtained a default judgment against one defendant that contained a statement that it disposed of all parties and all claims and was final. 317 S.W.3d 247 (Tex. 2009). The judgment was not final, however, because there was another defendant in the suit. More than fifteen months after the default, the plaintiff attempted to file a motion for judgment nunc pro tunc to correct "typographical errors" and clarify that it was interlocutory. After the trial court granted the motion, the defendant filed a petition for writ of mandamus, arguing that the judgment was final and ended the litigation. The Texas Supreme Court agreed with the defendant, stating:

But the lack of any basis for rendering judgment against Daredia did not preclude dismissing him from the case. Even if dismissal was inadvertent, as American Express insists, it was nonetheless unequivocal, and therefore effective. American Express complains that the trial court never made a substantive disposition of its claims against Daredia, but dismissal is not a ruling on the merits. We conclude that the judgment by its clear terms disposed of all claims and parties and was therefore final.

American Express complains that the judgment, if not corrected, will give Daredia a windfall, but being given the relief an opponent requests can hardly be considered a windfall. Further, had American Express acted promptly in pursuing its claim against Daredia, before and after suit, counsel's error in allowing the claim to be dismissed could have been rectified, either by timely moving to reinstate the case, or perhaps by refiled the lawsuit. We conclude that the trial court clearly abused its discretion in setting aside a judgment after its plenary power expired. Daredia has no adequate remedy at law.

*Id.* at 249. Compare *Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009) (per curiam) (order from nonsuit was not final where no statement of finality and where sanctions claim was still pending).

In *Ford v. Exxon Mobil Chemical Company*, the court found that a summary judgment order was final even though it awarded a lump sum and did not itemize every element of damages:

ExxonMobil argues that the undisputed summary judgment evidence established attorney's fees of \$36,167 and expert fees of \$1,500, and that the trial court's award of precisely \$36,167 means it adjudicated only the former. But the award was a lump sum that did not specify what it was for; that it may have been incorrect if it did not include both fees does not mean it was interlocutory. We have never held that an order disposing of all claims can be final only if it itemizes each and every element of damages pleaded. Similarly, a summary judgment order clearly disposing of a suit is final even if it does not break down that ruling as to each element of duty, breach, and causation. Accordingly, we hold this order granting a lump sum for all Ford's claims is final.

235 S.W.3d 615 (Tex. 2007).

In *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, the court found that a default judgment was interlocutory because it did not address the plaintiff's claim for punitive damages. 167 S.W.3d 827 (Tex. 2005). Interestingly, the default judgment had statements about issuing writs and executing on the judgment that would indicate it was intended to be a final judgment. But the court found that this was not sufficient to make it final: "We cannot conclude that language permitting execution 'unequivocally expresses' finality in the absence of a judgment that

actually disposes of all parties and all claims." *Id.* at 830.

And failure to address competing claims for attorneys' fees renders an otherwise final judgment interlocutory, even when the judgment includes a Mother Hubbard clause, as the court held in *Farm Bureau Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161 (Tex. 2015) (per curiam). The court noted that "Mother Hubbard clauses do not, on their face, implicitly dispose of claims not expressly mentioned in the order, including claims for attorney's fees. Instead, there must be evidence in the record to prove the trial court's intent to dispose of any remaining issues when it includes a Mother Hubbard clause in an order denying summary judgment." *Id.* at 164. "[M]ost importantly, the parties presented no evidence from the record suggesting that the trial court intended the Mother Hubbard clause to deny attorney's fees to either party." *Id.*

In *M.O. Dental Lab v. Rape*, the court found that a summary judgment order was final where it stated only that "[n]o dangerous condition existed" and defendant "committed no acts of negligence." 139 S.W.3d 671, 674-75 (Tex. 2004). In *Ritzell v. Espeche*, the court concluded that the summary judgment order was final where it stated that the plaintiff take nothing, and found that the order was incorrectly granted but final. 87 S.W.3d 536 (Tex. 2002). See also *Jacobs v. Satterwhite*, 65 S.W.3d 653 (Tex. 2001).

The courts of appeals have taken heed of *Lehmann* and have held that Mother Hubbard language, alone, is not sufficient to make an order final and appealable. See *Phillips v. Baker*, No. 14-02-01099-CV, 2002 Tex. App. LEXIS 8568 (Tex. App.—Houston [14<sup>th</sup> Dist.] December 5, 2002, no pet.) (not designated for publication); *Yazdchi v. Bennett Law Firm*, No. 14-01-00928, 2002 Tex. App. LEXIS 3973 (Tex. App.—Houston [14<sup>th</sup> Dist.] May 30, 2002, no pet.) (not designated for publication); *Sabre Oil & Gas Corp. v. Gibson*, 72 S.W.3d 812 (Tex. App.—Eastland 2002, pet. denied).

The following provisions are sufficient to be unmistakably clear that the order is intended to be final and appealable:

- 1) judgment stated, in part, "that plaintiff take nothing against defendants by its suit" and taxed costs against the parties; *Texas Integrated Conveyor Syhs. Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 375076 (Tex. App.—Dallas 2009, pet. denied);
- 2) judgment that stated that "This is a Final Judgment of the court disposing of all parties and claims," was final; *Rehab 2112, L.L.C. v. Audio Images Int'l Inc.*, 168

- SW.3d 308, 311 (Tex. App.—Dallas 2005, no pet.);
- 3) judgment disposes of “all claims” between the only existing parties; *Lopez v. Yates*, No. 14-01-00649-CV, 2002 Tex. App. LEXIS 8229 (Tex. App.—Houston [14th Dist.] November 21, 2002, no pet.) (not designated for publication);
  - 4) judgment disposes of all of the plaintiff’s claims and the defendant’s “various counterclaims”; *Clark v. Bula*, No. 05-01-00887-CV, 2002 Tex. App. LEXIS 4548 (Tex. App.—Dallas June 26, 2002, no pet.) (not designated for publication);
  - 5) judgment stated “all issues and matters between [the parties] have been decided, and that this Order constitutes a final judgment”; *Arredondo v. City of Dallas*, 79 S.W.3d 657 n.7 (Tex. App.—Dallas 2002, pet denied);
  - 6) judgment stated “[the court] is of the opinion that the Motions for Summary Judgment should be granted as to all claims asserted by Plaintiff”; *Alashmawi v. IBP, Inc.*, 65 S.W.3d 162 (Tex. App.—Amarillo 2001, pet. denied);
  - 7) judgment stated that the “Judgment on all claims is entered in favor of Defendant”; *Murphy v. Gulf States Toyota, Inc.*, No. 01-00-00740-CV, 2001 Tex. App. LEXIS 3774 (Tex. App.—Houston [1st Dist.] June 7, 2001, no pet) (not designated for publication); and
  - 8) judgment stated that “[a]s a result of the other orders signed on this date, this is a final judgment.” *Capstead Mortgage Corp. v. Sun America Mortgage Corp.*, 45 S.W.3d 233 (Tex. App.—Amarillo 2001, no pet.).

But courts of appeals have also held that language that is very similar to, or is, Mother Hubbard language is also unmistakably clear under the facts and circumstances of those cases. See *Hodde v. Portanova*, No. 14-99-00656-CV, 2001 Tex. App. LEXIS 1505 (Tex. App.—Houston [14th Dist.] 2001, no pet. ) (not designated for publication) (“[plaintiffs] take nothing by their action.”); *Morales v. Craig*, No. 03-99-00553-CV, 2001 Tex. App. LEXIS 3724 (Tex. App.—Austin June 7, 2001, no pet.) (not designated for publication) (take nothing language and Mother Hubbard language was sufficient to constitute final judgment).

In determining whether a judgment is final, an appellate court should look to the four corners of the judgment and also to the appellate record to determine the claims asserted, the claims addressed by the judgment, and the claims intended to be addressed. See *Lehmann v. HarCon Corp.*, 39 S.W.3d at 205-06.

But a trial court cannot make an order final by signing a subsequent order (a clarification order) that states that the prior order was final and appealable. See *Guajardo v. Conwell*, 46 S.W.3d 862 (Tex. 2001), but see *Lopez v. Sulak*, 76 S.W.3d 597 (Tex. App.—Corpus Christi 2002, no pet). The fact that an order awards costs does not, in and of itself, make the order final and appealable. See *Lehmann v. HarCon Corp.*, 39 S.W.3d at 205; *City of Houston v. Houston Firemen’s Relief & Ret. Fund*, No. 01-02-00739, 2002 Tex. App.—LEXIS 2119 (Tex. App.—Houston [1st Dist.] March 21, 2002, no pet.) (not designated for publication). If the court of appeals is still uncertain as to the finality of the judgment, it can abate the appeal and remand the case to the trial court for clarification. See *Lehmann v. HarCon Corp.*, 39 S.W.3d at 205-06; see e.g., *Vansteen Marine Supply, Inc. v. Twin City Fire Ins. Co.*, No. 14-01-00901-CV, 2002 Tex. App. LEXIS 7612 (Tex. App.—Houston [14th Dist.] October 24, 2002, pet. denied) (not designated for publication) (court of appeals reviewed reporter’s record to determine finality); *Walker v. City of Georgetown*, 86 S.W.3d 249 (Tex. App.—Austin 2002, pet denied).

Most importantly, if a judgment does not dispose of all claims or parties, but it erroneously states that it does, it starts the appellate deadlines anyway. See *Lehmann v. HarCon Corp.*, 39 S.W.3d at 204, see also *Ritzell v. Espeche*, 87 S.W.3d 536 (Tex. 2002); *Kleven v. Texas Dept. of Crim. Justice – Institutional Div.*, 69 S.W.3d 341, 343-44 (Tex. App.—Texarkana 2002, no pet.); *Haas v. George*, 71 S.W.3d 904 (Tex. App.—Texarkana 2002, no pet). For example, if a defendant files a motion for summary judgment on one of four claims raised by the plaintiff, and the trial court grants the motion and signs a judgment that states that it is final and that the plaintiff takes nothing, the judgment is erroneous but final and appealable. See *Lehmann v. HarCon Corp.*, 39 S.W.3d at 204. If the appellant does not file a notice of appeal from a judgment that purports to be final, though it is actually not, the judgment still becomes final and un-appealable. But if that purportedly final judgment is appealed, and after reviewing the record the appellate court determines that it is not a final judgment, then the appellate court will either dismiss the appeal or abate the appeal and remand the case to the trial court to determine whether to render a final judgment. See, e.g., *Bobbitt v. Stran*, 52 S.W.3d 734, 735 (Tex. 2001) (affirmed dismissal of appeal); *McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001) (remanded to court of appeals to determine whether to abate appeal).

If a summary judgment is not final, a trial court may make it final by severing the claims or parties resolved by the order from other pending claims or parties. See *Doe I v. Pilgrim Rest Baptist Church*, 218

S.W.3d 81, 82 (Tex. 2007). It should be noted, however, that if the severance is contingent on some future event, it may not create a final order. *See id.*

### III. SUMMARY JUDGMENT GROUNDS

A summary judgment appeal will stand or fall on two main components: 1) the grounds asserted in the motion; and 2) whether the evidence was sufficient to create a fact issue in reference to the grounds. *See Science Spectrum v. Martinez*, 941 S.W.2d 910 (Tex. 1997). Accordingly, whether the grounds were properly asserted and what grounds were asserted are very important factors in appealing a summary judgment. *See id.*

#### A. Traditional Motion For Summary Judgment

The movant must expressly state the specific grounds for summary judgment in the motion. *See id.; McLendon v. Detoto*, No. 14-06-00658-CV, 2007 Tex. App. LEXIS 5173 (Tex. App.—Houston [14th Dist.] July 3, 2007, pet. denied). The purpose of this requirement is to provide the nonmovant with adequate information to oppose the motion and to define the issues for the purpose of summary judgment. *See Westchester Fire Ins. Co. v. Alvarez*, 576 S.W.2d 771, 772 (Tex. 1978). The specificity requirement of Rule 166a(c) echoes the “fair notice” pleading requirements of Texas Rules of Civil Procedure 45(b) and 47(a). *Id.* at 773. If the motion contains a concise statement that provides fair notice of the claim involved to the nonmovant, the grounds for summary judgment are sufficiently specific. *See Tomlinson v. Estate of Theis*, No. 03-07-00123-CV, 2008 Tex. App. LEXIS 372 (Tex. App.—Austin January 18, 2008, no pet.); *Dear v. City of Irving*, 902 S.W.2d 731, 734 (Tex. App.—Austin 1995, writ denied).

In *McConnell v. Southside Independent School District*, the Texas Supreme Court dealt with the issue of whether a party properly raised summary judgment grounds. 858 S.W.2d 337, 338 (Tex. 1993). The defendant filed the summary judgment motion, which asserted only that “there were no genuine issues as to any material facts . . . .” *Id.* at 339 n.1. In a separate document the defendant filed a twelve-page brief in support of the motion. *See id.* The plaintiff filed an exception to the form of the defendant’s motion and argued that the motion did not state the grounds for the summary judgment. *See id.* at 344-45 (Hecht, J., dissenting). The trial court overruled the plaintiff’s exception and granted the summary judgment, which the plaintiff appealed. *See id.* at 339. The court of appeals affirmed the trial court. *See id.* The Texas Supreme Court, relying on Texas Rule of Civil Procedure 166a(c), reversed the judgments of both lower courts. *See id.* at 343-44. Rule 166a(c) states,

“the motion for summary judgment shall state the specific grounds therefor.” TEX. R. CIV. P. 166a(c).

Taking a literal view of the rule, the Texas Supreme Court held that a “motion for summary judgment must itself expressly present the grounds on which it is made.” *McConnell*, 858 S.W.2d at 341. Further, the court held that a trial court may not rely on briefs or summary judgment evidence in determining whether grounds are expressly presented. *See id.*; *see also Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997); *RR Publication & Prod. Co. v. Lewisville Indep. Sch. Dist.*, 917 S.W.2d 472, 473 (Tex. App.—Fort Worth 1996, no writ).

A court of appeals cannot review a ground that was not contained in the summary judgment motion to affirm that order. *See Paragon General Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876 fn. 9 (Tex. App.—Dallas 2007, no pet.). A trial court can only grant summary judgment on the grounds addressed in the motion for summary judgment. *See Blancett v. Lagniappe Ventures, Inc.*, 177 S.W.3d 584, 592 (Tex. App.—Houston [1st Dist.] 2005, no pet.); *Positive Feed, Inc. v. Guthmann*, 4 S.W.3d 879, 881 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (“When, as here, a trial court grants more relief by summary judgment than requested, by disposing of issues never presented to it, the interests of judicial economy demand that we reverse and remand as to those issues, but address the merits of the properly presented claims.”).

The Texas Supreme Court recently issued an opinion affirming a trial court’s summary judgment where the issue on appeal was whether a ground was raised in the underlying motion. *See Nall v. Plunkett*, 404 S.W.3d 552 (Tex. 2013) (per curiam). In *Nall*, the plaintiff sued the defendants based on an accident that occurred after a third party left a party being hosted by the defendant. *See id.* at 554. The plaintiff raised a negligence claim based on the defendants’ alleged failure to exercise due care in their undertaking. *See id.* The summary judgment motion stated the issue as: “Whether [the defendants] have any duty to [plaintiff] in the factual scenario plead by [the plaintiff].” *See id.* at 556. The defendants “short answer” was that “Texas does not recognize social host liability, and defendants do not have any duty to the plaintiff in this case.” *See id.* The court of appeals held that the trial court erred by granting summary judgment because the defendants failed to address the plaintiff’s negligent-undertaking theory in their motion. *See id.* The Texas Supreme Court disagreed, holding that summary judgment motion specifically addressed the negligent-undertaking claim by arguing that a prior opinion foreclosed the assumption of any duty (i.e., an undertaking) by a social host. Therefore, the court held that the court of appeals erred by reversing the trial court’s judgment.

*See id.* at 556-57. The court reviewed the briefing and arguments in the motion to give flesh to the rather broad issue statement.

When a plaintiff amends her pleadings after a defendant has moved for summary judgment, the defendant must ordinarily file an amended motion for summary judgment to be entitled to prevail on the entirety of the plaintiff's case. *See Smith v. Atl. Richfield Co.*, 927 S.W.2d 85, 88 (Tex. App.—Houston [1st Dist.] 1996, writ denied). The portion of a final summary judgment that is rendered on the plaintiff's entire case under these circumstances must be reversed because the judgment grants more relief than requested. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2000); *Positive Feed, Inc. v. Guthmann*, 4 S.W.3d 879, 881 (Tex. App.—Houston [1st Dist.] 1999, no pet.). However, an exception applies when the grounds initially asserted in the motion for summary judgment conclusively negate an element that is common to the allegation asserted in the amended pleadings. *See Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 502-03 (Tex. App.—Houston [1st Dist.] 1995, no writ). *See Fraud-Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366, 387 (Tex. App.—Fort Worth 2003, pet. denied).

The party who wants to complain of the form of the motion must “properly” except to it. But what is a “proper exception”? Must the non-movant except to the trial court, or can he raise the defect for the first time in his appellate brief? The Texas Supreme Court set forth some guidelines for deciding this issue. *See McConnell*, 858 S.W.2d at 342-43. When the motion does not present any grounds in support of summary judgment, the non-movant is not required to except to it in the trial court. *See id.* at 342; *see also Mercantile Ventures, Inc. v. Dunkin' Donuts, Inc.*, 902 S.W.2d 49, 50 (Tex. App.—El Paso 1995, no writ). The reasoning is that the motion must stand or fall on its own merits, and the non-movant's failure to respond or except to the motion in the trial court should not result in a judgment by default. *See McConnell*, 858 S.W.2d at 342.

Where the summary judgment motion presents some grounds, but not all, once again the non-movant is not required to except to the trial court because to do so in this situation would require the non-movant to alert the movant to the additional grounds that he left out of his summary judgment motion. *See id.* *See also DeWoody v. Rippley*, 951 S.W.2d 935, 944 n.7 (Tex. App.—Fort Worth 1997, writ dism'd by agr.).

The court noted that “[a]n exception is required should a non-movant wish to complain on appeal that the grounds relied on by the movant were unclear or ambiguous.” *McConnell*, 858 S.W.2d at 342; *see also D.R. Horton-Tex., Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 743 (Tex. 2009) (“A non-movant must present its objections to a summary judgment motion

expressly by written answer or other written response to the motion in the trial court or that objection is waived.”). “However, even when a non-movant fails to except, the court of appeals cannot ‘read between the lines’ or infer from the pleadings any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court.” *Nall*, 404 S.W.3d at 555 (quoting *McConnell*, 858 S.W.2d at 343).

It is only when the grounds in the summary judgment motion are unclear or ambiguous that the non-movant must file an exception to the motion with the trial court, thus ensuring that the parties and the trial court are focused on the same grounds. *See McConnell*, 858 S.W.2d at 342-43. *See also Porterfield v. Galen Hosp. Corp.*, 948 S.W.2d 916, 920 (Tex. App.—San Antonio 1997, writ denied); *cf. Toubaniaris v. American Bureau of Shipping*, 916 S.W.2d 21, 24 (Tex. App.—Houston [1st Dist.] 1995, no writ).

The *Toubaniaris* court stated the following:

We hold the language in *McConnell* inapplicable to this case because *McConnell* only addressed the issue whether a non-movant should specially except to a motion for summary judgment when the grounds in the motion are unclear or ambiguous. This case involves a motion that is itself ambiguous whether it is a motion for summary judgment or a motion for forum non conveniens.

*Id.* at 24 (footnote omitted). Thus, the non-movant did not have to specially except to the trial court to preserve error. If the non-movant fails to file an exception to a motion with this defect, the only harm the non-movant will incur is that, on appeal, he will lose the right to have the grounds narrowly focused. *See McConnell*, 858 S.W.2d at 343. Thus, the appellate court can affirm on any ground that was included in the ambiguous summary judgment motion. *See id.* at 342-43. Further, these rules apply to the non-movant's response and supporting brief because he must also expressly present to the trial court any issues that defeat the movant's “entitlement.” *See id.* at 343; *see also Cornerstones Mun. Util. Dist. v. Monsanto Co.*, 889 S.W.2d 570, 574 (Tex. App.—Houston [14th Dist.] 1994, writ denied) (“Any issue that a non-movant contends avoids the movant's entitlement to summary judgment must be expressly presented by written answer to the motion, and not in a brief.”).

There is one difference in the consequences that attach to a movant's failure to file his motion and supporting brief in the same document and those

resulting from a non-movant's failure to file his response and supporting brief in the same document. *See McConnell*, 858 S.W.2d at 343. A non-movant's failure to answer or respond cannot, by itself, entitle the movant to a summary judgment because, even if the non-movant fails to respond, the movant still has the obligation to carry his initial burden. *See id.* at 343. However, this choice is not the most advantageous position for the non-movant because, on appeal, he may only argue the legal sufficiency of the summary judgment motion. *See id.* Even if the party who is required to file an exception to the motion or response with the trial court does so, that party is still required to present the issue to the appellate court in his appellate brief, or he waives the issue. *See Wilson v. General Motors Acceptance Corp.*, 897 S.W.2d 818, 823 (Tex. App.—Houston [1st Dist.] 1994, no writ). That the motion or response contains the grounds is not the only requirement. The party need not completely brief each ground or issue; he must only notify the opposing party of what they are. *See Golden Harvest Co., Inc. v. City of Dallas*, 942 S.W.2d 682, 691 (Tex. App.—Tyler 1997, writ denied) (“The motion for summary judgment must state specific grounds on which it is made. The grounds in the motion are sufficiently specific if the motion gives ‘fair notice’ to the non-movant.”); *see also Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 175 (Tex. 1995). Furthermore, if the motion itself states legally sufficient grounds, the trial court does not err in considering a separately filed brief in deciding a summary judgment motion. *See Golden Harvest Co.*, 942 S.W.2d at 692.

### B. No-Evidence Motion for Summary Judgment

Just as a traditional summary judgment movant must present its grounds in the motion, a no evidence movant must similarly raise any no evidence grounds clearly in the motion. The no evidence motion should be specific as to the challenged elements to give fair notice to the non-movant as to the evidence it must present. *See Timpte Indus. Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). A party can contest every element of its opponent's case so long as each element is distinctly and explicitly challenged. *See Martin v. McDonald*, 247 S.W.3d 224, 233 (Tex. App.—El Paso 2006, no pet.).

A party can assert both traditional and no-evidence grounds in the same motion. *See Merriman v. XTO Energy, Inc.*, No. 11-0494, 2013 Tex. LEXIS 492, \*5 (Tex. 2013); *Binur v. Jacobo*, 135 S.W.3d 646, 650 (Tex. 2004). And a no evidence summary judgment motion that attaches evidence should not be disregarded or treated as a traditional summary judgment motion. *See Rankin v. Union Pac. R. Co.*, 319 S.W.3d 58, 63 (Tex. App.—San Antonio 2010, no

pet.) (citing *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004)).

