SUMMARY JUDGMENTS AND DECLARATORY JUDGMENTS IN DIVORCE

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STATE BAR OF TEXAS
25th ANNUAL MARRIAGE DISSOLUTION INSTITUTE
May 9-10, 2002
Austin, Texas
Chapter 8

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PROFESSIONAL ASSOCIATIONS

American Board of Trial Advocates-Associate
American Bar Association- Family Law Section
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Family Law Council, Co-Chair of the Amicus Curiae Committee-term expires 2005
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Member of Capital Area Trial Lawyers Association
Member of Williamson County Bar Association
President, American Academy of Matrimonial Lawyers-Texas Chapter
President of Travis County Family Law Advocates 1999-2000
State Bar of Texas -Family Law Section -Appellate Section
Texas Academy of Family Law Specialists
Travis County Bar Association-Family Law Section-Appellate Section
Treasure, Travis County Family Law Advocates-Political Action Committee 1999-2002
Texas Trail Lawyers Association
Screening Committee Travis County Family Law Advocates-1999-2002

HONORS

Americas Top Lawyers 2001-2002- Family Law Section
Listed -The Best Lawyers in America- Family Law 1999-2002
Martindale-Hubbell-"AV" rating
Martindale-Hubbell Bar Register of Preeminent Lawyers

COMMITTEES & RESPONSIBILITIES

Planning Committee for 1994, 2000, 2001,2002 Advanced Family Law Seminar
Planning Committee for 1998, 2001,2002 New Frontiers in Marital Property Law Seminar
Chair, Interdisciplinary Relations on Mental Health Committee- 1997, 1998, 1999, 2000,2001 - American Academy of Matrimonial Lawyers
Member of Newsletter Committee - American Academy of Matrimonial Lawyers
Member of the Foundation of the American Academy of Matrimonial Lawyers
Planning Committee Marriage Dissolution - 1998,1999,2000,2002
Chair Texas Association of Family Law Specialists Legislative Oversight Committee -1999
Co-Course Director, Family Law on the Front Lines Conference 2001, 2002
Course Director- Ultimate Trial Notebook Family Law-2000
Nominating Committee -Family Law Council-2001

Membership Committee-Family Law Council 2001-2002
Co-Chair of Amicus Curiae Committee-Family Law Council 2001-2002
Course Director-American Academy of Matrimonial Lawyers, Texas Chapter, Survival Retreat-2001
Chapter Leader Conference November 2001, American Academy of Matrimonial Lawyers
American Academy of Matrimonial Lawyers Social Function Committee 2002.

CLE ACTIVITY- SPEECHES, PANELS, & ARTICLES

INTERNATIONAL ACADEMY OF MATRIMONIAL LAWYERS

"Fiduciary Duties of Spouses and Non-Physical Torts", International Academy of Matrimonial Lawyers, Palm Beach, Florida, March 2000.

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS

"Early-Stage Company Valuation,"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

"Issues Unique to Early-Stage Companies: Property and Support Conundrum,"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

"Valuation of Law Practice in Divorce", American Academy of Matrimonial Lawyers, Sanibel, Florida, 2002.

"Mental Health Professionals and the Legal System Including Ethical Issues," American Academy of Matrimonial Lawyers, Chicago, Illinois, November 1998.

"Relocation: Moving Forward, or Moving Backward?," American Academy of Matrimonial Lawyers Annual Conference, Chicago, Illinois, November 1996.

NEW FRONTIER'S MARITAL PROPERTY LAW

"Valuation, Characterization and Division of Unusual Assets", New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 2001.

"Pretrial and Trial Strategies for the Complex Property Case", New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 2000.

"Strategic Use of Law Beyond the Family Code", New Frontiers in Marital Property Law, San Diego, California, October 1999.

"Fiduciary Duties of Spouses, Effective Use of the Remedy of the Constructive Trust, Recoveries for Violations of these Duties, and Issues Presented When Spouses are Under Multiple and/or Conflicting Duties," New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 1998.

"Dealing With Special Problems Relevant to Evaluation & Division of Professional Practices," Second Annual New Frontiers in Marital Property Law, San Diego, California, October 1997.

ADVANCED FAMILY LAW:

"Professional Partings: Valuing Medical/Legal Professional Practices", 27th Annual Advanced Family Law Course, San Antonio, Texas, August 2001.

"Representing the High Tech Entrepreneur: IPO's, Venture Capitalists and Beyond", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"The Appellate Process-the Good, the Bad, and the Ugly", 25th Annual Advanced Family Law Course, Dallas, Texas, August 1999.

"Breach of Fiduciary Duty and Nonphysical Tort Claims," Annual Advanced Family Law Course, San Antonio, Texas, August 1998.

"The Ab(use) of the Rules of Evidence and Privileges," Advanced Family Law Course, San Antonio, Texas, August 1997.

"Reporting Child Abuse: Counterpoint - A Lawyer has a Duty to Report Child Abuse," State Bar of Texas Annual Meeting, Houston, Texas, June, 1997 and Advanced Family Law Course, San Antonio, Texas, August 1997.

"Piercing Claims of Immunity in Family Law Litigation," Advanced Family Law Course, San Antonio, Texas, 1994.

"Representing the High Tech Entrepreneur: IPO's, Venture Capitalists and Beyond", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Family Law Court v. Probate Court: What Every Family Lawyer Should Know," 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"The Appellate Process-the Good, the Bad, and the Ugly," 25th Annual Advanced Family Law Course, Dallas, Texas, August 1999.

"Breach of Fiduciary Duty and Nonphysical Tort Claims," Annual Advanced Family Law Course, San Antonio, Texas, August 1998.

"Recent Development in Custody Law", State Bar of Texas, Advanced Family Law Seminar, March 1997.

"Whose Kids are They Anyway? Reporting Child Abuse: Counterpoint - A Lawyer has a Duty to Report Child Abuse," State Bar of Texas Annual Meeting, Houston, Texas, June, 1997 and Advanced Family Law Course, San Antonio, Texas, August 1997.

"The Ab(use) of the Rules of Evidence and Privileges," Advanced Family Law Course, San Antonio, Texas, August 1997.

"Piercing Claims of Immunity in Family Law Litigation," Advanced Family Law Course, San Antonio, Texas, 1994.

"Getting and Characterizing Punitive Damages in Family Law Litigation," Advanced Family Law Course, San Antonio, Texas, August 1994.

ADVANCED CIVIL APPELLATE

"Trends in Preservation of Error (At Trial, Charge, and Post Verdict)," 13th Annual Advanced Civil Appellate Practice Course, State Bar of Texas, Austin, Texas, October 1999.

MARRIAGE DISSOLUTION

"Summary Judgments and Declaratory Judgments in Divorce", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Termination and Adoption: It Ain't Over Till It's Over", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Valuing and Dividing the Community Business, Marriage Dissolution Seminar, Corpus Christi, Texas, May 2001.

"Bill of Review," 23rd Annual Marriage Dissolution Seminar, Fort Worth, Texas, May 2000.

"Sex and Lies: A Daubert Challenge, Techniques for Presenting the Child's Testimony to the Trial Court in a Child Abuse Case," 23rd Annual Marriage Dissolution Seminar, Fort Worth, Texas, May 2000.

"Appellate Tips: Judges Panel," 23rd Annual Marriage Dissolution Seminar, Fort Worth, Texas, May 2000.

"Litigating Marital Agreements: "You can't always get what you want....",22nd Annual Marriage Dissolution Institute, San Antonio, Texas, May 1999.

"Handling the Divorce Involving a Medical Practice," Marriage Dissolution Conference, Austin, Texas, May, 1998.

"Scratches on the Heart: Non-Physical Tort Claims," Marriage Dissolution Conference, Dallas, Texas, May, 1997.

"The Effective Use of the New Conservator Rights Responsibilities and Duties in a Custody Case," Marriage Dissolution Conference, South Padre Island, Texas, 1994.

TEXAS ACADEMY OF FAMILY LAW SPECIALISTS

"Presenting the Child's Perspective: Techniques for Presenting the Child's Preference of Conservator to the Trial Court," Texas Academy of Family Law Specialists, Las Vegas, Nevada, February 2000.

TEXAS TRIAL LAWYERS ASSOCIATION

"Conflicts Between Personal Injury and Family Law," Texas Trial Lawyers Association, Austin, Texas, February 1999.

"How Much Is Your Law Practice Worth? Valuing Personal Injury Law Practices for Purposes of Divorce," Texas Trial Lawyers Association, Dynamic Advocacy Seminar, Whitefish Montana, July, 1998.

"Discussion of Texas Supreme Court Cases Involving Tort Claims of Emotional Distress," joint meeting of Travis County Trial Lawyers and Travis County Women's Bar, Austin, Texas, 1994.

"Divorce & Emotional Distress :Custer's Last Stand,"1992.

UNIVERSITY OF TEXAS COURSES

"Child Support Collection: A Practical Guide to the Opportunities and Pitfalls in Enforcing and Defending Child Support Obligations," Family Law on the Front Lines, Galveston, Texas, April 2002.

"District Judges Panel: 10 Bad Things that Good Lawyers Do," Family Law on the Front Lines, Galveston, Texas, April 2002.

"Interaction of Probate Court and Family Law," Family Law on the Front Lines, Galveston, Texas, April 2001.

"Daubert: Experts & Admissiblity" Family Law on the Front Lines, The University of Texas School of Law, April 2001.

STATE BAR OF TEXAS COURSES

"Playing By the Rules," Winning Techniques in Family Law Litigation: Mastering the Challenge, Houston, Texas, December 1998.

"Emerging Issues in Custody Litigation," 1997 State Bar of Texas Legal Assistant Division Advanced Family Law Seminar, Austin, Texas, March, 1997.

"Changes in Texas Family Law," The College of the State Bar of Texas, Austin, Texas, 1994.

"Sharpening Negotiating Skills - Your Key to Success," State Bar of Texas, Women's Law Section, Austin, Texas, 1990.

"Mothers Without Custody," San Francisco, California, 1987.

"Child Abuse - The Quiet Crime," State Bar of Texas, San Antonio, Texas, 1985.

"Post Divorce, Modification of Conservatorship and Support Orders in Divorce," 1984: Division of Property and Decisions on Children, El Paso, Texas 1984.

"Bottom Line Appellate Issues," Ultimate Trial Notebook: Family Law, New Orleans, Louisiana, December 2000.

The Ultimate Trial Notebook - Family Law, 1994, State Bar of Texas, Austin, Texas, "The Social Worker: Learning from Your Expert What to Ask."

ASSOCIATION OF FAMILY AND CONCILIATION COURTS

"Parental Relocation Disputes: An Interdisciplinary Approach to Resolution," Second World Congress on Family Law and the Rights of Children and Youth with the 1997 Annual Conference of the Association of Family and Conciliation Courts, San Francisco, California, June, 1997.

"Gender Issues in Domestic Torts," Association of Family and Conciliation Courts, Montreal, Canada, May 1995.

SPEAKER/AUTHOR VARIOUS COURSES

"Grandparents Rights after Troxel" Capital Area Paralegal Association, Austin, Texas, January 2002.

Summary of the 1999 amendments to the Texas Family Code," Legal Assistant U, San Antonio, Texas, September 1999.

"Domestic Tort Liability and Characterization of Damages," First Annual Texas Marital Property Institute, Austin, Texas, October, 1997.

"Trying Jury Cases Under the Amendments to the Texas Family Code and the New Texas Pattern Jury Charge," Travis County Family Law Section Meeting, April 1996.

"What Attorneys Expect from an Appraiser in a Divorce Situation," American Society of Appraisers, Austin, Texas, November 1995.

"Complex Family Law Litigation, Interspousal Tort Claims," Texas College of Advanced Judicial Studies, 1993.

"Changes in the Family Code," Travis County Family Law Section Meeting, Austin, Texas, 1993.

Travis County Bar Association Third Annual Jury Selection Seminar, Family Law Voir Dire Demonstration, 1993.

"Issues Particular to the Appeal of Family Law Cases in Texas," Civil Appellate Seminar, Austin, Texas, April, 1994.

Travis County Bar Association Second Annual Jury Selection Seminar, Family Law Voir Dire Demonstration, 1992.

Travis County Domestic Relations Division - Child Custody Litigation, 1990.

"Child Custody Litigation," Tarrant County Bar Association, Fort Worth, Texas, 1990.

VARIOUS PUBLICATIONS

"Overview of the New Uniform Child Custody Jurisdiction Enforcement Act," The Newsletter of the American Academy of Matrimonial Lawyers, Winter 2000.

"Targeted by the Opposing Party; The Tort of Negligent Misrepresentation Applied to Divorce Lawyers," Texas Lawyer, December 1999.

"Relocation: Moving Forward or Moving Backward?", 15 Journal of American Academy of Matrimonial Lawyers 701 (Spring 1999).

"The Fiduciary Duty Between Spouses, A Look at "Fraud on the Community," Texas Lawyer, October, 1998.

"Torts in Texas the New Frontier," Texas Trial Lawyers Forum, 1992.

"Infliction of Emotional Distress: No Justice in the Middle Ground," Texas Trial Lawyers Forum, 1992.

"Evaluation and Division of Professional Goodwill and Professional Degrees During Marriage," Texas Trial Lawyers Forum, 1985.

Co-Author with Dan Price, "Post Divorce, Modification of Conservatorship and Support Orders in Divorce," Division of Property and Decisions on Children, 1984.

Co-Author with Thomas Oakland, Ph.D.: Divorced Fathers, 1984.

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Board Certified, Civil Appellate Law (1988-present)
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Texas Board of Legal Specialization

LICENSED TO PRACTICE

The Supreme Court of Texas
The Supreme Court of the United States

The United States Courts of Appeals for the Fifth and Eighth Circuits
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PROFESSIONAL MEMBERSHIPS & HONORS

Martindale-Hubbell - "AV" rating
Martingale-Hubbell Bar Register of Preeminent Lawyers

Member, Association of Attorney-Mediators

Member, Planning Committee, Family Law on the Front Lines (2001, 2002)

Member, Planning Committee, The Ultimate Trial Notebook - Family Law (2000)

Associate Chair, Family Law on the Front Lines (2002)

Member, Planning Committee, Fifth, Sixth, Ninth, Tenth, Eleventh and Thirteenth Annual Advanced Civil Appellate Practice Courses (1991-92, 1995-97, 1999)

Member, Planning Committee, University of Texas School of Law, First, Second and Third Annual Insurance Law Institutes (1996-98)

Member, Editorial Board, APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section 1994-97

Member, Council, State Bar Appellate Practice & Advocacy Section 1995-1998

Member, Task Force on Staff Diversity, Texas Commission on Judicial Efficiency 1995-96

Chair, Civil Appellate Law Section, Travis County Bar Association November 1991-1993, 1995-1997

Texas Academy of Family Law Specialists

Secretary/Treasurer, Travis County Family Law Advocates 2001-

Member, Travis County Bar Association Board of Directors November 1991-1993, 1995-1997

Member, Planning Committee, Primer for Handling Civil Appeals, Travis County Bar Association, Austin 1995, 1996

Staff Attorney, Hon. Jack Hightower, Justice The Supreme Court of Texas 1989-1995

EDUCATION

Baylor University School of Law J.D., *cum laude* 1980

University of Texas B.A. 1974

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Early-Stage Company Valuation"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

"Summary Judgments and Declaratory Judgments in Divorce", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Termination and Adoption: It Ain't Over Till It's Over", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Child Support Collection: A Practical Guide to the Opportunities and Pitfalls in Enforcing and Defending Child Support Obligations," Family Law on the Front Lines, Galveston, Texas, April 2002.

"Valuation of Law Practice in Divorce," American Academy of Matrimonial Lawyers, Sanibel, Florida March 2002.

"Valuation, Characterization and Division of Unusual Assets", New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 2001.

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"Bill of Review", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Appellate Tips: Judges Panel", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Fiduciary Duties of Spouses and Non-Physical Torts", International Academy of Matrimonial Lawyers, Palm Beach, Florida, March 2000.

Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes, 31 TEX. TECH L. REV. 63 (2000)

"Strategic Use of Law Beyond the Family Code", New Frontiers in Marital Property Law, San Diego, California, October 1999.

"Trends in Preservation of Error (At Trial, Charge, and Post Verdict)", 13th Annual Advanced Civil Appellate Practice Course, State Bar of Texas, Austin, Texas, October 1999.

"The Appellate Process-the Good, the Bad, and the Ugly", 25th Annual Advanced Family Law Course, Dallas, Texas, August 1999.

"Litigating Marital Agreements: "You can't always get what you want....",22nd Annual Marriage Dissolution Institute, San Antonio, Texas, May 1999.

"Fiduciary Duties of Spouses, Effective Use of the Remedy of the Constructive Trust, Recoveries for Violations of These Duties, and Issues Presented When Spouses are under Conflicting Fiduciary Duties," New Frontiers in Marital Property Law, Sante Fe, New Mexico October 1998

"Appeal of the Coverage Suit," Third Annual Insurance Law Institute (University of Texas School of Law, October 1998) (panelist/speaker and co-author);

"The New Appellate Rules -- At Last!" Eleventh Annual Advanced Civil Appellate Practice Course, Dallas September 1997 (speaker and author);

GUIDE TO THE NEW RULES OF APPELLATE PROCEDURE (State Bar of Texas 1997) (contributing author);

Motion Practice in the Texas Supreme Court, 59 TEX. B. J. 846 (October 1996)

"Factual and Legal Sufficiency in the Texas Supreme Court," Tenth Annual Advanced Civil Appellate Practice Course, Austin 1996 (co-author)

"Inside the Texas Supreme Court," Ninth Annual Advanced Civil Appellate Practice Course, San Antonio 1995 (moderator and author)

Internal Procedures in the Texas Supreme Court, 26 TEX. TECH L. REV. 935 (1995)

"Internal Procedures and Motion Practice in the Supreme Court," Seventh Annual Advanced Civil Appellate Practice Course, Austin 1993 (speaker and author)

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PROFESSIONAL ACTIVITIES

Board Certified, Family Law, 1996
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Board Certified, Civil Appellate Law, 1993
Board Certified, Civil Trial Law, 1991

PROFESSIONAL AFFILIATIONS

Texas Academy of Family Law Specialists, Travis County Bar Association, Texas Bar Association, College of the State Bar, San Antonio Bar Association, San Antonio Family Law Association, Texas Bar Foundation

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Early-Stage Company Valuation"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

"Summary Judgments and Declaratory Judgments in Divorce", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Termination and Adoption: It Ain't Over Till It's Over", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Child Support Collection: A Practical Guide to the Opportunities and Pitfalls in Enforcing and Defending Child Support Obligations," Family Law on the Front Lines, Galveston, Texas, April 2002.

"Valuing and Dividing the Community Business, Marriage Dissolution Seminar, Corpus Christi, Texas, May 2001.

"Interaction of Probate Court and Family Law," Family Law on the Front Lines, Galveston, Texas, April 2001.
"Bottom Line Appellate Issues," Ultimate Trial Notebook: Family Law, New Orleans, Louisiana, December 2000.

"Pretrial and Trial Strategies for the Complex Property Case", Santa Fe, New Mexico, October 2000.

"Representing the High Tech Entrepreneur: IPO's, Venture Capitalists and Beyond", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

Co-Author, Bill of Review", 23rd Annual Marriage Dissolution Seminar, Fort Worth, Texas, May 2000.

Co-Author, "Sex and Lies: A Daubert Challenge, Techniques for Presenting the Child's Testimony to the Trial Court in a Child Abuse Case, 23rd Annual Marriage Dissolution Seminar, Fort Worth, Texas, May 2000.

Co-Author, "Fiduciary Duties of Spouses and Non-Physical Torts", International Academy of Matrimonial Lawyers, Palm Beach, Florida, March 2000.

Co-Author, "Presenting the Child's Perspective: Techniques for Presenting the Child's Preference of Conservator to the Trial Court", Texas Academy of Family Law Specialists, Las Vegas, Nevada, February 2000.

Co-Author, "Strategic Use of Law Beyond the Family Code", New Frontiers in Marital Property Law, San Diego, California, October 1999.

Co-Author, "Trends in Preservation of Error (At Trial, Charge, and Post Verdict)", 13th Annual Advanced Civil Appellate Practice Course, State Bar of Texas, Austin, Texas, October 1999.

Co-Author, "Summary of the 1999 amendments to the Texas Family Code", Legal Assistant U, San Antonio, Texas, September 1999.

Co-Author, "The Appellate Process-the Good, the Bad, and the Ugly", 25th Annual Advanced Family Law Course, Dallas, Texas, August 1999

Co-Author, "Malpractice", Advanced Family Law Course, State Bar of Texas, San Antonio, Texas, 1992.

Co-Author, "Malpractice, Advanced Family Law Course, State Bar of Texas, San Antonio, Texas, 1991.

Co-Author, "Expert Witnesses", Advanced Family Law Course, State Bar of Texas, San Antonio, Texas, 1990.

Table of Contents

SUMMARY JUDGMENTS AND DECLARATORY JUDGMENTS IN DIVORCE

I. SUMMARY JUDGMENT

A. Overview

Under the Texas Rule of Civil Procedure, there are two types of summary judgments: first, the traditional summary judgment, and second, the newer (in Texas) "no evidence" summary judgment. In a divorce case with complex property issues, any summary judgment, whether traditional or "no evidence", will probably arise as a partial summary judgment, disposing of some, but not all, of the contested issues in the case. Accordingly, this discussion of summary judgments first focuses on the two types of summary judgments, and then on partial summary judgment, and finally on the application of summary judgment relief to specific family law contexts.

B. What is Summary Judgment?

A summary judgment is a judgment rendered as a matter of law in favor of a litigant because the litigant has shown that there is no genuine issue of material fact. As will be discussed in greater detail below, a summary judgment may be rendered on an entire claim, or on one or more issues involved in a claim. *See generally* TEX.R.CIV.P. 166a.

C. Purpose and Function

The function of summary judgment is to eliminate patently unmeritorious claims and untenable defenses; it is not intended to deprive a litigant of the right to a full hearing on the merits of any real issue of fact. *See, Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952); *see also, Gaines v. Hamman*, 626, 358 S.W.2d 557, 563 (Tex. 1962) (the purpose of the summary judgment is not to provide either a trial by deposition or a trial by affidavit; rather, the rule provides a method of summarily terminating a case when it clearly appears that only a question of law is involved and that no genuine issue of fact remains); *Robinson v. Warner-Lambert*, 998 S.W.2d 407, 410 (Tex. App.–Waco 1999, no pet.) (the purpose of the summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial). Indeed, Texas courts have expressed a desire to eliminate patently unmeritorious claims through summary judgment procedures. *See e.g, Ross v. Texas One Partnership,* 796 S.W.2d 206, 209 (Tex. App.–Dallas 1990), *writ denied per curiam*, 806 S.W.2d 222 (Tex. 1990).

D. Practical Reality

Texas courts freely acknowledge that summary judgment is a harsh remedy. *See, e.g., Martin v. Martin, Martin & Richards, Inc*., 991 S.W.2d 1, 11 (Tex. App.–Fort Worth 1997), *rev'd on other grounds*, 989 S.W.2d 357 (Tex. 1999). One commentator has noted that, although the thrust of summary judgment practice is to eliminate issues about which there is no real dispute, as a practical matter, many trial judges are reluctant to grant summary judgment since the denial of a motion for summary judgment rarely affords an opportunity for appeal, much less a reversal. Joe Shannon, Jr., *Summary Judgment–The Fast Lane or the Exit Ramp,* R-5, 25th ANNUAL ADVANCED FAMILY LAW COURSE (State Bar of Texas 1999) (hereinafter "Shannon"). According to Mr. Shannon, Texas judges often operate on the theory that if a fact is undisputed at trial, or if there is a lack of evidence as to a particular fact, then a motion for directed verdict will serve the same function as the granting of a motion for summary judgment, without the increased chance of reversal and the concomitant denial of the opportunity for the non-movant to present his or her case to the trier of fact. *Id*. at R-6.

Moreover, Texas courts have recognized that even greater care should be taken when considering summary judgment motions in select categories of litigation. *Garcia v. John Hancock Variable Life Ins. Co*., 859 S.W.2d 427, 436 (Tex. App.–San Antonio 1993, writ denied). For example, when the issue is inherently one for a jury or judge, as in cases involving intent, reliance, uncertainty, unliquidated damages, or discretion, summary judgment has been viewed as inappropriate. *Id*.; *see also*, *Bauer v. Jasso*, 946 S.W.2d 552, 556 (Tex. App.–Corpus Christi 1997, no pet.) (summary judgment should not be granted when the cause of action depends on proof of facts not ordinarily subject to absolute verification or denial, *e.g.*, intent, reliance, reasonable care, or uncertainty); *Wofford v. Blomquist*, 865 S.W.2d 612, 614 (Tex. App.–Corpus Christi 1993, writ denied) (summary judgment should not be granted when the cause of action depends on proof of facts not ordinarily subject to absolute verification or denial).

Of course, the counter-argument to any reluctance to grant summary judgment lies in the need to conserve time and resources, both judicial and private. Shannon at R-6. Nonetheless, the cogent policy reasons underlying summary judgment notwithstanding, a party moving for summary judgment will carry a greater practical burden than a party resisting summary judgment. *Id*.

II. TRADITIONAL MOTION FOR SUMMARY JUDGMENT

Rule 166a of the Texas Rules of Civil Procedure governs summary judgment procedure before the trial court. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996).

A. Parties

Under the Texas Rules of Civil Procedure, any party may request summary judgment relief. Specifically, TEX.R.CIV.P. 166a(a) provides that a party seeking to recover upon a claim, counterclaim, or cross-claim, or to obtain a declaratory judgment may, at any time after the adverse party has appeared or answered, move with or without supporting affidavits for a summary judgment in his or her favor upon all or any part thereof. TEX.R.CIV.P. 166a(b) provides that a party against whom a claim, counterclaim, or cross-claim is asserted, or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his or her favor as to all or any part thereof.

B. Timing of Motion

A plaintiff or petitioner may request summary judgment at any time after the adverse party has appeared or answered. TEX.R.CIV.P. 166a(a). A defendant or respondent may move for summary judgment at any time. TEX.R.CIV.P. 166a(b).

C. Grounds For Summary Judgment

1. Factual

A movant establishes its entitlement to summary judgment by conclusively proving all essential elements of its cause of action as a matter of law. *Harwell v. State Farm Mut. Auto. Ins. Co.,* 896 S.W.2d 170, 173 (Tex. 1995); *City of Houston v. Clear Creek Basin Auth*., 589 S.W.2d 671, 678 (Tex. 1979).

2. Face of the Pleadings

Normally, in order to base summary judgment on the failure to state a cause of action, the defendant must specially except to the pleading deficiency and the plaintiff must be given an opportunity to amend. *Salmon v. Miller*, 958 S.W.2d 424, 429 (Tex. App.–Texarkana 1997, pet. denied). However, when the plaintiff's pleadings themselves establish the lack of a valid cause of action, or if the plaintiff's pleadings fail to allege facts that, if proved, establish liability, pleadings alone can justify summary judgment, and special exceptions are not required. *Id*.; *see also, Texas Dep't of Corrections v. Herring*, 513 S.W.2d 6, 10 (Tex. 1974) (if, after the trial court has granted a special exception, a party refuses to amend, or the amended pleading fails to state a cause of action, then summary judgment may be granted); *Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998) (summary judgment may be proper if a pleading deficiency is of the type that could not be cured by an amendment).

That summary judgment may be rendered–although rarely–on the pleadings is an example of the settled Texas rule that a party may plead himself out of court. *See, e.g., Alice Roofing & Sheet Metal Works, Inc. v. Halleman*, 775 S.W.2d 869, 870 (Tex. App.–San Antonio 1989, no writ). In other words, a party may plead facts that affirmatively negate his or her cause of action. *Id.; see also, Schroeder v. Texas & Pacific Ry. Co.*, 243 S.W.2d 261, 263 (Tex.Civ.App.–Dallas 1951, no writ).

In *Alice Roofing*, for example, the plaintiff corporation repaid a personal loan of the defendant and sought collection from the defendant eleven years after the loan was repaid. The record consisted of plaintiff's petition and the defendant's motion for summary judgment, which raised the statute of limitations as an affirmative defense. The trial court granted summary judgment for the defendant based on limitations, and the issue on appeal was whether the limitations operated as a bar to the plaintiff's cause of action. The San Antonio Court of Appeals affirmed the trial court's judgment, holding that the plaintiff's pleadings acknowledged that the transaction occurred more than four years prior to the filing of the lawsuit and therefore the statute of limitations barred collection of the debt. *Halleman*, 775 S.W.2d at 870. The San Antonio appellate court recognized that a party may plead himself out of court by pleading facts which affirmatively negate his cause of action. *Id*. In such an instance, held the San Antonio Court of Appeals, it is proper to grant the defendant's motion for summary judgment. *Id.; see also, Natividad v. Alexsis, Inc*., 875 S.W.2d 695, 699 (Tex. 1994) (summary judgment based on a pleading deficiency is proper if a party has had an opportunity by special exception to amend and fails to do so, or files a further defective pleading).

A party who moves for summary judgment solely on the basis of the other party's pleadings must accept all facts and inferences in the pleadings as true in the light most favorable to the opposing party, and any defects in the non-movant's pleadings must appear to be incurable by amendment.. *Trunkline LNG Co. v. Trane Thermal Co.*, 722 S.W.2d 722, 724 (Tex. App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.).

Likewise, a summary judgment may not be based on a weakness of the non-movant's pleading or proof, unless it establishes the absence of a right of action or an insurmountable bar to recovery. *State v. Durham*, 860 S.W.2d 63, 68 (Tex. 1993).

D. Form of the Motion

1. In Writing

TEX.R.CIV.P. 166a(c) requires that a motion for summary judgment state the specific grounds therefor, and that 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. Thus, the motion must be in writing. *See, e.g., Casso v. Brand*, 776 S.W.2d 551, 553 (Tex. 1989) (all theories in support

of or in opposition to a motion for summary judgment must be presented in writing to the trial court).

2. Specific

In *McConnell v. Southside Independent School Dist*., 858 S.W.2d 337, 314 (Tex. 1993), the Texas Supreme Court held:

> [c]onsistent with the precise language of Rule 166a(c)...a motion for summary judgment must itself expressly present the grounds upon which it is made. A motion must stand or fall on the grounds expressly presented in the motion. In determining whether grounds are expressly presented, reliance may not be placed on briefs or summary judgment evidence.

In other words, a summary judgment cannot be affirmed on grounds not expressly set out in the motion or response. *Stiles v. Resolution Trust Corp*., 867 S.W.2d 24, 26 (Tex. 1993); *see also*, *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993) (granting a motion for summary judgment on causes of action not addressed in the motion is reversible error).

The purpose of the specificity requirement is to ensure that the non-movant has adequate notice of the movant's claims, such that it will enable the non-movant to prepare a response. *Travis v. City of Mesquite*, 830 S.W.2d 94, 101 (Tex. 1992). Grounds for summary judgment are sufficiently specific when they consist of a concise statement sufficient to give notice to the non-movant of the grounds upon which judgment is sought. *Id.; see also, Thomas v. Cisneros*, 596 S.W.2d 313, 316 (Tex. App.–Austin 1980, writ ref'd n.r.e.). Not only must the movant specifically identify the grounds for summary judgment, but when the movant asserts more than one ground for summary judgment, the movant must reference, incorporate or at least mention the summary judgment proof in support of each ground in the section or paragraphs containing each ground.

In *Johnson v. Brewer & Pritchard, P.C.*, ___ Tex. Sup. Ct. J. ___ (Tex. March 21, 2002), Brewer & Richard sued a former associate, James Chang, for, among other things, breach of fiduciary duty based on Mr. Chang's referral of a case to another firm. The Texas Supreme Court held that an associate of a law firm owes a fiduciary duty not to accept or agree to accept profit, gain, or any benefit from referring or participating in the referral of a client or potential client to a lawyer or firm other than the associate's employer. In his motion for summary judgment, Chang asserted that he did not owe the law firm or any of its principals **any** fiduciary obligation. Although a general section of the motion for summary judgment entitled "Procedural Background" set forth facts and record cites to support his contention that he did not agree to accept, has not received, and does not expect to receive any compensation as a result of the referral, the only section of the motion for summary judgement that addressed his breach of fiduciary duty claim did not incorporate the general discussion of the facts by reference or in any way refer to or rely on the evidence identified in the "Procedural Background" section of the motion. As a result, the Texas Supreme Court held that Chang was not entitled to summary judgment on the basis of no breach of fiduciary duty because he did not include that ground in his motion.

3. Verification Not Required

A motion for summary judgment need not be sworn to or verified since it does not form the basis of proof necessary to permit a movant to prevail. Shannon at R-6; *see also*, *Acevedo v. Droemer*, 791 S.W.2d 668, 669 (Tex. App.–San Antonio 1990, no writ) (a motion for summary judgment is a pleading, not summary judgment evidence).

4. Number of Motions

Rule 166a of the Texas Rule of Civil Procedure does not limit the number of summary judgment motions a party may file. *De Los Santos v. Southwest Texas Methodist Hosp*., 802 S.W.2d 749, 756 (Tex. App.–San Antonio 1990, no writ) (overruled on other grounds by *Lewis v. Blake*, 876 S.W.2d 314 (Tex. 1994)). Once a summary judgment motion is denied, the judge who denied the motion, or the judge to whom the case is transferred, may change or modify the original order since the denial is interlocutory and in no way final. *De Los Santos*, 802 S.W.2d at 756.

E. Brief

A brief should not be submitted in lieu of a complete motion for summary judgment. Joan F. Jenkins and Elva C. Godwin, *Summary Judgment: An Overlooked, Underused But Useful Tool,* K-2, 24th ANNUAL ADVANCED FAMILY LAW COURSE (State Bar of Texas 1998) (hereinafter "Jenkins and Godwin"). The grounds for summary judgment must be stated in the motion for summary judgment, and not in a brief filed contemporaneously with the motion or in the summary judgment evidence. *McConnell,* 858 S.W.2d at 339. However, the movant may incorporate a brief into his or her motion for summary judgment.

F. Notice of Hearing

Pursuant to TEX.R.CIV.P. 166a(c), except on leave of court, with notice to opposing counsel, a motion for summary judgment and any supporting affidavits shall be filed and served at least twenty-one days before the time specified for hearing. Rule 166a makes no other specific reference to notice. *Martin v. Martin, Martin & Richards, Inc*., 991 S.W.2d 1, 11 (Tex. App.–Fort

Worth 1997), *rev'd on other grounds,* 989 S.W.2d 357 (Tex. 1998).

However, in *Lewis v. Blake*, 876 S.W.2d 314, 315 (Tex. 1994), the Texas Supreme Court held that a non-movant's right under Rule 166a(c) is to have minimum notice of the summary judgment hearing, and that TEX.R.CIV.P. 21a extends that minimum notice by three days when the motion is served by mail. Thus, the trial court may set a hearing on a motion for summary judgment as early as the 21st day after the motion is served, or the 24th day if the motion is served by mail. *Lewis,* 876 S.W.2d at 316. Note that the provisions of Rule 21a concerning service by mail also apply to telephonic document transfer (i.e., service by facsimile).

The purpose of the twenty-one day notice provision is to give the party opposing the summary judgment a full opportunity to respond on the merits. *Stephens v. Turtle Creek Apartments, Ltd.*, 875 S.W.2d 25, 26 (Tex. App.–Houston [14th Dist.] 1994, no writ). In particular, the notice provisions of the rule are intended to prevent the rendition of a judgment without the opposing party having a full opportunity to respond on the merits. *Bell v. Showa Denko K.K.*, 899 S.W.2d 749, 759 (Tex. App.–Amarillo 1995, writ denied). Customarily, parties serve the motion, and notice of the hearing on the motion, at the same time. *Chadderdon v. Blaschke*, 988 S.W.2d 387, 388 (Tex. App.–Houston [1st Dist.] 1999, no pet.)

Because summary judgment is a harsh remedy, the notice requirements of Rule 166a must be strictly construed. *Martin*, 991 S.W.2d at 11. A movant must comply with all the requirements of Rule 166a before being entitled to summary judgment. *Guinn v. Zarsky*, 893 S.W.2d 13, 17 (Tex. App.–Corpus Christi 1994, no writ).

In *Chadderdon*, the motion for summary judgment was served by mail 53 days before the hearing, but notice of the hearing was mailed only 21 days before the hearing occurred. 988 S.W.2d at 388. Thus, under *Lewis,* the Houston First Court of Appeals in *Chadderdon* held that the non-movant was entitled to 24 days notice of the hearing, regardless of how far in advance of the hearing she received the motion itself, and thus it was error to put her to trial on the summary judgment request. *Id*; *cf., Martin v. Martin, Martin & Richards, Inc*., 989 S.W.2d 357, 359 (Tex. 1998) (because the notice of hearing or submission of a summary judgment motion is required in order to inform the respondent of when a response to the motion for summary judgment is due, it is not "jurisdictional," and therefore the trial court's grant of a motion for summary judgment before providing proper notice of the motion to the opposing party was harmless error, when the trial court then fully considered the opposing party's response to the summary judgment motion and reconfirmed its ruling; the trial court was not required to vacate the summary judgment and then reinstate it).

It has been suggested that it is prudent to allow an opponent some additional time to respond to a motion for summary judgment, rather than face a motion for continuance. Shannon at R-7.

G. Rescheduling the Hearing

Rule 166a's twenty-one day requirement from notice to hearing, however, does not apply to a resetting of the hearing, provided that the non-movant receives notice twenty-one days before the date of the original hearing. *LeNotre v. Cohen*, 979 S.W.2d 723, 726 (Tex. App.–Houston [14th Dist.] 1998, no pet.) As mentioned, the reasoning behind the twenty-one day notice requirement in Rule 166a(c) is to give the non-movant sufficient time to prepare and file a response for the original setting; by rescheduling a hearing, the movant is actually giving the non-movant additional time to respond. *Id*. Therefore, a party need only give reasonable notice that a hearing on a summary judgment has been rescheduled. *Id*. Reasonable notice means at least seven days before the hearing on the motion because a non-movant may only file a response to a motion for summary judgment not later than seven days prior to the date of the hearing without leave of court. *Id.*; *see also*, TEX.R.CIV.P. 166a(c).

H. Waiver: Lack of Notice

A failure to receive ***any*** notice of a hearing on a motion for summary judgment places in question the trial court's jurisdiction to hear the motion. *Bell*, 899 S.W.2d at 759. However, an allegation that a party received less than the required notice does not raise a jurisdictional question and may be waived. *Id.*; *see also, Delta (Delaware) Petroleum & Energy Corp. v. Houston Fishing Tools Co.*, 670 S.W.2d 295, 296 (Tex. App.–Houston [1st Dist.] 1983, no writ).

Texas appellate courts have not been altogether consistent in their responses to allegations of a lack of proper notice to summary judgment proceedings. The Austin Court of Appeals has stated that, "***[g]enerally***, a complaint regarding notice is required to be in writing and before the court at the summary judgment hearing." *Hall v. Lone Star Gas Co.*, 954 S.W.2d 174, 177 (Tex. App.–Austin 1997, pet. denied), *citing, City of Houston*, 589 S.W.2d at 677 (emphasis added). In *Stephens v. Turtle Creek Apts., Ltd.*, 875 S.W.2d 25, 26 (Tex. App.–Houston [14th Dist.] 1994, no writ), the Houston Fourteenth Court of Appeals held that, to preserve error, an objection to service of a motion for summary judgment had to be in writing and before the trial court at the summary judgment hearing, and further that the requirement that the complaint be in writing and before the court at the summary judgment hearing ***is a requirement applicable to all objections*** to entry of summary judgment. (Emphasis added). In *Stephens,* the Fourteenth Court of Appeals also cited *City of Houston*, 589 S.W.2d at 671.

In *Hall,* the Austin Court of Appeals held that when the complainant did not have the

opportunity to present objections until after the entry of summary judgment, the complainant was required to set forth any objections in a post-judgment motion. *Hall*, 954 S.W.2d at 177, *citing, Smith v. Mike Carlson Motor Co.*, 918 S.W.2d 669, 672 (Tex. App.–Fort Worth 1996, no writ) (party should bring lack of notice of summary judgment motion and hearing to court's attention after summary judgment has been granted to preserve complaint for appellate review) and *Negrini v. Beale*, 822 S.W.2d 822, 824 (Tex. App.–Houston [14th Dist.] 1992, no writ) (participant in hearing on motion who failed to apprise trial court of complaint before, during, or after summary judgment hearing, waived any objection to improper notice and could raise it for first time on appeal).

Consistent with *Hall,* in *Rios v. Texas Bank*, 948 S.W.2d 30, 33 (Tex. App.–Houston [14th Dist.] 1997, no pet.), the Houston Fourteenth Court of Appeals noted that a party who has no notice of the summary judgment hearing is unable to attend the hearing and should be able to preserve error by post-trial motion alone. On the other hand, according to the Houston appellate court, if a party receives notice that is untimely, but is nonetheless sufficient to enable the party to attend the summary judgment hearing, the party must file a motion for continuance and/or raise the complaint of late notice in writing, supported by affidavit evidence, during the summary judgment hearing. *Id.* To hold otherwise, continued the Houston Fourteenth Court of Appeals, would allow a party who participated in the hearing to lie behind the log until after the summary judgment is granted and then raise the complaint of late notice for the first time in a post-trial motion. *Id*.

In *Rios,* the non-movant had notice of the motion and hearing approximately seven days before the hearing date. Although the non-movant had time to file a motion for continuance or a motion for leave to file a response raising the issue of late notice, he did not do so, and therefore, because the non-movant did not raise his complaint of late notice in writing at the summary judgment hearing, he did not preserve error on that ground. *Id.* Thus, the trial court was within its discretion to grant the motion for summary judgment despite improper notice. *Id*.

It should be noted that other appellate courts have addressed the question of improper notice in summary judgment proceedings. For example, the Houston First Court of Appeals found waiver when the non-movant did not file ***both*** a motion for continuance and a post-trial motion complaining of late notice. *White v. Wah,* 789 S.W.2d 312, 319 (Tex. App.–Houston [1st Dist.] 1990, no writ) (emphasis added). Still another variation of this rule is offered by the El Paso Court of Appeals, which found waiver when the non-movant did not request a continuance, a rehearing, or a new trial. *Wyatt v. Furr's Supermarkets, Inc*., 908 S.W.2d 266, 270 (Tex. App.– El Paso 1995, writ denied).

Furthermore, an agreement to shorten the time period for the summary judgment hearing is sufficient to waive any objection to the shortened time. *Bell*, 899 S.W.2d at 759; *see also, Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 3-4 (Tex. App.–Corpus Christi 1991, no writ).

I. Summary Judgment Proof

1. In General

The evidence offered in support of a motion for summary judgment (or in opposition) must be admissible. *Hidalgo v. Surety Sav. & Loan Ass'n*, 462 S.W.2d 540, 545 (Tex.1971) (summary judgment evidence, whether offered through depositions, affidavits, or interrogatories, must be in a form that would be admissible in a conventional trial proceeding). For example, Rule 166a(f) of the Texas Rule of Civil Procedure requires that, in summary judgment proceedings, supporting and opposing affidavits "shall set forth such facts as would be admissible in evidence...." *See, e.g.*, *United Blood Services v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997). No difference exists between the standards for evidence that would be admissible in a summary judgment proceeding and those applicable at a regular trial. *Id*.

Generally, pleadings are not competent evidence, even if sworn or verified. *Laidlaw Waste Systems (Dallas), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995); *see also, Acevedo,* 791 S.W.2d at 669 (it is well established that sworn pleadings are not summary judgment evidence in Texas); *Kendall v. Whataburger, Inc*., 759 S.W.2d 751, 754 (Tex. App.–Houston [1st Dist.] 1988, no writ) (a motion for summary judgment is a pleading and may not be considered as summary judgment evidence). Likewise, a response to a motion for summary judgment is not competent summary judgment evidence. *Rhobes v. Interfirst Bank Fort Worth, N.A.*, 719 S.W.2d 263, 264 (Tex. App.–Fort Worth 1986, no writ).

However, do not ignore *Rodriguez v. Motor Express, Inc*., 909 S.W.2d 521, 525 (Tex. App.–Corpus Christi 1995), *rev'd on other grounds*, 925 S.W.2d 638 (Tex.1996). In *Rodriguez*, the plaintiffs (and non-movants), who suffered a summary judgment against them in their bystander claim arising out a the death of the plaintiff's cousin-in-law, argued that defendant (and summary judgment movant) could not rely on their [the plaintiffs'] second amended original petition and discovery admissions as summary judgment proof to support the defendant's assertion that the plaintiff and the decedent were not "closely related" (the petition alleged that one plaintiff was the decedent's cousin-in-law, but the discovery responses admitted that the decedent was not a member of the plaintiffs' household, nor was he a sibling, a parent, or their child).

On appeal, the Corpus Christi Court of Appeals noted the "general" rule in Texas that pleadings do not constitute summary judgment

evidence, but added that facts alleged in the pleadings are accepted as true by the court and are binding on the pleader. *Id*. In other words, according to the Thirteenth Court of Appeals, facts alleged in pleadings constitute judicial admissions. *Id*. Judicial admissions are not considered summary judgment proof, but rather a waiver of proof because of their binding effect as an admission. *Id*. Thus, the Corpus Christi appellate court held that the pleadings attached to the defendant's motion for summary judgment were adequate to form a basis for obtaining summary judgment. *Id*.; *see also, Judwin Properties, Inc. v. Griggs and Harrison*, 911 S.W.2d 498, 504 (Tex. App.–Houston [1st Dist.] 1995, no writ) (pleadings may be used as summary judgment evidence when they contain statements rising to the level of admitting a fact or conclusion which is directly adverse to the pleading party's theory or defense of recovery). Note that in reversing *Rodriguez,* the Texas Supreme Court did not address the issue of whether the plaintiffs' pleadings were properly relied upon in support of the summary judgment.

Under the Texas Rules of Civil Procedure, oral testimony is not taken at a summary judgment hearing. TEX.R.CIV.P. 166a(c); *see also, State v. Easley*, 404 S.W.2d 296, 297 (Tex. 1966) (the trial court may not receive extrinsic evidence, either oral or documentary, at the hearing on the motion for summary judgment). Oral arguments at the presentation of the motion do not form a basis upon which summary judgment may be rendered. *Rogers v. R.J. Reynolds Tobacco Co.*, 761 S.W.2d 788, 795 (Tex. App.–Beaumont 1988, writ denied). Equally, statements contained in a brief also do not constitute summary judgment proof. *Acevedo,* 791 S.W.2d at 669.

Further, in a summary judgment case, the courts will not judicially notice judgments even of the same court which have not been properly attached to the motion for summary judgment. *McCurry v. Aetna Cas. and Sur. Co.*, 742 S.W.2d 863, 867 (Tex. App.–Corpus Christi 1987, writ denied). However, even in a summary judgment case, the trial court may judicially notice the documents and orders which are a part of its record in the present case, since they are, unlike prior judgments, already on file and available for the court's consideration at the hearing. *Id*. at 867-68.

2. Burden of Proof

The party moving for summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222 (Tex. 1999); *see also,* TEX.R.CIV.P. 166a(c). The movant must establish its right to summary judgment on the issues expressly presented to the trial court by conclusively proving all elements of the movant's cause of action or defense as a matter of law. *Rhone-Poulenc, Inc.*, 997 S.W.2d at 223; *see also, Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). The non-movant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense. *Id*. at 222-23.

The trial court may not grant summary judgment by default because the non-movant did not respond to the summary judgment motion if the movant's summary judgment proof is legally insufficient. *Id*. at 223. According to the Texas Supreme Court, while some states place a burden on the non-movant to present evidence in support of the non-movant's claim or defense, in Texas, the burden of proof is never shifted [except in a Rule 166a(i) motion] to the non-movant unless and until the movant has established his or her entitlement to a summary judgment on the issues expressly presented to the trial court by conclusively proving all essential elements of his or her cause of action or defense as a matter of law. *State v. Durham*, 860 S.W.2d at 68, *citing, Casso*, 776 S.W.2d at 556.

A defendant/movant may obtain summary judgment by (1) disproving at least one of the elements of each of the plaintiff's causes of action; or (2) conclusively proving all the elements of an affirmative defense. *Texas Dept. of Transp. v. Shaw*, 847 S.W.2d 618, 620 (Tex. App.–San Antonio 1992, writ denied). Essentially, the defendant/movant is required to meet the plaintiff's causes of action, as pled, and to demonstrate that the plaintiff cannot prevail. *Id*.; *see also, Doe v. Boys Clubs of Greater Dallas, Inc*., 907 S.W.2d 472, 476-77 (Tex. 1995) (a defendant is entitled to summary judgment if it disproves an essential element of the plaintiff's causes of action as a matter of law); *Rose v. Odiorne*, 795 S.W.2d 210, 213 (Tex. App.–Austin 1990, writ denied) (a defendant is not entitled to summary judgment unless he proves that the plaintiff could not succeed upon any theory pleaded). A defendant moving for summary judgment on an affirmative defense (thereby becoming the movant) has the burden to conclusively establish that defense. *Rhone-Poulenc, Inc.*, 997 S.W.2d at 222; *see also, Swilley v. Hughes*, 488 S.W.2d 64, 67 (Tex. 1972) (under Rule 166a, when a defendant moves for summary judgment on the basis of an affirmative defense, he must conclusively prove all essential elements of that defense).

Once the defendant produces sufficient evidence to establish a right to summary judgment, the plaintiff must set forth sufficient evidence to give rise to a genuine issue of material fact. *Pinckley v. Dr. Francisco Gallegos, M.D., P.A.*, 740 S.W.2d 529, 531 (Tex. App.–San Antonio 1987, writ ref'd n.r.e).

When both parties move for a summary judgment, each party must carry his or her own burden, and neither can prevail because of the failure of the other to discharge his burden. *Federal Deposit Ins. Corp. v. Attayi*, 745 S.W.2d 939, 948 (Tex. App.–Houston [1st Dist.] 1988, no writ).

3. Types of Summary Judgment Evidence

Affidavits, depositions, interrogatories, and admissions are proper summary judgment evidence when referred to or incorporated in the motion for summary judgment. *See, e.g., Stewart v. U.S. Leasing Corp*., 702 S.W.2d 288, 290 (Tex. App.–Houston [1st Dist.] 1985, no writ). In contrast, denials to requests for admissions may not be used as summary judgment evidence. *Acevedo,* 791 S.W.2d at 669.

a. Affidavits

The Texas Rules of Civil Procedure impose several requirements on affidavits intended as summary judgment evidence. It is possible that portions of an affidavit may be competent summary judgment evidence while other portions of the affidavit may not. *See, Doe v. Boys Clubs of Greater Dallas, Inc*., 868 S.W.2d 942, 952 n.9 (Tex. App.–Amarillo 1994), *aff'd on other grounds*, 907 S.W.2d 472 (Tex.1995); *cf., Lesbrookton, Inc. v. Jackson*, 796 S.W.2d 276, 288 (Tex. App.–Amarillo 1990, writ denied) (finding that even though an affidavit contained legal conclusions that could not be considered by the trial court, the affidavit could be considered for the factual assertions contained therein).

(1) Form

TEX.R.CIV.P. 166a(f) provides:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. Defects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend.

According to one commentator, the least expensive, and often the most expeditious form of summary judgment evidence, is an affidavit. Shannon at R-8.

As explicitly stated in Rule 166a(f), a summary judgment affidavit must set forth facts that would be admissible in evidence. *See also, Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (affidavit must state facts in a form that would be admissible in evidence at a trial.) For instance, "facts" alleged in an affidavit which are actually mere hearsay cannot simply be bootstrapped into evidence simply by including such facts in a summary judgment affidavit. *See,* Jenkins and Godwin at K-6; *cf*., *Wiggins v. Overstreet*, 962 S.W.2d 198, 201 (Tex. App.–Houston [14th Dist.] 1998, pet. denied) (although the affiant stated that her testimony was based on personal knowledge, such knowledge was gained by statements of others, and therefore the affidavit and the letters attached to it were not admissible because they were hearsay). Hearsay statements in affidavits may not be made the basis of a summary judgment. *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 233 (Tex.1962). Further, hearsay statements do not require the adverse party to contravene the allegations in the motion. *Box v. Bates*, 346 S.W.2d 317, 319 (Tex. 1961).

In addition, a summary judgment affidavit must be signed by the party making it, sworn to before an officer authorized to administer oaths, and officially certified to by the officer under his seal of office; in other words, the affidavit must contain a jurat and not just an acknowledgment. *Perkins v. Crittenden*, 462 S.W.2d 565, 567-68 (Tex. 1970).

(2) Personal Knowledge

TEX.R.CIV.P. 166a(f) requires that "supporting and opposing affidavits shall be made on personal knowledge...." S*ee also, Humphreys v. Caldwell*, 888 S.W.2d 469, 470 (Tex. 1994) (affidavit, stating that the affiant's statements were based on his "own personal knowledge and/or knowledge which he has been able to acquire upon inquiry," failed to unequivocally show that such statements were based on personal knowledge, and was legally invalid). A witness' affidavit which recites that the affiant "estimates," or "believes," or "understands" certain facts to be true will not support summary judgment because such language does not positively and unqualifiedly represent that the "facts" disclosed are true. *Ryland Group, Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996); *see also, Lightfoot v. Weissgarber*, 763 S.W.2d 624, 628 (Tex. App.-San Antonio 1989, writ denied) (testimony based on the affiant's best knowledge and belief did not meet the strict requirements of summary judgment practice); *cf., Goggin v. Grimes*, 969 S.W.2d 135, 138-39 (Tex. App.–Houston [14th Dist.] 1998, no pet.) (when the affidavit does not specifically recite that the facts set forth are true, but does set out that it was made on the affiant's personal knowledge, the affidavit suffices).

(3) Competency

Rule 166a(f) also requires an affidavit to show that it is made by a person who is competent to testify on the matter. *Radio Station KSCS v. Jennings*, 750 S.W.2d 760, 761-62 (Tex. 1988). A summary judgment affidavit must affirmatively show how the affiant became personally familiar with the facts so as to testify as a witness. *Ryland Group, Inc*., 924 S.W.2d at 122; *see also, Villacana v. Campbell*, 929 S.W.2d 69, 74 (Tex. App.–Corpus Christi 1996, writ denied). However, a self-serving

recitation that a witness is personally familiar with the facts alleged does not satisfy the competency requirement. *Ryland Group, Inc*., 924 S.W.2d at 122.