If an appellate court determines that the motion did not adequately present the no-evidence ground to the trial court, the movant could waive that ground because of the lack of notice to the non-movant. *See Bean v. Reynolds Realty Group, Inc.*, 192 S.W.3d 856, 859 (Tex. App.—Texarkana 2006, no pet.) (holding that motion that stated only that “there is no evidence to support the plaintiff's causes of actions and allegations” was ineffective); *Thomas v. Clayton Williams Energy, Inc.*, 2 S.W.3d 734 (Tex. App.—Houston [14th Dist.] 1999, no pet.). The Corpus Christi Court of Appeals has been especially quick to find waiver of no-evidence grounds. *See Richard v. Reynolds Metal Co.*, 108 S.W.3d 908 (Tex. App.—Corpus Christi 2003, no pet.) (where a summary judgment motion does not unambiguously state that it is filed under Rule 166a(i) and does not strictly comply with the requirements of that Rule, then court will construe it as a traditional motion); *Michael v. Dyke*, 41 S.W.3d 746, 750 (Tex. App.—Corpus Christi 2001, no pet.). Further, issues not expressly presented to the trial court may not be considered at the appellate level, either as grounds for reversal or as other grounds in support of a summary judgment. *See generally* TEX. R. CIV. P. 166a(c); *Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex. 1993); *W.R. Grace Co. v. Scotch Corp.*, 753 S.W.2d 743 (Tex. App.—Austin 1988, writ denied); *Dickey v. Jansen*, 731 S.W.2d 581, 583 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

If the no-evidence point is hidden, the appellate court may simply treat that ground as waived and reverse the summary judgment unless one of the movant's traditional grounds can support the summary judgment. *See Shaw v. Maddox Metal Works*, 73 S.W.3d 472, 476 n.2 (Tex. App.—Dallas 2002, no pet.); *Hunt v. Killeen Imports*, No. 03-99-00093-CV, 1999 Tex. App. LEXIS 9278 (Tex. App.—Austin December 16, 1999, pet. denied) (not design. for pub.); *Thomas v. Clayton Williams Energy, Inc.*, 2 S.W.3d 734 (Tex. App.—Houston [14th Dist.] 1999, no pet.). For example, in *Tello v. Bank One, N.A.*, the court of appeals found that that the movant waived its no-evidence grounds:

The Bank did not specify whether the part of its motion opposing Tello's counterclaims was a traditional motion or a “no-evidence” motion. At times, the Bank used language applicable to a traditional motion; but at other times, the Bank generally asserted that Tello has “no evidence” to support his various claims or factual allegations. However, the motion did not “state the elements as to which there is no evidence”

as required by Rule 166a(i). Because the motion did not unambiguously state it was filed under Rule 166a(i) and did not strictly comply with that rule, we construe it as a traditional motion.

218 S.W.3d 109 (Tex. App.—Houston [14th Dist.] January 9, 2007, no pet.) (citing *Adams v. Reynolds Tile & Flooring, Inc.*, 120 S.W.3d 417, 420 (Tex. App.—Houston [14th Dist.] 2003, no pet.)).

However, some courts are more lenient and will look to the merits of the motion no matter what it is called. *Tomlinson v. Estate of Theis*, 2008 Tex. App. LEXIS 372 (Tex. App.—Austin Jan. 18, 2008, no pet.). In *Tomlinson*, the court found:

When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated. The supreme court has noted that although it is good practice to use headings “to clearly delineate the basis for summary judgment under subsection (a) or (b) from the basis for summary judgment under subsection (i),” the rule does not require it. We will therefore treat the Albins’ motion as a hybrid motion where, on the issue of testamentary capacity, they met the higher summary-judgment burden under 166a by conclusively establishing that there existed no genuine issue of material fact.

*Id.* (internal citation omitted).

Courts have held that when a party files a dual motion but only argues on appeal “matter of law” points, it waives its “no-evidence” points on appeal. See *Brown v. Blum*, 9 S.W.3d 840 (Tex. App.—Houston [14th Dist.] 1999, review dismissed w.o.j.); but see *Young Refining Corp. v. Pennzoil Co.*, 46 S.W.3d 380 (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (more forgiving of drafting of no-evidence grounds). For example, in *Salazar v. Collins*, the court stated:

Although Appellees’ motion refers to both subsections (c) and (i) of Rule of Civil Procedure 166a, which govern traditional and no-evidence summary-judgment motions respectively, their motion does not delineate in any manner between traditional and no-evidence claims. *Salazar* cites the standard of review applicable to traditional summary-judgment motions in his brief, and *Collins* and *Garner* do not dispute that this is the applicable standard. Therefore, we

construe their motion as one for a traditional summary judgment.

2008 Tex. App. LEXIS 1565, fn. 4 (Tex. App.—Waco Feb. 27, 2008, no pet.).

If the movant fails to file a specific no-evidence motion, i.e., does not state the elements that he challenges, then the non-movant should raise an objection, or more properly a special exception, to the motion. If the non-movant fails to raise this special exception or objection, some courts have held that the non-movant will waive the complaint on appeal. See *Quesada v. American Garment Finishers Corp.*, No. 08-02-00092-CV, 2003 Tex. App. LEXIS 3338 (Tex. App.—El Paso April 17, 2003, no pet.) (memorandum opinion); *Zwank v. Kemper*, No. 07-01-0400-CV, 2002 Tex. App. LEXIS 6508 (Tex. App.—Amarillo August 29, 2002, no pet.) (not desig. for pub.); *Barnes v. Sulack*, No. 03-01-00159-CV, 2002 Tex. App. LEXIS 5727 (Tex. App.—Austin August 8, 2002, pet. denied) (not desig. for pub.); *Miller v. Elliott*, 94 S.W.3d 38 (Tex. App.—Tyler July 24, 2002, pet. denied); *Walton v. Phillips Petroleum, Co.*, 65 S.W.3d 262 (Tex. App.—El Paso 2000, pet. denied); *Williams v. Bank One Texas, N.A.*, 15 S.W.3d 110, 117 (Tex. App.—Waco 1999, no pet.); *Roth v. FFP Operating Partners, L.P.*, 994 S.W.2d 190, 194-95 (Tex. App.—Amarillo 1999, pet. denied). See also *Leifester v. Dodge Country, Ltd.*, No. 03-06-00044-CV, 2008 Tex. App. LEXIS 790 (Tex. App.—Austin February 1, 2008, no pet.).

Other courts have held that a no-evidence motion that does not properly challenge an element of the non-movant’s claim or defense is legally insufficient and that complaint can be raised for the first time on appeal. See *In re Estate of Swanson*, 130 S.W.3d 144, 147 (Tex. App.—El Paso 2003, no pet.); *Kesyler v. Menil Med. Ctr. of E. Tex.*, 105 S.W.3d 122 (Tex. App.—Corpus Christi 2003, no pet.); *Dentler v. Helm-Perry*, No. 04-02-00034-CV, 2002 Tex. App. LEXIS 8167 (Tex. App.—San Antonio November 20, 2002, no pet.) (not desig. for pub.); *Crocker v. Paulyne’s Nursing Home, Inc.*, 95 S.W.3d 416 (Tex. App.—Dallas November 8, 2002, no pet.); *Gross v. Methodist Hosp. Of Dallas*, No. 05-00-02124-CV, 2002 Tex. App. LEXIS 4590 (Tex. App.—Dallas June 27, 2002, no pet.) (not desig. for pub.); *Laparade v. Rivera*, No. 01-99-0723-CV, 2002 Tex. App. LEXIS 3487 (Tex. App.—Houston [1st Dist.] May 16, 2002, no pet.) (not desig. for pub.); *Cuyler v. Minns*, 60 S.W.3d 209 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex. App.—San Antonio 2000, pet. denied). For example, in *Rodriguez v. Gulf Coast & Builders Supply Inc.*, the court held that if a no-evidence motion does not state an element, the complaint about that failure can be raised for the first

time on appeal; however, the court noted that other complaints about the motion, e.g., vague, ambiguous, etc., require a special exception to preserve error. No. 14-05-00430-CV, 2006 Tex. App. LEXIS 11073 (Tex. App.—Houston [14th Dist.] December 28, 2006, no pet).

A party relying on an affirmative defense may not file a no-evidence motion on that defense as it would have the burden to prove that matter. See *Forney 921 Lot Dev. Partners I, L.P. v. Paul Taylor Homes, Ltd.*, 349 S.W.3d 258, 268 (Tex. App.—Dallas 2011, no pet.). If a movant files a no-evidence motion based on an affirmative defense, the non-movant should object or specially except to that impermissible ground. See *Hermann v. Lindsey*, 136 S.W.3d 286, 290 (Tex. App.—San Antonio 2003, no pet.) (movant filed no-evidence ground on its own counterclaim, court found that non-movant waived error by not filing a special exception but reviewed motion under a traditional summary judgment standard of review); *Flameout Design & Fabrication v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.); but see *Kesyler v. Menil Med. Ctr. of E. Tex.*, 105 S.W.3d 122 (Tex. App.—Corpus Christi 2003, no pet.). Therefore, it is important for a non-movant to point out to the trial court any improper burden-shifting by an objection or special exception.

### C. Pleadings To Support Ground For Summary Judgment

A party cannot not rely upon unpled claims or defenses as a ground for summary judgment. See *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991); *DeBord v. Muller*, 446 S.W.2d 299, 301 (Tex. 1969) (an unpled affirmative defense may not serve as the basis for a summary judgment). However, such a claim or defense may be raised in a summary judgment motion where the opposing party does not object to a lack of pleading. See *Roark*, 813 S.W.2d at 495; *TPAS, Inc. v. Engel*, 350 S.W.3d 602, 609 (Tex. App.—Houston [14th Dist. 2011, no pet.). This is based on the waiver theory of trial by consent. See *TPAS, Inc. v. Engel*, 350 S.W.3d at 609. However, a nonmovant is not required to anticipate and respond to grounds that were not raised in the motion. See *id.*

### D. Newly Plead Claims

After a party files a motion for summary judgment, it is not uncommon for the responding party to file an amended petition that raises new claims. A party may not be granted judgment as a matter of law on a cause of action not addressed in a summary judgment proceeding. See *Blancett v. Lagniappe Ventures, Inc.*, 177 S.W.3d 584, 592 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (reversed summary

judgment where it failed to address claim added in supplemental petition); *Espeche v. Ritzell*, 123 S.W.3d 657, 664 (Tex. App.—Houston [14th] Dist. 2003, pet. denied) (citing *Chessher v. Sw. Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983)). In order to get a final appealable summary judgment, the movant will have to amend its motion for summary judgment to address this new cause of action. See *Avary v. Bank of Am., N.A.*, 72 S.W.3d 779, 791 (Tex. App.—Dallas 2002, pet. denied). “In order to be a final, appealable summary judgment, the order granting the motion must dispose of all the parties and all the issues before the court.” *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 199 (Tex. 2001). If a summary judgment order grants more relief that was requested in the motion, it must be reversed and remanded. *Id.*

But if a motion for summary judgment is sufficiently broad to encompass later-filed claims or defenses, the movant need not amend its motion. See *Lampasis v. Spring Center, Inc.*, 988 S.W.2d 428, 436 (Tex. App.—Houston [14th Dist.] 1999, no pet.). If the amended petition only sets forth new facts or new grounds that are totally encompassed by the prior cause of action, i.e., different ways that the movant was negligent, then the original motion for summary judgment will be sufficiently broad to cover the added grounds and an amended motion for summary judgment will not be necessary. See *O’Kane v. Coleman*, 2008 Tex. App. LEXIS 4908 (Tex. App.—Houston [14th Dist.] July 1, 2008, no pet.); *Dubose v. Worker’s Med., P.A.*, 117 S.W.3d 916, 922 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Gulf Coast Radiology Assocs. v. Malek*, No. 14-02-01126-CV, 2003 Tex. App. LEXIS 3750 (Tex. App.—Houston [14th Dist.] May 1, 2003, no pet.); *Garza v. Minyard Food Stores, Inc.*, No. 05-98-02134-CV, 2001 Tex. App. LEXIS 4123 (Tex. App.—Dallas June 22, 2001, no pet.) (not desig. for pub.); *Lampasis v. Spring Center, Inc.*, 988 S.W.2d at 436.

In *Lampasis v. Spring Center, Inc.*, the movant filed a no-evidence motion for summary judgment against the non-movant’s negligence claim. 988 S.W.2d at 436. The non-movant filed an amended petition alleging new facts and new ways that the movant was negligent. The trial court granted the movant a final summary judgment, and the non-movant appealed this judgment arguing that the movant’s motion did not cover his newly pleaded grounds. The appellate court affirmed the summary judgment and stated:

The new no evidence summary judgment shifts the focus of the summary judgment from the pleadings to the actual evidence. . . . The thrust of the new rule is to require evidence. A no evidence summary

judgment prevents the nonmovant from standing solely on his pleadings, but instead requires him to bring forward sufficient evidence to withstand a motion for instructed verdict. . . . Here, the no evidence motion for summary judgment stated that there was no evidence of any duty, breach, or causation. . . . Instead of bringing forward evidence on these challenged elements, [appellant] amended his petition to include variations of other negligence claims. However, all these new variations in his second amended petition sound in negligence and are composed of the same essential elements, duty, breach, and causation, which were already challenged in appellees' motion. . . . Therefore, [the trial court] correctly granted the no evidence summary judgment. We do not hold that newly filed pleadings may not ever raise entirely new distinct elements of a cause of action not addressed in a no evidence motion for summary judgment. However, based on the facts before us, the amended petition merely reiterates the same essential elements in another fashion, and the motion for summary judgment adequately covers these new variations.

*Id.* Therefore, a non-movant will have to plead a totally new cause of action with new and different elements to be an effective delay to a movant's motion for summary judgment.

#### IV. SUMMARY JUDGMENT RESPONSE

The non-movant must expressly present to the trial court, by written answer or response, any issues defeating the movant's entitlement to summary judgment. *See McConnell*, 858 S.W.2d at 343 (citing *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex.1979)); *Dubose v. Worker's Medical, P.A.*, 117 S.W.3d at 916, 920 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see* TEX. R. CIV. P. 166a(c). "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." TEX. R. CIV. P. 166a(c); *see McConnell*, 858 S.W.2d at 343; *Dubose*, 117 S.W.3d at 920; *Querner Truck Lines, Inc. v. Alta Verde Indus., Inc.*, 747 S.W.2d 464, 469 (Tex. App.—San Antonio 1988, no writ) (finding non-movant waived argument on appeal that it was entitled to additional offset against movant's damages than offset allowed by trial court because non-movant did not raise issue of additional offset in its summary judgment response).

To "expressly" present issues pursuant to Rule 166a(c), "[t]he written answer or response to the

motion must fairly apprise the movant and the court of the issues the non-movant contends should defeat the motion." *Clear Creek*, 589 S.W.2d at 678; *see Engel v. Pettit*, 713 S.W.2d 770, 771-72 (Tex. App.—Houston [14th Dist.] 1986, no pet.).

Issues are not expressly presented by mere reference to summary judgment evidence. *See McConnell*, 858 S.W.2d at 341; *see Dubose*, 117 S.W.3d at 920; *D.M. Diamond Corp. v. Dunbar Armored, Inc.*, 124 S.W.3d 655, 659-60 (Tex. App.—Houston [14th Dist.] 2003, no pet.). In addition, the requirement that issues be expressly presented by written answer or response refers to an answer or response to the motion for summary judgment, not to the pleadings. *See Wheeler v. Security State Bank, N.A.*, 159 S.W.3d 754, 756 n.2 (Tex. App.—Texarkana 2005, no pet.) (citing *Clear Creek*, 589 S.W.2d at 673).

As shown below, however, where a traditional summary judgment movant fails to show that there is no genuine issue of material fact, the nonmovant can argue that failure on appeal even without a response on file in the trial court. *See M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). As one court recently stated: "A motion for summary judgment must stand on its own merits, and the nonmovant may argue on appeal that the movant's summary judgment proof is insufficient as a matter of law, even if the nonmovant filed no response to the motion." *Circle Ridge Prod. v. Kittrell Family Minerals, LLC*, No. 06-13-00009-CV, 2013 Tex. App. LEXIS 8790 (Tex. App.—Texarkana July 17, 2013, pet. denied) (mem. op.).

When a movant files a proper no-evidence motion for summary judgment, the burden shifts to the respondent and unless the respondent produces summary-judgment evidence raising a genuine issue of material fact, the trial court must grant the motion for summary judgment. TEX. R. CIV. P. 166a(i). To defeat a no-evidence motion for summary judgment, the non-movant need not marshal her evidence but must point out in her response evidence raising a genuine issue of fact as to the challenged elements. *See* cmt. TEX. R. CIV. P. 166a(i); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex. 2002); *see also Transcon. Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 692 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (holding non-movant's failure to respond to no-evidence motion was "fatal" to ability to successfully attack summary judgment on appeal); *Dyer v. Accredited Home Lenders, Inc.*, No. 02-11-00046-CV, 2012 Tex. App. LEXIS 877, 2012 WL 335858, at \*2-5. (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied) (holding that trial court is not required to review evidence presented by movant to support traditional portion of a combined motion for summary judgment to determine whether that

evidence raises a fact issue on the no-evidence ground, absent a timely response by non-movant); *Modelist v. Deutsche Bank Nat'l Trust Co.*, No. 14-10-00249-CV, 2011 Tex. App. LEXIS 6789, 2011 WL 3717010, at \*1, \*3 (Tex. App.—Houston [14th Dist.] Aug. 25, 2011, no pet.) (summarily affirming summary judgment on no-evidence grounds when movant filed combined motion but non-movant failed to respond); *Burns v. Canales*, No. 14-04-00786-CV, 2006 Tex. App. LEXIS 1551, 2006 WL 461518, at \*3-6 (Tex. App.—Houston [14th Dist.] Feb. 28, 2006, pet. denied) (affirming no-evidence summary judgment when non-movant filed one-half-inch-thick stack of evidence but page-and-a-half response which generally stated the attached evidence raised a fact issue but failed to cite argument or specific evidence supporting challenged causes of action; “trial court is not required, sua sponte, to assume the role of [non-movant’s] advocate and supply his arguments for him”).

## V. STANDARDS OF TRIAL COURT REVIEW

In appealing a summary judgment, the parties must consider the standard of review that the trial court has in ruling on the motion.

### A. Traditional Summary Judgment

The traditional summary judgment movant moves for summary judgment as a matter of law under Texas Rule of Civil Procedure 166a(a) and (b). It has the burden of production and persuasion in a summary judgment proceeding, and the court must resolve against the movant all doubts as to the existence of a genuine issue of fact so that all evidence favorable to the nonmovant will be taken as true. *See Provident Life Ins. Co. v. Knott*, 128 S.W.3d 211, 215-16 (Tex. 2003); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995); *see also Kassen v. Hatley*, 887 S.W.2d 4, 8 n.2 (Tex. 1994). Further, the court must indulge every reasonable inference in favor of the nonmovant and resolve doubts in his favor. *See Park Place Hosp.*, 909 S.W.2d at 510.

The nonmovant is not required to respond to the movant’s motion if the movant fails to carry his or her burden. A trial court may not grant a traditional summary judgment by default against the nonmovant for failing to respond to the motion if the movant’s summary judgment proof is legally insufficient to support the summary judgment; the movant must still establish his entitlement to judgment by conclusive summary judgment proof. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). *See also Ellert v. Lutz*, 930 S.W.2d 152, 155 (Tex. App.—Dallas 1996, no writ).

If the movant does not meet his burden of proof, there is no burden on the nonmovant. *See Clear Creek Basin Auth.*, 589 S.W.2d at 678-79. However,

if the movant has established a right to a summary judgment, the burden shifts to the nonmovant. *See Clarendon Nat'l Ins. Co. v. Thompson*, 199 S.W.3d 482, 486-487 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The nonmovant must then respond to the summary judgment motion and present to the trial court summary judgment evidence raising a fact issue that would preclude summary judgment. *Id.* If the non-movant does so, summary judgment is precluded. *See Clarendon Nat'l Ins. Co. v. Thompson*, 199 S.W.3d at 486-487.

The Texas Supreme Court noted the importance of the shifting burden of proof in *Amedisys, Inv. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507 (Tex. 2014). The non-movant, Amedisys, produced evidence that “constitute[d] prima facie evidence of a clear intent to accept Kingwood’s settlement offer and did not indicate that acceptance was conditioned on the alteration of any material terms.” *Id.* at 517. “Amedisys thus satisfied its initial summary judgment burden, and the burden shifted to Kingwood to produce evidence raising an issue of fact.” *Id.* Because Kingwood “did not submit any contrary evidence, nor did it challenge the validity of the acceptance at all until after the trial court granted summary judgment,” the court “conclude[d] that Amedisys conclusively established through its summary judgment evidence that it accepted Kingwood’s settlement offer.” *Id.*

In *Yancy v. United Surgical Partners International, Inc.*, the Texas Supreme Court stated that once the non-movant files evidence, the reviewing court must consider all of the evidence to determine if a reasonable juror could find a fact issue: “When reviewing a summary judgment, we ‘must examine *the entire record* in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.’” 236 S.W.3d 778, 782 (Tex. 2007).

When both parties move for summary judgment, each party must carry its own burden as the movant. *See Dallas County Cmty. College Dist. v. Bolton*, 185 S.W.3d 868, 871 (Tex. 2005); *Mead v. RLMC, Inc.*, No. 02-06-092-CV, 2007 Tex. App. LEXIS 2823 (Tex. App.—Fort Worth April 12, 2007, pet. denied); *James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701, 703 (Tex. App.—Houston [1st Dist.] 1987, writ denied). Also, to win, each party must bear the burden of establishing that it is entitled to judgment as a matter of law. *See Guynes v. Galveston County*, 861 S.W.2d 861, 862 (Tex. 1993). Each party must also carry its own burden as the nonmovant in response to the other party’s motion. *See James*, 742 S.W.2d at 703. Further, when both parties file motions for summary judgment, the court may consider all of the summary judgment evidence filed by either party. *See Commissioners Court v. Agan*, 940 S.W.2d 77, 81

(Tex. 1997). See also *Rose v. Baker & Botts*, 816 S.W.2d 805, 810 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

When the plaintiff moves for summary judgment on his own cause of action, he must present competent summary judgment evidence proving each element of his cause of action as a matter of law. See *MMP Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986); see also *Geiselman v. Cramer Fin. Group, Inc.*, 965 S.W.2d 532, 535 (Tex. App.—Houston [14th Dist.] 1997, no writ). If the plaintiff meets his burden, the trial court may grant a final summary judgment or may grant a partial summary judgment on liability alone, and hold a hearing on damages when they are unliquidated. See TEX. R. CIV. P. 166a(a). If the defendant asserts a counterclaim, the trial court can grant a final summary judgment for the plaintiff only if the plaintiff disproves at least one of the elements of the defendant's counterclaim in addition to conclusively proving every element of his own cause of action. See *Schafer v. Federal Servs. Corp.*, 875 S.W.2d 455, 456 (Tex. App.—Houston [1st Dist.] 1994, no writ). See also *Adams v. Tri-Continental Leasing Corp.*, 713 S.W.2d 152, 153 (Tex. App.—Dallas 1986, no writ). Alternatively, the plaintiff may move for a partial summary judgment solely on the defendant's counterclaims. See *Adams*, 713 S.W.2d at 153. If the plaintiff carries his burden with respect to his motion for summary judgment, the defendant, in order to defeat a summary judgment for the plaintiff, must either raise a fact issue about one of the elements of the plaintiff's cause of action, create a fact question about each element of his affirmative defense, or agree to the facts and show that the law does not allow the plaintiff a recovery. See *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Dillard v. NCNB Texas Nat'l Bank*, 815 S.W.2d 356, 360-61 (Tex. App.—Austin 1991, no writ). See *Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 90-91 (Tex. App.—Dallas 1996, writ denied); *Estate of Devitt*, 758 S.W.2d 601, 603 (Tex. App.—Amarillo 1988, writ denied).

When the defendant moves for summary judgment, he must either disprove at least one essential element of each theory of recovery pleaded by the plaintiff, or he must plead and conclusively prove each essential element of an affirmative defense. See *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996); *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 476-77 (Tex. 1995). Also, in *Roark v. Stallworth Oil & Gas, Inc.*, the Texas Supreme Court held that a plaintiff must except to the defendant's summary judgment motion to the trial court if he wants to complain on appeal that the defendant's pleading did not support the affirmative defense upon which the summary judgment was based. 813 S.W.2d 492, 494-95 (Tex.

1991). The court stated, "if the non-movant does not object to a variance between the motion for summary judgment and the movant's pleadings, it would advance no compelling interest of the parties or of our legal system to reverse a summary judgment simply because of a pleading defect." *Id.* at 495.

If the plaintiff does except to the defendant's answer to the trial court, then the defendant must only amend his answer and add the affirmative defense. If the defendant moves for summary judgment on his own counterclaim rather than on a defensive claim, then he has the same burden as a plaintiff moving for a summary judgment on his cause of action. See *Daniell v. Citizens Bank*, 754 S.W.2d 407, 409 (Tex. App.—Corpus Christi 1988, no writ). Accordingly, a plaintiff can thwart a defendant's summary judgment by either presenting summary judgment evidence creating a fact question on those elements of the plaintiff's case under attack by the defendant, creating a fact question on at least one element of each affirmative defense advanced by the defendant, or conceding the material facts and showing that the defendant's legal position is unsound. See *Torres v. Western Cas. & Sur. Co.*, 457 S.W.2d 50, 52 (Tex. 1970). *Maranatha Temple, Inc. v. Enter. Prods. Co.*, 893 S.W.2d 92, 97 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

## B. No-Evidence Motion

The trial court's review of a no-evidence summary judgment filed under Texas Rule of Civil Procedure 166a(i) differs from that of a traditional summary judgment.

### 1. Historical Standard

Under the no-evidence motion, the movant does not have the burden to produce evidence; the burden is on the non-movant. The no-evidence non-movant has the initial burden to present sufficient evidence to warrant a trial. See *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d 94, 99 (Tex. 2004); *Walmart Stores v. Rodriguez*, 92 S.W.3d 502 (Tex. 2002); *Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407 (Tex. App.—Waco 1999, no pet.); *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.). When a sufficient no-evidence motion is filed and served, the various burdens are split – the burden of production (burden to produce evidence) is placed on the non-movant, however, the burden of persuasion (burden to persuade the court that no genuine issue of fact exists) is on the movant. See David F. Johnson, *Can A Party File a No-Evidence Motion for Summary Judgment Based Upon an Inferential Rebuttal Defense?* 53 BAYLOR L. REV. 762, 767-68 (2001). Under this standard, as the Supreme Court stated:

A motion for summary judgment must be granted if, after adequate time for discovery, the moving party asserts that there is no evidence of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial and the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements.

*LMB, Ltd. v. Moreno*, 201 S.W.3d 686, 687 (Tex. 2006). See also *Sudan v. Sudan*, 199 S.W.3d 291 (Tex. 2006). A court must review the summary judgment evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. See *Timpte Indus. Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009); *Walmart Stores v. Rodriguez*, 92 S.W.3d 502 (Tex. 2002); *Morgan v. Anthony*, 27 S.W.3d 928, 929 (Tex. 2000). The inferences that are in favor of the non-movant trump all other inferences that may exist. See *Orangefield I.S.D. v. Callahan & Assocs.*, No. 09-00-171-CV, 2001 Tex. App. LEXIS 5066 (Tex. App.—Beaumont July 26, 2001, no pet.) (not design. for pub.); *Tucco Inc. v. Burlington Northern R.R. Co.*, 912 S.W.2d 311 (Tex. App.—Amarillo 1995), *aff'd as modified*, 960 S.W.2d 629 (Tex. 1997).

A no-evidence motion for summary judgment should be granted if the respondent fails to bring forth evidence to raise a genuine issue of material fact. See *Fort Worth Osteopathic Hosp., Inc. v. Reese*, 148 S.W.3d at 99. If the nonmovant presents more than a scintilla of evidence to support the challenged ground, the court should deny the motion. See *Forbes, Inc. v. Granada Biosciences*, 124 S.W.3d 167, 172 (Tex. 2003); *King Ranch v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003); *Wal-Mart Stores, Inc. v. Rodriguez*, 92 S.W.3d 502, 506 (Tex. 2002). A genuine issue of material fact exists if the nonmovant produces more than a scintilla of evidence establishing the existence of the challenged element. See *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598 (Tex. 2004); *Morgan v. Anthony*, 27 S.W.3d 928 (Tex. 2000). Less than a scintilla of evidence exists when the evidence is so weak as to do no more than create a mere surmise or suspicion of fact. See *Special Car Servs. v. AAA Texas, Inc.*, No. 14-98-00628-CV, 1999 Tex. App. LEXIS 4200 (Tex. App.—Houston [14th Dist.] June 3, 1999, no pet.) (not design. for pub.); *Medrano v. City of Pearsall*, 989 S.W.2d 141, 143 (Tex. App.—San Antonio 1999, no pet.).

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. See *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598. On the other hand, if “the evidence offered to prove a vital fact is so weak as to do no more than create a

mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence.” *Ford Motor Co. v. Ridgway*, 135 S.W.3d at 598.

For clarification of the terms “genuine” and “material fact,” as they are used in Rule 166a(i), Texas courts have turned to federal law. See *Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App.—Houston [14th Dist.] 1998, no pet.). Materiality is a criterion for categorizing factual disputes in relation to the legal elements of the claim. The materiality determination rests on the substantive law and those facts that are identified by the substantive law as critical are considered material. Stated differently, “[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L.Ed.2d 232, 106 S.Ct. 2595 (1986). A material fact issue is genuine if the evidence is such that a reasonable jury could find the fact in favor of the non-moving party. If the evidence simply shows that some metaphysical doubt exists as to a challenged fact, or if the evidence is not significantly probative, the material fact issue is not genuine.

Both direct and circumstantial evidence may be used to establish any material fact. See *Lozano v. Lozano*, 52 S.W.3d 141, 149 (Tex. 2001); *Ford Motor Co. v. Ridgway*, 135 S.W.3d at 598. To raise a genuine issue of material fact, however, the evidence must transcend mere suspicion. See *Ford Motor Co. v. Ridgway*, 135 S.W.3d at 598. Evidence that is so slight as to make any inference a guess is in legal effect no evidence. See *id.*

For example, in *Elizondo v. Krist*, the court rejected a trial court’s reliance on an attorney’s “conclusory” affidavit challenging a class settlement. 415 S.W.3d 259, 265 (Tex. 2013). The court, relying primarily on the reasoning in *Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999), held that the attorney’s affidavit lacked “a demonstrable and reasoned basis on which to evaluate his opinion that the settlement was inadequate” and, thus, the court concluded “the affidavit did not raise a genuine issue of material fact sufficient to defeat summary judgment.” *Id.* at 265-66.

## 2. City of Keller’s Reasonable Juror Standard

In 2005, the Texas Supreme Court revisited the no-evidence standard of review. In *City of Keller v. Wilson*, the court engaged in an extensive analysis of legal sufficiency principles. 168 S.W.3d 802 (Tex. 2005). The court found that the standard should remain the same and does not change depending on the motion in which it is asserted. See *id.* at 823. “Accordingly, the test for legal sufficiency review should be the same for summary judgments, directed

verdicts, judgments notwithstanding the verdict, and appellate no-evidence review.” *Id.* That test is:

The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict, legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.

*Id.* at 827. This standard shifts the review from a traditional legal sufficiency review to a “reasonable juror” standard. William V. Dorsaneo III, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225, 233-43 (2005). For example, in *Wal-Mart Stores, Inc. v. Spates*, the court set forth the standard of review as: “We review a summary judgment for evidence that would enable reasonable and fair minded jurors to differ in their conclusions.” 186 S.W.3d 566 (Tex. 2006); *see also Merriman v. XTO Energy, Inc.*, No. 11-0494, 2013 Tex. LEXIS 492 (Tex. 2013); *Timpte Indus. Inc. v. Gish*, 286 S.W.3d at 310.

For example, in *Hamilton v. Wilson*, the Texas Supreme Court reversed a no-evidence motion for summary judgment in a health care liability case where an expert’s opinion raised a material issue of genuine fact as to causation. 249 S.W.3d 425, 427 (Tex. 2008). The court held that the evidence could allow reasonable and impartial jurors to differ in their conclusions as to what caused the plaintiff’s injury. *See id.*

Under the *City of Keller*, some of the exceptions to the general rule, which requires that evidence contrary to the non-movant’s position be disregarded, are:

- (1) contextual evidence – “The lack of supporting evidence may not appear until all the evidence is reviewed in context”; *Id.* at 811.
- (2) competency evidence – “Evidence that might be ‘some evidence’ when considered in isolation is nevertheless rendered ‘no evidence’ when contrary evidence shows it to be incompetent”; *Id.* at 813.
- (3) circumstantial equal evidence – “When the circumstances are equally consistent with either of two facts, neither fact may be inferred.’ In such cases, we must ‘view each piece of circumstantial evidence, not in

isolation, but in light of all the known circumstances.” *Id.* at 813-14. ; and

- (4) consciousness evidence – when reviewing “consciousness evidence,” a no evidence review must encompass “all of the surrounding facts, circumstances, and conditions, not just individual elements or facts.”

*Id.* at 817-18. Accordingly, a court may not disregard certain types of evidence when a reasonable juror could not do so – the scope of review has been enlarged in the context of legal sufficiency of the evidence after a jury trial.

### C. Scope of Review For Summary Judgment Motions

The scope of review refers to what evidence a court can examine in determining the merits of a motion for summary judgment. In other words, can the trial court, and on appeal the court of appeals, review evidence submitted by the movant, the non-movant, or both?

Regarding a traditional motion filed under Texas Rules of Civil Procedure 166a(b), the court should first review the evidence submitted by the movant to determine if the movant proved its entitlement to summary judgment as a matter of law. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979). Therefore, at that stage, the court can review the movant’s evidence. If the movant meets its burden, the burden then shifts to the nonmovant to produce evidence to create a fact issue. *See id.* At this stage, the Texas Supreme Court stated that the reviewing court must consider all of the evidence to determine if a reasonable juror could find a fact issue: “When reviewing a summary judgment, we ‘must examine *the entire record* in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion.” *Yancy v. United Surgical Partners International, Inc.*, 236 S.W.3d 778, 782 (Tex. 2007).

However, a party filing a no-evidence motion for summary judgment does not have to file any evidence with its motion. Is the scope of review the same as a traditional motion? Texas Rule of Civil Procedure 166a(i) provides that “a party *without presenting summary judgment evidence* may move for summary judgment on the ground that there is no evidence . . . .” TEX. R. CIV. P. 166a(i) (emphasis added). One view is that a court can only look to the summary judgment evidence offered by the non-movant, and that any evidence offered by the movant should be disregarded for all purposes. There is language in opinions from the Eastland Court of Appeals that may support this view. *See Padron v. L&M Props.*, No. 11-02-001510-CV, 2003 Tex. App. LEXIS 1229 (Tex.

App.—Eastland February 6, 2003, no pet.); *Herod v. Baptist Found of Texas*, 89 S.W.3d 689 (Tex. App.—Eastland 2002, no pet.); *Kelly v. LIN TV of Texas*, 27 S.W.3d 564 (Tex. App.—Eastland 2000, pet. denied); *Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614 (Tex. App.—Eastland 2000, pet. denied). These cases dealt with a movant arguing that its evidence proves that the non-movant does not have any evidence to support a challenged element. The courts found that the movant could not do so.

Another view is that a court may consider all summary judgment evidence in determining whether a fact issue exists — even the movant’s evidence. See *Louck v. Olshan Found. Repair Co.*, 14-99-00076-CV, 2000 Tex. App. LEXIS 5337 (Tex. App.—Houston [14th Dist.] August 10, 2000, pet. denied) (not desig. for pub.); *Saenz v. Southern Union Gas. Co.*, 999 S.W.2d 490 (Tex. App.—El Paso 1999, pet. denied); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70 (Tex. App.—Austin 1998, no pet.). This view provides that the movant’s evidence is nonetheless before the court and, if applicable, can be used to support the non-movant’s position. However, those courts would not review the movant’s evidence to support the movant’s position that no evidence existed to support the non-movant element. The movant’s evidence could only be used against it.

The Texas Supreme Court has previously implied that this view is correct. In *Binur v. Jacobo*, the court stated: “Similarly, if a motion brought solely under subsection (i) attaches evidence, that evidence should not be considered unless it creates a fact question. . .” 135 S.W.3d 646 (Tex. 2004). This language would support the position that if a movant files evidence with a no-evidence motion, the evidence should be disregarded unless it helps the non-movant and creates a fact issue.

Following *Jacobo*, several courts of appeals similarly stated that they would ignore evidence that a movant attached or referred to in its no-evidence motion for summary judgment unless the evidence created a fact issue. See, e.g., *Hernandez v. Select Med. Corp.*, 2013 Tex. App. LEXIS 8930 (Tex. App.—Eastland July 18, 2013, no pet.); *Leal v. McDonald’s Corp.*, No. 03-05-00500-CV, 2009 Tex. App. LEXIS 6151, at \*5 n.3, 2009 WL 2410853 (Tex. App.—Austin Aug. 5, 2009, no pet.); *Davis v. Dillard’s Dep’t Store, Inc.*, No. 11-06-00027-CV, 2008 Tex. App. LEXIS 3201 (Tex. App.—Eastland May 1, 2008, no pet.); *Poteet v. Kaiser*, 2007 Tex. App. LEXIS 9749, fn. 6 (Tex. App.—Fort Worth Dec. 13, 2007, pet. filed); *Southtex 66 Pipeline Co. v. Spoor*, 238 S.W.3d 538 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Dunlap-Tarrant v. Association Cas. Ins. Co.*, 213 S.W.3d 452, 453 (Tex. App.—Eastland 2006, no pet.); *DeLeon v. DSD Devel. Inc.*, 2006 Tex. App. LEXIS 7799 (Tex.

App.—Houston [1st Dist] August 31, 2006, pet. denied); *Green v. Lowe’s Home Centers, Inc.*, 199 S.W.3d 514, 518 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Seaway Prods. Pipeline Co. v. Hanley*, 153 S.W.3d 643, 650 n.7 (Tex. App.—Fort Worth 2004, no pet.). One court stated thusly:

In a no-evidence motion for summary judgment, the non-movant bears the burden of producing competent summary judgment evidence; therefore in this case, Space Place bore the burden of producing proper summary judgment evidence, not Midtown. See TEX. R. CIV. P. 166a(i). Pursuant to this rule, we have not considered the evidence attached by Midtown in conjunction with its motion. See *Southtex 66 Pipeline Co., Ltd. v. Spoor*, 238 S.W.3d 538, 542 n.1 (Tex. App.—Houston [14th Dist.] pet. denied) (stating even though the movant in a no-evidence summary judgment attached evidence, the appellate court did not consider the evidence). As a result, Space Place’s objections to Midtown’s evidence were irrelevant; therefore, we need not address Space Place’s second issue on the merits.

*SP Midtown, Ltd v. Urban Storage, L.P.*, 2008 Tex. App. LEXIS 3364 (Tex. App.—Houston 14th Dist. May 8, 2008, pet. denied).

A recent case from the Fourteenth Court of Appeals frames this exact issue. See *Gallien v. Goose Creek Consol. Indep. Sch. Dist.*, 2013 Tex. App. LEXIS 2790 (Tex. App.—Houston [14th Dist.] Mar. 19, 2013, pet. dismissed). The movant filed a dual traditional and no-evidence motion that had evidence attached. See *id.* The majority affirmed the no evidence summary judgment because the nonmovant did not file a response, and the court refused to review the evidence attached to the motion. See *id.* A concurring justice disagreed with this approach and argued that the court should have reviewed the evidence attached to the motion to see if it created a fact issue. See *id.*

Another recent case posits that a nonmovant can rely on the movant’s evidence to create a fact issue only where the nonmovant files a response and directs the trial court to the evidence. See *Dyer v. Accredited Home Lenders, Inc.*, No. 02-11-0046-CV, 2012 Tex. App. LEXIS 877, 2012 WL 335858, at \*3 (Tex. App.—Fort Worth Feb. 2, 2012, pet. denied). It held that a nonmovant cannot rely on a movant’s evidence to create a fact issue where it did not file a response. See *id.* (“Although it appears to be a triumph of procedure over substance, we cannot create a rule that the trial court disposing of a combined motion has a

duty to look at the traditional summary judgment evidence to see if it defeats the movant's right to no-evidence summary judgment when the rules of procedure place the burden on the nonmovant to produce evidence.”).

After the *City of Keller* opinion, one commentator has argued that the scope of review for a no-evidence motion has been expanded. See Tim Patton, *Standard and Scope of Review Spotlight: “No-Evidence” Summary Judgment*, 17<sup>th</sup> Annual Conference on State and Federal Appeals, University of Texas School of Law, (June 1, 2007). In *City of Keller*, as shown above, the Texas Supreme Court included a lengthy discussion of the “contrary evidence that cannot be disregarded” by the jury when rendering verdict or by the appellate court when reviewing that verdict on no-evidence grounds. *City of Keller*, 168 S.W.3d at 810-18. Accordingly, the court's categories concern not only evidence that jurors must consider but also evidence a reviewing court should not disregard in conducting a legal sufficiency review. The issue is whether a trial court can review evidence filed by a no-evidence movant in determining that the non-movant has no evidence to support a challenged element of its claim or defense.

In discussing the standards for a no evidence motion for summary judgment, one court cited *City of Keller* and stated: “We view the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences, *unless there is no favorable evidence or contrary evidence renders supporting evidence incompetent or conclusively establishes the opposite.*” *Brent v. Daneshjou*, No. 03-04-00225-CV, 2005 Tex. App. LEXIS 9249 (Tex. App.—Austin Nov. 4, 2005, no pet.). This language would support the position that a court could look to “contrary evidence” to determine that the non-movant's evidence was incompetent. See *id.*

In the *City of Keller*, however, the court acknowledged that a party moving for summary judgment may not be able to take advantage of the expanded scope of review. 168 S.W.3d at 825. In a section of the opinion discussing how the no-evidence standard is the same no matter how it is raised, the court specifically excepted summary judgment motions:

In practice, however, a different scope of review applies when a summary judgment motion is filed without supporting evidence. *In such cases, evidence supporting the motion is effectively disregarded because there is none; under the rule, it is not allowed.* Thus, although a reviewing court must consider all the summary judgment evidence on file, in some cases that review

will effectively be restricted to the evidence contrary to the motion. *Id.*

Courts of appeals have found that the *City of Keller* opinion stands for the proposition that a party may not attach evidence to a no-evidence motion, and that if attached, it should not be considered. For example, in *AIG Life Insurance v. Federated Mutual Insurance Co.*, 200 S.W.3d 280, 283 (Tex. App.—Dallas 2006, pet. denied); the court of appeals addressed whether a vague motion was a traditional motion or a no-evidence motion – or both. The court stated:

The motions do not include a standard of review and do not clearly delineate whether they are traditional motions for summary judgment under Texas Rule of Civil Procedure 166a(c) or no-evidence motions for summary judgment under Texas Rule of Civil Procedure 166a(i). Attached to each motion was a substantial amount of summary judgment evidence, indicating the motions sought a traditional summary judgment. See *City of Keller v. Wilson*, 168 S.W.3d 802, 825, 48 Tex. Sup. Ct. J. 848 (Tex. 2005) (evidence supporting motion not allowed under rule 166a(i)).

The court concluded that the motion solely sought traditional grounds.

Similarly, in *Mathis v. Restoration Builders, Inc.*, the Fourteenth Court of Appeals found that a reviewing court should only review the evidence attached to the non-movant's response:

However, per *City of Keller*, although we “must consider all the summary judgment evidence on file, in some cases, that review will effectively be restricted to the evidence contrary to the motion.” Thus, in this case, our review is limited to the evidence favoring Mathis that was attached to the Response to the Motions for Summary Judgment, even though the body of Restoration's Motion for Summary Judgment, which was both a traditional and no-evidence motion, contained testimony on which Restoration relied.

231 S.W.3d 47, 52 (Tex. App.—Houston [14th Dist.] 2007, no pet.).

However, the Texas Supreme Court indicated that the enlarged scope of review may apply to no-evidence summary judgment proceedings. In *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572 (Tex. 2006); the Court held that the plaintiff's expert testimony had

been properly excluded, and therefore, a no-evidence motion for summary judgment was correctly granted on causation grounds. The court stated:

A summary judgment motion pursuant to Tex. R. Civ. P. 166a(i) is essentially a motion for a pretrial directed verdict. Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion. We review the evidence presented by *the motion and response* in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.

*Id.* at 581-82. In a *per curiam* opinion, the court has reaffirmed that: “An appellate court reviewing a summary judgment must consider *all* the evidence....” *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754 (Tex. 2007) (emphasis added). In *Goodyear*, the court reversed a court of appeals that disregarded uncontroverted evidence in reversing a traditional and no-evidence motion for summary judgment. *See id.*; *see also Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013).