For instance, in *Diggs' Estate v. Enterprise Life Ins. Co.*, 646 S.W.2d 573, 575 (Tex. App.–Houston [1st Dist] 1982, writ ref'd n.r.e.), although the affiant stated that he had personal knowledge of the facts testified to in the affidavit, there was nothing in the affidavit showing why or how he might have personal knowledge of such matters. According to the Houston First Court of Appeals, to be sufficient, a summary judgment affidavit must in some way show that the affiant is personally familiar with the facts so that he could personally testify as a witness. *Id*. A recitation that the affiant is of legal age, has never been convicted of a felony, and is making the affidavit on personal knowledge, is not in itself sufficient to show affirmatively that an affiant is competent to testify. *Id.* The Houston appellate court also noted that a fact considered by a layman to be personally known may be hearsay in law. *Id*. Thus, the affidavit in question was insufficient as summary judgment evidence. *Id*.; *cf., Goggin,* 969 S.W. 2d at 138-139 (attorney's affidavits filed in support of her motion for summary judgment in legal malpractice action complied with Rule 166a(f), when (1) the attorney stated that she was fully competent and qualified to make the affidavit on her own personal knowledge, that she was the attorney for client in the underlying divorce until she withdrew, that she intervened for her fees, and that attached exhibits were true and correct copies of the originals, and (2) she signed the affidavit which was sworn to and subscribed before a notary public).

(4) Subjective Belief

The Texas Supreme Court has held that a statement of subjective belief, which is not supported by other summary judgment proof, is not sufficient to support a summary judgment. *See, e.g., Ryland Group, Inc*., 924 S.W.2d at 122 ("[i]t is my understanding" did not raise a fact issue in response to a motion for summary judgment); *Texas Div.-Tranter, Inc. v. Carrozza*, 876 S.W.2d 312, 314 (Tex. 1994) ("I believe I was terminated because" did not raise a fact issue in response to a motion for summary judgment). Ultimately, subjective beliefs are no more than conclusions and are not competent summary judgment evidence. *Id*.

In *Rizkallah v. Conner*, 952 S.W.2d 580, 586 (Tex. App.–Houston [1st Dist.] 1997, no pet.), the defendant argued that the plaintiff's affidavit contained statements of the plaintiff's subjective belief, or opinion, which were not competent summary judgment proof. Specifically, the defendant challenged, among others, the following statements made by the plaintiff: (1) "I do not think the motor mounts had any bearing on my air ride going down"; and (2) "I do not think I should have to pay for air-conditioning service done incorrectly." *Id.* The Houston First Court of Appeals noted that such statements did include opinions of the plaintiff, but added that the issue on appeal was whether the plaintiff's opinion had any support in other factual statements in the affidavit. *Id.* Examining the plaintiff's statements, the Houston appellate court found that the first statement, communicating her subjective opinion about the motor mounts and the air ride, was based on information she obtained in a discussion with an auto mechanic–set out in the affidavit–and therefore had factual support in the affidavit and was proper summary judgment evidence. *Id*. The second statement, on the other hand, lacked factual support in the affidavit, and was therefore inappropriate summary judgment evidence. *Id.*

(5) Conclusions

A conclusory statement is one that does not provide the underlying facts to support the conclusion. *Id*. Conclusions are often nothing more than speculation. *See*, *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 434 (Tex. App.–Houston [14th Dist.] 1999, no pet.). Conclusory statements without factual support are not credible, and are not susceptible to being readily controverted. *Ryland Group, Inc*., 924 S.W.2d at 122.

Summary judgment may not be granted on conclusory evidence. *Aldridge v. De Los Santos*, 878 S.W.2d 288, 296 (Tex. App.–Corpus Christi 1994, writ dism'd w.o.j.). Affidavits containing conclusory statements are not competent summary judgment proof. *Id*.; *see also, Ryland Group, Inc*., 924 S.W.2d at 122 ("[c]onclusory affidavits are not enough to raise fact issues").

The objection that a statement is "conclusory" is an objection that is frequently made to challenge affidavits in summary judgment cases. *Rizkallah*, 952 S.W.2d at 587. There is much confusion about what the objection "conclusory" means. *Id.*; *see also, Arce v. Burrow*, 958 S.W.2d 239, 253 (Tex.App–Houston [14th Dist.] 1997), *rev'd in part on other grounds,* 997 S.W.2d 229 (Tex. 1999) (deciding whether an affidavit is sufficient, or instead, is conclusory and without basis can be a difficult, yet necessary, matter). For purposes of summary judgment, "conclusory" does not mean that logical conclusions based on stated underlying facts are improper. *Rizkallah*, 952 S.W.2d at 587. Logical conclusions based on stated underlying facts are proper in both lay and expert testimony. *Id*.

On the other hand, what is objectionable is testimony that is nothing more than a legal conclusion. *See, e.g., Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991). To allow such testimony is to reduce to a legal issue a matter that should be resolved by relying on facts. *Rizkallah*, 952 S.W.2d at 587. Statements of legal conclusions amount to little more than the witness choosing sides on the outcome of the case. *Id.; see also, Mowbray v. State*, 788 S.W.2d 658, 668 (Tex. App.–Corpus Christi 1990, pet. ref'd).

In *Rizkallah*, the defendant challenged, as conclusory, the following statement (among others) in the plaintiff's affidavit: when the plaintiff left her car with defendant it was "running perfectly." 952 S.W.2d at 587-88. The Houston appellate court found that the plaintiff's statement had some support in the record because the plaintiff had also averred that her car had "just had a major tune-up" at the Lincoln dealer, and that when she went to pick up the car the second time, it "idled up very high and it ran sluggishly." *Id*. at 588. However, as to the plaintiff's assertion that the work defendant performed on plaintiff's car was done to correct the problems he created by steam cleaning plaintiff's engine, the Houston First Court of Appeals could find no underlying factual support in the summary judgment record, and sustained the defendant's challenge to such statement. *Id*.; *see also*, *Green v. Industrial Specialty Contractors, Inc*., 1 S.W.3d 126, 130 (Tex. App.–Houston [1st Dist.] 1999, no pet.) (affidavits are not conclusory when they were based on the personal knowledge of the affiants, derived from his or her work, and provided the underlying factual basis for their statements).

(6) Interested Witness

Summary judgment may be based on the uncontroverted affidavit of an interested witness only if the evidence is clear, positive, direct, otherwise credible, free from contradictions and inconsistencies, and could have been readily controverted. TEX.R.CIV.P. 166a(c); *see also, Trico Technologies Corp. v. Montiel*, 949 S.W.2d 308, 310 (Tex. 1997). The mere fact that an affidavit is self-serving does not necessarily make the evidence an improper basis for summary judgment. *Id*. "Could have been readily controverted" does not mean that the summary judgment evidence could have been easily and conveniently rebutted, but rather indicates that the testimony could have been effectively countered by opposing evidence (gathered, for example, through discovery). *Id*.; *Casso*, 776 S.W.2d at 558.

Note that if the credibility of the affiant or deponent is likely to be dispositive, then summary judgment is not appropriate; however, if the non-movant must come forward with independent evidence to prevail, the summary judgment may well be proper in the absence of such controverting proof. *Id*.

(7) Experts, Some Interested

Some years ago, the Texas Supreme Court held that a summary judgment may be based on the opinion of an interested expert if the subject matter is such that a trier of fact would be guided solely by the opinion testimony of experts, and the evidence is: (1) clear, positive, and direct; (2) free from contradictions and inconsistencies; and (3) could have been readily controverted. *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991); *see also*, TEX.R.CIV.P. 166a(c). Although summary judgment can be granted on the affidavit of an interested expert witness, the expert's affidavit must not be conclusory. *Earle v. Ratliff*, 998 S.W.2d 882, 890 (Tex. 1999); *see also*, *Ryland Group, Inc*., 924 S.W.2d at 122 (an expert's conclusory statements will not support summary judgment because such statements are neither credible nor susceptible to being readily controverted). An expert's opinion is conclusory and will not support summary judgment if it does not contain the basis or reasoning for the opinion. *See, Anderson*, 808 S.W.2d at 55; *see also, Earle*, 998 S.W.2d at 890 (an expert's simple *ipse dixit* is insufficient to establish a matter; rather, the expert must explain the basis of his statements to link his conclusions to the facts).

Further, lay testimony is generally insufficient to refute an expert's testimony. *Id*.; *see also*, *Jensen Const. Co. v. Dallas County*, 920 S.W.2d 761, 768 (Tex. App.–Dallas 1996, writ denied). If an interested expert witness presents legally sufficient evidence in support of a motion for summary judgment, the opposing party must produce other expert testimony to controvert the claims. *Jensen Const. Co.*, 920 S.W.2d at 768.

In *Burrow v. Arce*, 997 S.W.2d 229, (Tex. 1999), the Texas Supreme Court revisited the issue of an interested expert witness's testimony in the context of a summary judgment proceeding. The Court reaffirmed that an expert's opinion testimony can defeat a claim as a matter of law even if the expert is an interested witness, such as the defendant. *Id*. at 235. However, the Court stressed, it is the basis of the witness's opinion, and not the witness's qualifications or his bare opinions alone, that can settle an issue as a matter of law; in other words, a claim will not stand or fall on the mere *ipse dixit* of a credentialed witness. *Id*. Thus, as the Court held in *Anderson*, conclusory statements made by an expert witness are insufficient to support summary judgment. *Id.*

In *Burrow,* a legal malpractice case, one defendant attorney's affidavit stated that his opinions were based on the pleadings and evidence in the case and his experience and training as a personal injury trial lawyer. *Id*. The Texas Supreme Court found the attorney's assertions deficient. *Id*. at 235-36. The Court acknowledged that the attorney's training and experience qualified him to offer opinions on the fairness of the settlements, but stated that the attorney simply could not say: "take my word for it, I know: the settlements were fair and reasonable." *Id*. at 236. According to the Texas Supreme Court, credentials qualify a person to offer opinions, but they do not supply the basis for those opinions; an expert's opinions must have a reasoned basis which the expert, because of his knowledge, skill, experience, training, or education, is qualified to state. *Id*. In *Burrow,* the attorney's affidavit failed to disclose the necessary foundation since it failed to explain why the settlements were fair and reasonable for each of the clients, and amounted to nothing more than a sworn denial of the plaintiff's claims. *Id.*

In another legal malpractice case, *Green v. Brantley*, 11 S.W.3d 259, 266 (Tex. App.–Fort

Worth 1999, pet. denied), the former client (and his daughters) sued their former attorneys, alleging that they had improperly induced them to settle the underlying wrongful death action (the former client's wife had died after surgery) against several physicians for $850,000, and that they could have recovered more had the plaintiffs gone to trial. The former client challenged, as conclusory, one attorney's analysis that his case against the doctors and hospital was known in law as a "loss of a chance of survival" case, a cause of action not available in Texas jurisprudence. *Id*.

However, on appeal, the Fort Worth Court of Appeals noted that the attorney's affidavit thoroughly explained his knowledge, skill, experience, training and education, all of which formed the platform for his reasoning and explanation why the $850,000 settlement was fair and reasonable for the client and his daughters. *Id.* The attorney explained that the history of the former wife's medical condition and treatments left the former client with only a non-viable cause of action for "loss of a chance of survival," and that a trial of that cause of action in Texas would not have achieved a recovery of money damages. *Id*. The attorney also opined, as an expert, that the client would have been unable to prove causation in their suit for wrongful death, and that because the client began cohabitating with his cousin's former wife soon after his wife had died–a fact well known in the county in which the case would be tried–it was unlikely that the jurors of that county would favorably view the client's action in seeking more than $850,000 in damages for his former wife's death. *Id*. As a result, the Fort Worth appellate court held that the attorney's affidavit was not conclusory. *Id*.

Naturally, an expert's affidavit offered to support or oppose a summary judgment motion must include proof of the expert's qualifications. *See, United Blood Servs. v. Longoria*, 938 S.W.2d 29, 31 (Tex.1997). A license to practice a profession does not inherently qualify the licensee as an expert in every matter related to the profession. *Green,* 11 S.W.3d at 263-64. It has been suggested that, since the admissibility of an expert's opinions is left to the broad discretion of the trial court, a *Daubert* qualification of the expert should be included in the expert's affidavit or deposition testimony, in order to be certain that the expert's testimony will be received as summary judgment evidence. Shannon at R-10.

(8) Exhibits

Exhibits attached to a summary judgment affidavit must also be in admissible form. *See,* Shannon at R-8. Exhibits are susceptible to objection on the basis of hearsay. *See, e.g., Coleman v. United Sav. Ass'n of Texas*, 846 S.W.2d 128, 131 (Tex. App.–Fort Worth 1993, no writ) (proponent of affidavit with attached "Move-in Inventory and Condition Form" did not even attempt to lay a foundational predicate under the hearsay exception for the admissibility of business records, and therefore the exhibit could not be summary judgment proof). In general, merely attaching exhibits to an affidavit without establishing the proper predicate for admissibility will not permit the exhibits to be valid summary judgment evidence. *See, e.g., Norcross v. Conoco, Inc*., 720 S.W.2d 627, 632 (Tex. App.–San Antonio 1986, no writ).

Copies of original documents are acceptable summary judgment proof if accompanied by a sworn affidavit that they are "true and correct" copies of the original documents. *Republic National Leasing Corp. v. Schindler*, 717 S.W.2d 606, 607 (Tex. 1986).

b. Discovery Products

Documents and testimony obtained through the discovery process are expressly permitted to be used as summary judgment evidence in TEX.R.CIV.P. 166a(c).

(1) Rule 166a(d)'s Notice Procedure

Under TEX.R.CIV.P. 166a(d), discovery products not on file with the clerk may be used as summary judgment evidence only if copies of the material, appendices containing the evidence, or a notice containing specific references to the discovery or specific references to other instruments, are filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs: (i) at least twenty-one days before the hearing if such proofs are to be used to support the summary judgment; or (ii) at least seven days before the hearing if such proofs are to be used to oppose the summary judgment. Thus, the rules of civil procedure establish two different procedures for using unfiled discovery materials to defeat, or to support, a motion for summary judgment: (1) a party may serve copies of the discovery materials with its motion, or (2) a party may use the "notice" method of Rule 166a(d). Tim Patton, *Selected Unsettled Aspects of Summary Judgment Law and Procedure*, G-13, 13th ANNUAL ADVANCED CIVIL APPELLATE PRACTICE COURSE (State Bar of Texas 1999) (hereinafter "Patton").

According to Mr. Patton:

> The appropriate procedure under the "notice" provisions of Rule 166a(d) is unsettled. The rule does not provide any insight into how specific the "specific references" to unfiled discovery must be. The rule also does not specify the deadline for filing previously unfiled discovery, assuming it is necessary for such materials to be filed at all. Because the text of Rule 166a(d) does not provide much guidance, courts have reached inconsistent results when discussing the burden imposed on a party seeking to use unfiled

> discovery as summary judgment proof through the notice provisions.

Id.

In *E.B. Smith Co. v. U.S. Fidelity & Guar. Co.*, 850 S.W.2d 621, 623-24 (Tex. App.–Corpus Christi 1993, writ denied), the Corpus Christi Court of Appeals fired the first volley on the issue of Rule 166a(d)'s "notice" provision. Acknowledging Rule 166a(d)'s intent to allow a notice with "specific references" to be used by a party, rather than requiring the party to have on file with the court a complete deposition or other discovery document, the Corpus Christi appellate court nonetheless held that it is incumbent upon the party relying on unfiled summary judgment evidence to show that the substance of unfiled discovery evidence was presented to the trial court before it ruled on the motion for summary judgment. *Id*. According to the Thirteenth Court of Appeals, the term "specific references" meant that the party relying on unfiled discovery, by its notice and statement of intent, must show the court language from an unfiled deposition or other unfiled discovery document before the court rules on the summary judgment motion. *Id*. Thus, the non-movant's mere references to depositions by deponent and page number, without providing the language of the testimony, failed to satisfy the requirements of Rule 166a(d) and could not be considered in the determination of the summary judgment. *Id*. at 623-24; *see also*, *Fojtik v. Charter Medical Corp*., 985 S.W.2d 625, 628 (Tex. App.–Corpus Christi 1999, pet. denied).

The Texarkana Court of Appeals has agree with the reasoning of *E.B. Smith Co.* In *Salmon v. Miller*, the Texarkana appellate court stated that, without some description of the evidence which the movant seeks to use as summary judgment evidence, the trial judge has no indication what impact this evidence would have on the motion, and courts would be asked to rule on summary judgments based upon evidence that the parties allege to possess in support of their positions, but that is not before the trial judge. 958 S.W.2d at 427-28.

In *Salmon*, the notification of intent to use the evidence was not specific enough to apprise the trial judge of the content of that evidence: it did not show any language from these documents or give any other indication to the trial judge as to the bearing such documents might have on the wrongful discharge claim. *Id*. at 428. Nor did it point to page numbers or make any other specific references to the location of the evidence upon which the party intended to rely, much less point out the exact language of the evidence. *Id*. Accordingly, the Texarkana Court of Appeals agreed with the Corpus Christi Court of Appeals that it was incumbent upon the party relying on unfiled summary judgment evidence to show in the record that the substance of unfiled discovery evidence was presented to the trial court before it ruled on a motion, and since the record in *Salmon* failed to demonstrate that the evidence listed by in the 166a(d) notification was before the trial court when the order granting summary judgment was signed, it could not be considered by the appellate court. *Id*. at 428-29; *see also, Medlock v. Commission For Lawyer Discipline*, 24 S.W.3d 865 (Tex. App.-Texarkana 2000, no pet.) (because the trial court could consider only written summary judgment evidence properly filed with the court prior to submission of the summary judgment motion, the trial court could not consider an affidavit when the party did not file the affidavit in response to her opponent's motion for summary judgment).

In *Gomez v. Tri City Community Hosp., Ltd.*, 4 S.W.3d 281, 283 (Tex. App.–San Antonio 1999, no pet.), the San Antonio Court of Appeals fell in line with the Texarkana and Corpus Christi appellate courts. The Fourth Court of Appeals noted that the comment to Rule 166a(d) stated that previously unfiled discovery products must be filed in advance of the summary judgment hearing, and that at least two Texas courts of appeals refused to consider such summary judgment proof if the appellate record did not demonstrate that the evidence was filed with the trial court when the trial court's order on the motion for summary judgment was entered. *Id., citing, Salmon*, 958 S.W.2d at 427-29, and *E.B. Smith Co.*, 850 S.W.2d at 623-24.

However, a majority of the Houston First Court of Appeals held that when the movant's notice of intent identified depositions by deponent and page number, and interrogatories by set and number, but did not include the actual language from either source in the notice itself or in the summary judgment record, the non-movant waived any deficiency in the notice or in the summary judgment proof, by failing to object at trial. *Grainger v. Western Cas. Life Ins. Co.*, 930 S.W.2d 609, 613-14 (Tex. App.–Houston [1st Dist.] 1996, writ denied). In other words, in the absence of an objection, the actual language from the unfiled discovery need not be submitted to the trial court; citations to page numbers and interrogatory answers satisfied the requirements of Rule 166a(d). *Id.* One justice filed a blistering dissent filed in the case, which was adopted later by the Texarkana Court of Appeals in *Salmon*. *Grainger*, 930 S.W.2d at 619-21 (Price, J., assigned, dissenting).

The Eighth Court of Appeals' position on this issue is not particularly clear. In *Steinkamp v. Caremark*, 3 S.W.3d 191, 193-95 (Tex. App.–El Paso 1999, pet. denied), the non-movant stated in the first paragraph of her response to her opponents' summary judgment motion that she was relying in part upon a summary judgment motion of another of her opponents, whose case against the her had been previously severed; the non-movant thereby attempted to rely on the severed opponent's summary judgment evidence. Additionally, in the body of her motion, the non-movant referred to certain express portions of one of the severed opponent's summary judgment evidence, stating that it was already before the court. *Id*. at 195. The movants objected to the non-movant's reliance on the summary judgment evidence that had been

severed from the case. *Id*. at 193. The trial court agreed with the movants, struck that portion of the non-movant's proffered summary judgment evidence that had originated in the severed claim, and granted the defendants' request for summary judgment. *Id*.

On appeal, the El Paso Court of Appeals noted that while Rule 166a(i) does not require a party to needlessly duplicate evidence already found in the court's file, a party must nevertheless insure that the evidence is properly before the trial court for consideration in resolving the motion for summary judgment. *Id*. at 194, *citing, Saenz v. Southern Union Gas Co.*, 999 S.W.2d 490 (Tex. App.–El Paso 1999, pet. denied). According to the El Paso appellate court, the mere existence in the court's file of a response to an earlier summary judgment is not enough, but rather, a party achieves the task of ensuring that the evidence is properly before the court either by requesting in the motion that the trial court take judicial notice of the evidence that is already in the record or by incorporating that document or evidence in the party's motion. *Id*. With regard to incorporation by reference, the Eighth Court of Appeals stated that magic language is not necessary; it is only necessary that the party makes the court aware of that particular evidence to which the party is referring. *Id*. at 194-95. Thus, since the non-movant, by expressly relying on the severed opponent's summary judgment motion and evidence, alerted the court exactly upon what evidence she was relying in her response to the movants' motion for summary judgment; thus, she met the Rule 166a(i) requirement, and the trial court abused its discretion in excluding her evidence. *Id*.

In *Barraza v. Eureka Co.*, 25 S.W.3d 225 (Tex. App. – El Paso 2000, pet. denied), the non-movant, in her response to the movant's motion for summary judgment filed various documents including her deposition, portions of depositions from co-workers and an affidavit. The non-movant made specific reference to some of the documents in her response. The movant filed a motion to strike all of the non-movant's summary judgment evidence, arguing that the unreferenced portions did not meet the requirements of Rule 166a(d). The trial court granted the motion to strike all of the unreferenced portions. *Id.* at 228. The El Paso Court of Appeals noted that nowhere does Rule 166a(d) require that the proponent of the evidence provide specific references to the summary judgment evidence if the actual documents are before the trial court for the trial court to consider it. *Id.* Since the trial court had the documents before it and the non-movant provided specific references to parts of the summary judgment evidence that she believed particularly supported her claim, the trial court abused its discretion in striking the unreferenced portions of the summary judgment evidence. *Id.* at 229-30.

Nevertheless, at least one commentator believes that the *Gomez* and *Salmon* line of cases correctly construes Rule 166a(d). Patton at G-15. According to Mr. Patton, a party relying on Rule 166a(d)'s notice provisions should be required to include specific references to the summary judgment proof being relied upon in the motion or response as well as file that summary judgment evidence before the hearing. *Id*.

(2) Depositions

Depositions are frequently used as summary judgment proof. Shannon at R-9. Two commentators have stated that deposition testimony may be given the same weight as any other summary judgment evidence. Jenkins and Godwin at K-5. However, it should be noted that several Texas cases hold that a deposition does not have controlling effect over an affidavit in determining whether a motion for summary judgment should be granted. *See, Gaines v. Hamman*, 358 S.W.2d 557, 562 (Tex. 1962); *Bauer*, 946 S.W.2d at 556. Thus, if conflicting inferences may be drawn from a deposition and from an affidavit filed by the same party, a fact issue is presented. *See, e.g., Randall v. Dallas Power & Light Co.*, 752 S.W.2d 4, 5 (Tex. 1988); *Gaines*, 358 S.W.2d at 562.

i. Authentication Not Required

Prior to 1990, in order to constitute permissible summary judgment proof, depositions that had not been filed with the court had to be authenticated by affidavits from the court reporter as well as by persons present when the deposition was given. Shannon at R-9. In 1990, the Texas Supreme Court amended Rule 166a by including paragraph (d), and later specifically held that authentication was not necessary before a deposition could be used as summary judgment evidence. *McConathy v. McConathy,* 869 S.W.2d 341, 342 (Tex. 1994) (deposition excerpts submitted as summary judgment evidence need not be authenticated).

ii. Specificity of Reference

Under TEX.R.CIV.P. 166a(d), a party may attach an entire deposition as part of his summary judgment proof. *Guthrie v. Suiter*, 934 S.W.2d 820, 826 (Tex. App.–Houston [1st Dist.] 1996, no writ). However, Rule 166a(d) does not relieve a party's burden of pointing out to the trial court where in the evidence the issues set forth in the motion or response are raised. *Id*. Thus, in *Guthrie*, the Houston First Court of Appeals held that the trial court did not abuse its discretion by refusing to sift through a 500-page deposition attached to a motion for summary judgment when the movant did not direct the trial court to the portions of the deposition upon which he placed reliance. *Id.*

Similarly, in *Rogers v. Ricane Enters., Inc*., 772 S.W.2d 76, 81 (Tex. 1989), the movant referred the trial court to the evidence "on file." The Texas Supreme Court held that the general reference to a voluminous record that did not direct the trial court, and the opposing parties, to the evidence on which the movant relied, was insufficient. In *Nicholson v. Naficy*, 747 S.W.2d 3, 4 n. 1 (Tex. App.–Houston [1st Dist.] 1987, no writ), the Fourteenth Court of

Appeals refused to consider a portion of a deposition that was attached to a motion for summary judgment, but was not cited, quoted, or otherwise pointed out to the trial court.

According to one commentator, *McConathy* indicates that the discovery material used to support a motion for summary judgment should either be attached to the motion itself or filed with the trial court. Shannon at R-9. Mr. Shannon recommends that attachment of the deposition pages relied upon in the motion for summary judgment is preferable to the "notice" procedure, unless the deposition testimony is voluminous, for at least two reasons: (1) the attachment of the pages will prevent typographical or other reference errors which might occur with the notice/reference method; and (2) attachment will make the documents readily available to the trial court. *Id*.

iii. Depositions From Other Proceedings

A deposition taken in a different proceeding is competent summary judgment proof if it complies with the Texas Rules of Civil Evidence. *Klager v. Worthing*, 966 S.W.2d 77, 82 (Tex. App.–San Antonio 1996, no writ); *see also*, TEX.R.EVID. 207(2). The Texas Rules of Civil Evidence require that notice of the deposition be given to parties against whom the testimony is to be used, or that such parties were present or represented at the taking of the testimony; thus, when there was no evidence of notice to or participation by the opposing party, deposition testimony could not be used, over a proper objection, in a summary judgment proceeding. *Klager*, 966 S.W2d at 82. In contrast, an investor's deposition testimony in the federal government's action against the promoter of a medical research company was proper summary judgment testimony in the investors' Texas state action against the law firms which advised the research company about federal income tax deductions available to United States investors when the investor's entire deposition testimony was attached as an exhibit to the law firms' motion for summary judgment in the Texas lawsuit and was properly authenticated by an attorney present at the deposition. *Sutton v. Mankoff*, 915 S.W.2d 152, 157 (Tex. App.–Fort Worth 1996, writ denied); *see also*, TEX.R.CIV.EVID. 901(a).

(3) Interrogatories

TEX.R.CIV.P. 166a(c) specifically authorizes the use of interrogatory answers as summary judgment evidence. However, TEX.R.CIV.P 168(2) states that interrogatory answers "may be used only against the party answering the interrogatories." *Yates v. Fisher*, 988 S.W.2d 730, 731 (Tex. 1998). Thus, a party may not use its own answers to interrogatories to defeat a motion for summary judgment. *Id*.; *see also*, *Garcia v. National Eligibility Exp., Inc*., 4 S.W.3d 887, 890 (Tex. App.–Houston [1st Dist.] 1999, no pet.) (interrogatory answers cannot be used in favor of the answering party even if the other party swears to their authenticity, puts them into evidence, and does not timely challenge them on appeal). Equally, an answer to an interrogatory may not be used to support a summary judgment against a party who was not the answering party. Shannon at R-10.

As with all summary judgment evidence, answers to interrogatories must be in a form that would be admissible in a conventional trial proceeding. *Hidalgo*, 462 S.W.2d at 545.

(4) Admissions

Admissions, whether in response to discovery requests or judicial admissions in testimony, pleading or by virtue of a discovery request having been deemed admitted, are proper summary judgment evidence when referred to or incorporated in the motion for summary judgment, *See, e.g.,* TEX.R.CIV.P. 166a(c); Shannon at. R-10; *Blieden v. Greenspan,* 742 S.W.2d 93, 98 (Tex. App.–Beaumont 1987), *rev'd on other grounds,* 751 S.W.2d 858 (Tex. 1988). Discovery admissions constitute competent summary judgment evidence if they satisfy two criteria: (1) the admissions must be referred to or incorporated in the summary judgment motion; and (2) the admissions can be only used against the party who filed them. *Rodriguez v. Motor Express, Inc*., 909 S.W.2d 521, 525 (Tex. App.–Corpus Christi 1995), *rev'd on other grounds*, 925 S.W.2d 638 (Tex. 1996).