Generally, courts of appeals have cited *Mack Trucks* and found that under the review of a no-evidence motion that the court of appeals must review the evidence attached to the motion and response in the light most favorable to the non-movant. *See, e.g., Anderson v. Limestone County*, No. 10-07-00174-CV, 2008 Tex. App. LEXIS 5041 (Tex. App.—Waco July 2, 2008, pet. denied); *Acad. of Skills & Knowledge, Inc. v. Charter Sch., USA, Inc.*, No. 12-07-00027-CV, 2008 Tex. App. LEXIS 4691 (Tex. App.—Tyler June 25, 2008, pet. denied); *Abendschein v. GE Capital Mortg. Servs.*, No. 10-06-00247-CV, 2007 Tex. App. LEXIS 9761 (Tex. App.—Waco December 12, 2007, no pet.); *Packwood v. Touchstone Cmtys.*, No. 06-07-00020-CV, 2007 Tex. App. LEXIS 7935 (Tex. App.—Texarkana October 5, 2007, no pet.); *State v. Beeson*, 232 S.W.3d 265 (Tex. App.—Eastland 2007, pet. abated); *Paragon General Contractors, Inc. v. Larco Constr., Inc.*, 227 S.W.3d 876, 2007 Tex. App. LEXIS 4949 (Tex. App.—Dallas 2007, no pet.). These opinions, however, merely state the rule as described in *Mack Trucks*, and do not discuss the issue in any depth.

One exception is the Dallas Court of Appeals, which stated that with regards to a no-evidence motion the “scope of our review includes both the evidence presented by the movant and the evidence presented by the respondent.” *Highland Crusader*

*Offshore Partners., L.P. v. Andrews & Kurth, L.L.P.*, 248 S.W.3d 887 (Tex. App.—Dallas 2008, no pet.). Therefore, that court is using the expanded *City of Keller* standard with regards to a no-evidence motion review.

Once again, in *Mack Trucks, Inc. v. Tamez*, the Texas Supreme Court stated “We review the evidence presented by the motion and response in the light most favorable to the party against whom the summary judgment was rendered, *crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.*” 206 S.W.3d 572, 582 (Tex. 2006). Therefore, it is clear under this standard that if the non-movant attaches evidence that hurts its position to the point that a reasonable juror could not disregard it, a reviewing court can use that evidence to show that there is no evidence. The issue is whether the reviewing court can also look to evidence filed by the movant and use the same standard. One commentator has noted that to enlarge the scope of review to include both the movant’s evidence and the nonmovant’s evidence would be consistent with the practice in the federal court system. *See* Tim Patton, *Standard and Scope of Review Spotlight: “No-Evidence” Summary Judgment*, 17<sup>th</sup> Annual Conference on State and Federal Appeals, University of Texas School of Law, (June 1, 2007) (citing *Celotex Corp v. Catrett*, 477 U.S. 317, 323 (1986); BRUNER & REDISH, SUMMARY JUDGMENT: FEDERAL LAW & PRACTICE, § 5:7 (3d ed. 2006)). The Texas Supreme Court has never really discussed this issue in depth. Accordingly, the issue of whether a court may review evidence attached to a no-evidence motion in determining whether the non-movant’s evidence raises a fact question for a reasonable juror is still unresolved.

## VI. STANDARDS OF APPELLATE REVIEW

### A. Traditional Summary Judgment

Appellate review of a trial court’s summary judgment ruling is *de novo*. *See Merriman v. XTO Energy, Inc.*, No. 11-0494, 2013 Tex. LEXIS 492, \*5 (Tex. 2013); *Shivers v. Texaco Exploration & Prod.*, 965 S.W.2d 727, 730 (Tex. App.—Texarkana 1998, pet. denied). The appellate court may look only to evidence that was presented to the trial court. *See H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 877-78 (Tex. App.—Corpus Christi 1996, writ denied); *see also E.B. Smith Co. v. United States Fidelity & Guar. Co.*, 850 S.W.2d 621, 624 (Tex. App.—Corpus Christi 1993, writ denied); *Totman v. Control Data Corp.*, 707 S.W.2d 739, 742-43 (Tex. App.—Fort Worth 1986, no writ). The *Totman* court stated:

The question on appeal is not whether the summary judgment proof presented raises material fact issues with regard to the essential elements of a cause of action or defense, but whether the evidence presented to the trial court establishes, as a matter of law, no genuine material fact issue exists as to one or more of the essential elements of plaintiff's cause of action.

*Id.* at 742. The question on appeal, as well as in the trial court, is whether the movant has established that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *see also* *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985).

### B. No-Evidence Summary Judgment

"No-evidence summary judgments are reviewed under the same legal sufficiency standard as directed verdicts." *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013) (citing *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003)). "Under that standard, evidence is considered in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not." *Id.* (citing *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005)).

There has been some confusion, however, among the courts of appeals about the appropriate standard. Some appellate courts hold that a no-evidence motion should have a *de novo* standard of review just like a traditional motion for summary judgment. *See* *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150 (Tex. 2004); *DTND Sierra Invs., LLC v. Deutsche Bank Nat'l Trust Co.*, 2013 Tex. App. LEXIS 10460 (Tex. App.—San Antonio Aug. 21, 2013, no pet. hist.); *Simulis, L.L.C. v. GE Capital Corp.*, 2008 Tex. App. LEXIS 2731 (Tex. App.—Houston [14th Dist.] Apr. 17, 2008, no pet.); *Baize v. Scott & White Clinic*, No. 03-05-00780-CV, 2007 Tex. App. LEXIS 366 (Tex. App.—Austin January 22, 2007, pet. denied); *Diaz v. Goodman Manf. Co., L.P.*, 214 S.W.3d 672 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2007, pet. denied); *In re Estate of Wallace*, No. 04-05-00567-CV, 2006 Tex. App. LEXIS 10603 (Tex. App.—San Antonio December 13, 2006, no pet.); *Aiken v. Hancock*, 115 S.W.3d 26 (Tex. App.—San Antonio 2003, pet. denied); *Leonard v. Coastal States Crude Gathering Co.*, No. 04-02-00238, 2003 Tex. App. LEXIS 4094 (Tex. App.—San Antonio May 14,

2003, pet. denied); *Jones v. City of Hitchcock*, No. 01-02-00676-CV, 2003 Tex. App. LEXIS 3353 (Tex. App.—Houston [1st Dist.] April 17, 2003, pet. denied); *Kesyler v. Menil Med. Ctr. of E. Tex.*, 105 S.W.3d 122 (Tex. App.—Corpus Christi 2003, no pet.); *Taub v. Aquila Southwest Pipeline Corp.*, 93 S.W.3d 451 (Tex. App.—Houston [14th Dist.] October 17, 2002, no pet.); *United Plaza-Midland v. Chase Bank of Tex. N.A.*, No. 14-01-0210-CV, 2002 Tex. App. LEXIS 6030 (Tex. App.—Houston [14th Dist.] June 6, 2002, no pet.) (not desig. for pub.); *Delgado v. Jim Wells County*, 82 S.W.3d 640 (Tex. App.—San Antonio 2002, no pet.); *Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614 (Tex. App.—Eastland 2000, pet. denied); *Shull v. UPS*, 4 S.W.3d 46 (Tex. App.—San Antonio 1999, pet. denied); *see also*, *Sarah B. Duncan, No-Evidence Motion for Summary Judgment: Harmonizing Rule 166a(i) and its Comments*, 41 S. TEX. L. REV. 873, 907 (2000).

Other courts, however, have determined that a no-evidence motion should have a legal sufficiency standard of review — the same as the review over a directed verdict motion. *See* *Merriman v. XTO Energy, Inc.*, No. 11-0494, 2013 Tex. LEXIS 492, \*5 (Tex. 2013); *King Ranch v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003); *see also* *Texas Integrated Conveyor Sys. Inc. v. Innovative Conveyor Concepts, Inc.*, 300 S.W.3d 348, 375076 (Tex. App.—Dallas 2009, pet. denied); *Butler v. McDonald's Corp.*, No. 11-05-00323-CV, 2007 Tex. App. LEXIS 64 (Tex. App.—Eastland January 5, 2007, no pet.); *Ross v. Womack*, No. 13-04-571-CV, 2006 Tex. App. LEXIS 10656 (Tex. App.—Corpus Christi December 14, 2006, no pet.); *Entravision Communs. Corp. v. Belalcazar*, 99 S.W.3d 393 (Tex. App.—Corpus Christi 2003, pet. denied); *Diversified Fin. Sys. v. Hill*, 99 S.W.3d 349 (Tex. App.—Fort Worth 2003, no pet.); *DRC Parts & Accessories, L.L.C. v. VM Mortori, S.P.A.*, No. 14-01-00507-CV, 2002 Tex. App. LEXIS 7431 (Tex. App.—Houston [14th Dist.] October 17, 2002, no pet.); *Trevino v. Goss*, No. 03-01-0521-CV, 2002 Tex. App. LEXIS 4462 (Tex. App.—Austin June 21, 2002, pet. denied) (not desig. for pub.); *Lattrell v. Chrysler Corp.*, 79 S.W.3d 141 (Tex. App.—Texarkana 2002, pet. denied); *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28 (Tex. App.—Fort Worth 2002, no pet.); *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 904 (Tex. App.—Dallas 2001, pet. denied); *Vargas v. KKB Inc.*, 52 S.W.3d 250, 254 (Tex. App.—Corpus Christi 2001, pet. denied); *General Mills Rest., Inc. v. Texas Wings, Inc.*, 12 S.W.3d 827, 832-33 (Tex. App.—Dallas 2000, no pet.); *Gomez v. Tri-City County Hosp., Ltd.*, 4 S.W.3d 281, 283 (Tex. App.—San Antonio 1999, no pet.); *Zapata v. Children's Clinic*, 997 S.W.2d 745, 747 (Tex. App.—Corpus Christi 1999, pet. denied); *Roth v. FFP Operating Partners*, 994 S.W.2d 190, 195

(Tex. App.—Amarillo 1999, pet. denied); *Jackson v. Fiesta Mart*, 979 S.W.2d 68, 70 (Tex. App. —Austin 1998, no pet.); see also *Mack Trucks v. Tamez*, 206 S.W.3d 572 (Tex. 2006).

One court has even held in the same case that the standard of review over a no-evidence motion is the same as a directed verdict (legal insufficiency) and that the standard is *de novo*. See *Allen v. Albin*, 97 S.W.3d 655 (Tex. App.—Waco 2002, no pet.); *Dodd v. City of Beverly Hills*, 78 S.W.3d 509, 512 (Tex. App.—Waco 2002, pet. denied). And at least one court has acknowledged the differing standards of review between a traditional and a no-evidence motion. See *Logsdon v. Miller*, No. 03-01-00575-CV, 2002 Tex. App.-LEXIS 2055 (Tex. App.—Austin March 21, 2002, pet. denied) (not desig. for pub.).

The courts that favor the *de novo* standard hold that the better approach is to review no-evidence motions “in the same manner as any other 166a summary judgment is reviewed,” as there is “no reason to engage in analogies [to directed verdict practice] when we already have in place a standard of review by which to review most summary judgments.” *Hight v. Dublin Veterinary Clinic*, 22 S.W.3d at 614. The Authors agree that the standard of review over a no-evidence motion should be the same as a traditional motion — *de novo*. The standard of review determines how much deference a court of appeals gives to the trial court’s determination. In the no-evidence summary judgment context, that deference is zero — the court of appeals looks at the motion, response, and evidence as if it were the first court reviewing them.

In exercising its *de novo* standard of review, the court of appeals sits in the same position as the trial court and reviews the evidence under a legal sufficiency standard. Accordingly, the distinction between standards is really without a difference because both standards provide that a court should review the evidence in the light most favorable to the non-movant and that the motion should be granted only if no more than a scintilla of evidence is produced to support the claim or defense. See *Ellis v. McKinney*, No. 01-00-0198, 2001 Tex. App. LEXIS 7715 n. 2 (Tex. App.—Houston [1st Dist.] November 15, 2001, pet. denied) (not desig. for pub.). In the Authors’ views, the courts that hold that the standard of review is legal sufficiency are basically just skipping a step.

### C. Standards of Review Over Adequate Time For Discovery, Evidence Objections, And Motions For Continuance

A trial court’s determination on whether there has been an adequate time for discovery is reviewed under an abuse of discretion standard because that determination encompasses a balancing and weighing

of factors that is best left in the discretion of the trial court. See *McLendon v. Detoto*, No. 14-06-00658-CV, 2007 Tex. App. LEXIS 5173 (Tex. App.—Houston [14<sup>th</sup> Dist.] July 3, 2007, pet. denied); *First Select Corp. v. Grimes*, No. 2-01-257-CV, 2003 Tex. App. LEXIS 604 (Tex. App. —Fort Worth January 23, 2003, no pet.); *Carter v. MacFaddyen*, 93 S.W.3d 307 (Tex. App. —Houston [14<sup>th</sup> Dist.] August 8, 2002, pet. denied); *Restaurant Teams International, Inc. v. MG Securities Corp.*, 93 S.W.3d 336 (Tex. App.—Dallas June 18, 2002, no pet.); *Dickson Const. v. Fidelity & Deposit Co.*, 5 S.W.3d 353, 357 (Tex. App.-Texarkana 1999, pet. denied).

Trial court rulings concerning the admission or exclusion of summary judgment evidence are reviewed under an abuse of discretion standard. See *Sanders v. Shelton*, 970 S.W.2d 721 (Tex. App.—Austin 1998, writ denied); *Su Inn v. University of Texas at Arlington*, 984 S.W.2d 672 (Tex. App.—Amarillo 1998, writ denied); *Lergva v. Soltero*, 966 S.W.2d 765, 768 (Tex. App.—El Paso 1998, no writ). Further, a trial court’s ruling on a motion for continuance is reviewed under an abuse of discretion standard. See *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984). In *Joe v. Two Thirty Nine J.V.*, the Texas Supreme Court provided the appellate standard of review for an order denying a motion for continuance from a summary judgment hearing:

The trial court may order a continuance of a summary judgment hearing if it appears “from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition.” When reviewing a trial court’s order denying a motion for continuance, we consider whether the trial court committed a clear abuse of discretion on a case-by-case basis. A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. We have considered the following nonexclusive factors when deciding whether a trial court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery: the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought.

145 S.W.3d 150, 161 (Tex. 2004). A party moving for a continuance from a summary judgment should keep this standard in mind.

## VII. APPEAL OF DENIAL OF SUMMARY JUDGMENT MOTION

Generally, a party cannot appeal a trial court's denial of a summary judgment motion because the order is interlocutory. *See Lancer Ins. Co. v. Garcia Holiday Tours*, 345 S.W.3d 50 (Tex. 2011); *Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex. 1980); *Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966); *United Parcel Serv. Inc. v. Tasdemiroglu*, 25 S.W.3d 914 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Amerivest, Inc. v. Bluebonnet Sav. Bank*, 897 S.W.2d 513, 515 n.1 (Tex. App.—Fort Worth 1995, writ denied); *Motor 9, Inc. v. World Tire Corp.*, 651 S.W.2d 296 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.). Additionally, the denial of a motion for summary judgment does not preserve any points raised in that motion, thus the movant must re-urge those issues at a latter point in the proceedings, i.e., objections to the charge, motion for a directed verdict, or a motion for judgment notwithstanding the verdict. *See Fling v. Steed*, No. 07-99-0450-CV, 2001 Tex. App. LEXIS 1585 (Tex. App.—Amarillo March 12, 2001, pet. denied) (not desig. for pub.); *Hines v. Commission for Lawyer Discipline*, 28 S.W.3d 697, 700 (Tex. App.—Corpus Christi 2000, no pet.); *United Parcel Serv. Inc. v. Tasdemiroglu*, 25 S.W.3d 914 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). *See also, Ackermann v. Vordenbaum*, 403 S.W.2d 362, 365 (Tex. 1966); *Motor 9, Inc., v. World Tire Corp.*, 651 S.W.2d 296, 299 (Tex. App.—Amarillo 1983, writ ref'd n.r.e.).

But if both parties file motions for summary judgment and the trial court grants one party's motion but denies the other's, the party whose motion the court denied may appeal both the granting of his opponent's motion and the denial of his motion. *See Lancer Ins. Co. v. Garcia Holiday Tours*, 345 S.W.3d 50 (Tex. 2011); *Tobin v. Garcia*, 159 Tex. 58, 316 S.W.2d 396, 400 (1958). *See also Amerivest, Inc.*, 897 S.W.2d at 515 n.1. When opposing parties file counter motions for summary judgment and the trial court grants one motion and denies the other, the appellate court has jurisdiction to determine all questions presented in the opposing motions and to render the judgment the trial court should have rendered. *See Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013); *Progressive Cnty. Mut. Ins. Co. v. Kelley*, 284 S.W.3d 805, 806 (Tex. 2009) (per curiam).

It is important to note in this circumstance that if the party whose summary judgment motion was denied appeals only the trial court's granting of his opponent's motion, the appellate court can only reverse the summary judgment and remand the case to the trial court. *See City of Denison v. Odle*, 808 S.W.2d 153, 156-57 (Tex. App.—Dallas 1991), *rev'd on other grounds*, 833 S.W.2d 935 (Tex. 1992). If the

appellant wants the appellate court to reverse his opponent's summary judgment and at the same time render and grant appellant's summary judgment, he must appeal not only the trial court's granting of the opponent's summary judgment, but also the denial of his summary judgment motion. *See id.* *See also Grainger v. Western Cas. Life Ins. Co.*, 930 S.W.2d 609, 614 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

Additionally, there are two special statutes that allow a party to appeal the denial of a summary judgment motion. When a trial court denies a summary judgment motion based on an assertion of immunity by an officer or employee of the state, the movant may immediately appeal that decision. *See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(5)*. When reviewing this denial, an appellate court uses the same standard of review as it does for an order granting a summary judgment motion. *See Bartlett v. Cinemark USA, Inc.*, 908 S.W.2d 229, 233 (Tex. App.—Dallas 1995, no writ). Note that the Texas Supreme Court recently held that employees and officers of private universities may also invoke this provision. *Wm. Marsh Rice Univ. v. Refaey*, 459 S.W.3d 590 (Tex. 2015). Also, if a trial court denies a summary judgment motion based on a claim against or defense by a member of the media, or a person whose communication the media published under the freedom of speech or free press guarantees, the movant may immediately appeal that denial. *See TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a)(6)*; *see also Freedom Communications, Inc. v. Brand*, 907 S.W.2d 614, 617 (Tex. App.—Corpus Christi 1995, no writ); *H&C Communications, Inc. v. Reed's Food Int'l, Inc.*, 887 S.W.2d 475, 476 (Tex. App.—San Antonio 1994, no writ).

The Texas Civil Practice and Remedies Code also allows for a permissive appeal in Texas. *See TEX. CIV. PRAC. & REM. CODE ANN. §51.014(d)*. This device would allow a party to appeal a traditionally non-appealable interlocutory ruling when it involves a controlling issue of law as to which there is a substantial ground for difference of opinion and when an immediate appeal may materially advance the ultimate termination of the litigation. *See id.* If all conditions are met for its use, the permissive appeal is a method to appeal a denial of a motion for summary judgment or the granting of a partial motion.

Further, under those limited circumstances when a party can appeal the denial of a summary judgment, the standard of review over a denial of a summary judgment is the same as the granting of a summary judgment. *See HBO v. Harrison*, 983 S.W.2d 31, 35 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

It should be noted that even though an appellate court cannot review the denial of a motion for summary judgment, it can order a trial court to rule on

a properly filed motion. See *In re Mission Consolidated Indep. Sch. Dist.*, 990 S.W.2d 459, 461 (Tex. App.—Corpus Christi 1999, orig. proceeding) (where motion had been filed for eight months with no response and trial court refused to rule, the movant was entitled to a writ of mandamus ordering the trial court to rule on the motion).

### VIII. MANDAMUS OF DENIAL OF SUMMARY JUDGMENT MOTION

As stated previously, generally, courts do not allow mandamus relief to review the denial of a summary judgment motion. Recently, there has been some precedent that may allow a court of appeals to review a denial of summary judgment via mandamus review. Mandamus is an extraordinary writ, usually issued by a higher court to a lower court or to an individual, ordering the subject of the writ to perform a particular legal duty or correct an abuse of discretion. Because mandamus is an “extraordinary remedy,” it historically has only been available in limited circumstances when necessary to “correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.” *CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996). Historically, Texas courts have not granted mandamus relief from a trial court’s denial of a summary judgment motion. *In re McAllen Medical Center, Inc.*, 275 S.W.3d 458, 465 (Tex. 2008); *In re Mohawk Rubber Co.*, 982 S.W.2d 494 (Tex. App.—Texarkana 1998, original proceeding). *But see State Bar of Texas v. Heard*, 603 S.W.2d 829 (Tex. 1980).

However, in 2004, the Texas Supreme Court changed the way that mandamus relief is evaluated. *In re Prudential Ins. Co.*, 148 S.W.3d 124, 135-38 (Tex. 2004) (orig. proceeding). In that case, the court held that “adequate” is a “proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests.” *Id.* at 136. The court stated:

Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction

to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is “adequate” when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

*Id.*

In *In re McAllen Medical Center, Inc.*, the Texas Supreme Court discussed the use of mandamus relief in the context of summary judgment denials. 275 S.W.3d at 465. The court stated:

Of course, mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion. But parties are not “entitled” to summary judgment in the same way they are entitled to arbitration, their chosen attorney, or an expert report like those here. Summary judgments were unknown at common law, and appeared in Texas cases only with adoption of the rule in 1949. Even if the merits could be decided only one way, jury trials may still be important both for justice and the appearance of doing justice. Moreover, trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice -- as it will if the first trial is conducted in the wrong time, place, or manner. By contrast, insisting on a wasted trial simply so that it can be reversed and tried all over again creates the appearance not that the courts are doing justice, but that they don’t know what they are doing. Sitting on our hands while unnecessary costs mount up contributes to public complaints that the civil justice system is expensive and outmoded.

*Id.*

Previously, the court held that mandamus was appropriate to order a trial court to enter summary judgment in *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996). The court held that mandamus relief was appropriate in that case as “the trial itself, therefore, and not merely the imposition of an adverse judgment, would violate relator’s constitutional rights.” *Id.* at 681.

After the *In re McAllen Medical Center, Inc.* opinion, the court granted mandamus relief to order a trial court to grant summary judgment based on a statute of limitations defense. *In re USAA*, 307 S.W.3d at 314. The extraordinary circumstances in USAA that justified mandamus relief were: (1) a previous trial by a trial court without jurisdiction, (2) an appeal to an appellate court and then to the supreme court to get that error corrected, and (3) a proposed second trial on a claim barred by limitations. *Id.* In granting mandamus relief, the court noted:

“Two wasted trials are not ‘[t]he most efficient use of the state’s judicial resources.’” *Id.* The Court concluded: “Denying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years (as well as the tolling provision’s inapplicability to suits filed with intentional disregard of proper jurisdiction), and we should not “frustrate th[at] purpose[] by a too-strict application of our own procedural devices.” Because the extraordinary circumstances presented here merit extraordinary relief, we conditionally grant the writ and direct the trial court to grant USAA’s motion for summary judgment.

*Id.*

Since *In re USAA*, courts of appeals have not generally been receptive to mandamus petitions from summary judgment denials absent the showing of some extraordinary issue. *See In re Ming Chu Chang*, No. 13-15-00352-CV, 2015 Tex. App. LEXIS 10382 (Tex. App.—Corpus Christi October 8, 2015, original proceeding) (“Relators have not shown that extraordinary circumstances justify granting mandamus relief on grounds that the trial court erroneously denied their motion for summary judgment.”); *In re OOIDA Risk Retention Grp., Inc.*, No. 02-15-00238-CV, 2015 Tex. App. LEXIS 9449 (Tex. App.—Fort Worth September 4, 2015, original proceeding) (“Relators have made no comparable showing of extraordinary circumstances. Expressing no opinion on the merits of the trial court’s order denying Relators’ motion for summary judgment, we hold that mandamus does not lie to review such an order.”); *In re TCPSP Corp.*, No. 12-14-00159-CV, 2014 Tex. App. LEXIS 3006 (Tex. App.—Corpus Christi March 18, 2014, original proceeding) (“The Court, having examined and fully considered the petition for writ of mandamus, is of the opinion that relator has not met its burden to show itself entitled to the relief sought.”); *In re Crawford & Co.*, 453 S.W.3d 450 (Tex. App.—Amarillo 2014, original

proceeding); *In re Willie*, No. 01-13-00263-CV, 2013 Tex. App. LEXIS 4822 (Tex. App.—Houston [1st Dist.] April 18, 2013, original proceeding); *In re Thuesen*, No. 14-13-00243-CV, 2013 Tex. App. LEXIS 4622 (Tex. App.—Houston [14th Dist.] April 11, 2013, original proceeding) (“Relator has not presented such extraordinary circumstances. Relator argues only that because an interlocutory order denying a motion for summary judgment may not be immediately appealed, he lacks an adequate appellate remedy. As the Texas Supreme Court has repeatedly held, the cost or delay incident to pursuing an appeal does not make the remedy inadequate.”); *In re Piper Aircraft Inc.*, No. 13-12-00329-CV, 2012 Tex. App. LEXIS 4232 (Tex. App.—Corpus Christi May 23, 2012, original proceeding); *In re Johnson*, No. 04-12-00220-CV, 2012 Tex. App. LEXIS 3208 (Tex. App.—San Antonio April 25, 2012, original proceeding); *In re AMF, Inc.*, No. 14-11-01011-CV, 2012 Tex. App. LEXIS 668 (Tex. App.—Houston [14th Dist.] January 26, 2012, original proceeding); *In re Conocophillips Co.*, 405 S.W.3d 93 (Tex. App.—Houston [14th Dist.] January 24, 2012, original proceeding); *In re Kalathil*, No. 14-10-00933-CV, 2010 Tex. App. LEXIS 8051 (Tex. App.—Houston [14th Dist.] October 5, 2010, original proceeding). *But see In re S.T.*, 467 S.W.3d 720 (Tex. App.—Fort Worth 2015, original proceeding) (granting mandamus relief ordering the granting of summary judgment where case involved child custody issues: “issues involving the rights of parents and children should be resolved expeditiously, and delay in such cases often renders appellate remedies inadequate.”); *In re Robinson*, 335 S.W.3d 776 (Tex. App.—Amarillo February 23, 2011, original proceeding) (granted mandamus relief ordering grant of summary judgment on breach of contract claim arising from unenforceable settlement agreement where doing so allowed a four-year old tort case to continue).

Accordingly, the courts of appeals have not seemed inclined to offer broad mandamus relief to parties who wish to challenge a trial court’s denial of a summary judgment. But there is Texas Supreme Court precedent that would support such relief depending on the factual and procedural posture of the case.

## IX. STANDARD FOR CHALLENGING A DEFAULT SUMMARY JUDGMENT

There has been some debate about whether a court of appeals should use the *Craddock*/equitable motion for new trial standard (not intentional, meritorious defense, and delay not harmful) to review the denial of a motion for new trial after a trial court grants a motion for summary judgment when the non-movant failed to file a response – essentially a default summary judgment. The Texas Supreme Court has

answered this question and determined that the *Craddock*/equitable motion for new trial standard does not apply “when the movant had an opportunity to seek continuance or obtain permission to file a late response.” See *Carpenter v. Cimarron Hydrocarbons Corp.*, 98 S.W.3d 682 (Tex. 2002). In other words, if a non-movant had an opportunity to file a motion for leave to file a late response and/or a motion for continuance, then the court of appeals should not apply the *Craddock*/equitable motion for new trial standard. Interestingly, however, the court found that a trial court should grant a motion for leave to file a late response or a motion for continuance when the non-movant “establishes good cause by showing that the failure to timely respond (1) was not intentional or the result of conscious indifference, but the result of an accident or mistake, and (2) that allowing the late response will occasion no undue delay or otherwise injure the party seeking summary judgment.” *Id.* A court of appeals should affirm a default summary judgment if the party seeking to reverse it had notice of the hearing and did not file a motion for continuance or a motion for leave to file a late response, or if the party does file such a motion but does not prove up good cause as described above.

Several courts of appeals have concluded after *Carpenter*, that *Craddock* applies when a default summary judgment nonmovant does not receive notice until after the summary judgment hearing. See *Harden v. East Tex. Med. Ctr. Health Care Assocs.*, No. 14-08-00627-CV, 2009 Tex. App. LEXIS 3409, at \*4 (Tex. App.—Houston [14th Dist.] May 19, 2009, no pet.) (mem. op.) (“*Craddock* applies when a summary-judgment non-movant does not receive notice of the submission of the summary-judgment motion until after the submission date.”); *Cantu v. Valley Baptist Med. Ctr.*, No. 13-02-00321-CV, 2003 Tex. App. LEXIS 7379, at \*3 n.2 (Tex. App.—Corpus Christi Aug. 28, 2003, no pet.) (mem. op.) (distinguishing *Carpenter* and applying *Craddock* where defaulting party contended she did not receive notice and learned of the hearing only after judgment was entered); *Olien v. University of Tex. of the Permian Basin*, No. 08-02-00300-CV, 2003 Tex. App. LEXIS 1549, at \*4 (Tex. App.—El Paso Feb. 20, 2003, no pet.) (mem. op.) (applying *Craddock* because fact pattern of *Carpenter* “not the case” where defaulting party did not become aware of hearing until after summary judgment granted). Cf. *Stanley v. CitiFinancial Mortg. Co.*, 121 S.W.3d 811, 815-16 (Tex. App.—Beaumont 2003, pet. denied) (observing that decision in *Carpenter* “called into question” whether *Craddock* applies when defaulting summary judgment nonmovant did not discover its mistake until after the hearing but deciding case on other grounds).

Several other courts have, instead, relied on language in *Carpenter* in determining whether the

defaulting summary judgment nonmovant met its burden in its motion for new trial without deciding whether *Craddock* or *Carpenter* governs. See *Limestone Constr., Inc. v. Summit Commercial Indus. Props., Inc.*, 143 S.W.3d 538, 542 (Tex. App.—Austin 2004, no pet.); *Kern v. Spencer*, No. 02-06-00199-CV, 2008 Tex. App. LEXIS 5582, at \*12-13 (Tex. App.—Fort Worth July 24, 2008, no pet.) (mem. op.).

In subsequent cases, the Texas Supreme Court has held in other contexts that *Carpenter* does not apply when the nonmovant was unaware of its need to file a response or take other action but has not resolved the question of its application in the context of a default summary judgment. See *DolgenCorp of Tex., Inc. v. Lerma*, 288 S.W.3d 922, 927 (Tex. 2009) (per curiam) (holding *Carpenter* does not apply to post-answer default judgment against defendant who was not aware of trial date); *Wheeler v. Green*, 157 S.W.3d 439 (Tex. 2005) (declining to apply *Carpenter* to summary judgment nonmovant, acting pro se, who filed responses to requests for admission two days late and did not realize need to move to withdraw deemed admissions but attended summary judgment hearing).

## X. TIMING ISSUES REGARDING MOTION, RESPONSE, REPLY AND HEARING

Timing issues are very important to consider in appealing a summary judgment. Parties to a summary judgment are not entitled to a hearing. *In re Am. Media Consol.*, 121 S.W.3d 70, 74 (Tex. App.—San Antonio 2003, orig. proceeding). See also *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998). If there is no hearing, then the non-movant must be given notice of a submission date. The summary judgment motion must be served on the opposing party at least twenty-one days before the hearing if a hearing is granted. See TEX. R. CIV. P. 166a(c). Similarly, the nonmovant must have twenty-one days notice of the hearing. See *Lewis v. Blake*, 876 S.W.2d 314, 315-16 (Tex. 1994). However, if the hearing is reset, the non-movant is not entitled to an additional twenty-one days notice before the reset date. See *Birdwell v. Texins Credit Un.*, 843 S.W.2d 246, 250 (Tex. App.—Texarkana 1992, no writ). The notice must include the fact that the hearing has been set, the date, and the time for the hearing. See *Mosser v. Plano Three Venture*, 893 S.W.2d 8, 11 (Tex. App.—Dallas 1994, no writ). Furthermore, one court has held that if the movant provides notice in a document other than the motion itself, that the notice has to contain a certificate of service. See *Tanksley v. CitiCapital Commercial Corp.*, 145 S.W.3d 760, 763 (Tex. App.—Dallas 2004, pet. denied).

The day of service is not included in the twenty-one day period, but the day of the hearing is included. See *Lewis v. Blake*, 876 S.W.2d 314, 315-16 (Tex.

1994); *Lee v. Palo Pinto County*, 966 S.W.2d 83 (Tex. App.—Eastland 1998, pet. denied). Therefore, the movant starts counting on the day after he files his no-evidence motion, and the hearing can be on the twenty-first day thereafter. Further, if service is completed by mail pursuant to Texas Rule of Civil Procedure 21a, the movant will have to add three additional days to the twenty-one day period, which makes it a twenty-four day period. See *id.* at 315; Tex. R. Civ. P. 21a(c). Therefore, if the movant serves the motion by use of the mail, the day after it is mailed is day one, and the hearing can be held on day twenty-four or later.

The non-movant must file and serve the response, accompanying evidence or special exceptions or objections to the movant's no-evidence motion not later than seven days before the hearing. See *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993); *Crews v. Plainsman Trading Co.*, 827 S.W.2d 455 (Tex. App.—San Antonio 1992, writ denied). The non-movant can file the response on the seventh day before the hearing – there does not have to be seven full days. See *Thomas v. Medical Arts Hosp.*, 920 S.W.2d 815, 817-18 (Tex. App.—Texarkana 1996, writ denied); *Wright v. Lewis*, 777 S.W.2d 520, 521 (Tex. App.—Corpus Christi 1989, no writ); *Benger Builders, Inc. v. Business Credit Leasing, Inc.*, 764 S.W.2d 336, 338 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Pursuant to Texas Rule of Civil Procedure 5, the non-movant can also use the mail to file his response, and if he does, it is considered timely filed on the day it is deposited in the mail so long as it reaches the clerk no more than ten days after it is due. See *Geiselman v. Cramer Fin. Group*, 965 S.W.2d 532 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Clendennen v. Williams*, 896 S.W.2d 257, 259 (Tex. App.—Texarkana 1995, no writ). The party relying on the mail box rule has the burden to establish its application. See *Landers v. State Farm Lloyds*, 257 S.W.3d 740, 745 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (summary judgment was affirmed where response was filed via the mail and did not establish the application of the mailbox rule).

The non-movant who uses the mail to file and serve his response does not have to add three days to the seven day period pursuant to Texas Rule of Civil Procedure 21a. See *Lee v. Palo Pinto County*, 966 S.W.2d 83 (Tex. App.—Eastland 1998, pet. denied); *Holmes v. Ottawa Truck, Inc.*, 960 S.W.2d 866, 869 (Tex. App.—El Paso 1997, pet. denied). In essence, the timing sequence implemented by Rule 166a is designed to provide the non-movant with fourteen days to review the summary judgment motion and to serve a response. See *Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 3 (Tex. App.—Corpus Christi 1991, no writ).

If the non-movant has to file his response late (within seven days of the hearing), then he must get written permission from the trial court or else the response will not be before the court. See *INA of Texas v. Bryant*, 686 S.W.2d 614, 615 (Tex. 1985); *Lazaro v. University of Tex. Health Science Ctr.*, 830 S.W.2d 330, 331-32 (Tex. App.—Houston [14th Dist.] 1992, writ denied). If the record does not contain some indication that the trial court granted leave to file the late response, the appellate court will assume that it was not before the trial court, and the non-movant will waive all of his issues. See *Goswami v. Metropolitan S.&L. Ass'n*, 751 S.W.2d 487, 490 n.1 (Tex. 1988); *Waddy v. City of Houston*, 834 S.W.2d 97, 101 (Tex. App.—Houston [1st Dist.] 1992, writ denied). Similarly, the non-movant must get the court's leave to file evidence within seven days of the hearing, and if no written order appears in the record, the late-filed evidence will not be considered as being before the court. See *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). The best practice is for a non-movant to file a motion requesting leave to file late-filed evidence with the evidence itself. Further, the non-movant must be careful to have the trial court either sign a separate order allowing the requested leave, or have the order granting or denying the no-evidence motion state that the trial court allowed leave to file the evidence. See *Daniell v. Citizens Bank*, 754 S.W.2d 407, 409 (Tex. App.—Corpus Christi 1988, no writ).

If one of the parties desires to rely upon the mail box rule, it should be very careful to make sure the record indicates how it served and filed the motion or response, and when it did so. For example, in *Derouen v. Wal-Mart Stores, Inc.*, the record showed that the response was filed six days before the summary judgment hearing and there was no indication of any leave being granted for late filing. No. 06-06-00087-CV, 2007 Tex. App. LEXIS 569 (Tex. App.—Texarkana January 26, 2007, no pet.). The court of appeals presumed that the non-movant filed the response late due to the file date stamp on the response and there being no other evidence in the record indicating otherwise. See *id.* The court affirmed the summary judgment after not finding any indication that the trial court granted the non-movant leave to late-file its response. See *id.* Accordingly, the Authors suggest that parties to a summary judgment proceeding include a "Certificate of Filing and Service" and indicate in that certificate all facts necessary to establish the applicability of the mail box rule for the purposes of filing.

Lastly, the movant is entitled to file a reply to the non-movant's response. However, Rule 166a does not set forth any time requirements for filing a movant's reply based solely upon legal arguments. See TEX. R. CIV. P. 166A; *Knapp v. Eppright*, 783 S.W.2d 293,

296 (Tex. App.—Houston [14th Dist. 1989, no writ). The movant could file this reply the very day of the hearing on his motion. See *Knapp v. Eppright*, 783 S.W.2d at 296; *Wright v. Lewis*, 777 S.W.2d 520, 522 (Tex. App.—Corpus Christi 1980, no writ). However, if the movant raises any special exceptions to the non-movant's response, it must file and serve those special exceptions not less than three days before the hearing on his motion for summary judgment. See *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 n. 7 (Tex. 1993).

Some courts have extended this three day rule to objections to summary judgment evidence. However, other courts have not done so. For example in *Grotjohn Precise Connexiones Int'l v. JEM Fin. Inc.*, the court held that objections made for the first time at a hearing were timely and that the trial court erred in striking those objections due to timeliness: "Because Grotjohn et al. filed their objections to the affidavits before the trial court rendered the partial summary judgment, the objections were timely and the trial court erred in overruling them on the basis that they were not timely." 12 S.W.3d 859, 866 (Tex. App.—Texarkana 1999, no pet.). See also *Reynolds v. Murphy*, 188 S.W.3d 252, 259 (Tex. App.—Fort Worth 2005, pet. denied).

Courts have held that an order granting summary judgment objections after the summary judgment order was signed did not preserve error. See *Choctaw Props. L.L.C. v. Aledo Ind. Sch. Dist.*, 127 S.W.3d 235, 241 (Tex. App.—Waco 2003, no pet.). However, other courts have held that an order on objections can be signed after a summary judgment order is signed. See *Crocker v. Paulyne's Nursing Home, Inc.*, 95 S.W.3d 416, 421 (Tex. App.—Dallas 2002, no pet.). See also *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). In *Crocker v. Paulyne's Nursing Home, Inc.*, the party appealing a summary judgment argued that the movant waived its evidence objections by failing to obtain an express ruling until eighty-nine days after the court granted the summary judgment. 95 S.W.3d at 420-21. The court of appeals stated:

In doing so, appellants confuse a party's duty to preserve error with a trial court's authority to rule on objections. The issue in this case is not whether the Rembrandt Center (which obtained a favorable ruling in the trial court) preserved its complaint for appellate review. Rather, the issue is whether the trial court's order, which was reduced to writing eighty-nine days after the summary judgment was signed, was effective.

*Id.* at 421. The court held that so long as the ruling was made within the trial court's plenary period, the ruling was effective. Further, the court in *Dolcefino v. Randolph*, held that there is a presumption that a trial court rules on timely filed summary judgment objections before ruling on the motion, and that a party only has to have these rulings expressed "near the time" that the trial court grants the motion or risk waiver. *Id.* at 925, 926 n. 15.

A court can grant a motion for summary judgment after initially denying it without allowing the non-movant the further opportunity to argue or present evidence. The general rule is "[a] trial court may, in the exercise of discretion, properly grant summary judgment after having previously denied summary judgment without a motion by or prior notice to the parties, as long as the court retains jurisdiction over the case." *H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 877 (Tex. App.—Corpus Christi 1996, writ denied). See also *Roberts v. E. Lawn Mem. Park Cemetery*, 2006 Tex. App. LEXIS 3183 (Tex. App.—Fort Worth Apr. 20, 2006, no pet.). Citing this rule, one court stated: "a trial court's action when it considers a party's motion to reconsider the court's prior ruling on a motion for summary judgment is within the court's discretion." *Mendez v. San Benito/Cameron County Drainage Dist. No. 3*, 45 S.W.3d 746 (Tex. App.—Corpus Christi 2001, no pet.) (affirmed trial court's granting of second summary judgment on reconsideration).

For example, in *Lindale Auto Supply v. Ford Motor Co.*, the court of appeals affirmed a trial court that granted a partial summary judgment (by a visiting judge), but then later (without notice) withdrew that order and entered the same summary judgment (by the active judge). 1998 Tex. App. LEXIS 1564 (Tex. App.—Houston [14th Dist.] March 12, 1998, no pet.). The nonmovant complained that he did not have a chance to respond, and the COA found that it was not entitled to new notice and affirmed. See *id.* So, if a court denies summary judgment, then later sua sponte grants it without any notice, that is fine.

Finally, after the hearing, trial courts are widely recognized to have "considerable discretion" in the time they take to issue a summary judgment decision. See *Bayou City Fish Co. v. S. Tex. Shrimp Processors, Inc.*, 2007 Tex. App. LEXIS 9148 (Tex. App.—Corpus Christi Nov. 20, 2007, no pet. h.); *Zalta v. Tennant*, 789 S.W.2d 432, 433 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (refusing to grant mandamus relief to relator because the trial court's over one-year-long wait to decide on a motion for summary judgment was not an abuse of discretion). However, one court of appeals issued mandamus relief and ordered a trial court to rule on a motion where a no-evidence motion had been on file for eight months with no response and trial court refused to

rule. See *In re Mission Consolidated Indep. Sch. Dist.*, 990 S.W.2d 459, 461 (Tex. App.—Corpus Christi 1999, orig. proceeding).

## XI. PRESERVATION OF ERROR

A party can win or lose an appeal depending on whether an issue has been preserved for appellate review. Whether the party is appealing an objection to summary judgment evidence, motion for continuance, or motion for leave to file new evidence, the issue must be preserved.

### A. Preserving Error Regarding Objections to Summary Judgment Evidence

In Texas state court, the standard for admissibility of evidence in a summary judgment proceeding is the same as at trial. See *Lewis v. Nolan*, No. 01-04-00865-CV, 2006 Tex. App. LEXIS 10668 (Tex. App.—Houston [1<sup>st</sup> Dist.] December 14, 2006, pet. denied); *Dupuy v. American Ecology Envtl. Servs. Corp.*, No. 12-01-0160-CV, 2002 Tex. App. LEXIS 3581 (Tex. App.—Tyler May 14, 2002, no pet.) (not desig. for pub.); *Bayless v. U.C. Rentals, Inc.*, 14-98-00337-CV, 1999 Tex. App. LEXIS 3406 (Tex. App.—Houston [14<sup>th</sup> Dist.] May 5, 1999, no pet.) (not desig. for pub.). Historically, in order to preserve error as to a movant's objection to the non-movant's evidence, the movant must have obtained an express ruling on his objections in a written order. See *Utilities Pipeline Co. v. American Petrofina Mktg.*, 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ). Texas Rule of Appellate Procedure 33.1, however, now provides that a separate, signed order is no longer required to preserve an issue for appellate review. Accordingly, a signed order should no longer be required to preserve an objection to a non-movant's evidence when the trial court orally ruled on the objection and the ruling appears in the record. See *Allen v. Albin*, 97 S.W.3d 655 (Tex. App.—Waco 2002, no pet.); *Columbia Rio Grande Regional Hosp. v. Stover*, 17 S.W.3d 387, 395 96 (Tex. App.—Corpus Christi 2000, no pet.) (error is preserved if the reporter's record of the summary judgment hearing shows that the trial court announced an oral ruling on the objection). Therefore, a party should request that the reporter's record be prepared and sent to the court of appeals if the trial court made oral rulings on objections to summary judgment evidence that are in the party's favor. A careful practitioner, however, should still have the trial court reduce all rulings on summary judgment evidence objections to writing as some courts are still citing old authority and requiring written rulings. See *Crocker v. Paulyne's Nursing Home, Inc.*, 95 S.W.3d 416 (Tex. App.—Dallas 2002, no pet.).

Additionally, Rule 33.1(a) states that in order to preserve a complaint for appellate review, the record

must show that the trial court either expressly or implicitly ruled on an objection that was sufficiently specific to make the trial court aware of the complaint. See TEX. R. APP. P. 33.1(a) (1)-(2). There has been great debate in Texas' courts of appeals about whether a court of appeals can imply a ruling on an objection to summary judgment evidence due to the trial court's granting of the motion. Some courts hold that under the facts of the case, an implied ruling can exist in a summary judgment context. See *Praytor v. Ford Motor Co.*, No. 14-01-00734-CV, 2002 Tex. App. LEXIS 8013 (Tex. App.—Houston [14<sup>th</sup> Dist.] November 7, 2002, no pet.) (not desig. for pub.) (holding that movant/appellee is not required to preserve complaint as to non-movant/appellant's summary judgment evidence where trial court grants summary judgment motion); *Trusty v. Strayhorn*, 87 S.W.3d 756 (Tex. App.—Texarkana September 13, 2002, no pet.); *Clement v. City of Plano*, 26 S.W.3d 544, 550 n.5 (Tex. App.—Dallas 2000, no pet.), *disapproved on other grounds by Telthorster v. Tennell*, 92 S.W.3d 457 (Tex. 2002); *Dagley v. Haag Eng'g*, 18 S.W.3d 787, 795 n.9 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2000, no pet.); *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 387, 395-96 (Tex. App.—Corpus Christi 2000, no pet.); *Williams v. Bank One*, 5 S.W.3d 119, 114-15 (Tex. App.—Waco 1999, no pet.); *Frazier v. Yu*, 987 S.W.2d 607, 609-10 (Tex. App.—Fort Worth 1999, no pet.); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.). Under this standard, in granting a summary judgment motion, a trial court implicitly sustains the movant's objections to evidence that, if considered, would create a fact issue and implicitly denies the non-movant's objections to evidence that is necessary to support the summary judgment. Either way, the timely raised objections are simply preserved for appellate review. Otherwise, an appellate court infers that the trial court intentionally granted a summary judgment motion when it knew the "evidence" created a fact issue.