Under the Texas Rules of Civil Procedure, if no timely response is served to requests for admissions, a request is considered admitted without the necessity of a court order. TEX.R. CIV. P. 198.2(c). The effect is that the requests are conclusively established, unless, on motion, the court permits the withdrawal or amendment of the admissions. TEX.R. CIV. P. 198.3; *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 497 (Tex. 1991); *see also*, *Beasley v. Burns*, 7 S.W.3d 768, 770 (Tex. App.–Texarkana 1999, pet. denied) (in cases involving summary judgments, the trial court cannot consider affidavits offered by the non-movant to contradict deemed admissions).

In contrast to admissions, denials to requests for admissions are not summary judgment evidence in Texas. *Americana Motel, Inc. v. Johnson*, 610 S.W.2d 143, 143 (Tex. 1980); *Arguello v. Gutzman*, 838 S.W.2d 583, 587 (Tex. App.–San Antonio 1992, no writ).

A trial court may take judicial notice of admissions in its file. *Schafer v. Federal Serv. Corp*., 875 S.W.2d 455, 456 (Tex. App.–Houston [1st Dist.] 1994, no writ). Rather than rely on the trial court taking judicial notice, however, it would be more prudent to attach the request for admission, along with the opponent's answer thereto, to the motion for summary judgment or to the response. Shannon at R-10.

(5) Record of Prior Proceedings

A statement of facts from a prior trial from the same case and between the same parties may be considered as summary judgment evidence. *See, e.g., Austin Bldg. Co. v. Nat'l Union Fire Ins. Co.*, 432 S.W.2d 697, 698-99 (Tex. 1968).

In *Murillo v. Valley Coca-Cola Bottling Co.*, 895 S.W.2d 758, 761 (Tex. App.–Corpus Christi 1995, no writ), the Corpus Christi Court of Appeals stated that it did not believe that *Austin Bldg. Co.* (and its progeny) stood for the proposition that prior testimony is proper summary judgment evidence only if it is from the same case between the same parties. Accordingly, the Corpus Christi appellate court held that testimony from an earlier trial could be used by a defendant in the earlier trial as support for its motion for summary judgment in a second suit involving the same general circumstances, but a new plaintiff who was not involved in the first suit. *Id.* Court records, including trial testimony from other cases, stated the Thirteenth Court of Appeals, are acceptable summary judgment evidence, provided that the records set forth facts that would be admissible at trial, and are certified or attested under oath as authentic. *Id*. at 762, *citing, Gardner v. Martin*, 345 S.W.2d 274, 276 (Tex.1961) (the trial court may take judicial notice of its own records in a case involving the same subject matter between the same, or practically the same, parties), and TEX.R.CIV.P. 166a(c) (authenticated or certified public records are proper summary judgment evidence); *but cf., Holbrook v. Guynes*, 827 S.W.2d 487, 489 (Tex. App.–Houston [1st Dist.] 1992), *aff'd*, 861 S.W.2d 861 (Tex 1993) (the trial court could not consider a statement of facts and exhibits from an earlier temporary injunction hearing between the parties because there was no reference to the injunction hearing in the motion for summary judgment; only those papers on file at the time of the summary judgment hearing, and only those issues and/or evidence expressly presented to the trial court in writing, were properly before the court).

In *State Bar of Texas v. Erskine*, 954 S.W.2d 868, 870 (Tex. App.–Eastland 1997, pet. denied), the State Bar of Texas, as the non-movant, asserted that summary judgment was improper because the trial court erred in striking the affidavit one of its attorneys and the exhibit attached to it. The affidavit, which was attached to the State Bar's response to the motion for summary judgment, verified the authenticity of a witness' sworn testimony at a prior grievance committee hearing. *Id*. at 870-71. A copy of excerpts from the testimony and a copy of the court reporter's certificate certifying that "the foregoing is a full and correct transcript" of the proceedings from the grievance committee hearing, were attached to the attorney's affidavit. *Id*. at 871. At the hearing on his motion for summary judgment, the movant objected to the affidavit and the sworn testimony, asserting that the attorney could not verify the witness' testimony because the attorney was not present at the grievance committee hearing. *Id*. The trial court sustained the objection and struck the affidavit and the attached testimony. *Id*.

On appeal, the Eastland Court of Appeals held that the trial court erred in striking the attorney's affidavit and its attachment. *Id*. The Eastland appellate court noted that discovery products no longer need to be authenticated for summary judgment purposes, and further noted that the copy of the sworn testimony and court reporter's certificate were properly authenticated by the attorney's testimony. *Id*. In addition, the court reporter's certificate authenticated the accuracy of the contents of the witness' sworn testimony, and the attorney's affidavit authenticated the duplication process by verifying the accuracy of the copies. *Id*. Thus, held the Eastland Court of Appeals, the trial court should have considered these attachments as summary judgment proof. *Id*.

4. Evidence From Earlier Motions

The Texas Supreme Court has held that summary judgment proof "be on file, either independently or as part of the motion for summary judgment, the reply thereto, or some other properly filed instrument." *Richards v. Allen*, 402 S.W.2d 158, 161 (Tex. 1966). While the better practice is to attach all summary judgment evidence to the motion presented to the court, the rule itself states that the trial court shall consider all summary judgment evidence "on file." *R.I.O. Systems, Inc. v. Union Carbide Corp*., 780 S.W.2d 489, 492 (Tex. App.–Corpus Christi 1989, writ denied). As a result, proof attached to earlier summary judgment motions can be properly before the trial court. *See, e.g.*, *Evans v. First Nat. Bank of Bellville*, 946 S.W.2d 367, 376 (Tex. App.–Houston [14th Dist.] 1997, pet. denied); *R.I.O. Systems, Inc.*, 780 S.W.2d at 492 (documents and affidavit attached to first motion for summary judgment, which was denied by the trial court, were properly before the court in the second motion for summary judgment since they were "on file" prior to the hearing on the second motion); *see also*, *Gensheimer v. Kneisley*, 778 S.W.2d 138, 140 (Tex. App.–Texarkana 1989, no writ) (exhibits from original motion for summary judgment that were not physically attached to the amended motion for summary judgment, but were instead incorporated by reference, were properly considered by the trial court).

J. Hearing

Pursuant to Rule 166a(c), no oral testimony may be received at the hearing on a motion for summary judgment. Further, oral hearings on a motion for summary judgment are not necessary, and it is not error for a trial court to rule based solely on the written submissions. *Martin,* 989 S.W.2d at 359; *Owen Elect. Supply, Inc. v. Brite Day Constr., Inc*., 821 S.W.2d 283, 288 (Tex. App.–Houston [1st Dist.] 1991, writ denied). The summary judgment rule does not mandate an oral hearing in all cases. *Martin,* 989 S.W.2d at 359; *Gordon v. Ward*, 822 S.W.2d 90, 92 (Tex. App.–Houston [1st Dist.] 1991, writ denied). Moreover, a party who fails to object at the trial level about the lack of oral hearing on a motion for summary judgment waives that complaint, and

because such complaint does not present a jurisdictional question, it may not be raised for the first time on appeal. *Martin,* 991 S.W.2d at 11.

Summary judgment proceedings are generally not transcribed. Jenkins and Godwin at K-4; *see also*, *El Paso Associates, Ltd. v. J.R. Thurman & Co.*, 786 S.W.2d 17, 19 (Tex. App.–El Paso 1990, no writ) (a court reporter's recording of summary judgment hearings is neither necessary, nor appropriate, to the purposes of such hearing).

Recall that only the issues contained in the motion for summary judgment, or a response thereto, are to be considered by the trial court. TEX.R.CIV.P. 166a(c). Thus, issues are not to be presented orally at the hearing. *City of Houston*, 589 S.W.2d at 677 (issues must be submitted in writing).

Finally, it should be noted that a summary judgment hearing is a "trial" for purposes of the rule requiring leave of court to file an amended pleading within seven days of the date of trial. *Honea v. Morgan Drive Away, Inc*., 997 S.W.2d 705, 707 (Tex. App.–Eastland 1999, no pet.).

K. Judgment

As previously discussed, a motion for summary judgment must be supported by pleadings, and the final judgment must conform to the pleadings. *Krull v. Somoza*, 879 S.W.2d 320, 322 (Tex. App.–Houston [14th Dist.] 1994, writ denied). When an order granting summary judgment explicitly states the grounds therefor, an appellate court can affirm the summary judgment looking only to those grounds and to no others. *State Farm Fire & Casualty Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993). On the other hand, when the summary judgment does not specify the specific grounds upon which it was granted, on appeal it is presumed that judgment was granted on all grounds raised by the moving party, and it is then the burden of the non-moving party to show that each independent argument alleged in the motion was insufficient to support the trial court's order. *See, e.g., Insurance Co. Of N. Am. v. Security Ins. Co.*, 790 S.W.2d 407, 410 (Tex. App.–Houston [1st Dist.] 1990, no writ). However, the Texas Supreme Court is currently "trying to find a way that trial court judges can convey their view to appeals courts so that attorneys will have to brief only the issues on which a motion [for summary judgment] was granted." Mary Alice Robbins, *In Summary: Attorneys Want Some Explanations*, TEX. LAWYER 4 (July 3, 2000).

A judgment is rendered when the trial court officially announces its decision in open court or by written memorandum filed with the clerk. *S & A Restaurant Corp. v. Leal*, 892 S.W.2d 855, 857-58 (Tex.1995). Rendition is a present act, either by spoken word or by signed memorandum, which resolves the issues upon which the ruling is made. *In re Bland*, 960 S.W.2d 123, 124 (Tex. App.–Houston [1st Dist.] 1997, orig. proceeding). An entry in the court's docket does not constitute a written order or judgment. *See, Smith v. McCorkle*, 895 S.W.2d 692, 692 (Tex.1995). Thus, a docket entry and telephone call notifying parties of a summary judgment in favor of one party was not a "rendition" of summary judgment, since a written order was not signed and no pronouncement was made in open court. *Withrow v. State Farm Lloyds*, 990 S.W.2d 432, 435 (Tex. App.–Texarkana 1999, pet. denied).

In *Singleton v. LaCoure*, 712 S.W.2d 757, 761 (Tex. App.–Houston [14th Dist.] 1986, writ ref'd n.r.e.), the Houston Fourteenth Court of Appeals concluded that a summary judgment which included the names of the parties in the heading, stated that the court had considered the pleadings, the arguments of counsel, and applicable law and facts, and stated finally that the motion should be granted, satisfied the requirements of a judgment. *See also, Lang v. City of Nacogdoches*, 942 S.W.2d 752, 767-68 (Tex. App.–Tyler 1997, writ denied) (the trial court's "general" order was sufficient, when it recited the identity of all parties in the case, stated that the court had considered all of the pleadings, the argument of counsel, and the summary judgment evidence, as well as that the trial court found "that there was no genuine issue as to any material fact necessary to establish plaintiffs' claims," and concluded that "all defendants are therefore entitled to judgment as a matter of law on all issues before the court, ..." and that "... all defendants' motions for summary judgment are meritorious and should be, in all things, granted").

Unlike an entry of judgment after a conventional trial on the merits, the entry of a summary judgment raises no presumption that the court disposed of all parties and issues. *Chase Manhattan Bank, N.A. v. Lindsay*, 787 S.W.2d 51, 53 (Tex. 1990). Therefore, to dispose of all parties and issues, the trial court must either carefully draft its judgment to conform to the pleadings, or it must clearly and unequivocally state that it finally disposes of all claims and parties. *Lehman v. Har-Con, Corp.*, 39 S.W.3d 191, 205 (Tex. 2001). A judgement issued without a conventional trial, such as a summary judgment, is final for purposes of appeal if and only if either it actually disposes of all claims and parties then before the court, or 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; *see Guajardo v. Conwell*, 46 S.W.3d 862, 863-64 (Tex. 2001). Furthermore, simply labeling a summary judgment "Final Judgment" is not sufficient. *Lehman*, 39 S.W.3d at 205. The inclusion of a general statement in the judgment denying all relief not otherwise specifically granted, commonly known as a Mother Hubbard clause, or a statement with language equivalent to such a clause, does not render a summary judgment final for purposes of appeal. *Id.* at 203-204.

L. Sanctions

TEX.R.CIV.P. 166a(h) ("Affidavits Made in Bad Faith") provides:

> [s]hould it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

There appear to be no reported cases actually discussing the sanctions provision of Rule 166a, and one reason for this may be the relatively negligible sanction Rule166a(h) permits (as opposed to the panoply of sanctions permissible under other Texas rules).

For example, in *Otis Elevator Co. v. Parmelee*, 817 S.W.2d 731, 735 (Tex. App.–Houston [1st Dist.] 1991), *rev'd on other grounds,* 850 S.W.2d 179 (Tex. 1993), the non-movant requested sanctions, pursuant to Rules 166a and 215, against the movant for filing a motion for summary judgment. The trial court ordered the following sanctions, among others: the movants were disallowed from any further discovery of any kind, charged with all of the expenses of discovery and all of the taxable court costs, and prohibited from supporting [their] defenses or opposing the claims of [the non-movant]; money judgments were also rendered against the movants including $10,000 for the non-movant's mental anguish, exemplary damages in the amount of $20,000, and $25,000 for reasonable attorneys' fees and costs. *Id*. at 734.

On appeal, the movants claimed that neither Rule 166a(h) nor Rule 215 authorized the trial court's sanctions. *Id*. at 735. The Houston First Court of Appeals agreed that Rule 166a did not authorize the type of sanctions imposed by the trial court, but held that Rule 215(2)(b) did. *Id*. Ultimately, the sanctions order was reversed by the Texas Supreme Court. 850 S.W.2d at 180. In any event, the kind of sanctions obtainable by means of Texas law, other than Rule 166a, are obviously far more imposing than those allowed under Rule 166a(h).

It should be noted that even if Rule 166a(h) sanctions are unattractive, both Rule 13 sanctions and sanctions under the Civil Practice and Remedies Code are applicable to summary judgment practice. See, e.g., *Karlock v. Schattman*, 894 S.W.2d 517, 521 (Tex. App.–Fort Worth 1995, orig. proceeding) (the trial court found that a motion for partial summary judgment, and an attached affidavit violated Rule 13, and entered sanctions); *University of Texas at Arlington v. Bishop*, 997 S.W.2d 350, 353 (Tex. App.–Fort Worth 1999, pet. denied) (imposition of sanctions, pursuant to TEX.CIV.PRAC.& REM.CODE §10.004(d), against the summary judgment movant, for violation of the rule against advancing frivolous pleadings and motions, was warranted, when such sanctions were based on the movant's making verified statements which misrepresented facts it knew to be false, and for filing claims and contentions that were not warranted by existing law).

Moreover, according to the Texas Supreme Court, a motion for summary judgment asserting that no genuine issue of material fact exists is not proved groundless or in bad faith merely by the filing of a response which raises an issue of fact, even if the response was or could have been anticipated by the movant. *GTE Communications Sys. Corp. v. Tanner*, 856 S.W.2d 725, 731 (Tex. 1993). Similarly, the mere denial of a motion for summary judgment alone is not grounds for sanctions. *Id*. (Rule 13 does not permit sanctions for every pleading or motion denied by the trial court).

III. SUMMARY JUDGMENT RESPONSE

Once summary judgment evidence has been offered by the movant, the non-movant should–but is not required to–respond either by submitting evidence that raises a genuine issue of material fact, or by objecting to the summary judgment proof offered by the movant, or by both. *See,* Shannon at R-10; *see also, Marchal v. Webb*, 859 S.W.2d 408, 412 (Tex. App.–Houston [1st Dist.] 1993, writ denied) (burden shifts to the non-movant on summary judgment once the movant has established its right to summary judgment).

A. Response Not Required

A non-movant is not required to file a response to defeat a motion for summary judgment because deficiencies in the movant's summary judgment proof or legal theories might defeat its right to judgment as a matter of law. *City of Houston*, 589 S.W.2d at 678. Even if the non-movant never files a response, a summary judgment may be reversed if the motion is not in the proper form with proper supporting proof. *Wasson v. Stracener*, 786 S.W.2d 414, 416 n. 1 (Tex. App.–Texarkana 1990, writ denied); *see also, McConnell*, 858 S.W.2d at 343 (when a nonmovant does not file a response, the lack of a response does not supply by default the summary judgment proof necessary to establish the movant's right to summary judgment). However, if there is a factual issue to preclude summary judgment, the non-movant is required to present it in a response to the motion for summary judgment. *City of Houston*, 589 S.W.2d at 678.

Further, if the non-movant fails to file a response, the only ground for reversal he or she can raise on appeal is to attack the legal sufficiency of the movant's summary judgment proof. *McConnell*, 858 S.W.2d at 343; *City of Houston*, 589 S.W.2d at 678. The better practice is to file a written response to a motion for summary judgment setting forth with specificity each element, fact issue, or defect that

defeats the motion, if for no other reason than to preserve error. Jenkins and Godwin at K-3.

B. Form

Issues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion, or by other written response to the motion, and are not expressly presented by mere reference to summary judgment evidence. *McConnell*, 858 S.W.2d at 341; *see also, City of Houston*, 589 S.W.2d at 678 ("the non-movant must expressly present to the trial court any reasons seeking to avoid the movant's entitlement ...").

C. Time to File

TEX.R.CIV.P. 166a(c) provides that "[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response." In order to file a response within seven days of the hearing, the party must obtain leave of the trial court. *See, e.g., Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). It is within the trial court's discretion to allow the late filing of a response or affidavit opposing the motion for summary judgment. *See, e.g., Williams v. Huber*, 964 S.W.2d 84, 86 (Tex. App.–Houston [14th Dist.] 1997, no writ) (the trial court did not abuse its discretion by denying a party the opportunity to file a controverting affidavit within seven days of the summary judgment hearing when the party had 66 days in which to procure the testimony of an expert witness and to file an affidavit in support of her opposition to the motion for summary judgment).

With regard to the time periods established for summary judgment practice, the words of one court of appeals should be kept in mind: "...it is incumbent upon all movants and respondents to devote particular attention to the time limits applicable to summary judgment practice." *White v. Independence Bank, N.A.*, 794 S.W.2d 895, 901 (Tex. App.–Houston [1st Dist.] 1990, writ denied).

Rule 21a of the Texas Rules of Civil Procedure does not apply to a response to a summary judgment. In *Lee v. Palo Pinto County*, 966 S.W.2d 83, 85 (Tex. App.–Eastland 1998), *pet. denied per curiam,* 988 S.W.2d 739 (Tex. 1998), for example, the non-movant filed its response 8 days before the date set for the hearing. The non-movant's attorney, however, mailed the response to opposing counsel, who did not received it until 2 days before the hearing. *Id.* The movant argued to the trial court that the response was not timely; the trial court agreed and struck the non-movant's response. *Id*. at 86. On appeal, the Eastland Court of Appeals held that Rule 21a did not require that 3 days be added to the prescribed period (*i.e.,* 7 days before the summary judgment hearing), and therefore the response was timely. *Id*.; *see also*, *Holmes v. Ottawa Truck, Inc*., 960 S.W.2d 866, 869 (Tex. App.–El Paso 1997, pet. denied) (the El Paso Court of Appeals also held that Rule 21a did not apply to the filing of a response to a motion for summary judgment).

In *Clendennen v. Williams*, 896 S.W.2d 257 (Tex. App.–Texarkana 1995, no writ), the Texarkana appellate court sought to interpret Rule 5 of the Texas Rules of Civil Procedure, as it applied to a summary judgment response (rather than Rule 21a). Rule 5 provides, in pertinent part:

> [i]f any document is sent to the proper clerk by first-class United States mail in an envelope or wrapper properly addressed and stamped and is deposited in the mail on or before the last day for filing same, the same, if received by the clerk not more than ten days tardily, shall be filed by the clerk and be deemed filed in time.

Clendennen involved a suit against several doctors and a hospital for malpractice. *Id*. at 258. Summary judgment was granted in favor of the defendants because the trial court did not consider the plaintiff's summary judgment response due to its allegedly untimely filing. *Id*. at 259.

On appeal, the plaintiff argued that her response was timely filed since it was mailed on April 4, while the hearing was set for April 11. *Id*. The defendants argued that since Rule 166a specifically governed summary judgment practice, Rule 5 did not apply to responses to summary judgment motions. *Id*.

The Texarkana Court of Appeals held that, in fact, Rule 5 did apply to a response to a summary judgment motion; since the plaintiff mailed her response seven days before the hearing, it was within the time limit set out in Rules 5 and 166a(c), and should have been considered by the trial court. *Id*.; *see also*, *Geiselman v. Cramer Financial Group, Inc*., 965 S.W.2d 532, 535 (Tex. App.–Houston [14th Dist.] 1997, no pet.) (under Rule 5, the non-movants timely filed their response to the motion for summary judgment by mailing their response to the motion on last day allowed for filing a timely response).

D. Motion for Continuance

TEX.R.CIV.P. 166a(g) provides:

> [s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. *Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *see also*, *Sosebee v. Hillcrest Baptist Medical Center*, 8 S.W.3d 427, 431 (Tex. App.–Waco 1999, pet. denied) (a party waived its complaint that the trial court erred by shortening the time to respond to a motion for summary judgment, when it filed neither an affidavit explaining the need for further discovery nor a verified motion for continuance); *RHS Interests, Inc. v. 2727 Kirby Ltd.*, 994 S.W.2d 895, 897 (Tex. App.–Houston [1st Dist.] 1999, no pet.) (in absence of an explanatory affidavit or a motion for continuance, the party waived its complaint that it was denied adequate time for discovery).

The granting or denial of a motion for continuance is within the trial court's sound discretion, and will not be disturbed except for a clear abuse of discretion. *See e.g., Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986). A trial court properly can deny a motion for continuance in certain situations. *See, e.g., Sipes v. General Motors Corp.*, 946 S.W.2d 143, 161 (Tex. App.–Texarkana 1997, writ denied). If, for instance, the record is developed enough, a trial court may determine that no discovery is necessary before granting summary judgment. *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 521 (Tex. 1995).

Factors to be considered in the determination of whether to grant a Rule 166a(g) motion for continuance include: (1) the length of time the case has been on file; (2) the materiality of the discovery sought; and (3) whether the party seeking the continuance has exercised due diligence in attempting to obtain the discovery sought. *Laughlin v. Bergman*, 962 S.W.2d 64, 65-66 (Tex. App.–Houston [1st Dist.] 1997, no pet.).

E. Special Exceptions

Special exceptions may be used to challenge the sufficiency of a pleading. *Friesenhahn*, 960 S.W2d at 658. The Texas Supreme Court has stated that "the protective features of special exception procedure should not be circumvented by a motion for summary judgment on the pleadings when...[the] plaintiff's pleadings fail to state a cause of action." *Id.* Thus, before a trial court may grant a "no cause of action" summary judgment, it must give the parties an adequate opportunity to plead a viable cause of action. *Id.* at 659; *see also, Texas Dep't of Corrections*, 513 S.W.2d at 10 (if, after the trial court has granted a special exception, a party refuses to amend, or the amended pleading fails to state a cause of action, then summary judgment may be granted); *Hendricks v. Thornton*, 973 S.W.2d 348, 371 (Tex. App.–Beaumont 1998, pet. denied) (generally, it is improper to grant summary judgment on a deficient pleading's failure to state a cause of action when the deficiency can be attacked through special exceptions); *Keever v. Finlan*, 988 S.W.2d 300, 305 (Tex. App.–Dallas 1999, pet. dism'd) (when the trial court construed a party's prior motion for summary judgment as special exceptions, sustained the special exceptions, and ordered the opposing party to replead, which the opposing did, but in such a manner that the amended pleading was still deficient, the trial court did not err in granting summary judgment against the opposing party since the opposing party had a fair opportunity to correct the deficiencies in his pleading, but did not).

Furthermore, the requirement that a written response must be filed and served not later than seven days prior to the hearing applies equally to the non-movant's exceptions. *McConnell,* 858 S.W.2d at 343 n. 7.

In the situation when one party files a motion for summary judgment against opposing pleadings, and the trial court grants the summary judgment, the party against whom the summary judgment was granted must object to the trial court's action, or request an opportunity to amend its pleadings, or any objection to the summary judgment on that ground is waived. *See, e.g., San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 209-10 (Tex. 1990).

F. Objections

1. In General

TEX.R.CIV.P. 166a(f) provides in pertinent part: "[d]efects in the form of affidavits or attachments will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal, to amend." As already discussed, a failure to make any objection places the losing party in the position on appeal of being able to argue only the legal sufficiency of the grounds presented by the movant. *See, McConnell*, 858 S.W.2d at 343. Further, an objection must be in writing, filed and served not later than seven days prior to the hearing. *Id.* at 343 n. 7. Objections filed by the movant to the non-movant's response must be filed and served not less than three days prior to the hearing. *Id.*

An objection must be specific enough to reasonably apprise either its opponent or the court of its complaint. *Williams v. Conroe Indep. Sch. Dist.*, 809 S.W.2d 954, 957 (Tex. App.–Beaumont 1991, no writ); *see also*, *Columbia Rio Grande Regional Hosp. v. Stover*, 17 S.W.3d 387, 396 (Tex. App.–Corpus Christi 2000, no pet.) (since specific statements must be identified in order to determine whether they are hearsay, objections to the exhibits as a whole, not pointing out which parts were objectionable hearsay, were not specific enough to reasonably apprise either the opponent or the court of its complaint and preserved nothing for appellate review); *Matherne v. Carre*, 7 S.W.3d 903, 907-908 (Tex. App.–Beaumont 1999, pet. denied) (argument that affidavits were deficient, without any specific reference to any particular portion of the affidavit to

which the generalization might be relevant, and a general assertion that attached documents were not authenticated, without identifying any particular document that had not been properly identified, presented nothing for appellate review).

The express language of Rule 166a(f) requires objections concerning ***matters of form***; as a result, Texas courts have held that a failure to object to ***matters of substance*** will not waive the defect and that such defects of substance will not support summary judgment. *See,* Shannon at R-10; *see also, City of Houston*, 589 S.W.2d at 678 (failure to object to defects of form constitutes a waiver of appellate review on that issue); *Harley-Davidson Motor Company, Inc. v. Young*, 720 S.W.2d 211, 213 (Tex. App.–Houston [14th Dist.] 1986, no writ) (objection to the substance, not the form, of an affidavit may be presented for the first time on appeal); *Rizkallah*, 952 S.W.2d at 585 (because the lack of personal knowledge of facts contained in an affidavit is a defect in form and not of substance, the party waived any complaint on appeal by not objecting to the affidavit on such ground at trial).

Another critical difference between a defect in form and a defect in substance is that when the defect is one of substance, the trial court is not required to give the party offering the affidavit an opportunity to amend. *See, e.g., Bell v. Moores*, 832 S.W.2d 749, 756 (Tex. App.–Houston [14th Dist.] 1992, writ denied).

Rule 166a(f) does not define a defect in form; caselaw provides the only guidance on the issue. *Natural Gas Clearinghouse v. Midgard Energy Co.*, 23 S.W.3d 372 (Tex.App–Amarillo 1999, pet. denied). One commentator has indicated that the differentiation between form and substance has caused problems for both attorneys and courts: his suggestion is that the safe call is to object if there is any doubt whatsoever about the need for an objection. Shannon at R-10, R-12.

2. Preservation of Error

Prior to the new rules of appellate procedure, which took effect September 1, 1997, a party objecting to summary judgment evidence had to obtain a written ruling on the objection, or to a lack of a ruling. *See, e.g., Camden Mach. & Tool v. Cascade Co.*, 870 S.W.2d 304, 310 (Tex. App.–Fort Worth 1993, no writ) (applying former rule 52(a), predecessor to TEX.R.APP.P. 33.1). However, Rule 33.1(a)(2)(A) of the Texas Rule of Appellate Procedure now provides that, to preserve error for appellate review, the record must show that the trial court ruled on the request, objection, or motion, either expressly or implicitly. *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.–Fort Worth 1999, pet. denied).

Subsection 2(A) of Rule 33.1 is a substantive revision of prior law. *Id*. Rule 33.1 relaxes the former requirement of an express ruling and codifies case law that recognized implied rulings. *Id.* Thus, error is preserved as long as the record indicates in some way that the trial court ruled on the objection, either expressly or implicitly. *Id*.

In *Frazier*, for example, the court was aware of the existence of the complaining party's objections to his opponent's affidavits since the affidavits were specifically and extensively objected to in the complaining party's written objections and motion to strike the affidavits. *Id*. On appeal, the Fort Worth Court of Appeals held that, because the court granted summary judgment against the complaining party's opponent, announcing that it reviewed all competent summary judgment evidence, an inference was created that the court implicitly sustained the complaining party's objections. *Id*.

However, the current state of the law in Texas on the issue of no longer needing a written ruling by the trial court if the circumstances reveal an "implicit" ruling to preserve error in the context of summary judgment proceedings is unclear. *See, Blum v. Julian*, 977 S.W.2d 819, 823-24 (Tex. App.–Fort Worth 1998, no pet.) (finding that the trial court's granting summary judgment created an inference that the trial court implicitly reviewed and overruled objections to an affidavit offered in support of the motion); *Williams v. Bank One, Texas, N.A.*, 15 S.W.3d 110, 114 (Tex. App.–Waco 1999, no pet.) (the trial court's granting of summary judgment created an inference that the trial court had implicitly overruled a pending motion for continuance); *Columbia Rio Grande Regional Hospital*, 17 S.W.3d at 395-96 (in adopting the reasoning of *Frazier*, the Corpus Christi appellate court found that the record demonstrated that objections to summary judgment exhibits were explicitly overruled by the trial court although no order was signed); *Taylor-Made Hose, Inc. v. Wilkerson*, 21 S.W.3d 484 (Tex. App.–San Antonio 2000, pet. denied) (although the record contained no written order ruling on the objections to the plaintiff's amended affidavit in response to the motion for summary judgment, the trial courts granting of a summary judgment created an inference that the objections were sustained).

In *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313 (Tex. App. – San Antonio 2000, no pet.), the San Antonio Court of Appeals rejected the reasoning in *Frazier* and *Blum*, stating "a trial court's ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment; a ruling on the objection is simply not 'capable of being understood' from the ruling on the motion for summary judgment." *Id.* at 317. *Accord Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) ("Unlike other courts faced with similar situations, we cannot infer from the record in this case that the trial court implicitly overruled or implicitly sustained appellants' objections."); *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 435-36 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) ; *Estate of*

Loveless, 64 S.W.3d 564 (Tex. App. – Texarkana 2001, no pet. hist.)

3. Objections to Defective Motion

a. Motion Presenting No Grounds

When the grounds for summary judgment are not expressly presented in the motion for summary judgment itself, any confusion may and should be resolved by exception in the trial court. *McConnell*, 858 S.W.2d at 342. However, because a motion for summary judgment must stand or fall on its own merits, even if the non-movant fails to except or respond, if the grounds for summary judgment are not expressly presented in the motion for summary judgment itself, the motion is legally insufficient as a matter of law, and the non-movant is not required to object. *Id*.

b. Motion Presenting Certain Grounds

When the motion for summary judgment clearly presents certain grounds but not others, a non-movant is not required to except. *Id*.

c. Grounds Unclear From Motion

The non-movant must object should the non-movant wish to complain on appeal that the grounds relied on by the movant were unclear or ambiguous. *Id*.

4. Objections to Response

An objection that a response to a motion for summary judgment is untimely must be raised in the trial court, in writing, before or during the hearing on the motion. *See, e.g., Archambault v. Archambault*, 846 S.W.2d 359, 361 (Tex. App.–Houston [14th Dist.] 1992, no writ).

5. Objections to Summary Judgment Proof

a. Waivable Objections (Form)

(1) Affidavit Form

Defects in the form of affidavits (or attachments) will not be grounds for reversal unless specifically pointed out by objection by an opposing party with opportunity, but refusal to amend. TEX.R.CIV.P. 166a(f).

(2) Lack of Personal Knowledge

The lack of personal knowledge of facts contained in an affidavit is a defect in form and not of substance, and therefore can be waived by not objecting to the affidavit on such ground at trial. *See, e.g., Grand Prairie Indep. Sch. Dist. v. Vaughn*, 792 S.W.2d 944, 945 (Tex. 1990); *Harris v. Spires Council of Co-Owners*, 981 S.W.2d 892, 896 (Tex. App.–Houston [1st Dist.] 1998, no pet.); *and cf., Rizkallah*, 952 S.W.2d at 585 (the Houston appellate court opined that, although the Texas Supreme Court had confused the issue in two different opinions, *i.e., Grand Prairie Indep. Sch. Dist*. and *Laidlaw Waste Sys. (Dallas), Inc.*, *Grand Prairie Indep. Sch. Dist*. stated the better rule -- an objection that an affidavit is not based on personal knowledge points to a defect in form and not in substance).

(3) Lack of Competency

If no objection to the competency of a witness is made, the defect is waived. *See, e.g., Woods Exploration & Producing Co. v. Arkla Equip. Co.*, 528 S.W.2d 568, 570-71 (Tex. 1975); *see also, Bauer*, 946 S.W.2d at 556 (an objection to the competency of summary judgment proof must may be waived).

(4) Hearsay

Hearsay in an affidavit is a defect in form. *Youngstown Sheet & Tube Co., v. Penn*, 363 S.W.2d 230, 233 (Tex. 1962); *see also, Einhorn v. LaChance*, 823 S.W.2d 405, 410 (Tex. App.–Houston [1st Dist.] 1992, writ dism'd w.o.j.) (an objection that an affidavit contains statements of opinion or hearsay is an objection to the form of the affidavit); *El Paso Assoc. v. J.R. Thurman & Company*, 786 S.W.2d 17, 19 (Tex. App.–El Paso 1990, no writ) (affidavit stating that it was based upon the affiant's personal knowledge, which knowledge was gained by the statements of others, was admissible and competent testimony in a summary judgment proceeding absent a written objection to hearsay); *but cf., Bell*, 832 S.W.2d at 756 (complaints that affidavits contained hearsay, among other objectionable material, were complaints as to defects of substance).

(5) Lack of Predicate

The failure of summary judgment proof to establish the predicate for the admissibility of testimony requires an objection by the resisting party. *See*, Shannon at R-11, *citing*, *Life Insurance Company of Virginia v. Gar-Dal, Inc.*, 570 S.W.2d 380-381 (Tex. 1978); *see also, De Los Santos*, 802 S.W.2d at 756 (complaint that affidavit did not satisfy the business records exception to the hearsay rule was waived in absence of an objection to the trial court).

(6) Best Evidence

An assertion that a document offends the best evidence rule, being a complaint as to the form of the evidence, requires an objection. *See*, *Crow v. Rockett Special Utility Dist*., 17 S.W.3d 320, 324 (Tex. App.–Waco 2000, pet. denied), *citing, Rodriguez v. Ed Hicks Imports*, 767 S.W.2d 187, 190 (Tex. App.–Corpus Christi 1989, no writ).

b. Non-Waivable Objections (Substance)

(1) Unsworn Affidavit

An unsworn acknowledgment is not an affidavit; such a substantive defect may be raised for the first time on appeal. *See, e.g., Laman v. Big Spring State Hosp.*, 970 S.W.2d 670, 671-72 (Tex. App.–Eastland 1998, pet. denied); *State Bar of Texas v. Tinning*, 875 S.W.2d 403 (Tex. App.–Corpus Christi 1994, writ denied); *Clendennen v. Williams*, 896 S.W.2d 257, 260 (Tex. App.–Texarkana 1995, no writ) (because the notary's certificate was left blank, and was neither signed by the notary nor contained a seal, the affiant's statement was not verified–and thus was not an affidavit–and did not constitute competent summary judgment proof); *see also, Perkins v. Crittenden*, 462 S.W.2d 565, 568 (Tex. 1970) (a jurat is not the same as an acknowledgment).

(2) Unsigned Affidavit

The lack of a signature by the affiant is a substantive defect in an affidavit. *See*, *De Los Santos*, 802 S.W.2d at 755 (a statement signed on behalf of the affiant is not a valid affidavit even if the affiant expressly authorizes the signature; in order to be an affidavit, the written statement must be signed by the person making the statement).

Note that one appellate court has stated that, although Texas caselaw has characterized unsworn and unsigned affidavits as suffering a "substantive defect," it is more accurate to describe such errors as ones that cause the document to have no evidentiary value (and would not be considered in any event on appeal). *Cain v. Rust Indus. Cleaning Servs., Inc.*, 969 S.W.2d 464, 467 n. 6 (Tex. App.–Texarkana 1998, pet. denied).

(3) Legal Conclusions

Texas courts have generally held that an objection to the conclusory nature of a summary judgment affidavit goes to the substance of the affidavit. *See, e.g., Crow*, 17 S.W.3d at 324; *Cain,* 969 S.W.2d at 467; *but see and cf., Archambault*, 846 S.W.2d at 361 (objection that the affidavit of an expert contained mere opinions and legal conclusions had to be timely lodged in the trial court and could not be raised for the first time on appeal); *but cf., Lesbrookton, Inc.,* 796 S.W.2d at 288 (despite containing impermissible legal conclusions, the affidavit could be considered for the factual assertions contained therein).

(4) Failure to State Expert's Qualifications

Similarly, Texas courts have generally held that the failure of an expert's affidavit to disclose the expert's qualifications is a defect of substance. *See, e.g., Crow*, 17 S.W.3d at 324.

(5) Conclusory (Factual)

An objection that an affidavit is conclusory is an objection to the substance of the affidavit that can be raised for the first time on appeal. *See, e.g, Green v. Industrial Specialty Contractors, Inc.*, 1 S.W.3d at 130, *citing, City of Wilmer v. Laidlaw Waste Sys., Inc.*, 890 S.W.2d 459, 467 (Tex. App.–Dallas), *aff'd*, 904 S.W.2d 656 (Tex. 1995).

c. Failure to Attach Documents Forming Basis of Expert Opinion

In interpreting Rule 166a(f), several courts have held that the failure to attach copies of the documents relied upon in forming an expert opinion is a defect in substance, and therefore, can be raised for the first time on appeal. *See, e.g., Gorrell v. Texas Utils. Elec. Co.*, 915 S.W.2d 55, 60 (Tex. App.–Fort Worth 1995), *writ denied per curiam*, 954 S.W.2d 767 (Tex. 1997) (the failure to attach sworn or certified affidavits of the extraneous documents referred to in the affidavit was a defect in substance and the trial court was not required to give offering party the chance to amend); *Natural Gas Clearinghouse*, 23 S.W.3d at 378-79 (summary judgment affidavit by an expert, stating that damage calculations were based on information from a computer disk provided by another party, was fatally defective when the disk or a transcript of the information on it was not attached to the affidavit; such defect was in the substance of the affidavit and could be raised for the first time on appeal), *citing, Rodriquez v. Texas Farmers Ins. Co.*, 903 S.W.2d 499, 506 (Tex. App.–Amarillo 1995, writ denied) ("[f]ailure to attach copies of the documents relied upon in forming ... [the expert's] opinion was a fatal defect in the substance of the affidavit, and the trial court properly excluded it from consideration"); *Ceballos v. El Paso Health Care Sys.*, 881 S.W.2d 439, 444-45 (Tex. App.–El Paso 1994, writ denied) ("[t]he failure to attach to, or serve with...[the experts'] affidavits sworn or certified copies of the medical chart or other record referred to therein is not simply a defect in the form of [the] affidavit, but rather is a defect in the substance thereof....[t]his is true because there is no way to tell from these affidavits on what specific entries, notations or statements entered on the medical chart they are basing their respective opinions").

Other courts have held that the failure to attach copies of the documents relied upon in forming an expert opinion is a waivable defect in form. *See, e.g., Sunsinger v. Perez*, 16 S.W.3d 496, 500-01 (Tex. App.–Beaumont 2000, pet. denied) (although there is possibly a conflict among courts of appeals as to whether the failure to attach records to an affidavit in support of summary judgment is a defect of form or substance, we agree with those courts that hold that such a failure is a defect of form, not of substance); *Martin v. Durden*, 965 S.W.2d 562, 565 (Tex. App.–Houston [14th Dist.] 1997, pet. denied) ("we find the failure to attach sworn or certified copies of documents relied upon in expert opinion is merely a defect in form which is waived on appeal if not raised in the trial court");

Knetsch v. Gaitonde, 898 S.W.2d 386, 389-90 (Tex. App.–San Antonio 1995, no writ) (characterizing the failure to attach documents to summary judgment affidavit as a defect in form, but ultimately disposing of case on substantive ground that affidavit itself raised issue of material fact).

One court has decided that it depends on whether the content of the records is disputed. *Noriega v. Mireles*, 925 S.W.2d 261, 265-66 (Tex. App.–Corpus Christi 1996, writ denied) ("[i]f there is a dispute as to what is contained in the medical records, we agree that the failure to attach the medical records to the summary judgment affidavit would be a substantive defect....when there is no dispute regarding the contents of the medical records and the treatment the patient received, and in which the disputed issue relates to additional treatment that the patient clearly did not receive but arguably should have, the failure to attach the relevant medical records to the expert witness's affidavit is a formal, rather than a substantive defect").

In *Mathis v. Bocell*, 982 S.W.2d 52, 60 (Tex. App.–Houston [1st Dist.] 1998, no writ), the Houston First Court of Appeals asked itself: "[h]ow can this conflict be resolved?" According to the Houston appellate court, the best way to analyze such defects -- form vs. substance -- is on the basis of admissibility versus competency. *Id.* A defect is substantive if the evidence is incompetent, and it is formal if the evidence is competent but inadmissible. *Id*. Formal defects may be waived by failure to object, and if waived, the evidence is considered; substantive defects are never waived because the evidence is incompetent and cannot be considered under any circumstances. *Id*.

Consequently, held the First Court of Appeals, the failure of the expert to attach to his affidavit the medical records on which he relied was a defect of form. *Id*. Clearly, continued the Houston appellate court, the affidavit was competent: it recited the patient's medical history, established the affiant as an expert in the field in which he was testifying, and presented his expert opinion. *Id*. The lack of underlying documents on which he relied makes the evidence inadmissible, not incompetent, and therefore the objecting party waived his objection when he failed to obtain a ruling by the trial court. *Id*.

The Texas Supreme Court has not yet decided the issue. *See Gorrell v. Texas Utilities Elec. Co.*, 954 S.W.2d 767, 767 (Tex. 1997) ("[w]e neither approve nor disapprove of the conclusion of the court of appeals that the failure to attach copies of documents referenced in the affidavit of an expert witness constituted a defect in the substance of the affidavit.")

G. Controverting Evidence

In order to avoid an adverse summary judgment, a non-movant must produce summary judgment evidence controverting the movant's summary judgment proof unless the movant's summary judgment evidence is insufficient as a matter of law. *See e.g., Musgrave v. Lopez*, 861 S.W.2d 262, 264 (Tex. App.–Corpus Christi 1993, no writ); *see also, Westland Oil Dev. Corp. v. Gulf Oil Corp*., 637 S.W.2d 903, 907 (Tex. 1982) (when necessary to establish a fact issue, the non-movant must present summary judgment evidence). To defeat a summary judgment, the non-movant's controverting evidence need only raise an issue of fact with respect to an element of the cause of action negated by the movant's summary judgment evidence. *See e.g., Niemann v. Refugio County Memorial Hosp*., 855 S.W.2d 94, 96 (Tex. App.–Corpus Christi 1993, no writ).

For a non-movant to raise a fact issue, there must be evidence to support his assertion. *See, e.g., Life Ins. Co. of Virginia v. Gar-Dal, Inc*., 570 S.W.2d 378, 382 (Tex. 1978). Therefore, the mere pleading or assertion of defensive issues without presenting summary judgment evidence to support them is not sufficient to defeat an otherwise proper motion for summary judgment. *KPMG Peat Marwick v. Harrison County Housing*, 988 S.W.2d 746, 749-50 (Tex. 1999).

H. Nonsuit

Generally, plaintiffs have the right under TEX.R. CIV. P. 162 to take a nonsuit at any time until they have introduced all evidence other than rebuttal evidence. *In re Bennett,* 960 S.W.2d 35, 38 (Tex. 1997). A plaintiff's right to take a nonsuit is unqualified and absolute as long as the defendant has not made a claim for "affirmative relief." *BHP Petroleum Co. Inc. v. Millard*, 800 S.W.2d 838, 840 (Tex. 1990); *see also, Aetna Cas. & Sur. Co. v. Specia*, 849 S.W.2d 805, 806 (Tex. 1993) (the plaintiff's right to nonsuit is firmly rooted in Texas jurisprudence); *Grimes v. Stringer*, 957 S.W.2d 865, 868 (Tex. App.–Tyler 1997, pet. denied) (because the defendant asked for no affirmative relief in its motion for summary judgment or by way of its counterclaim, but rather simply asked for judgment on the basis of its affirmative defenses, the counterclaim merely restated its defenses and did not qualify as a claim for affirmative relief independent of the plaintiff's claims; thus, since the plaintiff filed a nonsuit as to the defendant before the trial court ruled on the defendant's motion for summary judgment, the trial court had no jurisdiction to grant a summary judgment for the defendant).

A plaintiff has a right to take a nonsuit after the defendant files a motion for summary judgment, up to the time the court announces a summary judgment (provided the defendant has not filed a claim for affirmative relief). *See, e.g., Leon Springs Gas Co. v. Restaurant Equipment Leasing Co.*, 961 S.W.2d 574, 576-77 (Tex. App.–San Antonio 1997, no pet.) (the defendant raised affirmative defenses and asked for attorney's fees, and then filed a motion for partial summary judgment asking for a take nothing judgment against the plaintiff, whereupon the plaintiff permissibly filed a non-suit

before the summary judgment motion was heard); *see also, Taliaferro v. Smith*, 804 S.W.2d 548, 550 (Tex. App.–Houston [14th Dist.] 1991, no writ).

However, once a trial court announces a decision on a motion for partial summary judgment, that claim is no longer subject to the plaintiff's right to nonsuit. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 854-55 (Tex. 1995) (a nonsuit sought after a trial court grants a partial summary judgment results in a dismissal with prejudice on the issues disposed of by the summary judgment, thereby converting the partial summary judgment into a final, appealable judgment; thus a partial summary judgment survives a nonsuit).

Further, when a defendant obtains a partial summary judgment on certain of plaintiff's causes of action and the court thereafter dismisses the plaintiff's case for want of prosecution, without vacating the partial summary judgment, the dismissal for want of prosecution results in a dismissal with prejudice on the issues decided in the partial summary judgment. *Newco Drilling Co. v. Weyand*, 960 S.W.2d 654, 655-56 (Tex. 1998) (a plaintiff, who after suffering an adverse summary judgment, allows his claims to be dismissed for want of prosecution, should not be allowed a second bite at the apple since to do so would allow such a plaintiff to avoid *Hyundai Motor Co*. by simply doing nothing and waiting for the trial court to dismiss the case).

I. Review by Mandamus

Ordinarily, mandamus is not available to review an order denying a motion for summary judgment. *Abor v. Black*, 695 S.W.2d 564, 566-67 (Tex. 1985). In *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 497 (Tex. App.–Texarkana 1998, orig. proceeding), a party asserted that mandamus was appropriate because the trial court did not actually rule on its motion for summary judgment. However, on appeal, the Texarkana appellate court found that, although the order signed contained a large amount of extraneous material, it also contained the necessary decretal language denying the motion; thus, mandamus was unavailable. *Id.*

J. Appellate Review

1. Findings of Fact and Conclusions of Law

Findings of fact and conclusions of law have no place in a summary judgment proceeding. *Linwood v. NCNB Texas*, 885 S.W.2d 102, 103 (Tex.1994). If summary judgment is proper, there are no facts to find and the legal conclusions have already been stated in the motion and the response. *See IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex.1997). The trial court should not make, and the appellate court cannot consider, such findings and conclusions in connection with a summary judgment. *See id.* Therefore, a trial court does not err in not making any findings of fact and conclusions of law. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 20 S.W.3d 119, 125 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). However, in *Cortez v. Progressive County Mut. Ins. Co.*, 61 S.W.3d 68, 71 fn.4 (Tex. App. – Austin 2001, pet. filed), the Third Court of Appeals distinguished *Linwood v. NCNB Texas* and *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.* stating that "neither *Linwood* nor *Pro-Line* prohibits a trial court from including a recitation of material facts and construction of material statutes in a summary judgment order." *Id.*

2. Standard of Review

The standard of review on appeal for a traditional motion for summary judgment is well settled:

> In a summary judgment case, the issue on appeal is whether the movant met his summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. The burden of proof is on the movant, and all doubts about the existence of a genuine issue of material fact are resolved against the movant. Therefore, we must view the evidence and its reasonable inferences in the light most favorable to the nonmovant.
>
> In deciding whether there is a material fact issue precluding summary judgment, all conflicts in the evidence are disregarded and the evidence favorable to the nonmovant is accepted as true. Evidence that favors the movant's position will not be considered unless it is uncontroverted.
>
> A defendant is entitled to summary judgment if the summary judgment evidence establishes, as a matter of law, that at least one element of a plaintiff's cause of action cannot be established. To that end, the defendant-movant must present summary judgment evidence that conclusively negates an element of the plaintiff's claim. Once that evidence is presented, the burden shifts to the plaintiff to put on competent controverting evidence that proves the existence of a genuine issue of material fact with regard to the element challenged by the defendant.

Blackburn v. Columbia Medical Center, 58 S.W.3d 263, 269 (Tex. App. – Fort Worth 2001, no pet.). *See Great Am. Reserve Ins. Co. v. San Antonio Plumbing Supply Co.*, 391 S.W.2d 41, 47 (Tex. 1965); *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d

195, 197 (Tex.1995); *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex.1995); *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex.1996); *KPMG Peat Marwick v. Harrison County Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex.1999); *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex.1999); *Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 803 (Tex.1999).

3. Grounds for Review

A motion for summary judgment may be granted on general or specific grounds. "When reviewing a summary judgment granted on general grounds, this Court considers whether any theories asserted by the summary judgment movant will support the summary judgment. 'When a trial court's order granting summary judgment does not specify the ground or grounds relied on for the ruling, summary judgment will be affirmed on appeal if any of the theories advanced are meritorious.'" *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 ((Tex. 1993) (*quoting Rogers v. Ricane Enter. Inc.*, 772 S.W.2d 76, 79 (Tex.1989)). In other words, when there are multiple grounds for summary judgement and the order granting summary judgment does not specify the ground on which the summary judgment was granted, the appealing party must negate all grounds on appeal. *State Farm Fire & Cas. Co.*, 858 S.W.2d at 381. If summary judgment may have been granted, properly or improperly, on a ground not challenged on appeal, the judgment must be affirmed. *Holloway v. Starnes,* 840 S.W.2d 14, 23 (Tex. App. – Dallas 1992, writ denied).

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, an 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 in the interest of judicial economy. *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625-26 (Tex. 1996).

4. Denial of Motion for Summary Judgment

Generally, a denial of a motion for summary judgment is not reviewable on appeal. *Cincinnati Life Ins. Co.*, 927 S.W.2d at 625. This is because a denial of a summary judgment is not a final judgment. *Id.* There are, however, at least two exceptions to this general rule. When both parties file motions for summary judgment and the trial court grants one and denies the other, the denial may be appealed. *See Davis v. Manning*, 847 S.W.2d 446, 452 (Tex.App.--Houston [14th Dist.] 1993, no writ). An appeal from the denial of a motion for summary judgment is also proper when the denial is: (1) based on an assertion of immunity by an individual who is an officer or employee of the state or a political subdivision of the state; or (2) based in whole or in part upon a claim against or defense by a member of the media, acting in such capacity, or a person whose communication appears in or is published by the media, arising under the free speech or free press clause of the First Amendment of the United Stated Constitution, or Article 1, Section 8 of the Texas Constitution. *See* TEX. CIV. PRAC. & REM.CODE §51.014(a)(5)-(6).

IV. "NO EVIDENCE" SUMMARY JUDGMENT AND RESPONSE

A. Introduction

In 1997, the Texas Supreme Court amended Rule 166a to add the "no evidence" summary judgment to Texas summary judgment practice. TEX.R.CIV.P. 166a(i) now provides:

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

In the Comment to Rule 166a(i), the Texas Supreme Court stated that "this comment is intended to inform the construction and application of the rule." In light of the Texas Supreme Court's declaration, the Comment is properly considered significant to the "future construction" of paragraph (i). Shannon at R-12. Accordingly, the remainder of the Comment is reprinted here:

> Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before. The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case. Paragraph (i) does not apply to ordinary motions

> for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law. To defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice. A motion under paragraph (i) is subject to sanctions provided by existing law (TEX. CIV. PRAC.& REM. CODE §§ 9.001-10.006) and rules (TEX.R.CIV.P. 13). The denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c).

Although the "no evidence" summary judgment is relatively new to Texas jurisprudence, it has long been part of federal practice. Shannon at R-12.

A Rule 166a(i) no-evidence summary judgment is essentially a pretrial directed verdict. *See, e.g., Frazier*, 987 S.W.2d at 610; *but see Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614 (Tex. App. -- Eastland 2000, pet. denied) (Contrary to several cases reviewing no-evidence summary judgments as though they were pretrial directed verdicts, we believe that the better approach is to review no-evidence motions for summary judgments in the same manner any other Rule 166a summary judgment is reviewed); *Estate of Fawcett*, 55 S.W.3d 214, 217 (Tex. App. – East land 2001, pet. denied). As with a traditional summary judgment, the purpose of a no-evidence summary judgment motion is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. *Reynosa v. Huff*, 21 S.W.3d 510 (Tex. App.–San Antonio 2000, no pet.). In contrast to a traditional motion for summary judgment, in a no evidence summary judgment, the movant must specifically state the elements as to which there is no evidence; the burden then shifts to the non-movant to produce evidence that raises a fact issue on the challenged elements. *See e.g., Greathouse v. Alvin Independent School Dist*., 17 S.W.3d 419, 423 (Tex. App.–Houston [1st Dist.] 2000, no pet.); *Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407, 409 (Tex. App.–Waco 1999, no pet.) (a no evidence motion for summary judgment places the burden on the non-movant to present enough evidence to be entitled to a trial). Thus, in no evidence summary judgment procedure, the focus is shifted from the pleadings to the actual evidence. *See e.g., Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 436 (Tex. App.–Houston [14th Dist.] 1999, no pet.).

Note that the party without the burden of proof on a claim (or defense) is the party who is permitted under Rule 166a(i) to bring a no evidence motion for summary judgment. *See, e.g.*, *Quanaim v. Frasco Restaurant & Catering*, 17 S.W.3d 30, 41 (Tex. App.–Houston [14th Dist.] 2000, pet. denied) (the motion for summary judgment, although purporting to be filed under the no evidence provisions of Rule 166a(i), was based on affirmative defenses and, therefore, was actually a traditional motion for summary judgment, since a defendant moving for summary judgment on the basis of an affirmative defense bears the burden to conclusively prove all essential elements of the defense).