But most courts hold that a court of appeals cannot imply a ruling. See *Arellano v. Americanos USA, LLC*, No. 08-08-00305-CV, 2010 Tex. App. LEXIS 9372 (Tex. App.—El Paso November 29, 2010, no pet. history); *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92 (Tex. App.—Dallas 2010, pet. denied); *Gellatly v. Unifund CCR Partners*, 2008 Tex. App. LEXIS 5018 (Tex. App.—Houston [1<sup>st</sup> Dist.] July 3, 2008, no pet.) (mem. op.); *Anderson v. Limestone County*, 2008 Tex. App. LEXIS 5041 (Tex. App.—Waco July 2, 2008, pet. denied) (mem. op.); *Delfino v. Perry Homes*, 223 S.W.3d 32, 35 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2007, no pet.); *Hixon v. Tyco Int'l, Ltd.*, No. 01-04-01109-CV, 2006 Tex. App. LEXIS 9494 (Tex. App.—October 31, 2006, no pet.); *Strunk v. Belt Line Road Realty Co.*, 225 S.W.3d 91,

99 (Tex. App.—El Paso 2005, no pet.); *Palacio v. AON Props., Inc.* 110 S.W.3d 493, 496 (Tex. App.—Waco 2003, no pet.); *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842-43 (Tex. App.—Dallas 2003, no pet.); *Sunshine Mining & Ref. Co. v. Ernst & Young, L.L.P.*, 114 S.W.3d 48 (Tex. App.—Eastland June 12, 2003, no pet.); *Wilson v. Thomason Funeral Home, Inc.*, No. 03-02-00774-CV, 2003 Tex. App. LEXIS 6358 (Tex. App.—Austin July 24, 2003, no pet.); *Allen v. Albin*, 97 S.W.3d 655 (Tex. App.—Waco 2002, no pet.); *Jones v. Ray Ins. Agency*, 59 S.W.3d 739, 752-53 (Tex. App.—Corpus Christi 2001, pet. denied); *Rogers v. Continental Airlines, Inc.*, 41 S.W.3d 196, 200 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Ball v. Youngblood*, 2001 Tex. App. LEXIS 5660 (Tex. App.—Dallas 2001, no pet.) (not desig. for pub.); *Chapman Children’s Trust v. Porter & Hedges, L.L.P.*, 32 S.W.2d 429, 435-36 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 316-17 (Tex. App.—San Antonio 2000, pet. denied); *Hou-Tex., Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Taylor Made Hose, Inc. v. Wilkerson*, 21 S.W.3d 484, 487 (Tex. App.—San Antonio 2000, pet. denied). For example, the San Antonio Court of Appeals disagreed with implicit rulings and held:

[R]ulings on a motion for summary judgment and objections to summary judgment evidence are not alternative; nor are they concomitants. Neither implies a ruling-or any particular ruling-on the other. In short, a trial court’s ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment.

*Well Solutions, Inc. v. Stafford*, 32 S.W.3d at 316-17.

In general, there is great confusion regarding when objections to summary judgment evidence are preserved. Many commentators have noted the conflict among the courts of appeals on this important issue. See, e.g., *Judge David Hittner & Lynee Liberato, Summary Judgments in Texas*, 47 SOUTH TEXAS L. REV. 409, 447-48 (2006) (“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.”); *Judge David Hittner & Lynee Liberato, Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, n. 194 (2006); *Omar Kilany & Prescott Scot, Implied Rulings on Summary Judgment Objections: Preservation of Error and Appellate Rule 33.1(a)(2)(A)*, 15 APPELLATE ADVOCATE ST. B. TEX. APPELLATE SEC. REP. 4

(2002) (published online at [www.tex-app.org](http://www.tex-app.org)); *David F. Johnson, The No-Evidence Summary Judgment In Texas*, 52 BAYLOR L. REV. 930, 966 (2000); *Charles Frazier, et. al., Recent Development: Celotex Comes To Texas: No-Evidence Summary Judgments And Other Recent Developments In Summary Judgment Practice*, 32 TEX. TECH. L. REV. 111, 132 (2000). See also WILLIAM V. DORSANEO, TEXAS LITIGATION GUIDE: APPELLATE REVIEW, § 145.03[2][a] (2007); MCDONALD & CARLSON, TEXAS CIVIL PRACTICE, § 18.20 (2<sup>nd</sup> Ed. Supp. 2007); MICHOLO’CONNOR, O’CONNOR’S TEXAS RULES, CIVIL TRIAL, Ch. 7.B, § 10.2(1)-(2) 669-70 (2015) (five courts find that there can be implicit rulings, eight courts find that there cannot be implicit rulings – some of the courts from both groups are the same); *Tim Patton, Selected Unsettled Aspects of Summary Judgment Practice and Procedure*, 2-5, ADVANCED CIVIL TRIAL COURSE, (State Bar of Texas 2003).

Take the Fort Worth Court of Appeals for an example. In *Blum v. Julian*, the court held that when a trial court granted a motion for summary judgment, an inference was created that the trial court implicitly overruled the non-movant’s objections to the movant’s evidence. 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.). Similarly, in *Frazier v. Yu*, the court held an order granting a summary judgment implicitly sustained the movant’s objections to the non-movant’s evidence. 987 S.W.2d 607, 610-11 (Tex. App.—Fort Worth 1999, no pet.).

But, later, the court reversed course. In *Wrenn v. GATX Logistics, Inc.*, the court limited *Frazier* to the facts of that case because the trial court stated that it reviewed the “competent” evidence in the order, and held that when the record does not indicate that the trial court expressly ruled on the objections, they are waived. 73 S.W.3d 489, 498 (Tex. App.—Fort Worth 2002, no pet.). In *Mead v. RLMC, Inc.*, however, the court completely retreated from *Frazier*, holding that even when the trial court’s summary judgment order expressly states that it considered the “competent” evidence, the movant’s objections are waived. 225 S.W.3d 710 (Tex. App.—Fort Worth 2007, pet. denied).

It is judicially inefficient for an appellate court to reverse a trial court’s summary judgment, which is otherwise correct, because the trial court failed to expressly rule on proper objections to otherwise incompetent evidence. A court of appeals should analyze whether the objection was meritorious and whether the evidence should be considered.

Notwithstanding, until the Texas Supreme Court clears this confusion, a cautious party will request express rulings, and submit proposed rulings on summary judgment evidence in either a separate order or the order granting a summary judgment. Further, if the trial court still refuses to rule, the party should

object to the trial court's failure to rule. See TEX. R. APP. P. 33.1(a)(2)(B); *Allen v. Albin*, 97 S.W.3d 655 (Tex. App.—Waco 2002, no pet.).

### **B. Preserving Error Regarding Objections To The Non-Disclosure of Experts**

There was a split in the intermediate courts of appeals regarding whether an undesignated expert can provide evidence in a summary judgment proceeding. Most of the appellate courts addressing whether the discovery rules apply in a summary judgment case have applied the revised discovery rules to summary judgments. See *Thompson v. King*, No. 12-06-00059-CV, 2007 Tex. App. LEXIS 2768 (Tex. App.—Tyler April 11, 2007, pet. denied); *F.W. Industries, Inc. v. McKeehan*, 198 S.W.3d 217 (Tex. App.—Eastland 2005, no pet.); *Cunningham v. Columbia/St. David's Healthcare System, L.P.*, 185 S.W.3d 7,10 (Tex. App.—Austin 2005, no pet.); *Villegas v. Texas Dept. of Transp.*, 102 S.W.3d 26 (Tex. App.—San Antonio 2003, pet. denied); *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 273 (Tex. App.—Austin 2002, pet. denied).

Other courts had found that the discovery rules do not apply to summary judgment proceedings, and that a trial court cannot strike an undesignated or underdesignated expert. See, e.g., *Alaniz v. Hoyt*, 105 S.W.3d 330, 340 (Tex. App.—Corpus Christi 2003, no pet.); *Johnson v. Fuselier*, 83 S.W.3d 892, 897 (Tex. App.—Texarkana 2002, no pet.).

In *Chau v. Riddle*, the court of appeals affirmed a trial court's striking of expert evidence. *Chau v. Riddle*, 2008 Tex. LEXIS 453 (Tex. 2008). Even though the Texas Supreme Court reversed the court of appeals on a different issue, it noted as follows: "In this Court, Chau challenges the court of appeals' holding that the trial court did not abuse its discretion in enforcing a docket control order or in striking part of Chau's expert testimony. We agree with the court of appeals' resolution of those issues." *Id.* More recently, in *Fort Brown II Condominium Association v. Gillenwater*, the court held that a trial court did not abuse its discretion in striking an expert where there was no good cause shown for his untimely designation. 285 S.W.3d 879, 881-82 (Tex. 2009). Accordingly, if a party intends to rely on expert evidence in a summary judgment proceeding, the party should fully designate the expert according to the Texas Rules of Civil Procedure and according to any scheduling order.

### **C. Preserving Error Regarding Adequate Time for Discovery**

Courts have placed a burden on the non-movant to file a verified motion for continuance or affidavit

proving up relevant facts in order to argue that there was not an adequate time for discovery — this is true even though a presumption arose that there was not an adequate time for discovery. See *Collinsworth v. Eller Media Co.*, No. 01-01-0074 9-CV, 2003 Tex. App. LEXIS 4813 (Tex. App.—Houston [1st Dist.] June 5, 2003, no pet.); *Sparks v. Butler Mfg. Co.*, No. 05-99-00115-CV, 1999 Tex. App. LEXIS 8731 (Tex. App.—Dallas November 22, 1999, no pet.) (not desig. for pub.); *Flores v. Snelling*, No. 06-98-00046, 1999 Tex. App. LEXIS 7009 (Tex. App.—Texarkana September 14, 1999, no pet.) (not desig. for pub.); *Hopkins v. Keuhm*, No. 03-98-00514-CV, 1999 Tex. App. LEXIS 5923 (Tex. App.—Austin August 12, 1999, no pet.) (not desig. for pub.); *Jamies v. Fiesta Mart, Inc.*, No. 01-98-00754-CV, 1999 Tex. App. LEXIS 4553 (Tex. App.—Houston [1st Dist.] June 17, 1999, no pet.) (not desig. for pub.); but see *Kesyler v. Menil Med. Ctr. of E. Tex.*, 105 S.W.3d 122 n. 10 (Tex. App.—Corpus Christi 2003, no pet.). When the non-movant files a motion for continuance in order to collect more evidence, the motion should meet the requirements for Texas Rules of Civil Procedure 166a(g) and 252. See *Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996). This can be done with an affidavit that is specific — general allegations that the attorney has personal matters, other cases or insufficient time is not enough. See *Cronin v. Nix*, 611 S.W.2d 651, 653 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.). The affidavit should set out the identity of the specific type of discovery or other affidavit needed, the person from whom it is sought, and the information that will be obtained. See TEX. R. CIV. P. 252; *Rocha v. Faltys*, 69 S.W.3d 315 (Tex. App.—Austin July 7, 2002, no pet.); *Gabalton v. G.M. Corp.*, 876 S.W.2d 367, 370 (Tex. App.—El Paso 1993, no writ).

The non-movant will need to show in detail how the needed discovery is material to the challenged element. See TEX. R. CIV. P. 252; *J.E.M. v. Fidelity & Cas. Co.*, 928 S.W.2d 668, 676 (Tex. App.—Houston 1996, no writ). Further, the non-movant will need to show in detail how he has been diligent in attempting to secure the needed evidence and why he has been unable to secure the evidence in a timely fashion. See TEX. R. CIV. P. 252; *Gregg v. Cecil*, 844 S.W.2d 851, 853 (Tex. App.—Beaumont 1992, no writ); *Rhima v. White*, 829 S.W.2d 909, 912 (Tex. App.—Fort Worth 1992, writ denied).

The motion for continuance must have affidavits or sworn testimony to prove up all factual allegations. See TEX. R. CIV. P. 166a(g); *Casey v. Interstate Building Maintenance, Inc.*, No. 03-99-00524-CV, 2000 Tex. App. LEXIS 2555 (Tex. App.—Austin April 20, 2000, no pet.) (not desig. for pub.); *Crow v. Rockett Special Util. Dist.*, 17 S.W.3d 320 (Tex. App.—Waco 2000, pet. denied). The safest practice

is to request a hearing and present sworn proof as to the need for a continuance following the above listed requirements. *See Roob v. Von Bergshasy*, 866 S.W.2d 765, 766 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

Lastly, courts have ruled differently on whether a non-movant has to get an express ruling by the court on a motion in order to preserve error. *Compare Williams v. Bank One*, 15 S.W.3d 110 (Tex. App.—Waco 1999, no pet.) (Under new Texas Rule of Appellate Procedure 33.1, a non-movant does not have to have an express ruling on the trial court's denial of his motion for continuance to preserve error, and the trial court's granting of the summary judgment and holding of hearing is an implicit overruling of the non-movant's motion.); *and Casey v. Interstate Building Maintenance, Inc.*, No. 03-99-00524-CV, 2000 Tex. App. LEXIS 2555 (Tex. App.—Austin Apr. 20, 2000, no pet.) (not desig. for pub.) (party must object to the court's failure to rule or waive error); *Washington v. Tyler ISD*, 932 S.W.2d 686, 690 (Tex. App.—Tyler 1996, no writ) (decided under the former Texas Rule of Appellate Procedure 52(g), which required an 'express' ruling). However, the safest course is to always get an express ruling or object to the court's failure to rule.

#### **D. Preserve Complaint Regarding Opponent's Failure to Produce Evidence in Discovery**

If a non-movant needs discovery from the movant in order to respond to the movant's motion for summary judgment, he should: (1) file a motion to compel, (2) set a hearing, and (3) get the trial court's ruling before the hearing on the no-evidence motion. *See Anderson v. T.U. Elec.*, No. 05-99-01255-CV, 2000 Tex. App. LEXIS 2878 (Tex. App.—Dallas May 3, 2000, no pet.) (not desig. for pub.); *Casey v. Interstate Building Maintenance, Inc.*, No. 03-99-00524-CV, 2000 Tex. App. LEXIS 2555 (Tex. App.—Austin April 20, 2000, no pet.) (not desig. for pub.). But the non-movant can still file a motion for continuance because a trial court will not err in granting a properly filed, valid motion despite outstanding discovery issues. The filing of a motion to compel can also be a factor in a court of appeals determination of whether there was an adequate time for discovery. *See Hayes v. Woods*, No. 05-001121, 2001 Tex. App. LEXIS (Tex. App.—Dallas June 29, 2001, no pet.) (not desig. for pub.).

#### **E. Preserve Complaint Regarding Notice of Hearing**

If the movant did not provide the non-movant with twenty-one days notice of the hearing, the non-movant should file an objection and a motion for continuance based on the untimely notice. The non-movant will waive any objection to the faulty notice if

he fails to object to it in a timely fashion after he has knowledge of the improper notice. *See Ajibaou v. Edinburg Gen. Hosp.*, 22 S.W.3d 37 (Tex. App.—Corpus Christi 2000, pet. filed); *Veal v. Veterans Life Ins. Co.*, 767 S.W.2d 892, 895 (Tex. App.—Texarkana 1989, no writ). This objection should be made before the hearing, but the latest the non-movant can raise it is in a motion for new trial. *See Nickerson v. E.I.L. Instr., Inc.*, 817 S.W.2d 834, 835-36 (Tex. App.—Houston [1st Dist.] 1991, no writ). All that is required is that the non-movant formally object and present proof that he did not receive proper notice. *See Guinn v. Zarsky*, 893 S.W.2d 13, 17 (Tex. App.—Corpus Christi 1994, no writ). Once again, the safest practice is to request a hearing and present sworn proof as to the lack of notice. *See Roob v. Von Bergshasy*, 866 S.W.2d 765, 766 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

Whether error is preserved depends on the circumstances of when notice was actually received. If a party receives notice that is untimely but sufficient to enable the party to attend the summary judgment hearing, a party must file a motion for continuance and/or raise the complaint of late notice in writing, supported by affidavit evidence. *See Fertic v. Spencer*, 247 S.W.3d 242, 248 (Tex. App.—El Paso 2007, pet. denied). However, if a party receives no notice of the summary judgment hearing or is deprived of its right to seek leave to file additional affidavits or other written responses, the error may be preserved in a post-trial motion. *See id.*

#### **F. Preserving Right To Correct Defects In Evidence**

A trial court should give the non-movant an opportunity to correct any defects that the movant has pointed out in the non-movant's response or evidence. *See Webster v. Allstate Ins. Co.*, 833 S.W.2d 747, 750 (Tex. App.—Houston [1st Dist.] 1992, no writ). "Defects in the form of an affidavit must be objected to, and the opposing party must have the opportunity to amend the affidavit." *Brown v. Brown*, 145 S.W.3d 745, 751 (Tex. App.—Dallas 2004, pet. denied). As the Fort Worth Court of Appeals stated:

Rule 166a(f) indicates that a party offering an affidavit that is defective in form, as pointed out by the opposing party, should have the "opportunity" to amend. A defect is substantive if the summary judgment proof is incompetent; it is formal if the summary judgment proof is competent, but inadmissible.

*Tri-Steel Structures, Inc. v. Baptist Foundation*, 166 S.W.3d 443, 448 (Tex. App.—Fort Worth 2005, pet. denied).

For example, in *Keeton v. Carrasco*, the defendant objected to the summary judgment use of an expert affidavit on the day of the summary judgment hearing. 53 S.W.3d 13, 22 (Tex. App.—San Antonio 2001, pet. denied). At the summary judgment hearing, the plaintiffs tendered an amended expert affidavit to the trial court, but the trial court denied them leave to file the amended report. *Id.* The appellate court reversed, holding that the trial court should have given the plaintiffs the opportunity to amend their expert's affidavit. *Id.* at 23. See also *Garcia v. Willman*, 4 S.W.3d 307, 311 (Tex. App.—Corpus Christi 1999, no pet.); *Wyatt v. McGregor*, 855 S.W.2d 5 (Tex. App.—Corpus Christi 1993, writ denied).

The non-movant will need to ask for a continuance to get additional time to correct errors in his response or evidence. See *Marty's Food & Wine v. Starbuck Corp.*, No. 05-01-00008-CV, 2002 Tex. App. LEXIS 7672 (Tex. App.—Dallas October 28, 2002, no pet.) (not desig. for pub.); *Brown v. Wong*, No. 05-99-00706-CV, 2000 Tex. App. LEXIS 2632 (Tex. App.—Dallas April 24, 2000, pet. denied) (not desig. for pub.). See also *Eckmann v. Des Rosiers*, 940 S.W.2d 394, 400 (Tex. App.—Austin 1997, no writ); *Peerenboom v. HSP Foods, Inc.*, 910 S.W.2d 156, 160 (Tex. App.—Waco 1995, no writ); *Webster v. Allstate Ins. Co.*, 833 S.W.2d 747, 750 (Tex. App.—Houston [1st Dist.] 1992, no writ). If the non-movant does not or cannot correct a defect in its evidence, then a court may strike the evidence and grant the movant's motion by default. See *Sparks v. Butler Mfg. Co.*, No. 05-99-00115-CV, 1999 Tex. App. LEXIS 8731 (Tex. App.—Dallas November 22, 1999, no pet.) (not desig. for pub.). Moreover, a court does not need to allow a party the chance to amend evidence to correct an error of substance. See *Olsen v. Comm'n for Lawyer Discipline*, 347 S.W.3d 876, 885 (Tex. App.—Dallas 2011, pet. denied).

## **XII. SUMMARY JUDGMENT RECORD**

The record for a summary judgment appeal traditionally has only been the clerk's record because there was no testimony at the hearing and only written rulings would preserve error. See TEX. R. CIV. P. 166a(c); *McConnell v. Southside ISD*, 858 S.W.2d 337, 343 n.7 (Tex. 1993); *Utilities Pipeline Co. v. American Petrofina Mktg.*, 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ) (only written rulings preserved error). Accordingly, historically, nothing in the reporter's record could have an impact on the appeal.

However, that is currently not the case. A signed order should no longer be required to preserve an objection to evidence when the trial court orally ruled on the objection and the ruling appears in the record. See *Allen v. Albin*, 97 S.W.3d 655 (Tex. App.—Waco 2002, no pet.); *Aguilar v. LVDVD, L.C.*, 70 S.W.3d 915, 917 (Tex. App.—El Paso 2002, motion); *Columbia Rio Grande Regional Hosp. v. Stover*, 17 S.W.3d 387, 395-96 (Tex. App.—Corpus Christi 2000, no pet.) (error is preserved if the reporter's record of the summary judgment hearing shows that the trial court announced an oral ruling on the objection).

Therefore, a party should request that the reporter's record be prepared and sent to the court of appeals if the trial court made oral rulings on objections to summary judgment evidence that are in the party's favor. However, one court has held that a trial court does not err in refusing a written record during a summary judgment hearing as live testimony is not allowed. See *Olsen v. Comm'n for Lawyer Discipline*, 347 S.W.3d 876, 885 (Tex. App.—Dallas 2011, pet. denied).

Moreover, there may be other collateral matters to the summary judgment proceeding that may require a reporter's record. For example, if there is an objection to expert testimony, there may be live testimony and evidence offered to support the expert: a *Daubert/Robinson* hearing. Further, there may be live testimony offered to support a motion for continuance of the summary judgment hearing or motion for leave to file evidence late. Accordingly, if a collateral issue impacts a trial court's summary judgment order, the appellant should request the preparation of a reporter's record.