A no evidence summary judgment prevents the non-movant from standing solely on his pleadings, but instead requires him to bring forward sufficient evidence to withstand a motion for instructed verdict. *Lampasas*, 988 S.W.2d at 436. If the non-movant is unable to provide enough evidence, the trial judge must grant the motion. *Id*. at 433; *see also*, *General Mills Restaurants, Inc. v. Texas Wings, Inc*., 12 S.W.3d 827, 832 (Tex. App.–Dallas 2000, no pet.) (when a motion is presented under Rule 166a(i) asserting there is no evidence of one or more of the essential elements of the non-movant's claims, upon which the non-movant would have the burden of proof at trial, the movant does not bear the burden of establishing each element of its own claim or defense; rather, the burden shifts to the non-movant to present enough evidence to be entitled to a trial, *i.e*., evidence that raises a genuine fact issue on the challenged elements).

B. Form

Rule 166a(i) does not prescribe a particular form, style or outline for a no evidence motion, nor does it require that a motion explicitly state that it is brought under subparagraph (i). *Welch v. Coca-Cola Enterprises, Inc*., 36 S.W.3d 532 (Tex. App.–Tyler 2000, opinion withdrawn pursuant to settlement). Rule 166a(i) simply states: "[t]he motion must state the elements as to which there is no evidence." S*ee also*, *Drew v. Harrison County Hosp. Ass'n*, 20 S.W.3d 244, 247 (Tex. App.–Texarkana 2000, no pet.) (a party moving for summary judgment under Rule 166a(i) must state in its motion which element of the adverse party's claim it alleges has no evidentiary basis). Because Rule 166a(i) and its Comment do not provide much guidance as to the proper form of a no evidence

motion for summary judgment, Texas appellate courts have struggled with the issue. Patton at G-3.

1. Identification as a No Evidence Motion

In *Ethridge v. Hamilton County Elec. Coop. Ass'n*, 995 S.W.2d 292, 295 (Tex. App.–Waco 1999, no pet.), the Waco Court of Appeals stated:

> The no-evidence summary judgment is a relatively new creature which is working its way through the appellate courts. In several recent cases, we have seen confusion when a party argues on appeal that a motion was a "no-evidence" motion for summary judgment when the motion was clearly a motion under the long-standing rule allowing motions for summary judgment. In the future, a party moving for a "no-evidence" summary judgment under the new rule should explicitly state that it is a "no-evidence" motion under Rule 166a(i). Such a motion should be made without presenting summary judgment evidence. (Citations omitted).

Confronted with the same issue, the Amarillo Court of Appeals, in *Roth v. FFP Operating Partners*, 994 S.W.2d 190, 194-95 (Tex. App.–Amarillo 1999, pet. denied), held that the defendant's second summary judgment motion was sufficient to give fair notice that it was made on the grounds of no evidence, although it did not specifically state that it was brought under the no evidence subsection of summary judgment rule, when the words "no evidence" appeared at least eight times in four specific allegations, the plaintiffs' response acknowledged the motion to be a no evidence motion, and the summary judgment proof and argument were presented as if the no evidence subsection was implicated. The Amarillo appellate court noted that neither subparagraphs (c) nor (i) of Rule 166a prescribed a particular form, style or outline for a no-evidence motion, and did not require that a motion state that it is brought under subparagraph (i), but added that, while it may be good practice for a no evidence motion to specifically state, in the caption or elsewhere, that it is brought under subparagraph (i), such identification was not mandatory. *Id.; see also, Lehrer v. Zwernemann*, 14 S.W.3d 775, 776, n. 2 (Tex. App.-Houston [1st Dist.] 2000, pet. denied) (although the motion for summary judgment did not cite Rule 166a(i), it was clear from the language in the motion, the response to the motion, the trial judge's order, the non-movant's points of error on appeal, and the movant's reply to such points of error on appeal, that the trial judge granted the motion based on the lack of evidence to support the non-movant's causes of action; therefore, the appellate court reviewed the order as though it was a no evidence summary judgment).

At least one other Texas appellate court agrees in principal with *Roth*. *See*, *Welch*, 36 S.W.3d at 536 ("we agree that it would be good practice to specifically state, in the caption or elsewhere, that it is brought under (i), if that is intended"; when the words "no evidence" and "TEX.R.CIV.P. 166a(i)" appear four times apiece in the statute of frauds argument, the motion is not defective for failing to expressly recite, in the caption or elsewhere, that it is brought pursuant to (i)); *see also Garrett v. L.P. McCuistion Community Hosp.*, 30 S.W.3d 653, 655 (Tex. App. Texarkana 2000, no pet); *but cf.*, *Thomas v. Clayton Williams Energy, Inc.*, 2 S.W.3d 734, 737, n. 1 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (it was unclear whether the movant moved for summary judgment under Rule 166a(b) or Rule 166a(i), and, as a result, the movant failed to give the non-movant "fair notice" that it was moving for summary judgment under Rule 166a(i); thus, appellate review proceeded under Rule 166a(b)).

In *Hamlett v. Holcomb*, ___ S.W.3d ___, 2002 WL 254041 at *2 (Tex. App. – Corpus Christi February 21, 2002, no pet. hist.), the Court of Appeals stated that "[w]hen reviewing a summary judgment, an appellate court must first determine whether the trial court granted the summary judgment on traditional or 'no evidence' grounds. This is a critical distinction that must be made in order to avoid improperly shifting the burden of proof. When it is not readily apparent to the trial court that summary judgment is sought under Rule 166a(i), the appellate court will presume that the motion is filed under the traditional summary judgment rule and analyze it accordingly." *See Michael v. Dyke*, 41 S.W.3d 746, 750-51 n.3 (Tex. App. – Corpus Christi 2001, no pet.).

One commentator has suggested, given the unsettled nature of Texas law on the issue, that the better practice is to specifically identify a no-evidence motion for summary judgment as being brought under subparagraph (i). Patton at G-5; *cf.*, *Welch,* 36 S.W.3d at 535-36 (it was clear that the motion was based upon Rule 166a(i), since it was entitled "Amended No-Evidence Motion For Summary Judgment").

2. Hybrid No Evidence Motion

According to one Texas appellate court, the Texas summary judgment rules do not prohibit a "hybrid motion," *i.e.*, containing both a no evidence summary judgment claim and an ordinary summary judgment claim. *Grant v. Southwestern Elec. Power Co.*, 20 S.W.3d 764, 768 (Tex. App.–Texarkana 2000, pet. granted). However, stated the Texarkana Court of Appeals in *Grant*, the better practice is either to file two separate motions, one containing the no evidence summary judgment and one containing the ordinary summary judgment, or to file one document containing both motions, but with the arguments and authorities for each clearly delineated and separate from one another. *Id*.

In *Amouri v. Southwest Toyota, Inc*., 20 S.W.3d 165, 168 (Tex. App.–Texarkana 2000, pet. denied), the motion for summary judgment contained language indicative of both traditional and no evidence summary judgment motions. In the motion, the defendant contended that, as a matter of law, the plaintiff could not establish fraud because Texas law charged parties with knowledge of the contents of contracts they sign, and such rule foreclosed proof of any representation contrary to the terms of the contract as well as any reliance on a representation. *Id*. The motion also contended that the plaintiff's case presented "no evidence" of a false representation or reliance which are elements of a fraud cause of action. *Id*. The defendant also asserted that the rule of law about charging parties to a contract with knowledge of its terms made it impossible for there to be any evidence of false representation or reliance. *Id*. On appeal, the Texarkana Court of Appeals construed such portion of the motion to be a traditional summary judgment motion. *Id*.

Additionally, the defendant in *Amouri* contended that in order for the plaintiff to successfully assert a fraud claim, he must have presented evidence that defendant prevented him from reading the lease, or physically forced him to sign it. *Id*. On appeal, the Texarkana appellate court found that the plaintiff's allegations failed as a no evidence challenge. *Id*. In a footnote, the Texarkana Court of Appeals discussed its prior holding in *Grant,* noting again that the Texas Rules of Civil Procedure did not prohibit "hybrid" motions, but distinguished *Grant* on the grounds that, in *Grant,* the movant based his motion on two independent, alternative theories. *Id*. at 168 n.1. In *Grant,* one of the movant's alternative theories was not subsumed by the other as was the case in *Amouri*. *Id*. Further, according to the Texarkana appellate court, the parties in *Amouri* both recognized that one portion of the defendant's motion was a traditional summary judgment motion. *Id*. As for the alleged no evidence portion of the motion, the Texarkana Court of Appeals noted that the plaintiff's response to the defendant's motion stated that the "[d]efendant filed a Motion for Summary Judgment on the grounds that the Plaintiff could not prevail as a matter of law on his claim of Breach of Contract and Common Law Fraud..." thus indicating that the plaintiff also believed the defendant had asserted a traditional summary judgment motion. *Id*.

In *Fletcher v. Edwards*, 26 S.W.3d 66 (Tex. App.–Waco 2000, pet. denied), the movants filed a motion for summary judgment raising both traditional summary judgment and no evidence claims. Although the movants' claims were not as distinctly segregated as the Waco Court of Appeals preferred, the appellate court nonetheless conducted a close reading of the motion and found that the traditional summary judgment claims could be distinguished from the no evidence claims. *Id*.; *see also*, *Welch,* 36 S.W.3d at 536 (when the movant addressed the sovereign immunity grounds for judgment, it did not state that it was a 166a(i) motion, nor did it mention "no evidence" in any context; however, when the movant addressed the statute of frauds issue, it alleged "no evidence" and Rule 166a(i) in several instances); *Williams*, 15 S.W.3d at 117 (because the movant clearly segregated the no evidence portion of its motion from the remainder of the motion, the appellate court concluded that the segregated portion of the motion could be properly referred to as a no-evidence motion); *but cf*., *Brown v. Blum*, 9 S.W.3d 840, 844 (Tex. App.–Houston [14th Dist.] 1999, pet. dism'd) (while the movant characterized his summary judgment motion as both a "no evidence" motion and an "ordinary" motion, he primarily argued "matter of law" issues rather than "no evidence" issues, and therefore the appellate court treated his motion as a traditional motion rather than a "no evidence" motion).

3. Conclusory No Evidence Motion

Recall that the Comment to Rule 166a(i) states that a no evidence motion must be specific in challenging the evidentiary support for an element of a claim or a defense, and cannot allege merely conclusory or general no evidence challenges to an opponent's case. *See, Bomar v. Walls Regional Hosp*., 983 S.W.2d 834, 840 (Tex. App.–Waco 1998, no pet.) (a party is not allowed to bring general no evidence motions for summary judgment); *Flameout Design & Fabrication, Inc. v. Penzoil Caspian Corp*., 994 S.W.2d 830, 834 (Tex. App.–Houston [1st Dist.] 1999, no pet.) (a no-evidence motion may not be general, but must state the elements on which there is no evidence).

It has been cautioned that, if all that Rule 166a(i) requires is identification of the elements allegedly lacking evidentiary support, then a no-evidence motion for summary judgment could be "exceedingly" conclusory. Patton at G-4. Mr. Patton has written that such a construction would result in glaringly disproportionate burdens on the parties to no evidence summary judgment proceedings:

> Potentially, the "no-evidence" motion for summary judgment could be two pages long and the response two feet thick. The movant need not produce any proof in support of its "no evidence" claim. Instead, the mere filing of the motion shifts the burden to the respondent to come forward with enough evidence to take the case to a jury. If the respondent does not, the court, under the new rule, must grant the motion.

Id., *quoting*, Judge David Hittner and Lynne Liberato, *No-Evidence Summary Judgment Under the New Rule*, 4, 20th ANNUAL ADVANCED CIVIL TRIAL COURSE (State Bar of Texas 1997). Commentators have been hesitant to endorse such a broad view of the no evidence summary judgment motion. *See, e.g.,* Patton at G-4, *citing generally*,

Duncan, *No-Evidence Motions for Summary Judgment: Harmonizing Rule 166a(i) and Its Comment,* PRODUCTS LIABILITY AND PERSONAL INJURY COURSE (University of Texas 1997).

In *Dolcefino v. Randolph*, 19 S.W.3d 906, 917 n.6 (Tex. App.–Houston [14th Dist.] 2000, pet. denied), the non-movants argued on appeal that the movants were required to state in their motion that the parties had adequate time for discovery, apparently contending that the failure to do so rendered the motion conclusory. The Houston Fourteenth Court of Appeals summarily rejected their argument, stating that Texas law did not require such a statement. *Id*.

4. Evidence Attached to Motion

One apparent conflict among Texas appellate courts concerns the effect of attaching evidence to a purported no evidence motion for summary judgment. The Waco Court of Appeals has repeatedly held that a no evidence motion for summary judgment should be made without presenting any evidence. *See*, *Ethridge*, 995 S.W.2d at 295; *see also*, *Grimes v. Andrews*, 997 S.W.2d 877, 880 n. 5 (Tex. App.–Waco 1999, no pet.) (the parties moved for both a traditional summary judgment and a no evidence summary judgment, but attached summary judgment evidence to their motions; because a no evidence motion for summary judgment should be made without presenting any evidence, the Waco appellate court examined the resulting appeal under the traditional summary judgment standard of review); *Crow*, 17 S.W.3d at 328 (neither of the movant's summary judgment motions qualified as a no evidence motion because the movant presented affidavits in support of each).

In *Jackson v. Fiesta Mart, Inc*., 979 S.W.2d 68, 69-70 (Tex. App.–Austin 1998, no pet.), however, the Austin Court of Appeals affirmed a no-evidence summary judgment when the movant had attached deposition evidence to a no evidence motion for summary judgment. The Austin appellate court did not discuss the issue of the effect of attaching such evidence to the motion in its opinion. *See also, Saenz*, 999 S.W.2d at 493 (although it was not required to submit any evidence, the plaintiff detailed the summary judgment evidence on which it relied, including defendant's pleadings and discovery responses; the defendant's no evidence motion was apparently not defective for that reason although the El Paso appellate court did not explicitly address the issue); *McClure v. Attebury*, 20 S.W.3d 722 (Tex. App.–Amarillo 1999, no pet.) (on appeal, evidence attached to a no evidence summary judgment motion was considered "surplusage").

5. Specificity of No Evidence Motion

Rule 166a(i) provides that a no evidence motion "must state the elements as to which there is no evidence." The purpose of the rule is to provide the opposing party with adequate information for opposing the motion, and to define the issues; the requirement of specificity is satisfied if the grounds in the motion give "fair notice" to the non-movant. *Roth,* 994 S.W.2d at 194.

Reported opinions issued by Texas courts of appeals may indicate that it takes very little to satisfy the specificity requirements of Rule 166a(i). Patton at G-4; *see also*, Welch, 36 S.W.3d at 537 ("[t]he specification of each element challenged and the good faith assertion that there is no evidence to support that specified element is all that is required to put the burden on the opposing party to produce summary judgment evidence raising a genuine issue of material fact relevant to the challenged element"). For example, in *In re Mohawk Rubber Co.*, 982 S.W.2d at 497, a complex toxic tort case involving over 200 plaintiffs, the trial court overruled the plaintiff's objection that the defendant's no evidence motion was too general because it only alleged that there was no evidence of "causation." On appeal, the Texarkana Court of Appeals noted that the plaintiffs alleged repeatedly in their petition that their injuries were "proximately caused" by the products manufactured by the defendants, and therefore the defendant had a right to move for summary judgment on the causation alleged by the plaintiffs, and it did so in its motion by alleging that the plaintiffs had no evidence of "causation." *Id*. The Texarkana appellate court went on to state:

> [Rule 166a(i)] requires a motion to be specific in alleging a lack of evidence on an essential element of the plaintiffs' alleged cause of action, but it does not require that the motion specifically attack the evidentiary components that may prove an element of the cause of action. The specificity requirement is designed to avoid conclusory no-evidence challenges to an opponent's cause of action. The rule requires a specific challenge to the evidentiary support for an element of a claim or defense. Causation is a specific element of tort liability.

Id. at 497-498. Thus, the no evidence motion alleging no evidence of "causation," a necessary element of the plaintiff's cause of action, withstood appellate scrutiny as to its specificity. *Id*.

Similarly, in *Denton v. Big Spring Hosp. Corp*., 998 S.W.2d 294, 298 (Tex. App.–Eastland 1999, no pet.), the Eastland Court of Appeals upheld a no evidence motion alleging that there was no evidence to prove malice or to prove injury. According to the Eastland appellate court, Rule 166a(i) requires a motion to be specific in alleging a lack of evidence on an essential element of a plaintiff's cause of action, but it does not require that the motion specifically attack the evidentiary components that may prove an element of the cause of action. *Id*.; *see also*, *Saenz*, 999 S.W.2d at 493 (in an employment-discrimination suit, the

defendant's allegation that the plaintiff could produce no evidence that "[the defendant] had accommodated any other employee who was permanently disqualified from performing the duties of his position due to an injury for which a workers' compensation claim was not asserted by creating for such person theretofore non-existing position with the company" complied with Rule 166a(i)'s requirement to specifically challenge the evidentiary support for an element of the plaintiff's discrimination claim, and therefore the burden shifted to the plaintiff to produce summary judgment evidence raising a genuine issue of material fact).

Moreover, at least one appellate court has concluded that, even if the no evidence appears to generally challenge the plaintiff's theory of liability, if the context of the motion reveals an attack on one specific element of the cause of action, the motion is sufficiently specific. Patton at G-4, G-5; *see, Grant*, 20 S.W.3d at 773-74 (in a negligence action, the existence of a duty is ultimately a question of law for the court to decide from the facts surrounding the occurrence in question; while a plaintiff's petition must contain sufficient allegations of facts to show the existence of a legal duty owed by the defendant to the plaintiff, the plaintiff is not required to make specific allegations of a duty, if a duty can be inferred from allegations in the petition, including the relationship of the parties and other pertinent facts). *See also Garrett v. L.P. McCuistion Community Hosp.*, 30 S.W.3d at 655).

On the other hand, as already discussed, a no-evidence motion for summary judgment is insufficient if it is conclusory, *i.e.,* if it does not specifically allege that the non-movant lacks evidence, or if it does not challenge a particular element of the non-movant's claim. *See*, *Weaver v. Highlands Ins. Co.*, 4 S.W.3d 826 (Tex. App.–Houston [1st Dist.] 1999, no pet.); *see also*, *Amouri*, 20 S.W.3d at 168 (the defendant contended that in order for the plaintiff to successfully assert a fraud claim, he must have presented evidence that the defendant prevented the plaintiff from reading a lease, or physically forced him to sign it, which the plaintiff failed to do; however, according to the Texarkana appellate court, by such a contention, the defendant did not specifically challenge any essential element of the plaintiff's fraud cause of action, and thus the motion was insufficient as a no evidence motion); *Abraham v. Ryland Mortg. Co.*, 995 S.W.2d 890, 892 (Tex. App.–El Paso 1999, no pet.) (no evidence motion that simply stated "there is absolutely no evidence to support [the plaintiff's] assertions that [the defendant] committed a wrongful foreclosure" neither referred to any element of the plaintiff's cause of action, nor referred to any specific allegation contained in plaintiff's petition, and therefore did not meet the requirements of Rule 166a(I); trial court could not have appropriately granted summary judgment on that ground).

Furthermore, "[w]hen it is not readily apparent to the trial court that summary judgment is sought under rule 166a(i), the court should presume that it is filed under the traditional summary judgment rule and analyze it according to those well-recognized standards." *Michael v. Dyke*, 41 S.W.3d 746, 751 (Tex. App. – Corpus Christi 2001, no pet.). *See Hamlett v. Holcomb*, ___ S.W.3d ___, 2002 WL 254041 at *2. In addition, "an order granting summary judgment should clarify whether the motion is granted on no-evidence grounds or traditional grounds. When an order fails to so clarify, a motion requesting such clarification should be filed with the trial court." *Id.*

Ultimately, at this point, the specificity requirements for no-evidence motions for summary judgment appear to be:

> 1. the motion must specifically challenge an element or elements of the non-movant's theory of liability or defense;
>
> 2. a specific challenge on the evidentiary components that may prove an element of the cause of action is unnecessary as long as the element itself is specifically challenged; and
>
> 3. attacking the theory of liability or defense as a whole without a separate, specific attack on one or more of the individual elements of the theory is insufficient.

Patton at G-5.

Questions concerning the necessary specificity will doubtlessly persist for some time to come. Will it be sufficient to allege that there is no evidence that a particular property is a spouse's separate property? Or will it be required to allege that there is no evidence that particular property was owned or claimed by the opposing spouse before marriage or that the property was acquired during the marriage by gift, will or descent? Time will tell.

C. Time to File

1. In General

Another difference between a no evidence motion for summary judgment and a traditional motion for summary judgment is that while a traditional summary judgment motion can be filed anytime after the adverse has appeared or answered, the no evidence motion may be filed only "after adequate time for discovery." TEX.R.CIV.P 166a(i). Neither Rule 166a(i) nor its Comment provide much guidance into the meaning of "after adequate time for discovery," in any context other than when the trial court has entered a pretrial order establishing discovery deadlines. Patton at G-2; *see also,* TEX.R.CIV.P. 166a(i), Comment–1997 ("[a] discovery period set by pretrial order should be

adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before"). As discussed herein, reported Texas appellate cases are just beginning to address the issue of the meaning and implications of the phrase "after adequate time for discovery." At the outset, it should be noted that Rule 166a(i) does not require that discovery be completed. *In re Mohawk,* 982 S.W.2d at 498.

Because no-evidence summary judgment practice has been a part of federal practice for many years, it has been suggested that federal caselaw should provide a fertile area for construction of Rule 166a(i). *See*, Shannon at R-12. Indeed, in *McClure,* 20 S.W.3d at 728-29, the non-movant argued that reliance should be placed on federal caselaw, and in particular, on *Fano v. O'Neill*, 806 F.2d 1262, 1266 (5th Cir.1987), in construing the concept of "adequate time for discovery." On appeal, however, the Amarillo Court of Appeals expressed reluctance to rely on federal caselaw in such a context for a number of reasons. *Id.* Although Rule 166a is somewhat similar to Rule 56 of the Federal Rules of Civil Procedure, stated the Amarillo appellate court, there are significant differences in the two. *Id.* For example, under Texas practice, Rule 166a(c) requires 21 days notice to the non-movant before the time specified for the hearing while Rule 56 requires only 10 days notice. *Id.* Also, despite their commonalities, Rule 56 does not contain a counterpart to Rule 166a(i), and particularly, to the phrase "after adequate time for discovery," which is a material distinction between the Texas and federal rules. *Id.* Consequently, the Amarillo Court of Appeals in *McClure* did not rely on the federal precedent. *Id.*

Whether a non-movant has had adequate time for discovery for purposes of Rule 166a(i) is "case specific." *Id.* at 729.; *see also, Dickson Const., Inc. v. Fidelity & Deposit Co. of Maryland*, 5 S.W.3d 353, 356 (Tex. App.–Texarkana 1999, pet. denied) (in considering whether a non-movant has had adequate time for discovery, an appellate court must consider the time needed for discovery in the context of the nature of the particular cause of action). While some lawsuits which present only questions of law may require limited or minimal discovery, other actions may require extensive discovery. *McClure*, 20 S.W.3d at 729; *see also, National Union Fire Ins. Co. v. CBI Indus.,* 907 S.W.2d 517, 522 (Tex. 1995) (summary judgment may be permissible before a discovery deadline set by pretrial order upon a showing that there are no fact issues meriting further discovery and the record has been sufficiently developed to support summary judgment).

An adequate time for discovery is determined by the nature of the cause of action, the nature of the evidence necessary to controvert the no evidence motion, and the length of time the case has been active in the trial court. *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140 (Tex. App.–Houston [14th Dist.] 2000, pet. denied). A court may also look to factors such as the amount of time the no evidence motion has been on file, whether the movant has requested stricter time deadlines for discovery, the amount of discovery that has already taken place, and whether the discovery deadlines that are in place are specific or vague. *Id*., *citing*, William J. Cornelius and David F. Johnson, *Tricks, Traps, And Snares in Appealing a Summary Judgment in Texas*, 50 BAYLOR L.REV. 813 (1998).

In *McClure*, 20 S.W.3d at 730, the Amarillo Court of Appeals held that the trial court did not abuse its discretion in overruling the non-movant's objections that he did not have adequate time for discovery, when the suit had been on file for 7 months, the non-movant had 24 weekdays, excluding holidays, to conduct discovery between the time the no-evidence was filed and the date of the hearing, and the non-movant offered no affidavit explaining why he couldn't obtain the facts necessary for him to present his defense. *See also, Dickson Const., Inc.,* 5 S.W.3d at 356-57 (adequate time for discovery occurred in suit pending for over two years, when four months passed between the date appellate action on the first summary judgment became final and the movant filed its second no evidence motion, sixty days passed thereafter before the hearing on the second motion, and the record showed that the non-movant made no concentrated effort to obtain evidence through discovery during those periods); *Specialty Retailers, Inc.*, 29 S.W.3d at 145 (adequate time for discovery had passed for purposes of determining whether no evidence summary judgment could be granted, even though plaintiff claimed that the defendant delayed discovery by promises to supplement its interrogatories, all the while preparing its no evidence motion, when the suit had been on-going for approximately 16 months at the time of the motion, one extension to the discovery period had already been granted, the plaintiff, with only eight days before the end of the discovery period, had not yet deposed the defendant, did not notice the deposition of the defendant until after the motion was filed, and presented no evidence that the defendant's discovery responses were inadequate or that the defendant abused the discovery process).

2. Effect of Discovery Levels

The 1999 revisions to the discovery provisions of the Texas Rules of Civil Procedure established three different case levels and time limitations for discovery. *See,* TEX.R.CIV. P. 190, *et. seq.*; *McClure*, 20 S.W.3d at 729. Level 1 covers divorce suits not involving children and marital estates of less than $50,000 value; level 1 permits a limited amount of discovery over a period of time extending until 30 days before trial. TEX.R.CIV.P. 190.2; *see also,* Shannon at R-12. Level 2, which includes cases under the Texas Family Code, also permits discovery to continue until 30 days before trial. TEX.R.CIV.P. 190.3; *see also,* Shannon at R-12. Level 3 includes all cases in which discovery time limits are set by pretrial order. TEX.R.CIV.P. 190.4; *see also,* Shannon at R-12.

One commentator has noted that all, or nearly all, divorce cases in Texas are tried "under the Family Code" and are therefore Level 2 cases. Shannon at R-12. Consequently, according to Mr. Shannon, the majority of family law matters will have a discovery period extending until 30 days before trial. *Id.*

Mr. Shannon also notes that when the Comment to Rule 166a(i) was written, the new discovery time limits were not yet in effect. *Id.* Mr. Shannon remarks that if the Comment's language, expressly intended to "inform the construction and application of the rule," is actually applied, then it is unlikely that a no evidence motion for summary judgment will be a practical reality in cases tried under the Texas Family Code and Level 2 discovery limits. *Id.* The motion could not be filed until the 30 days before trial, and with the 21 day notice provision (24 days under Rule 21a), there would remain virtually no time in which to conduct a hearing on the motion before trial. *Id.* According to Mr. Shannon, counsel might more profitably spend such critical time before trial in preparation for trial, rather than in preparation for the summary judgment hearing. *Id.* It should be noted that at least one Texas appellate court has explicitly indicated that the Comment to Rule 166a(i) should be considered in construing the phrase "adequate time for discovery." *See, Specialty Retailers*, 29 S.W.3d at 145.

Mr. Shannon also acknowledges that a family law matter in which the trial court establishes a pretrial discovery order will provide the practitioner with a greater window of opportunity to utilize no evidence summary judgment. Shannon at R-13.

3. Nasty Trick?

In *Specialty Retailers*, 29 S.W.3d at 145, the non-movant argued that the movant had purposefully delayed the discovery process, artfully delaying with promises to supplement his interrogatories while preparing his no evidence motion. The Houston Fourteenth Court of Appeals stated that a party should not be able to abuse the discovery process, withhold key evidence from their opponents, and then use that lack of evidence to win a judgment. *Id.* The Houston appellate court went on to say that, had the non-movant been able to show that the movant actually abused the discovery process in such a manner, it would likely have been enough to establish that there had not been an adequate time for discovery. *Id.* However, in *Speciality Retailers,* the non-movant failed to make the required showing -- there was no evidence that the non-movant considered the movant's responses to be inadequate, and the "mere accusation" that the movant abused the discovery process was not sufficient to establish such abuse. *Id.*

4. Trial Rescheduling

In his article, Mr. Shannon poses a question concerning the effect of the rescheduling of a trial, suggesting that, since any pertinent discovery deadlines will likely be extended, the time to file a no evidence motion for summary judgment would also likely be extended. Shannon at R.13. Mr. Shannon proposes that, if a party made known its desire to file a no evidence motion, the trial court could impose appropriate discovery deadlines so that the motion could be heard at a meaningful time. *Id.* Note that, as already discussed, the twenty-one day notice requirement for a summary judgment hearing does not carry forward upon the rescheduling of a hearing. *See, Lenotre,* 979 S.W.2d at 723.

D. Burden of Proof

1. In General

As previously discussed, a no evidence motion for summary judgment places the burden on the non-movant to present enough evidence to be entitled to a trial. *Robinson*, 998 S.W.2d at 409. Under the no evidence summary judgment standard, the party with the burden of proof at trial will have the same burden of proof in a summary judgment proceeding. *Galveston Newspapers, Inc. v. Norris*, 981 S.W.2d 797, 799 (Tex. App.–Houston [1st Dist.] 1998, no pet.).

Rule 166a(i) states that "[t]he court must grant the motion [for summary judgment] unless the respondent produces summary judgment evidence raising a genuine issue of material fact." With respect to the non-movant's burden, the Comment to Rule 166a(i) provides:

> [t]o defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements.

A no evidence summary judgment is improperly granted when the respondent brings forth more than a scintilla of probative evidence that raises a genuine issue of material fact. *See, e.g., Gomez*, 4 S.W.3d at 283. 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, e.g., Merrell Dow Pharmaceuticals, Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997); *Greathouse*, 17 SW.3d at 423. However, less than a scintilla of evidence exists when the evidence is so weak as to do no more than create mere surmise or suspicion. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983); *see also, Green*, 11 S.W.3d at 268 (the most the non-movants did in their response was present the trial court with a weak surmise, or a suspicion of a fact, and that amounts to "no evidence"); *Weiss v. Mechanical Associated Services, Inc.*, 989 S.W.2d 120, 124 (Tex. App.–San Antonio 1999, pet. denied) (summary judgment is not appropriate if the only evidence offered to prove an essential element of the claim cannot be given weight by the court; in other words, the non-movant

may not rely on evidence that is barred from consideration by rules of law or evidence, or that amounts to no more than a scintilla.

To determine the meaning of the term "a genuine issue of material fact" in the context of Rule 166a(i), Texas appellate courts often look to the interpretation of Federal Rule of Civil Procedure 56(c). *See, e.g., Zapata v. The Children's Clinic*, 997 S.W.2d 745, 747 (Tex. App.–Corpus Christi 1999, pet. denied); *Taylor-Made Hose, Inc.*, 21 S.W.3d at 490-91 (Lopez, J., dissenting). Under Rule 56(c), a fact is "material" only when it affects the outcome of the suit; in making this determination, courts rely upon the substantive law, and only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *See, e.g., Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-49 (1986); *see also, Lampasas*, 988 S.W.2d at 433. "A material fact" is "genuine" if the evidence is such that a reasonable jury could find the fact in favor of the non-moving party. *See, Id*. at 248; *see also, Lampasas*, 988 S.W.2d at 433. Equally, if the evidence is not significantly probative, the fact issue is not genuine. *Id*.; *see also, Lampasas*, 988 S.W.2d at 433.

2. "Marshal" vs. "Point-Out" Evidence

The Texas Supreme Court's Comment to Rule 166a(i) requires a "pointing-out," rather than a "marshalling," of evidence. According to the Texarkana Court of Appeals:

> [t]o marshal one's evidence is to arrange all of the evidence in the order that it will be presented at trial....[a] party is not required to present or arrange all of its evidence in response to a summary judgment motion....[h]owever, Rule 166a(i) explicitly provides that in response to a no-evidence summary judgment motion, the respondent must present some summary judgment evidence raising a genuine issue of material fact on the element attacked, or the motion must be granted.

In re Mohawk, 982 S.W.2d at 498 (a non-movant does not meet this requirement by the mere existence in the court's file of a response to an earlier summary judgment motion) (citations omitted); *see also, Weiss*, 989 S.W.2d at 124 (the non-movant need not "marshal its proof"; rather it need only point out evidence that raises a fact issue on the challenged elements).

In *Johnson v. Brewer & Pritchard, P.C.*, ___ Tex. Sup. Ct. J. ___ (Tex. March 21, 2002), the Texas Supreme Court analyzed the non-movant's response to determine whether it produced evidence raising a genuine issue of material fact on the elements of conspiracy challenged by the movant. In the response, the non-movant did not identify any of the headings by a specific reference to the challenged claim of conspiracy or otherwise specifically identify facts related to the challenged elements. However, the Supreme Court concluded that the summary judgment response met the minimum requirements of Rule 166a(i) even though it characterized whether the non-movant adequately pointed out evidence related to challenged elements of the conspiracy claim as a close call. Apparently courts are to look to the entire response when determining whether the non-movant produced evidence raising a genuine issue of material fact on the challenged elements. Unfortunately *Johnson v. Brewer & Pritchard, P.C.* does not provide much if any direction when determining whether the non-movant has produced evidence raising a genuine issue of material fact on a challenged element.

As one commentator has indicated, neither Rule 166a(i) nor its Comment provide much help in interpreting the requirement of "marshaling" one's evidence. Patton at G-6. Accordingly, to stay on the safe side, it has been recommended that a response to a no evidence motion for summary judgment should include:

> 1. specific identification of all discovery to date relevant to the challenged element or elements, using, when needed, the mechanism provided in Rule 166(d) for relying on previously unfiled discovery;
>
> 2. at least a summary, if not a detailed analysis, of the manner in which the referenced discovery raises jury questions on the challenged elements;
>
> 3. legally and factually sufficient affidavits containing admissible testimony raising jury questions on the challenged elements; and
>
> 4. objections to defects in the no-evidence motion.

Patton at G-8. Mr. Patton acknowledges that the above recommendations arguably exceed the requirements of current Texas law, but stresses that the consequences of not erring on the side of decided overkill are simply too great to risk for the non-movant and its attorney. *Id*.

E. Objections

The general requirements of summary judgment practice continue to be governed by the existing rules, and are applicable to no evidence summary judgment proceedings. *Flameout Design & Fabrication, Inc.*, 994 S.W.2d at 834. Thus, non-movants must object to defects in no evidence motions exactly as they must object to defects in traditional motions for summary judgment. *See, e.g.*, *Roth*, 994 S.W.2d at 195 (by their special exceptions, the non-movants did not challenge the

motion as being deficient for failing to expressly state the specific grounds required by Rule 166a(c), or for failing to state the elements on which there was no evidence as required by Rule 166a(i), and therefore the non-movants waived such objections); *Fletcher*, 26 S.W.3d at 72 (the non-movants waived their challenge concerning whether the no evidence portion of the summary judgment motion adequately identified the element(s) of the non-movant's claims on which the movants contended there was no evidence because they did not object to the form of the movant's motion in their written response); *Walton v. City of Midland*, 24 S.W.3d 853, 857-58 (Tex. App. – El Paso 2000, no pet.) (Objection is necessary to preserve complaint that motion did not meet requirements of Rule 166a(i)); *Williams v. Bank One, Texas, N.A.*, 15 S.W.3d 110, 117 (Tex. App. Waco 1999, no pet.) (Objection necessary to preserve complaint concerning specificity); *Hess v. McLean Feedyard, Inc.*, 59 S.W.3d 679, 684 (Tex. App. Amarillo 2000 pet. denied); *but see Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3-4 (Tex. App. San Antonio 2000, pet. denied); *Cuyler v. Minns*, 60 S.W.3d 209, 213 (Tex. App. – Houston [14th Dist] 2001, pet. denied) (If a no-evidence motion for summary judgment is not specific in challenging a particular element, or is conclusory, the motion is insufficient as a matter of law and may be challenged for the first time on appeal)..

F. Motion for Continuance

As in traditional summary judgment practice, when a party contends that it has not had an adequate opportunity for discovery before a no evidence summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance. *See, e.g., Crow,* 17 S.W.3d at 328.

G. No Evidence Default

As previously discussed, when a non-movant fails to file a response to a traditional motion for summary judgment, the lack of a response does not supply by default the summary judgment proof necessary to establish the movant's right to summary judgment. *McConnell*, 858 S.W.2d at 343. However, in the case of a no evidence summary judgment, there can be a "judgment by default" because, if the non-movant (who bears the burden of producing evidence) does not respond, judgment can be rendered against the non-movant, summarily disposing of the challenged cause of action or defense. *Welch*, 36 S.W.3d at 537; *see also, Saenz*, 999 S.W.2d at 494.

H. Review by Mandamus

Although Rule 166a(i) plainly states that a no evidence motion for summary judgment "must" be granted absent a proper response, under the construction of Rule 166a(i) required by the Comments ("[t]he denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c)"), an appellate court does not have the authority by mandamus to review a denial of such motion, or to require the trial court to grant a no evidence motion for summary judgment. *In re Mission Consol. Independent School Dist.,* 990 S.W.2d 459, 460 (Tex. App.–Corpus Christi 1999, orig. proceeding). In *In re Mission Consol. Independent School Dist.,* the defendant filed a no evidence summary judgment motion in the pending sexual harassment suit against it, but the plaintiff failed to respond to the motion in the trial court; moreover, although seven months elapsed after the trial court heard motion, the trial court did not rule on the motion. *Id*. The plaintiff then filed a mandamus proceeding, complaining that the trial court's failure to rule on the motion amounted to an abuse of discretion. *Id*.

Considering the mandamus request, the Corpus Christi Court of Appeals stated that, because a trial judge may not arbitrarily halt trial proceedings, courts of appeals have the power by mandamus to compel the trial judge to proceed to trial and judgment in a case, but not the power to control the character of the judgment. *Id*. at 461. In addition, added the Corpus Christi appellate court, Texas courts of appeals have the power to compel the trial judge by mandamus to rule on pending motions. *Id*. Accordingly, held the Thirteenth Court of Appeals, the trial court's refusal to rule on a motion for summary judgment within a reasonable time after it was filed and heard amounted to an abuse of discretion, and entitled the defendant to a writ of mandamus compelling the trial judge to rule. *Id*.

In support of its holding, the Corpus Christi appellate court noted that the purpose of the no evidence summary judgment motion is to enable the movant to file the equivalent of a motion for directed verdict at the pretrial stage of the lawsuit and thus to dispose of unsubstantiated claims early in the process; but, unless the trial court rules on the motion, the purpose of the rule is thwarted. *Id*.

I. Appellate Review

The standard of review for a "no evidence" motion for summary judgment under Rule 166a(i) is less settled than the standard for review for traditional motions for summary judgment. *See Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App. – Houston [1st Dist.] 1998, no pet.); Patton at G-8. The following approach adopted by *Moore v. K Mart Corp*., 981 S.W.2d 266 (Tex. App. – San Antonio 1998, pet. denied), reflects the majority view:

> "A no-evidence summary judgment is essentially a pretrial directed verdict," and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. We review the evidence in the light most favorable to the respondent against whom the no-evidence summary judgment

> was rendered, disregarding all contrary evidence and inferences. A no-evidence summary judgment
>
> is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. 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 a fact. 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."

Id. at 269 (citations omitted). *See* Patton at G-8, G-9 and G-10. *See e.g.*, *Zapata v. The Children's Clinic*, 997 S.W.2d at 747; *General Mills Restaurants, Inc. v. Texas Wings, Inc*., 12 S.W.3d 827, 832-33 (Tex. App. – Dallas 2000, no pet.);*Blackburn v. Columbia Medical Center*, 58 S.W.3d at 270; *K-Six Television, Inc. v. Santiago*, ___ S.W.3d ___, 2002 WL 214693 (Tex. App. – San Antonio 2002, no pet. hist.); see also *Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614 (Tex. App. -- Eastland 2000, pet. denied); *Estate of Fawcett*, 55 S.W.3d at 217.

V. PARTIAL SUMMARY JUDGMENT

A. In General

TEX.R.CIV.P. 166a(e) ("Case not Fully Adjudicated on Motion") provides:

> [i]f summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

A summary judgment may be granted on separate issues within a single cause of action. TEX.R.CIV.P. 166a(a); see also, *Chase Manhattan Bank*, 787 S.W.2d at 53. Such a summary judgment is partial and interlocutory until all of the issues are either adjudicated or ordered severed by the trial court. *See, Pan American Petroleum Corp. v. Texas Pacific Coal & Oil Co.*, 324 S.W.2d 200 (Tex. 1959).

A partial summary judgment is a decision on the merits unless set aside by the trial court; it becomes final upon the disposition of the other issues of the case. *Newco Drilling Co. v. Weyand*, 960 S.W.2d 654, 656 (Tex.1998); *cf., Methodist Hosp. v. Corporate Communicators, Inc*., 806 S.W.2d 879, 883 (Tex. App.–Dallas 1991, writ denied) (in an apparent attempt to get a second bite at the apple, over three months after the granting of a partial summary judgment against it, the non-movant, amended its answer, raising a new affirmative defense, and filed a motion asking the court to reconsider its ruling on the partial summary judgment concerning liability; however, once the trial court granted the partial summary judgment, no obligation existed for it to consider further motions on that issue from either party).

If a party files a motion for summary judgment and omits one of his claims from the motion, the omitted claim is not waived because the movant can always move for partial summary judgment. *McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001). As a result, there can be no presumption that a motion for summary judgment addresses all of the movant's claims. *Id.*

B. Effect of Partial Summary Judgment

Issues determined on a motion for partial summary judgment are final and cannot be relitigated unless the trial court sets the judgment aside or the summary judgment is reversed on appeal. *Martin v. First Republic Bank, Fort Worth, N.S.*, 799 S.W.2d 482, 488-89 (Tex. App.–Fort Worth 1990, writ denied). Although the issues determined by the partial summary judgment are considered final and will not be further litigated at trial, the partial summary judgment is interlocutory, not appealable, and contemplates the necessity for a conventional trial to be held as to some remaining issues or parties. *Alvarado v. Hyundai Motor Co., Inc*., 885 S.W.2d 167, 172 (Tex. App.–San Antonio 1994), *rev'd on other grounds*, 892 S.W.2d 853 (Tex. 1995); *see also*, *Krenek v. Texstar North Am., Inc*., 787 S.W.2d 566, 570 (Tex. App.–Corpus Christi 1990, writ denied) (a purpose of summary judgment procedure is to make final any issues determined by summary judgment, and the issues so decided cannot be further litigated unless the summary judgment is set aside by the trial court or reversed on appeal; thus further discovery is not permitted on the issue disposed by partial summary judgment).

Additionally, the trial court retains authority to modify, withdraw, or otherwise alter a partial summary judgment so long as its plenary power exists. *Shelby Operating Co. v. City of Waskom*, 964 S.W.2d 75, 80 (Tex. App.–Texarkana 1997, pet. denied).

A partial summary judgment can be made final by severing out the issues and/or parties disposed of by the partial summary judgment; the resulting, severed action is considered final for purposes of appeal. *Pan Am. Petroleum Corp. v. Texas Pac. Coal & Oil Co.*, 324 S.W.2d 200, 201 (Tex. 1959)*; see also, Sanders v. Shelton*, 970 S.W.2d 721, 723-24 (Tex. App.–Austin 1998, pet. denied). Finally, as previously discussed, a partial summary judgment, once rendered, will survive a

non-suit. *Hyundai Motor Co.,* 892 S.W.2d at 854-55.

VI. USES OF SUMMARY JUDGMENT IN FAMILY LAW CASES

Summary judgment can be particularly useful if for no other reason than the simplification of issues it may achieve. The importance of simplification cannot be overstated. Settlement may be utterly impossible in the face of unanswered questions regarding any number of issues that routinely crop up.

A. Premarital and Postmarital Agreements

1. Enforceability In General

TEX.FAM.CODE §4.006 provides the statutory framework for the enforcement of premarital agreements. Section 4.006 provides:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is requested proves that:
>
> (1) the party did not sign the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was signed and, before signing the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.
>
> (b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.
>
> (c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

See, generally, Edwin J. (Ted) Terry, Jr., Kristin Proctor, James A. Vaught, Warren Cole, and James LaRue, *Litigating Marital Agreements:"You can't always get what you want....,"* 22nd ANNUAL MARRIAGE DISSOLUTION INSTITUTE (State Bar of Texas 1999).

The provisions of TEX.FAM.CODE §4.105, providing for the enforcement of a "partition and exchange agreement," are identical to section 4.006. *See*, *Marsh v. Marsh,* 949 S.W.2d 734, 745 n. 4 (Tex. App.–Houston [14th Dist.] 1997, no writ).

Furthermore, although section 4.105 deals specifically with "partition and exchange" agreements, it does not expressly cover agreements between spouses concerning income or property derived from separate property. The Committee on Pattern Jury Charges of the State Bar of Texas, however, has stated that the same standard for enforceability (as provided in section 4.105) should apply to both types of agreements. Comment, TEXAS PATTERN JURY CHARGES - FAMILY § 207.4 (2000); *see also, Daniel v. Daniel*, 779 S.W.2d 110, 113-14 (Tex. App.-Houston [1st Dist.] 1989, no writ) (it seems evident that the legislature intended income arrangements between spouses, which were covered by former Texas Family Code § 5.53 (entitled "Agreements Between Spouses Concerning Income from Property Derived") to be enforced in the same manner as "partition and exchange agreements" covered by former Texas Family Code § 5.52).

2. Burden of Proof

According to the statutes, the party opposing enforcement bears the burden of proof to rebut the presumption of validity and establish that the marital agreement is not enforceable. *See, e.g., Marsh v. Marsh*, 949 S.W.2d 734, 739 (Tex. App.-Houston [14th Dist.] 1997, no writ); *Grossman v. Grossman*, 799 S.W.2d 511, 513 (Tex. App.-Corpus Christi 1990, no writ). One commentator has expressed the belief that it is much easier to plead that a marital agreement is unenforceable, but quite another matter to prove it. Shannon at R-14.

3. Unconscionability

The Texas Family Code expressly provides that whether a premarital agreement was unconscionable at the time it was signed is a matter of law to be decided by the court. TEX.FAM.CODE §4.006(b). Neither the legislature nor Texas courts have defined "unconscionable" in the context of marital property agreements. *Marsh*, 949 S.W.2d at 739. Instead, Texas courts have addressed the issue of unconscionability on a case-by-case basis, looking to the entire atmosphere in which the agreement was made. *Pearce v. Pearce*, 824 S.W.2d 195, 199 (Tex. App.-El Paso 1991, writ denied).

The simplicity of the statutory language notwithstanding, the determination of "unconscionability" is actually quite complex, and usually involves a detailed inquiry into the

facts and circumstances surrounding a disputed marital agreement. Moreover, the statute is unclear as to the nature of the proceedings by which the trial court is to determine unconscionability. For example, in *Blonstein v. Blonstein*, 831 S.W.2d 468, 472 (Tex. App.–Houston [14th Dist.], *writ denied per curiam*, 848 S.W2d 82 (Tex. 1992), it was argued on appeal that the trial court should make the determination of unconscionability early in the proceedings. In response, the Fourteenth Court of Appeals stated:

> While this court finds that an early determination is the better practice, the statute does not require the trial court to make the determination prior to submitting the case to the jury. The section requires only that the trial judge make the finding as a matter of law.

4. Summary Judgment on Marital Agreements

As just mentioned, the Houston Fourteenth Court of Appeals, in *Blonstein,* stated that it was the better practice for the trial court to determine early in the proceedings whether an agreement is unconscionable. Summary judgment is the optimal method by which to test an agreement for enforceability, and particularly, for unconscionability, early in the game. *See, e.g., Beck v. Beck*, 814 S.W.2d 745, 746 (Tex. 1991) (summary judgment, holding that premarital agreement was enforceable, affirmed by the Texas Supreme Court)

In the words of one commentator:

> A "no-evidence" motion for summary judgment should prove a useful vehicle on the part of the party supporting the validity of the agreement to obtain a partial summary judgment on [the issue of unconscionability] alone. If it is found that there is no evidence supporting the contention of the challenging party [*i.e.,* the agreement is unconscionable], the agreement would be upheld as an interlocutory order. This procedure should simplify and shorten the trial by permitting the court and the parties to focus only on the community property remaining.

Shannon at R-14.

As also already discussed, because the statute governing enforcement of premarital agreements creates a rebuttable presumption that the agreement is enforceable, the party who seeks to set aside the premarital agreement bears the burden to prove that the agreement is unenforceable. TEX.FAM.CODE §4.006. The respective burdens in a summary judgment motion, filed by the party seeking enforcement of a premarital agreement, were set forth in *Grossman*, 799 S.W.2d at 513, as follows:

> In a summary judgment context, when the movant is seeking to enforce a premarital agreement to which he is a party, such a presumption operates without evidence other than that of the existence and terms of the agreement to establish that there is not a genuine issue of material fact regarding the enforceability of the agreement.

Recall that a summary judgment may be granted on separate issues within a single cause of action. *Chase Manhattan Bank*, 787 S.W.2d at 53. The trial court may grant summary judgment concerning any one or more issues of defense to the enforceability of the agreement. For example, the trial court can grant a partial summary judgment that a marital agreement was not unconscionable at the time that it was signed, without determining that the marital agreement is altogether enforceable or unenforceable.

A no evidence summary judgment is an extremely attractive method, for the proponent of a marital agreement, to dispose of the issues of validity and enforceability early in the case. Since the burden to defeat a marital agreement rests on the party resisting its enforceability, carefully drafted discovery will flush out any pertinent claims which could defeat the contract.

It is strongly suggested that requests for admissions, interrogatories, and depositions be initiated as soon as possible to posture the client for a motion for summary judgment. Even if all of the issues can not be resolved by way of a complete summary judgment, a partial summary judgment disposing of the issues of validity and enforceability of the contract will conserve both time and money.

5. The Difficulty with Summary Judgment

Although a summary judgment, or more likely, a partial summary judgment, is possible in any marital agreement case, problems do exist. Most importantly, even the concept of "unconscionability," its purported character as a question of law notwithstanding, is, under current case law, a rather fact-dependant issue. The cases reiterate that "unconscionability" must be determined on a case-by-case basis, considering the

totality of the circumstances. *See, e.g., Marsh,* 749 S.W.2d at 740.

Thus, disputed relevant facts may abound in any marital property case, including facts that pertain to any "unconscionability" alleged by a resisting party. A prudent practitioner should probably think hard about the necessary expense, and the inevitable disclosures that will occur, before pursuing summary judgment in all but the most glaring circumstances.

B. Bill of Review

1. In General

Summary judgment is a powerful tool in bill of review litigation and is particularly useful when defending a bill of review.

In Texas, a bill of review is an independent equitable action to set aside a judgment that is no longer appealable or subject to a motion for new trial. *Transworld Fin. Serv. Corp. v. Briscoe*, 722 S.W.2d 407, 407 (Tex. 1987). Generally, bill of review relief is available only if a party has exercised due diligence in pursuing all adequate legal remedies against a former judgment and, through no fault of its own, has been prevented from making a meritorious claim or defense by the fraud, accident, or wrongful act of the opposing party. *Wembley Investment Company v. Herrera*, 11 S.W.3d 924, 927 (Tex. 1999); *see also, Beck*, 771 S.W.2d at 141 (ordinarily, a party seeking to invoke a bill of review must plead and prove (1) a meritorious defense to the cause of action alleged to support the judgment, (2) an excuse justifying the failure to make that defense which is based on the fraud, accident or wrongful act of the opposing party, and (3) an excuse unmixed with the fault or negligence of the petitioner).

2. Summary Judgment

Summary judgment may be granted against the proponent of a bill of review if the movant can establish, as a matter of law, the absence of any of the three elements of the bill. *Montgomery v. Kennedy*, 669 S.W.2d 309, 311-12 (Tex. 1984); *Kennell v. Kennell*, 743 S.W.2d 299, 300 (Tex. App.–Houston [14th Dist.] 1987, no writ) (when a defendant in a bill of review action moves for summary judgment and disproves even one element of the petitioner's case, the defendant is entitled to summary judgment unless the plaintiff raises a material issue of fact as to that element).

Summary judgment cases abound in the context of bills of review in family law matters. *See, e.g., Ortmann v. Ortmann,* 999 S.W.2d 85, 88 (Tex. App.–Houston [14th Dist.] 1999, pet. denied) (after the entry of a consent divorce decree, the former husband filed a bill of review seeking to set aside a money judgment entered against him for fraud on the community estate and waste of community assets; the summary judgment entered in favor of the former wife was upheld on appeal because there was no evidence of (1) extrinsic fraud or (2) that, prior to filing the bill of review, the husband diligently exhausted all his available legal remedies); *Chandler v. Chandler*, 991 S.W.2d 367 392 (Tex. App.–El Paso 1999, pet. denied) (the trial court granted partial summary judgment, finding that the former husband had presented a prima facie meritorious defense and was entitled to a trial on the merits); *Williamson v. Williamson*, 986 S.W.2d 379, 380 (Tex. App.-El Paso 1999, no pet.) (the former wife filed a bill of review to set aside the property settlement, alleging that her husband had threatened that if she did not sign the divorce judgment approving the settlement, he would turn all of the community property over to her because he knew she could not handle the management responsibilities; the husband moved for summary judgment, which the trial court properly granted, based on two theories, *i.e.,* that the former wife failed to exhaust her available remedies without sufficient excuse and therefore, had no right to an equitable action seeking a bill of review, and that the wife made no prima facie showing of a meritorious defense); *Lawrence v. Lawrence*, 911 S.W.2d 443, 447 (Tex. App.–Texarkana 1995, writ denied) (the husband had a meritorious defense when the trial court improperly awarded the wife a life estate, rather than a homestead interest, in the parties' marital domicile, thereby divesting the husband of his fee interest in his separate property; but the husband could not prove extrinsic fraud, and he failed to pursue legal remedies when they were available, and therefore summary judgment was properly granted to the former wife).

Note that, typically, in a bill of review brought to overturn a property division–whether made by agreement or by decree–the petitioner must normally show, as his or her meritorious defense, that he or she received an unfair settlement and would obtain a more favorable property division on retrial if his or her allegations were believed. *Martin v. Martin*, 840 S.W.2d 586, 592 (Tex. App.–Tyler 1992, writ

denied); *DeCluitt v. DeCluitt*, 613 S.W.2d 777, 780 (Tex.Civ.App.–Waco 1981, writ dismissed).

3. No Evidence Motion and Bill of Review

A no evidence motion for summary judgment will immediately focus the attention of the trial court on whether the bill of review petitioner can demonstrate all of the grounds required for bill of review relief; thus, the no evidence motion could be dispositive of the entire case. Shannon at R-14. In other contexts, even a traditional summary judgment may well prevent a trial of the trial of a bill of review (which is what it is supposed to do).