## **XIII. ADVERSE EFFECTS FROM MOTIONS, RESPONSES, OR EVIDENCE MISSING FROM THE RECORD**

One problem that has plagued many summary judgment appellants is an adverse presumption applied against them because of motions, responses, or evidence missing from the record. This presumption could act as a waiver by the appellant of entire points of error or the appeal itself. Because oral testimony argument at a summary judgment hearing is not summary judgment evidence, the record on appeal consists solely of the papers on file with the trial court, *i.e.*, clerk's record. See TEX. R. APP. P. 34.1; see *El Paso Assocs., Ltd. v. J.R. Thurman & Co.*, 786 S.W.2d 17, 19 (Tex. App.—El Paso 1990, no writ). An appellate court cannot review any evidence or summary judgment grounds not on file with the trial court at the time of the summary judgment hearing. See *Gandara v. Novasad*, 752 S.W.2d 740, 743 (Tex. App.—Corpus Christi 1988, no writ). So, if a motion, response, or evidentiary document is not on file at the

time of the summary judgment hearing, an appellate court cannot consider that document in its determination of the appeal.

### A. Historically

In the former rules of appellate procedure, rule 50(d) stated: “The burden is on the appellant, or other party seeking review, to see that a sufficient record is presented to show error requiring reversal.” TEX. R. APP. P. 50(d) (Vernon 1996, repealed 1997). The party who perfects an appeal has historically had the burden to produce a complete record. *See id.*; *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 689 (Tex. 1990). Even when an appellant requested that items be included in the appellate record, “he still had the duty to be certain that all requested items are actually received by the appellate court.” *Worthy v. Collagen Corp.*, 921 S.W.2d 711, 717 (Tex. App.—Dallas 1995) (Devany J., concurring), *aff’d*, 967 S.W.2d 360 (Tex. 1998). When the appellant failed to provide the appellate court with a complete record, the appellate court presumed that any missing material supported the trial court’s judgment. *See DeSantis*, 793 S.W.2d at 689. Consequently, when the clerk’s record did not contain an affidavit or deposition filed in support of a summary judgment motion, the appellate court would presume that the omitted documents supported the trial court’s judgment. *See Crown Life Ins. Co. v. Gonzalez*, 820 S.W.2d 121, 122 (Tex. 1991); *see also DeSantis*, 793 S.W.2d at 689. If an appellant failed to include the appellee’s summary judgment motion in the transcript, the motion was presumed to support the trial court’s judgment, and the appellate court would overrule the appellant’s points of error. *See Atchison*, 916 S.W.2d at 77. However, because a non-movant was not required to respond to a summary judgment motion at all, the appellant did not automatically waive the appeal by failing to include a response to the appellee’s summary judgment motion. *See Knapp v. Eppright*, 783 S.W.2d 293, 295 (Tex. App.—Houston [14th Dist.] 1989, no writ). The only issue before the appellate court was whether the summary judgment motion is sufficient as a matter of law. However, if the summary judgment could only be supported by a point of law, and not factually, the missing depositions or affidavits, although presumed to support the summary judgment, would not result in the appellant waiving the appeal. *See Gupta v. Ritter Homes, Inc.*, 633 S.W.2d 626, 628 (Tex. App.—Houston [14th Dist.] 1982), *aff’d in part, rev’d in part on other grounds*, 646 S.W.2d 168 (Tex. 1983).

### B. Currently

In September of 1997, the Texas Rules of Appellate Procedure were amended. Current Rule 35.3(a) states:

The trial court clerk is responsible for preparing, certifying, and timely filing the clerk’s record if:

a notice of appeal has been filed; and the party responsible for paying for the preparation of the clerk’s record has paid the clerk’s fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee.

TEX. R. APP. P. 35.3(a). Thus, an appellant is no longer obligated to make a specific request for the clerk’s record to be filed in the appellate court. *See John Hill Cayce, Jr. et al., Civil Appeals in Texas: Practicing Under the New Rules of Appellate Procedure*, 49 BAYLOR L. REV. 867, 919-20 (1997). Under the new rule, if the appellant files a notice of appeal and makes arrangements to pay the clerk’s fee, the trial court clerk has the responsibility to file the clerk’s record with the appellate court. *See id.* at 928-29. Further, Rule 34.5(a) defines what must appear in the clerk’s record. TEX. R. APP. P. 34.5(a). If a party’s document does not fall into one of the categories that automatically will be sent to the appellate court, then the party only has to designate the document in compliance with the new appellate rules, and the burden to send the designated document is on the trial court clerk. *See TEX. R. APP. P. 34.5(b)*. Under the new rule and new burden, appellate courts should no longer apply the presumption in favor of the judgment because of evidence or documents missing from the appellate record that the trial court clerk had the burden to produce. It would be unfair and unjust to presume that a missing pleading or properly designated evidentiary document favors the trial court’s judgment when the burden to produce the pleading or document is on the trial court clerk and not the appellant.

An interesting issue is presented when a party appeals a trial court’s ruling granting a summary judgment and evidence from the summary judgment motion or response or the motion or response itself is missing. Does the old presumption that the missing document favors the judgment still apply?

This question should be answered by determining who has the burden to produce the document. The only provision that may impose on the trial court clerk the responsibility to include a summary judgment motion, response, or reply, if the appellant has not made a designation, is the provision that the trial court clerk has the responsibility to include all pleadings in the record on which the trial was held. *See TEX. R. APP. P. 34.5(a)(1)*. Pleadings are alternating formulations of the parties’ contentions. The pleadings consist of the original petition, the original

answer, and each supplemental or amended petition or answer. A motion is *not* a pleading. Therefore, Rule 34.5 does not specifically list motions for summary judgment or supporting evidence as required contents of the clerk's record. *See* TEX. R. APP. P. 34.5. If the appellant fails to request any pertinent part of the summary judgment record, the court of appeals will presume that the omitted portion supported the judgment and affirm. *See Sparkman v. ReliaStar Life Ins. Co.*, 2008 Tex. App. LEXIS 3517 (Tex. App.—Corpus Christi May 15, 2008, pet. denied) (mem. op.); *Mallios v. Standard Ins. Co.*, 237 S.W.3d 778, 782 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

For example, in *Enter. Leasing Co. of Houston v. Barrios*, the Texas Supreme Court found that the appellant had the burden to designate summary judgment materials and applied the presumption for missing evidence:

Although Enterprise bears the burden to prove its summary judgment as a matter of law, on appeal Barrios bears the burden to bring forward the record of the summary judgment evidence to provide appellate courts with a basis to review his claim of harmful error. *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 689, 33 Tex. Sup. Ct. J. 517 (Tex. 1990); *Escontrias v. Apodaca*, 629 S.W.2d 697, 699, 25 Tex. Sup. Ct. J. 235 (Tex. 1982); *cf.* TEX. R. APP. P. 34.5(a) (only the items listed in Rule 34.5(a) are included in the appellate record absent a request from one of the parties). If the pertinent summary judgment evidence considered by the trial court is not included in the appellate record, an appellate court must presume that the omitted evidence supports the trial court's judgment. *DeSantis*, 793 S.W.2d at 689; *see also Crown Life Ins. Co. v. Gonzalez*, 820 S.W.2d 121, 122 (Tex. 1991). Therefore, we presume that Barrios's answers support the trial court's partial summary judgment in favor of Enterprise.

156 S.W.3d 547, 549-50 (Tex. 2004) (per curiam).

Furthermore, in *Pierson v. SMS Financial II, L.L.C.*, the appellate court dealt with an appeal from a partial summary judgment when the appellant's summary judgment response was not in the appellate record. 959 S.W.2d 343, 348 (Tex. App.—Texarkana 1998, no pet.). The appellant did not designate his response for inclusion in the clerk's record. *See id.* The appellate court concluded that, because a summary judgment response is not a pleading, and because there was no other category that would have

placed a burden on the trial court clerk to include the response in the appellate record, the appellant had a duty to designate it. *See id.* Because the appellant did not designate the missing response, the appellate court used the traditional presumption case law to conclude that the missing summary judgment response would be presumed in favor of the trial court's judgment. *See id.* In doing so, the court stated that "we must review the summary judgment as if appellant did not respond to the motion" and then proceeded to apply a legal sufficiency review of the partial summary judgment. *Id.* This case affirms that, although less likely, the traditional presumptions continue to apply to missing evidence, motions, and responses in some cases. "This waiver presumption rule will still apply in certain instances, but the new rules will make it much less likely that parties will forfeit grounds of error due to the failure to file a complete record." *Cayce*, at 928.

The obvious remedy for missing motions, responses, and evidence is to supplement the record and include the missing document. The new rule for supplementing the record has greatly liberalized supplementation of the record. *See id.* at 935. Under the new rule, any party may supplement the record at any time, and the adverse presumptions that previously resulted from motions, responses and evidence omitted from the record may now be avoided simply by supplementing the record. *See id.* For an excellent discussion of the former and current supplementation rules. *See Cayce*, at 934.

However, at least one court has not taken such a liberal view of supplementation. In *Zoya Enters. v. Sampri Invests., L.L.C.*, the court of appeals refused to consider a supplemental record filed after submission:

This is not a case of a simple oversight of tangential or insignificant information that could be easily overlooked. This is a case of continued neglect of information crucial to a proper appellate review. This neglect continued for over eleven months. The burden was on Zoya (1) to ensure that all the documents it needed for this Court to fully review the correctness of the summary judgment were in the record, and (2) to timely pay for the supplemental record once it realized necessary documents were excluded. Zoya did not carry its burden.

As a result, we refuse to consider the documents contained in the post-submission supplemental record. Instead, we will consider Zoya's issues on the record that was before us on the submission day.

No. 14-04-01158-CV, 2006 Tex. App. LEXIS 4406 (Tex. App.—Houston [14th Dist.] May 23, 2006, no pet.) (internal citation omitted). Moreover, although appellate courts strive to decide cases on the merits rather than on procedural technicalities, supplementing the record after a case is decided and reconsidering the prior decision does not serve judicial economy and does not violate this general policy. See *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 366 (Tex. 1998). See also *Texas First Nat'l Bank v. Ng*, 167 S.W.3d 842, 866 (Tex. App.—Houston [14th Dist.] 2005, pet. granted, judgment vacated w.r.m.) (refusing to consider supplemental record filed more than a month after court's opinion and judgment).

#### **XIV. ADVERSE EFFECTS DUE TO APPELLATE BRIEFING INADEQUACIES**

##### **A. Specific Judgments Versus General Judgments**

###### 1. General Definitions

If the order granting a summary judgment motion states the reasons why the trial court granted the summary judgment, it is a "specific judgment." See *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993); see also *Weiner v. Wasson*, 900 S.W.2d 316, 317 n.2 (Tex. 1995); *Shivers v. Texaco Exploration & Prod., Inc.*, 965 S.W.2d 727, 732 (Tex. App.—Texarkana 1998, pet. denied). If the trial court simply grants one party's summary judgment motion but does not state any ground for doing so, then it is called a "general judgment." See, e.g., *Sumerlin v. Houston Title Co.*, 808 S.W.2d 724, 726 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

###### 2. A Party Should Look to the Actual Order Granting Summary Judgment

There are occasions when the trial court may inform the parties on what grounds it is granting a summary judgment, but the actual order itself does not state the grounds. For example, the trial court sometimes informs the parties the grounds on which it is granting the summary judgment after oral argument or in a letter sent to each party. See, e.g., *Stevens v. State Farm Fire & Cas. Co.*, 929 S.W.2d 665, 669 (Tex. App.—Texarkana 1996, writ denied); *Richardson v. Johnson & Higgins of Texas, Inc.*, 905 S.W.2d 9, 11 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Martin v. Southwestern Elec. Power Co.*, 860 S.W.2d 197, 199 (Tex. App.—Texarkana 1993, writ denied). In these circumstances, where should the appealing party look to determine if the judgment is specific or general? Texas precedent requires that a party look only to the judgment to determine the grounds, if any, identified by the court as the basis of its judgment. See *Hailey v. KTBS, Inc.*, 935 S.W.2d

857, 859 (Tex. App.—Texarkana 1996, no writ); see also *Stevens*, 929 S.W.2d at 669; *Shannon v. Texas Gen. Indem. Co.*, 889 S.W.2d 662, 664 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Martin*, 860 S.W.2d at 199; *Taylor v. Taylor*, 747 S.W.2d 940, 944 (Tex. App.—Amarillo 1988, writ denied); *Frank v. Kuhnreich*, 546 S.W.2d 844, 847 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.); *Brazos River Auth. v. Gilliam*, 429 S.W.2d 949, 951 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.). "It is the court's order that counts, not the stated reason or oral qualifications." *Richardson*, 905 S.W.2d at 11. Even if the trial court sends a letter detailing the grounds on which the summary judgment was granted with the notice of judgment to each party, the letter is not a part of the judgment and cannot make a general judgment a specific one. See *Shannon*, 889 S.W.2d at 664. This rule can be harsh, but it has the prophylactic effect of ensuring that the plain meaning of a court's formal order or judgment is not disputed. See *Richardson*, 905 S.W.2d at 12.

##### **B. Specific Judgments**

###### 1. If The Trial Court Grants The Summary Judgment Motion On A Ground That Is Not In The Motion, The Appellant Should Object To The Trial Court Doing So.

Texas Rule of Civil Procedure 166a does not permit a trial court to grant a summary judgment based on a ground that was not presented to it in writing. See *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996); see also *Toonen v. United Servs. Auto. Ass'n*, 935 S.W.2d 937, 942 (Tex. App.—San Antonio 1996, no writ). Indeed, the rule provides:

The motion for summary judgment shall state the specific grounds therefor. . . . The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion or in an answer or any other response.

Tex. R. Civ. P. 166a(c).

The Texas Supreme Court has expressly stated that a trial court may not grant a summary judgment on a cause of action not addressed in a summary judgment proceeding. See *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993). See also *Chesher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983); *Smith v. Atlantic Richfield Co.*, 927 S.W.2d 85, 88 (Tex. App.—Houston [1st Dist.] 1996, writ denied). A summary judgment motion must "stand or fall on the grounds specifically set forth in

the motion(s).” *Ortiz v. Spann*, 671 S.W.2d 909, 914 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.). But this requirement can be waived. *See Toonen*, 935 S.W.2d at 942. The appellant will waive his objection if he fails to bring forward a point of error in his appellate brief complaining of the trial court’s error or arguing that excess relief was improperly granted. *See id.*; *see also Gilchrist v. Bandera Elec. Coop., Inc.*, 924 S.W.2d 388, 389 (Tex. App.—San Antonio 1996), *rev’d on other grounds*, 946 S.W.2d 336 (Tex. 1997); *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 342 (Tex. App.—San Antonio 1988, writ denied). Thus, if an appellant wants to complain that the trial court granted a summary judgment on a ground that was not presented in the motion for summary judgment, the appellant should raise this complaint to the appellate court in the brief by a point of error and argument with citation to authority.

## 2. Appellate Courts May Affirm On Any Ground In Motion

If the appellate court concludes that the trial court erred in granting summary judgment on one ground, may it look to other grounds to affirm the judgment even though the trial court may not have considered them? In *State Farm Fire & Casualty Co. v. S.S.*, the Texas Supreme Court addressed this issue in a plurality opinion. 858 S.W.2d 374 (Tex. 1993). The trial court granted summary judgment for the defendant insurance company on the specific basis that, as a matter of law, the homeowner’s policy provided no coverage for any of the plaintiff’s claims. *See id.* at 376. The plaintiff appealed, and the appellate court held that the trial court erred in granting the motion for summary judgment on the “no coverage” ground. *See id.* The defendant appealed to the supreme court and argued that the court of appeals erred in failing to affirm the summary judgment on a different and independent ground that was raised in the summary judgment motion. *See id.* at 380. The supreme court held that when a trial court’s order expressly specifies the ground relied on for the summary judgment, the judgment can be affirmed only “if the theory relied on by the trial court is meritorious, otherwise the case must be remanded.” *Id.* at 380-81. The court based this result on two policy considerations. First, if appellate courts could affirm a summary judgment on grounds that were not relied on by the trial court, the appellant would be required on appeal to challenge every ground raised in the motion for summary judgment, even though many of the grounds were not considered or ruled on by the trial court. *See State Farm*, 858 S.W.2d at 381. Second, if an appellate court was to consider grounds that were never considered by the trial court, the appellate court would usurp the trial court’s authority

to consider and rule on all issues before it. *See id.* at 381-82. The court stated:

Such a practice results in appellate courts rendering decisions on issues not considered by the trial court and voiding the trial court’s decision without allowing it to first consider the alternate grounds. Usurping the trial court’s authority does not promote judicial economy, but instead serves as an encouragement for summary judgment movants to obtain a specific ruling from the trial judge on a single issue and then try again with other alternate theories at the court of appeals, then assert the same or additional alternate theories before this Court.

*Id.*

This issue, however, was not conclusively settled until three years later in *Cincinnati Life Insurance Co. v. Cates*. 927 S.W.2d 623, 624 (Tex. 1996). In *Cincinnati Life Insurance*, the defendant insurance company filed a motion for summary judgment alleging grounds A, B, C, and D. *See id.* The trial court expressly granted the motion on grounds A and B, but expressly denied grounds C and D. *See id.* The court of appeals held that the trial court erred in granting the summary judgment on grounds A and B, but refused to consider grounds C and D and remanded the case to the trial court for further disposition. *See id.* In overruling *State Farm*, the Texas Supreme Court held that appellate courts should consider all of the summary judgment grounds that the appellee preserves for appellate review and that are necessary for final disposition of the appeal, whether or not the trial court actually ruled on those grounds. *See id.* at 627. *See also Baker Hughes, Inc. v. Keco R. & D. Inc.*, 12 S.W.3d 1, 5-6 (Tex. 1999); *Romo v. Texas Department of Transportation*, 48 S.W.3d 265, 269 (Tex. App.—San Antonio 2001, no pet.).

The Supreme Court has since stated the rule as follows: “In reviewing a summary judgment, we consider all grounds presented to the trial court and preserved on appeal in the interest of judicial economy.” *Diversicare Gen. Partner, Inc. v. Rubio*, 185 S.W.3d 842, 846 (Tex. 2005). Notably, the court did not articulate any different rule depending on the type of summary judgment order being appealed. In fact, in the appeal of a summary judgment, the appellate court may even review grounds in earlier summary judgment motions that the trial court denied or did not rule on. *Baker Hughes, Inc. v. Keco R. & D.*, 12 S.W.3d 1, 5 (Tex. 1999). In *Baker Hughes, Inc.* the court stated:

The court of appeals refused to consider whether Baker Hughes's second motion for summary judgment should have been granted, citing the general rule that a denial of summary judgment is interlocutory and not appealable. But as we recognized in *Cincinnati Life Insurance Co. v. Cates*, the rule does not apply when a movant seeks summary judgment on multiple grounds and the trial court grants the motion on one or more grounds but denies it, or fails to rule, on one or more other grounds presented in the motion and urged on appeal. In *Cates* we held that the appellate court must review all of the summary judgment grounds on which the trial court actually ruled, whether granted or denied, and which are dispositive of the appeal, and may consider any grounds on which the trial court did not rule.

*Id.* (internal citations omitted).

Finally, it should be noted that when a trial court grants a summary judgment on a specific ground, a court of appeals should review other alternative grounds for affirmance where they are preserved for review: "To preserve these grounds, the party must raise them in the summary judgment proceeding and present them in an issue or cross-point on appeal." *Westchester Fire Ins. Co. v. Admiral Ins. Co.*, 152 S.W.3d 172, 178 (Tex. App.—Fort Worth 2004, no pet.). Two courts of appeals have dealt with whether an appellee preserved the ground for appellate review. In *Valores Corporativos, S.A. de C.V. v. McLane Co., Inc.*, the court noted that "courts of appeals should consider not only all those grounds the trial court rules on but also those grounds the trial court did not rule on but that are preserved for appellate review." 945 S.W.2d 160, 161 n.3 (Tex. App.—San Antonio 1997, writ denied) (citing *Cincinnati Life Ins.*, 927 S.W.2d at 625-26). The court found, however, that the appellee failed to preserve any of the unruled upon grounds for appellate review by not seeking to affirm the summary judgment on those grounds in his brief. *See id.* In *Bennett v. Computer Associates International, Inc.*, the court held that the appellee had preserved for appeal a ground that was asserted in his summary judgment motion but was not considered by the trial court. 932 S.W.2d 197, 205 (Tex. App.—Amarillo 1996, writ denied). The appellee preserved error by developing the ground in its appellate brief after a general assertion that the trial court did not err in granting the summary judgment. *See id.* Without requiring the appellee to reargue all the grounds to the appellate court in support of the trial court's granting of the summary judgment, an appellate court could affirm a summary judgment on a ground raised by the

summary judgment motion but not considered by the trial court. This requirement serves as a form of notice to the appellant so that he will know which grounds he should brief to the appellate court. Of course, the appellant may need to file a reply brief to confront any grounds that the trial court did not consider but which were reasserted by the appellee in his appellate brief.

Several courts of appeals have interpreted *Cincinnati Life Insurance* loosely and arguably have eliminated the requirement that the appellee preserve and raise the unruled upon ground for appellate review. The Fourteenth Court of Appeals has held that "a summary judgment may be affirmed on any ground asserted in the motion that has merit." *City of Houston Fire Fighters v. Morris*, 949 S.W.2d 474, 476 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). The Tyler court has stated:

The Supreme Court has held that appellate courts, in the interest of judicial economy, may consider other grounds that the movant has reserved for review and the trial court did not rule on. We must be mindful, however, that a summary judgment cannot be affirmed on any grounds not presented in the motion for summary judgment.

*Robertson v. Church of God, Int'l*, No. 12-96-00083-CV, 1997 WL 555626, at \*4 (Tex. App.—Tyler Aug. 29, 1997, pet. denied) (not released for publication) (citation omitted). The Tyler court mentioned that the ground must be preserved, but seemed to suggest that the appellee does so by solely raising the ground in his summary judgment motion. *See id.* Further, the Tyler court did not discuss whether the appellee reargued the alternative ground in its appellate brief. *See id.* These interpretations omit the important requirement that the appellee must preserve the ground for appellate argument by raising the ground in an appellate brief, thereby allowing appellate courts to review sua sponte the motion for summary judgment and affirm on any ground that was meritorious. Therefore, a party defending a specific summary judgment on appeal should argue both the grounds on which the trial court based its judgment, and all other grounds that were included in the summary judgment motion. This action will afford the best chance of the specific summary judgment being affirmed on appeal.

The Texas Supreme Court recently addressed this question in a per curiam opinion in *Cardwell v. Whataburger*, No. 14-1019, 2016 WL 766550 (Tex. Feb. 26, 2016) (per curiam). Summarizing the procedural posture of the case, the court noted that "[t]he court of appeals in its opinion set out all of the parties' arguments at length but addressed only the grounds the trial court gave for its ruling." *Id.* at \*1.

Because the court of appeals did not “address[] every issue raised and necessary to final disposition of the appeal,” *id.* (quoting Tex. R. App. P. 47.1), it “could not order arbitration without either addressing Cardwell’s arguments or remanding the case to the trial court to address them,” *id.* The court, therefore, “reverse[d] the judgment of the court of appeals and remand the case to that court for further proceedings.” *Id.* at \*2.

Likewise, the safest procedure for the party appealing the summary judgment is to brief every ground that was raised in the motion for summary judgment. This will provide the appellate court with both sides of the argument on any possible ground that the court could use to affirm and will reduce the chances that the summary judgment will be affirmed.

### C. General Judgments

When the trial court grants a general summary judgment and does not specify the ground on which it granted the judgment, the appellant must argue that every ground of the summary judgment motion is erroneous. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996); *Boone R. Enters., Inc. v. Fox Television Stations, Inc.*, 189 S.W.3d 795, 796 (Tex. App.—Dallas 2005, no pet.). Further, the appellate court must affirm the summary judgment if any one of the movant’s theories has merit. *See Merriman v. XTO Energy, Inc.*, No. 11-0494, 2013 Tex. LEXIS 492, \*5 (Tex. 2013); *Western Invs., Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237 (Tex. 2001); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 624 (Tex. 1996).

#### 1. Specific Points of Error Versus General Points of Error

A party may use either specific points of error/issues or general points of error/issues to attack a summary judgment. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). In *Malooly Brothers, Inc. v. Napier*, the Texas Supreme Court asserted that the best approach on appeal is to write a general point of error that states, “The Trial Court Erred In Granting The Motion For Summary Judgment.” *Id.* This single point of error allows the party to challenge all of the grounds stated in the summary judgment motion. *See id.* The court also stated, however, that it is possible to challenge the summary judgment by separate, specific points of error. *See id.* An example of a specific point of error is “The Trial Court Erred In Granting The Summary Judgment Because The Movant Failed To Establish That There Is No Genuine Issue Of Material Fact As To When The Non-Movant Discovered His Injury So As To Toll The Statute Of Limitations.”

#### 2. Specific Points of Error

Where an appellant uses specific points of error to attack a general summary judgment and fails to attack one of the possible grounds on which the judgment was granted, the appellate court should affirm the judgment because the appellant has waived the error. *See id.* One court stated this waiver principle:

The movant requesting judgment is free to assert as many grounds therefor as he chooses. Should he raise several and the court fail to state on which it relied in granting relief, an additional obstacle confronts the non-movant. It falls on the latter, on appeal, to address each ground asserted and establish why it was deficient to support judgment. Failing to do this entitles the reviewing court to affirm on any unaddressed ground.

*Miller v. Galveston/Houston Diocese*, 911 S.W.2d 897, 899 (Tex. App.—Amarillo 1995, no writ) (citation omitted).

The rationale for waiver in this instance is that the summary judgment may have been based on a ground that was available to the trial court, it was not specifically challenged by the appellant, and there was no general assignment that the trial court erred in granting the summary judgment. *See Malooly Bros.*, 461 S.W.2d at 121; *Lewis*, 944 S.W.2d at 3.

Thus, if the party challenging the summary judgment uses specific points of error, he should be careful to include every possible ground raised by the summary judgment motion. The following are further examples of an appellant waiving his appeal because he failed to assign a specific point of error to a ground raised in the summary judgment motion: *Clark v. Compass Bank*, 2008 Tex. App. LEXIS 3783 (Tex. App.—Fort Worth May 22, 2008, no pet.) (mem. op.); *Pena v. Je Matadi Dress Co.*, 2008 Tex. App. LEXIS 678 (Tex. App.—Houston [1st Dist.] Jan. 31, 2008, no pet.); *Fluid Concepts, Inc. v. DA Apartments Ltd. P’ship*, 159 S.W.3d 226, 231 (Tex. App.—Dallas 2005, no pet.); *Evans v. First Nat’l Bank*, 946 S.W.2d 367, 377 (Tex. App.—Houston [14th Dist.] 1997, writ denied); *Dubow v. Dragon*, 746 S.W.2d 857, 859 (Tex. App.—Dallas 1988, no writ); *King v. Texas Employers’ Ins. Ass’n.*, 716 S.W.2d 181, 182-83 (Tex. App.—Fort Worth 1986, no writ); *Langston v. Eagle Publ’g Co.*, 719 S.W.2d 612, 615 (Tex. App.—Waco 1986, writ ref’d n.r.e.); *Rodriguez v. Morgan*, 584 S.W.2d 558, 559 (Tex. Civ. App.—Austin 1979, writ ref’d n.r.e.). It is important that the rules discussed here are general and only apply when a defendant attacks a judgment for a plaintiff who asserts a single cause of action. *See Fetty v. Miller*, 905 S.W.2d 296, 299 (Tex. App.—San Antonio 1995, writ denied).

Further, this discussion must be put in the context of the briefing rules of the 1997 version of the Texas Rules of Appellate Procedure. Those rules provide that an appellant's brief "must state concisely all issues or points presented for review," and the "statement of an issue or point will be treated as covering every subsidiary question that is fairly included." TEX. R. APP. P. 38.1(e). Courts of appeals normally liberally construe "points of error in order to obtain a just, fair and equitable adjudication of the rights of the litigants." *Sterner v. Marathon Oil Co.*, 767 S.W.2d 686, 690 (Tex. 1989). See also TEX. R. APP. P. 38.9; *Tex. Mexican Ry. Co. v. Bouchet*, 963 S.W.2d 52, 54 (Tex. 1998) ("Courts should liberally construe briefing rules."); *Anderson v. Gilbert*, 897 S.W.2d 783, 784 (Tex. 1995) ("Courts are to construe rules on briefing liberally.").

### 3. General Points of Error

"A general point of error stating that the trial court erred in granting the motion for summary judgment will allow the non-movant to dispute on appeal all possible grounds for the judgment." *Shivers v. Texaco Exploration & Prod., Inc.*, 965 S.W.2d 727, 732 (Tex. App.—Texarkana 1998, pet. denied). See also *Plexchem Int'l, Inc. v. Harris County Appraisal Dist.*, 922 S.W.2d 930, 930-31 (Tex. 1996); *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); *Gilbert v. Gilvin-Terrill, Ltd.*, 2008 Tex. App. LEXIS 4348 (Tex. App.—Amarillo June 12, 2008, no pet.) (mem. op.). Thus, an appellant may challenge "not only arguments focusing on whether a genuine issue of material fact was raised by the summary judgment evidence, but also is allowed to contest non-evidentiary issues such as the legal interpretation of a statute." *Moore v. Shoreline Ventures, Inc.*, 903 S.W.2d 900, 902 (Tex. App.—Beaumont 1995, no writ). See also *Shivers*, 965 S.W.2d at 732; *Cassingham v. Lutheran Sunburst Health Serv.*, 748 S.W.2d 589, 590 (Tex. App.—San Antonio 1988, no writ).

In *Speck v. First Evangelical Lutheran Church of Houston*, the appellant raised one general issue: "The Trial Court Erred In Granting Appellees' Motion For Summary Judgment, As There Existed Evidence In The Court's File Supporting Appellant's Case." 235 S.W.3d 811 (Tex. App. —Houston [1st Dist.] 2007, no pet.). The court of appeals construed this issue broadly and found it was sufficient to challenge the trial court awarding relief that was not requested:

We hold that when a trial court grants summary judgment on a ground not contained in the motion for summary judgment, an assertion on appeal that fact issues remain on that ground is sufficient under the Texas Rules of Appellate

Procedure to raise a challenge to the excess relief--without any request for summary judgment on a claim, nothing exists in the trial court record to controvert an appellant's contention on appeal that facts exist to support it.

*Id.* at 819.

In *Plexchem International Inc. v. Harris County Appraisal District*, the Texas Supreme Court noted that the appellant used a general point of error and presented three pages of argument and authority to support the allegedly waived ground. Thus he preserved error as to that ground. 922 S.W.2d at 931; *Shivers*, 965 S.W.2d at 733 (holding that the appellant did not waive his appeal when he used a general point of error and presented four pages of argument on the allegedly waived ground). Certainly, when an appellant uses a general point of error and briefs every ground raised in the summary judgment motion, there is no waiver.

However, it is not clear whether an appellant who uses a general point of error but does not brief every ground raised in the summary judgment motion waives the unargued grounds on appeal. See *Stevens v. State Farm Fire & Cas. Co.*, 929 S.W.2d 665, 669-70 (Tex. App.—Texarkana 1996, writ denied). There are two main situations when an appellant may face this issue. First, the appellant may have failed to challenge one of the movant's grounds either in the trial court in the response or in the appellate court in the appellate brief. Second, the appellees could have challenged all of the movant's grounds to the trial court in the response, but failed to challenge every ground in the appellate brief.

As to the first situation, courts have held that the appellant waived the appeal. In *San Jacinto River Authority v. Duke*, the Texas Supreme Court held that an appellate court may not reverse a summary judgment on issues that were not briefed or assigned as error. 783 S.W.2d 209, 209-10 (Tex. 1990). In doing so, the court cited *Central Education Agency v. Burke*, which held that a court of appeals erred in reversing a summary judgment on grounds neither raised in opposition to the motion at the trial court level nor presented to the court of appeals in a brief. 711 S.W.2d 7, 8-9 (Tex. 1986); see also *San Jacinto River Auth.*, 783 S.W.2d at 210.

In *Morriss v. Enron Oil & Gas Co.*, the defendant based its motion for summary judgment on the failure of one of the elements of the plaintiff's contract claim and on the affirmative defense of the statute of limitations. 948 S.W.2d 858, 863 (Tex. App.—San Antonio 1997, no writ). In his summary judgment response, the plaintiff only argued that the statute of limitations was tolled by the discovery rule. See *id.* at

871. The trial court signed an order granting the defendant's motion for summary judgment but failed to assign any particular basis for so doing. *See id.* On appeal, the plaintiff used a general point of error and alleged that the trial court erred in granting the summary judgment but only briefed and argued that the statute of limitations was tolled by the discovery rule. *See id.* The court stated that by using a general point of error, the plaintiff "could present argument on all grounds on which he contends that summary judgment was inappropriate." *Id.* The court noted, however, that the plaintiff did not take advantage of this opportunity; rather, he focused his briefing on the issue of limitations. *See id.* Thus, the court ruled that "failure to take advantage of the opportunity to present argument on the alternative ground results in waiver." *Id.*

Other courts have similarly found that a broad issue only allows an appellant the opportunity to brief and argue all grounds, it does not relieve a party of the obligation to brief all grounds that the trial court could have used to support the order. *See, e.g., McCoy v. Rogers*, 240 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *Cruikshank v. Consumer Direct Mortgage, Inc.*, 138 S.W.3d 497, 502-03 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 958-59 (Tex. App.—Corpus Christi 1998, no pet.) (concluding that *Malooly* allowed the non-movant to argue broadly on appeal under a general point of error, but it did not relieve an appellant of the burden to challenge the grounds for the summary judgment and to present argument for his case on appeal). *See also Judson 88 Partners v. Plunkett & Gibson, Inc.*, No. 14-99-00287-CV, 2000 Tex. App. LEXIS 3308, 2000 WL 977402, \*2 n.2 (Tex. App.—Houston [14th Dist.] May 18, 2000, no pet.) (not designated for publication) (noting that *Malooly* holds that "even a broad point of error must still be supported by argument challenging each independent summary judgment ground. . . . Otherwise, the assertion of a broad point of error would shift the burden to the appellate court to search the record for grounds on which to reverse the summary judgment.").

There is limited guidance from Texas courts as to the second situation. The Texas Supreme Court has authored a number of opinions that relate to this topic, but it has never directly addressed the situation when a non-movant attacks every ground in his response to the trial court and then only attacks a few of those grounds in his brief to the appellate court. In *Inpetco, Inc. v. Texas American Bank*, the non-movant appealed an adverse summary judgment to the appellate court using a general point of error. 729 S.W.2d 300 (Tex. 1987) (per curiam). The appellate court held that the non-movant had waived the appeal because the point of error was too broad and there was

insufficient argument and authorities under the point of error. *See Inpetco, Inc. v. Texas Am. Bank/Houston*, 722 S.W.2d 721, 721-22 (Tex. App.—Houston [14th Dist.] 1986), writ ref'd n.r.e. per curiam, 729 S.W.2d 300 (Tex. 1987). Though the supreme court affirmed the court of appeals judgment, refusing the writ of error finding no *reversible* error, the court did note that the appellate court erred in affirming the trial court's judgment on the basis of briefing inadequacies without first ordering the non-movant to rebrief. *See Inpetco*, 729 S.W.2d at 300.

The Texas Supreme Court's ruling in this case was contrary to the historical development of waiver in the context of briefing. *See David M. Gunn, Unsupported Points of Error on Appeal*, 32 S. TEX. L. REV. 105, 120-21 (1990). *Inpetco* apparently required appellate courts to allow appellants to rebrief inadequately briefed points of error before the court could find waiver. This case produced a wave of confusion in the courts of appeals. *See id.* at 121-33. Some courts of appeals simply ignored *Inpetco*, some distinguished it, and others seemingly refused to follow it. *See id.* Much of the confusion in this area occurred because the courts of appeals were trying to apply *Inpetco*, which applied the waiver doctrine to a summary judgment appeal, to non-summary judgment appeals without taking into account the inherent differences in the two types of judgments. One court has attempted to limit *Inpetco* because of the change in the Texas Rules of Appellate Procedure. *See Svabic v. Svabic*, 1999 Tex. App. LEXIS 7829 (Tex. App.—Houston [1st Dist.] Oct. 21, 1999, no pet.) (not design. for pub.) ("Rule 74, on which the court relied in *Inpetco*, has been repealed and replaced. Rule 38.9 does not require the court to allow rebriefing or supplementation as rule 74 did.").

In *Fredonia State Bank v. General American Life Insurance Co.*, the Texas Supreme Court revisited *Inpetco* and held that it did not require the courts of appeals to order rebriefing. 881 S.W.2d 279, 284-85 (Tex. 1994). Rather, the courts of appeals have discretion to determine whether to deem a point waived or to order rebriefing. *See id.* at 284 ("The principle underlying the opinion in *Davis* is the settled rule that an appellate court has some discretion to choose between deeming a point waived and allowing amendment or rebriefing, and that whether that discretion has been properly exercised depends on the facts of the case."). "Although *Fredonia* did not support its holding by distinguishing *Inpetco* on the basis that it was a summary judgment appeal, it seems to support [the proposition] that an appellate court has discretion to look to the appellant's response to supply any missing argument under a general point of error." *Shivers v. Texaco Exploration & Prod.*, 965 S.W.2d 727, 733 (Tex. App.—Texarkana 1998, pet. denied).

In *Bonham State Bank v. Beadle*, the Texas Supreme Court held that when an appellant had raised an issue challenging the summary judgment on an independent ground with the trial court but failed to raise it in the appellate brief, he waived that issue. 907 S.W.2d 465, 470 (Tex. 1995). *Beadle*, however, did not deal with a situation when the appellant lost the entire appeal due to the waiver. The appellate court simply chose not to consider the independent issue that the appellant raised to the trial court but failed to raise in the appellate court. *See id.* *See also General Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591 (Tex. 2001); *Standard Fruit & Vegetable Co. v. Johnson*, 985 S.W.2d 62 (Tex. 1998).

In *Stevens v. State Farm Fire and Casualty Co.*, the Texarkana Court of Appeals ruled that when an appellant advances a general point of error in his appellate brief, but fails to argue all grounds that the movant advanced in support of his motion in the trial court, the appellate court may in its discretion refuse to consider the unargued bases for reversing the judgment. 929 S.W.2d 665, 670 (Tex. App.—Texarkana 1996, writ denied); *see also Shivers*, 965 S.W.2d at 732. In *Stevens*, the court declined to use that discretion and instead considered that the appellant had simply limited his argument to his strongest point, and considered the other possible attacks against the judgment. *Stevens*, 929 S.W.2d at 670. In so holding the court stated:

As a practical matter, even if an appellant fails to argue all grounds after a general point of error, presumably it argued all those grounds in its summary judgment response at trial. If a general point of error simply is a request for the appellate court to conduct a de novo review of the trial court's judgment, the appellate court can, as a practical matter, step into the trial court's shoes and can, by reviewing the pleadings and evidence as raised in the motion and response, determine whether the trial court properly granted judgment. The appellee still must meet its appellate burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law.

*Id.*

“In essence, [the Texarkana court] ruled that because the appellant used a general point of error, he challenged all the grounds on which the summary judgment could have been based.” *Shivers*, 965 S.W.2d at 732. Due to the *de novo* standard of review on appeal, the appellate court, like the trial court, may consider the clerk's record and the appellant's summary judgment response, “wherein he presumably

briefed and challenged every argument that the appellee raised in his summary judgment motion.” *Id.* Further, there is no presumption of corrections in the summary judgment context. After a trial on the merits, a trial court's judgment is presumed correct. But in summary judgment cases, no presumption of correctness attaches to the trial court's judgment and the movant still must carry his burden at the appellate court level. *See Gillespie v. Fields*, 958 S.W.2d 228, 231 (Tex. App.—Tyler 1997, pet. denied) (“The presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear.”) (citing *Missouri Kansas-Texas R.R. Co. v. City of Dallas*, 623 S.W.2d 296, 298 (Tex. 1981)). Because unlike a judgment after a trial on the merits, there is no presumption applicable to a summary judgment. Thus, the briefing standards should also be different, with summary judgment appeals given more liberal treatment. *Compare King v. Graham Holding Co.*, 762 S.W.2d 296, 298-99 (Tex. App.—Houston [14th Dist.] 1988, no writ) (noting that *Inpetco* dealt with a summary judgment appeal where the more liberal *Malooly* briefing rules apply and that *Inpetco* did not create a general right to rebrief).

Following the rule that the appellant waives appeal by not briefing every possible ground would require an appellate court to affirm a summary judgment even if the trial court erred in finding that the movant's summary judgment grounds were legally sufficient, and the non-movant challenged the summary judgment in its entirety by a general point of error. *See Shivers*, 965 S.W.2d at 732. *See also Bean v. Reynolds Realty Group, Inc.*, 192 S.W.3d 856 (Tex. App.—Texarkana 2006, no pet.).

In *Sadler v. Bank of Am., N.A.*, the court of appeals held that it would not affirm a summary judgment based solely on briefing errors:

Sadler's failure to adequately brief the reasons he believed the trial court's ruling on the objections was erroneous would ordinarily result in a waiver of the issue. However, the waiver of this issue would require an affirmance of the trial court's judgment because Sadler would not have produced any summary judgment evidence in response to BOA's no-evidence motion. This court is not permitted to affirm a judgment on the basis of briefing inadequacies without first ordering the party to re-brief. *Inpetco, Inc. v. Texas American Bank/Houston N.A.*, 729 S.W.2d 300, 30 Tex. Sup. Ct. J. 336 (Tex. 1987). Accordingly, we do not rest our decision on Sadler's briefing inadequacies.

2004 Tex. App. LEXIS 5491 (Tex. App.—San Antonio June 23, 2004, no pet.).

In *A.C. Collins Ford, Inc. v. Ford Motor Co.*, the court found that the party appealing a summary judgment waived appeal by not raising in the appellate brief the issue of conspiracy. 807 S.W.2d 755, 760 (Tex. App.—El Paso 1990, writ denied). The court did not state whether the appellant had raised conspiracy in the summary judgment response in the trial court.

The best practice for a party appealing from a general summary judgment is to set out a general point of error and argue every ground raised in the summary judgment motion. If he/she does not do so, they will risk waiving the entire appeal. If the party fails to challenge every possible ground raised in the summary judgment motion in either the response to that motion, or in his appellate brief, the appellate court will certainly affirm the judgment on the unchallenged grounds. On the other hand, if the party challenges every ground raised in the summary judgment motion in the response to that motion, the appellate court arguably may, like the court in *Stevens*, choose to review that response and not find a waiver of the appellant's appeal. Most likely, however, the court will choose not to exercise that discretion because of docket concerns and, in light of the supreme court's recent and apparent fondness of summary judgments, it will not likely reverse the decisions of the courts of appeals affirming summary judgments.

#### 4. Criticism of General Points of Error

One court of appeals has complained of the *Malooly* briefing rule, which allows argument as to all possible summary judgment grounds to be raised under a single point of error. In *A.C. Collins Ford Motor Co.*, the court urged the Texas Supreme Court to reconsider the *Malooly* briefing rules. *Id.*; see also *Natividad v. Alexis, Inc.*, 833 S.W.2d 545, 549 (Tex. App.—El Paso 1992), *rev'd on other grounds*, 875 S.W.2d 695 (Tex. 1994). The court stated that “the time has come when attorneys should be able to direct an appellate court to the error of the trial court with such specificity that there is no question about the complaint on appeal.” *A.C. Collins Ford, Inc.*, 807 S.W.2d at 760. Further, the court pointed out that when the appellate record consists of volumes of material, “a single point of error saying the trial court erred is little help” to the appellate court. *Id.* To date, however, the Texas Supreme Court has refused to overrule *Malooly*. Indeed, it has reaffirmed *Malooly* in *Plexchem International, Inc. v. Harris County Appraisal District*. 922 S.W.2d 930, 931 (Tex. 1996); see also *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010).

#### 5. How to Raise and Brief a Proper Point of Error

A party appealing an adverse summary judgment should brief the appeal as thoroughly as possible. First, the general point of error should state, “The Trial Court Erred In Granting The Motion For Summary Judgment.” *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). As discussed above, this allows the appellant to attack every ground relied on by the motion for summary judgment. Because the appellate courts and their staffs will find sub-points of error helpful, the appellant should also raise a sub-point of error stating, “The trial court erred in granting the summary judgment on ground X because of Y.” An example of such a brief is contained in *Davis v. Pletcher*, where the court states:

By a plethora of points, appellant . . . assails the action of the trial court in partially granting the summary judgment. In the first of the 59 points of error, appellant complains simply that the court erred in granting the motion. The following 41 points elaborate on this first point in a multitude of ways and are addressed by appellant in seven groups of from one to thirteen points.

727 S.W.2d 29, 32 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.). This language will act as a road map and insure that the appellate court will not overlook any argument or authorities that may be dispositive. The appellant should brief and argue every ground raised in the summary judgment motion, and should place these contentions in sub-points of error. This should be done whether the appeal is from a general or specific summary judgment order. If the order is specific, the appellate court can still affirm the summary judgment on grounds not considered by the trial court. It is wise for an appellant to clearly set out opposition to every possible ground on which the appellate court can affirm a summary judgment. If the summary judgment order is general, the appellant should assert as a sub-point of error and brief every possible ground to avoid waiving his appeal.

### **XV. CONCLUSION**

As we have seen, an attorney faces many issues in appealing a summary judgment in Texas. Whether the issue is the appropriate standard and scope of review; the finality of the summary judgment order; the effect of motions, responses, and evidence missing from the record; or the exactitude of briefing to the appellate court, a party must be aware of recent precedent and rule changes in order to avoid the sometimes harsh consequence of waiver of an issue on appeal. Therefore, the Authors hope that this article will help to inform attorneys who either need to

appeal or respond to an appeal of a summary judgment.