For example, in *Kelly v. Klein*, 827 S.W.2d 609, 610 (Tex. App.–Houston [14th Dist.] 1992, no writ), after the divorce, the ex-wife filed a motion to modify an existing agreed order between the parties, seeking increased visitation rights due to the fact that the child was living in Arizona with the father. *Id.* After a hearing, the trial court granted the ex-wife's request for modification of visitation rights. *Id.*

The ex-wife, however, also filed a bill of review, seeking to have the original agreed judgment declared void. *Id.* The bill of review went to trial. *Id.* The former husband raised the defense of judicial estoppel, since the wife had already admitted, in her previous (and successful) motion to modify, the validity of the agreed judgment, and the trial court directed a verdict on that ground for the husband. *Id.* The wife appealed, but the Fourteenth Court of Appeals held that the wife had acknowledged the validity of the agreed order and recognized that it was in full force and effect; for that reason, she was judicially estopped from asserting its invalidity in her bill of review. *Id.*

The question must be asked: why did the bill of review in *Kelly* go to trial at all, and a jury trial at that? It appears that, only after the bill of review went to trial before a jury, did the former husband raise the defense of judicial estoppel. *Id*. The defense of judicial estoppel was proved as a matter of law, since the trial court directed a verdict on that ground for the husband, which survived an appeal by the ex-wife. *Id.* If the defense existed as a matter law, then it seems reasonable to have raised it, before trial, in a motion for summary judgment.

4. Summary Judgment in Equitable Actions

The Austin Court of Appeals has stated that summary judgment in a case governed by equitable principles presents even more potential difficulties than in the usual summary judgment case. *Fleetwood v. Med Center Bank*, 786 S.W.2d 550, 556 (Tex. App.–Austin 1990, writ denied); *Channel Equip. Co., Inc. v. Community State Bank*, 996 S.W.2d 374, 377 (Tex. App. – Austin 1999, no pet.). As stated, summary judgment may be granted only when the summary judgment evidence affirmatively shows that there is no genuine issue as to any material fact. *See, e.g., Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999) (on appeal of a favorable summary judgment, the movant still bears the burden of showing that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law). In a case governed by legal principles, the elements of the plaintiff's cause of action provide relatively well-defined guidelines for determining what is a "material fact." *Fleetwood,* 786 S.W.2d at 556. Consequently, the court need only review the summary judgment evidence and, on the basis of established rules of relevancy, decide if that evidence establishes the fact–or its absence–as a matter of law. *Id.*

However, in a case governed by equitable principles, there are no such clear guidelines for determining what is a material fact. *Id.* The main guiding principle is the prevention of an unfair or unjust result. *See, e.g., Johnson v. Cherry*, 726 S.W.2d 4, 8 (Tex. 1987) ("[t]he equitable power of the court exists to do fairness and is flexible and adaptable to particular exigencies, 'so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other,'" *quoting, Warren v. Osborne*, 154 S.W.2d 944, 946 (Tex.Civ.App.–Texarkana 1941, writ ref'd)). Thus, in an equitable action, the trial court must often take into consideration a myriad of circumstances and factors that would be immaterial in a legal action, resulting in an extraordinary burden on litigants in attempting to show–and courts in purporting to conclude–that there is no genuine issue as to any material fact. *Fleetwood,* 786 S.W.2d at 556.

Moreover, trial courts have a measure of discretion "in all cases governed by equitable principles." *Craddock v. Sunshine Bus Lines, Inc*., 133 S.W.2d 124, 126 (Tex. 1939). According to the Third Court of Appeals, the concept of discretion is not altogether consistent with the concept of summary judgment, the purpose of which is to eliminate patently unmeritorious claims and untenable defenses. *Fleetwood,* 786 S.W.2d at 557. In the words of a noted Texas jurist:

> If there is a range of equitable discretion within the authority of

> the trial judge apart from his authority to find facts, reviewable only for abuse of discretion, the matters which may be so determined are more nearly analogous to fact inferences to be drawn from the entire record than to conclusions of law resulting from application of established rules to undisputed facts. Consequently, such discretion should not be exercised without development of the evidence at a full trial.... ***Summary judgment is proper only when the summary-judgment proof shows that no question of equitable discretion exists.***

Reynolds-Penland Co. v. Hexter & Lobello, 567 S.W.2d 237, 245 (Tex. Civ. App.–Dallas 1978, writ dism'd by agr.) (Guittard, C.J., dissenting) (emphasis added). Justice Guittard's language seems to imply a rather different summary judgment standard in equitable actions than prevails in straight "legal" actions: rather than no genuine issue of material fact, there should exist "no question of equitable discretion."

The point is that any party resisting a motion for summary judgment in an equitable bill of review action should remind the trial court that, pursuant to established caselaw in Texas, it should be even more cautious than usual before granting summary judgment. *See, Fleetwood,* 786 S.W.2d at 557.

C. Characterization

Property cases frequently turn on characterization issues. Of course, in Texas, property possessed by either spouse during or on dissolution of marriage is presumed to be community property, and the party challenging the presumption must trace and demonstrate by clear and convincing evidence that the property is separate. *See, e.g., Slaton v. Slaton*, 987 S.W.2d 180, 182 (Tex. App.–Houston [14th Dist.] 1999, pet. denied).

Partial summary judgment is an effective method to establish the characterization of property as either separate or community. In *Dawson-Austin v. Austin*, 920 S.W.2d 776, 788 (Tex. App.–Dallas 1996), *rev'd on other grounds*, 968 S.W.2d 319 (Tex. 1998), for example, the husband filed a partial motion for summary judgment asserting that the entire value of a corporation was his separate property as a matter of law because the shares were issued before marriage and he never divested himself of any of the shares or acquired additional shares during the marriage. The trial court granted the partial motion for summary judgment. *Id*.

On appeal, the Dallas appellate court noted that the husband had presented uncontroverted evidence that he owned the shares of the corporation before the marriage and that he owned them without interruption throughout the marriage. *Id*. Accordingly, applying Texas characterization principles, the Dallas Court of Appeals held that the stock, with any value accrued during the marriage, was the husband's separate property, and that the trial court did not err in granting the husband's motion for summary judgment on the issue of characterization. *Id*.; *see also, Grossman*, 799 S.W.2d 513-514 (the wife's failure to present issue of character of marital property to trial court, in response to motion for summary judgment based on premarital agreement, waived consideration of that issue on appeal).

Since the burden of proof is on the party claiming property as separate, a no evidence summary judgment motion will be available to the party resisting such a claim.

D. Retirement Benefits

Many of the reported Texas family law cases involving summary judgment arise in the context of undivided retirement benefits. Jenkins and Godwin at K-10. In *Koepke v. Koepke*, 732 S.W.2d 299 (Tex. 1987), the Texas Supreme Court addressed such a situation. In *Koepke,* the former wife of a military serviceman brought a partition suit to obtain division of military retirement benefits. *Id*. at 299. The trial court rendered summary judgment partitioning the retirement benefits; the court of appeals reversed the summary judgment and rendered judgment for the former serviceman/husband, holding that the prior divorce decree had disposed of the retirement benefits and was accordingly res judicata of the issue. *Id*.

The Texas Supreme Court found that the divorce decree did not expressly award the military retirement benefits to the former

serviceman/husband. *Id*. at 300. Thus, the Texas Supreme Court reversed the holding of the lower appellate court and reinstated the summary judgment rendered by the trial court in favor of the wife. *Id*.; *cf., Carlson v. Carlson*, 983 S.W.2d 304, 305-06 (Tex. App.–Houston [1st Dist.] 1998, no pet.) (summary judgment properly rendered in favor of the ex-husband in his former wife's suit for an equitable interest in his military retirement benefits, when the divorce decree expressly awarded such benefits to him; the wife's partition suit was barred by res judicata); *Swoboda v. Swoboda*, 17 S.W.3d 276, 278-280 (Tex. App.-Corpus Christi 2000, no pet.) (the divorce decree provided that the wife would receive, as her sole and separate property, $695,000.00 out of the husband's "Thrift Plan," but made no provisions for the federal income tax liability associated with such a distribution; summary judgment was rendered against the wife's claim that the decree had actually awarded her a non-taxable sum of cash payable from her former husband that obligated him to incur all the penalties and tax liability associated with withdrawing the funds from his thrift plan).

E. Agreements Incident to Divorce

In *Cavazos v. Cavazos*, 941 S.W.2d 211, 213 (Tex. App.–Corpus Christi 1996, writ denied), the husband and wife entered into an agreement incident to divorce which was approved by the court and incorporated into their divorce decree; the agreement referred to and incorporated four schedules which set forth the property assigned to each spouse and the liabilities assumed by each spouse. A fifth schedule was also filed with the court, but was not referenced in or incorporated into either the decree or the agreement; the fifth schedule provided for the funding of a trust for the children of the parties. *Id*.

When, later, the former husband did not fund the trust, the parties' children, through the former wife as next friend, filed to clarify and enforce the decree. *Id*. The former husband filed a counterclaim and a motion for summary judgment asking the trial court to declare that, among other things, the fifth schedule was not a part of the agreement. *Id*. The trial court granted the former husband's motion for summary judgment and ordered the proceeding dismissed with prejudice. *Id*.

On appeal, the Corpus Christi appellate court reiterated the long-standing Texas rule that a marital property agreement, although incorporated into a final divorce decree, is treated as a contract and its legal force and meaning are governed by the law of contracts. *Id*. at 214, *citing, Allen v. Allen*, 717 S.W.2d 311, 313 (Tex. 1986). Under the rules of contract construction, in order for a document to be considered part of a signed contract, it must be signed or referred to in the signed contract; in *Cavazos*, the fifth schedule was neither signed nor referenced in either the decree of agreement. *Cavazos,* 941 S.W.2d at 214. Additionally, under the rules of incorporation by reference, the fifth schedule was not part of the agreement since the absence of a specific reference to the other document established that the parties did not intend to contract with reference to that document. *Id*. Thus, held the Corpus Christi Court of Appeals, the trial court properly granted summary judgment for the former husband. *Id*.

In *Svacina v. Gardner*, 905 S.W.2d 780, 781-83 (Tex. App.–Texarkana 1995, no writ), the holders of an owelty lien created in an agreement incident to divorce were granted summary judgment against the former wife in their action to foreclose the lien. Summary judgment was also granted to the wife in *Garrett v. Garrett*, 858 S.W.2d 639, 640-41 (Tex. App.–Tyler 1993, no writ), on her request to enforce an Ohio judgment that provided for the payment of alimony; the Ohio decree memorialized an agreement between the parties concerning alimony, and since the foreign divorce judgment was properly authenticated by the clerk of the court issuing the judgment, it was entitled to full faith and credit in Texas in the wife's action to recover unpaid alimony installments.

F. Settlement Agreements

Commentators have stated that, given TEX.FAM.CODE §6.602 and TEX.FAM.CODE §153.0071, the cumbersome summary judgment procedure is no longer necessary to effect judgment when the parties have reached a mediated settlement agreement, and such agreement complies with the requirements of the statutes. Jenkins and Godwin at K-11. However, such commentators believe that some confusion may yet exist on the issue. *Id*.

Texas Family Code §6.602 provides:

> (a) On the written agreement of the parties or on the court's own motion, the court may refer a suit for dissolution of a marriage to mediation.

> (b) A mediated settlement agreement is binding on the parties if the agreement:
>
> (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
>
> (2) is signed by each party to the agreement; and
>
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.
>
> (c) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

In pertinent part, Texas Family Code §153.0071 provides:

> (d) A mediated settlement agreement is binding on the parties if the agreement:
>
> (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
>
> (2) is signed by each party to the agreement; and
>
> (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed...;
>
> (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.

In *Alvarez v. Reiser*, 958 S.W.2d 232, 233 (Tex. App.–Eastland 1997, writ denied), the parties reached a mediated settlement agreement that complied with the requirements of Texas Family Code §153.0071. *Id*. The trial court entered judgment on the mediated settlement agreement even though the wife had withdrawn her consent to the agreement. *Id*. The wife appealed and the appellate court affirmed, concluding that: (1) a party's unilateral withdrawal of consent did not negate the enforceability of a mediated settlement agreement that complies with §153.0071(d), and (2) "a separate suit for enforcement of a contract was not necessary." *Id*. at 234; *see also*, *In re Kasschau,* 11 S.W.3d 305, 311 (Tex. App.–Houston [14th Dist.] 1999, no pet.) (citing *Alvarez* with approval); *but cf., Spinks v. Spinks*, 939 S.W.2d 229, 230 (Tex. App.–Houston [1st Dist.] 1997, no writ) (a party can revoke a mediated settlement agreement that does not comply with §153.071(d)). Thus, under *Alvarez*, the proper procedure for entering judgment based on a mediated settlement agreement is to file a motion to enter, not a motion for summary judgment. Jenkins and Godwin at K-12.

However, in contexts other than mediated settlement agreements under the Texas Family Code (and perhaps even there, under certain circumstances), summary judgment can still prove effective for establishing the existence, or non-existence, of a settlement agreement. *See, e.g., Harris v. Balderas*, 27 S.W.3d 71 (Tex. App.–San Antonio 2000, pet. denied) (summary judgment evidence raised a fact issue regarding the existence of a settlement agreement).

Summary judgments may also be useful in suits against mediators. In *Lehrer*, 14 S.W.3d at 776, disgruntled after reaching a mediated settlement agreement, the husband sued everybody involved, including the mediator. Among other things, the husband argued that he was injured by the mediator because the mediator represented himself to be a "third-party neutral" mediator, but at the mediation acted contrary to the husband's best interests; specifically, the husband alleged that the mediator and the opposing counsel had had a prior professional relationship because they had worked together in the past, as well as that the mediator did not inform the husband that the husband's own attorney had not conducted discovery in the case. *Id*. at 777. The mediator moved for a no evidence summary judgment, and the trial judge rendered summary judgment for the mediator. *Id*. On appeal, the Houston First Court of Appeals held that the summary judgment was properly granted, because the husband did not produce any summary judgment

evidence establishing a legal injury as a result of the actions of mediator. *Id.*

G. Undivided Property

In *Phillips v. Phillips*, 951 S.W.2d 955, 955 (Tex. App.–Waco 1997, no pet.), the former wife brought suit against her former husband seeking partition of the proceeds from the sale of wheat and grain-sorghum crops, asserting that since the court did not divide such crops in the parties' prior divorce judgment, she and her former husband owned the proceeds from such crops as tenants-in-common. The former husband moved for summary judgment, which the trial court granted. *Id.* On appeal, the Waco Court of Appeals held that fact issues existed, thus precluding summary judgment, as to whether or not the former husband repudiated the wife's claims, as well as to whether such a repudiation, if made, was unequivocal in view of later negotiations and settlement offers between the parties. *Id.* at 957.

See also, Walton v. Johnson, 879 S.W.2d 942, 946-47 (Tex. App.–Tyler 1994, writ denied) (the wife's summary judgment evidence failed to trace the proceeds from her father's estate into the bank accounts undivided by the trial court and the subject of the wife's later summary judgment motion, and therefore failed to establish the separate character of such accounts; the summary judgment rendered in favor of the wife was reversed); *Carter v. Charles*, 853 S.W.2d 667, 679-73 (Tex. App.–Houston [14th Dist.] 1993, no writ) (the former wife sued the former husband to partition property they had come to own as tenants-in-common via a divorce property division, whereupon the husband moved for summary judgment on the grounds of limitations, laches, res judicata, and collateral estoppel, which the trial court granted; on appeal, the appellate court held that the husband failed to prove, as a matter of law, any affirmative defense that precluded the wife's suit, that the wife was barred from bringing either an enforcement action on the divorce decree or a separate partition action, or that she was not entitled to a trial on the merits, and thus the trial court erred in granting the husband's motion).

H. Reimbursement Claims

Reimbursement is not available as a matter of law but lies in the discretion of the court. *Vallone v. Vallone*, 644 S.W.2d 455, 459 (Tex. 1982). Thus, reimbursement claims are not normally the stuff of summary judgment. However, it is settled Texas law that the party claiming a right of reimbursement has the burden of proof. *Jensen v. Jensen*, 665 S.W.2d 107, 110 (Tex. 1984). Consequently, a claim for reimbursement may be subject to a no evidence motion for summary judgment. For example, a party might claim that, under *Anderson v. Gilliland*, 684 S.W.2d 673, 675 (Tex.1 985) (a claim for reimbursement for funds expended by an estate for improvements to another estate is to be measured by the enhancement in value of the benefitted estate), there is no evidence of an enhancement in value. The burden would then shift to the other party to produce summary judgment evidence showing an enhancement in value. The same procedure would seemingly apply to a claim for economic contribution.

I. Appointment of Conservators and Domestic Violence

In Texas, when a Court is considering whether to appoint a party as a Sole or Joint Managing Conservator, the Court shall consider evidence of the intentional use of abusive physical force by a party against the party's spouse, a parent of the child, or any person younger than 18 years of age committed within a two-year period preceding the filing of the suitor during the pendency of the suit. TEX. FAM. CODE ANN. §153.004(a). As expressly provided in the Statute, "the Court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child...." TEX. FAM CODE §153.004(b). *In The Interest of M.R., A Minor Child,* 975 S.W.2d 51 (Tex. App. – San Antonio 1998, pet. denied).

Accordingly if one party establishes by credible evidence that the "abusive party" has physically sexually abused the party or a child of the parties within the preceding two (2) years, as a matter of law, the Court cannot appoint the "abusive party" as a Joint Managing Conservator or the Sole Managing Conservator of the child or children.

VII. DECLARATORY JUDGMENTS

A. Overview

The Uniform Declaratory Judgements Act (the "Act") is located in chapter 37 of the Texas Civil Practice and Remedies Code. The Act provides:

> § 37.001 Definitions
>
> In this chapter, "person" means an individual, partnership, joint-stock company, unincorporated association or society, or municipal or other corporation of any character.
>
> §37.002 Short Title, Construction, Interpretation

(a) This chapter may be cited as the Uniform Declaratory Judgments Act.

(b) This chapter is remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and it is to be liberally construed and administered.

(c) This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states that enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

§37.003 Power of Courts to Render Judgment; Form and Effect

(a) A court of record within its jurisdiction has power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. An action or proceeding is not open to objection on the ground that a declaratory judgment or decree is prayed for.

(b) The declaration may be either affirmative or negative in form and effect, and the declaration has the force and effect of a final judgment or decree.

(c) The enumerations in Sections 37.004 and 37.005 do not limit or restrict the exercise of the general powers conferred in this section in any proceeding in which declaratory relief is sought and a judgment or decree will terminate the controversy or remove an uncertainty.

§37.004 Subject Matter of Relief

(a) A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

(b) A contract may be construed either before or after there has been a breach.

§37.005 Declarations Relating to Trust or Estate

A person interested as or through an executor or administrator, including an independent executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust in the administration of a trust or of the estate of a decedent, an infant, mentally incapacitated person, or insolvent may have a declaration of rights or legal relations in respect to the trust or estate:

(1) to ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others;

(2) to direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity;

(3) to determine any question arising in the administration of the trust or estate, including questions of construction of wills and other writings; or

(4) to determine rights or legal relations of an independent executor or independent administrator regarding fiduciary fees and the settling of accounts.

§37.006 Parties

(a) When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties. A declaration does not prejudice the rights of a person not a party to the proceeding.

(b) In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state must also be served with a copy of the proceeding and is entitled to be heard.

§37.007 Jury Trial

> If a proceeding under this chapter involves the determination of an issue of fact, the issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.
>
> §37.008 Court Refusal to Render
>
> The court may refuse to render or enter a declaratory judgment or decree if the judgment or decree would not terminate the uncertainty or controversy giving rise to the proceeding.
>
> §37.009 Costs
>
> In any proceeding under this chapter, the court may award costs and reasonable and necessary attorney's fees as are equitable and just.
>
> §37.010 Review
>
> All orders, judgments, and decrees under this chapter may be reviewed as other orders, judgments, and decrees.
>
> §37.011 Supplemental Relief
>
> Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application must be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

B. Purpose and Function

The Declaratory Judgments Act is a procedural device for deciding cases that are within the court's jurisdiction. *State v. Morales*, 869 S.W.2d 941, 947 (Tex.1994); *Chambers County v. TSP Development, Ltd.*, 63 S.W.3d 835, 840 (Tex. App. – Houston [14th Dist.] 2001, pet. filed). The purpose of the Declaratory Judgments Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex.1995); *Rush v. Barrios*, 56 S.W.3d 88, 105 (Tex. App. – Houston [14th Dist.] 2001, pet. denied) (The purpose of a declaratory judgment is to establish existing rights, status, or other legal relations). The Declaratory Judgments Act is remedial only. *Bonham State Bank v. Beadle*, 907 S.W.2d at 467.

The Declaratory Judgments Act does not confer jurisdiction on the trial court, but, rather makes available the remedy of a declaratory judgment for a cause of action already within the court's jurisdiction. *State v. Morales*, 869 S.W.2d at 947; *Rush v. Barrios*, 56 S.W.3d at 105. A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought. *Bonham State Bank v. Beadle*, 907 S.W.2d at 467; *City of Longview v. Head*, 33 S.W.3d 47, 51 (Tex. App. – Tyler 2000, no pet.); *Rush v. Barrios*, 56 S.W.3d at 105. A justiciable controversy must be distinguished from an advisory opinion. *Longview v. Head*, 33 S.W.3d at 51.

Texas courts do not have the authority to render judgments that merely constitute advisory opinions. *Patterson v. Planned Parenthood of Houston & S.E. Tex., Inc.*, 971 S.W.2d 439, 443 (Tex.1998);*Waite v. Waite*, 64 S.W.3d 217, 223 (Tex. App. – Houston [14th Dist.] 2001, pet. denied); *Texas Dept. of Public Safety v. Moore*, 985 S.W.2d 149, 153 (Tex. App. – Austin 1998, no pet.). An opinion is advisory when the judgment sought would not constitute specific relief to a litigant or affect legal relations. *Continental Cas. Co. v. Texas Bd. of Chiropractic Examiners*, 2001 WL 359632 at *2 (Tex. App. – Austin April 12, 2001, no pet.); *Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d 764, 767 (Tex.App.-Austin 1999, no pet.). The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Continental Cas. Co. v. Texas Bd. of Chiropractic Examiners*, 2001 WL 359632 at *2; *Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d at 767.

C. Attorney's Fees

The award of attorney fees in a declaratory judgment action is within the trial court's discretion; an award of attorney's fees will not be reversed on appeal unless the complaining party clearly shows the trial court abused its discretion. *State Farm Lloyds v. C.M.W.*, 53 S.W.3d 877, 894 (Tex. App. – Dallas 2001, pet. denied). Although an award of attorney's fees is discretionary, the Declaratory Judgments Act imposes four limitations on the court's discretion. *Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex.1998); *Welder v. Green*, 985 S.W.2d 170, 180 (Tex.App.--Corpus Christi 1998, pet. denied). The fees must be reasonable, necessary, equitable, and just. *Bocquet*, 972 S.W.2d at 21. The reviewing court must make a factual determination concerning the reasonableness and necessity of the fees awarded and a legal determination concerning whether the fee is equitable and just. *Stable Energy, L.P. v. Newberry*, 999 S.W.2d 538, 556-57 (Tex.App.--Austin 1999, pet. denied); *Welder*, 985 S.W.2d at 180. "It is an abuse of discretion for a trial court to rule arbitrarily, unreasonably, or without regard to guiding legal principles, or to rule without supporting evidence." *Bocquet*, 972 S.W.2d

at 21. Although it may be appropriate to award attorneys' fees to the prevailing party in a declaratory judgment action, the Declaratory Judgments Act does not require an award of attorney's fees to the prevailing party, but merely provides that a court "may" award them. *Bouquet*, 972 S.W.2d at 20; *Hatton v. Grigar*, ___ S.W.3d ___, 2002 WL 58727 (Tex. App. – Houston [14th Dist.] January 17, 2002, no pet.); *State Farm Lloyds*, 53 S.W.3d at 894. In addition, a trial court may, in its discretion, award attorneys' fees to the nonprevailing party in a declaratory judgment action. *Barshop v. Medina County Underground Water Conservation Dist.*, 925 S.W.2d 618, 637-38 (Tex.1996); *State Farm Lloyds*, 53 S.W.3d at 894.

D. Uses of Declaratory Judgments in Family Law Cases

Courts generally do not favor petitions for declaratory relief that seek to "interpret" or change a prior judgment. *See Cohen v. Cohen*, 632 S.W.2d 172, 173 (Tex. App. – Waco 1982, no writ). In *Bonham State Bank*, the Supreme Court noted that "[a] suit to 'interpret' a judgment is usually a guise to obtain review or modification of a judgment outside of the appellate process or an attempt to collaterally attack a judgment."907 S.W.2d at 468. This is frequently the situation in family law cases. For example, in *Secrest v. Secrest*, 649 S.W.2d 610 (Tex. 1983), the former husband filed a declaratory judgment action seeking a determination of the validity and enforceability of a portion of a 1974 divorce decree. The decree incorporated a property settlement agreement which treated military retirement benefits as part of the community estate. After the United States Supreme Court decision in *McCarthy v. McCarthy*, 101 S.Ct. 2728 (1981), Mr. Secrest filed his declaratory judgment action in connection with the award of his military retirement benefits in the divorce. However, the Texas Supreme Court held that the divorce decree was a final, unappeased and valid judgment and that the suit for declaratory judgment was an impermissible collateral attack on the divorce decree. *Id.* at 613. *See Lee v Johnson*, 858 S.W.2d 58, 61 (Tex. App. – Houston [14th Dist.] 1993, no writ) (declaratory judgment may not be used to change terms of a property settlement agreement and divorce decree); *Cohen v. Cohen*, 632 S.W.2d at 173-74 (declaratory judgment suit was an impermissible collateral attack on a divorce decree which was unappealed and regular on its face); *Sutherland v. Sutherland*, 560 S.W.2d 531, 533 (Tex. Civ. App. – Texarkana 1978, writ ref'd n.r.e.) (declaratory judgment is not a remedy to set aside a final judgment). However, *Buck v. Rogers*, 709 S.W.2d 283, 285(Tex. App. – Corpus Christi 1986, no writ), involved a settlement agreement that provided for equal division of any undisclosed property. After the agreement was incorporated into a final divorce decree, the wife learned of her former husband's contingent fee interests in two lawsuits that were not disclosed in the settlement agreement. The Court of Appeals found that the trial court had jurisdiction to enter a declaratory judgment determining whether the settlement agreement applied to the contingent fees. *See Fyke v. Fyke*, 463 S.W.2d 242, 245 (Tex. Civ. App. – Fort Worth 1971, no writ).

The most practical use of a declaratory judgment in family law cases is in connection with common law marriages. For example, to determine the existence and validity of a common law marriage or the nonexistence of a common law marriage. *See Marriage of Hallgarth*, 2001 WL 574833 (Tex. App. – Amarillo May 29, 2001, no pet.); *Lavely v. Heafner*, 976 S.W.2d 896 (Tex. App. – Houston [14th Dist.] 1998, no pet.). *See* Original Petition for Declaratory Judgment attached as Appendix "A" in which the Plaintiff/Husband sought a declaratory judgment establishing, as a matter of law, that he and Defendant/Wife are not husband and wife for the reason that any assertion or claim that the parties were informally married in Texas is barred by the applicable statute of limitations.

APPENDIX "A"

NO. _____

CHARLES WILSON REYNOLDS	§	IN THE DISTRICT COURT
VS.	§	_____ JUDICIAL DISTRICT
GRETCHEN ANN HAZARD	§	TRAVIS COUNTY, TEXAS

ORIGINAL PETITION FOR DECLARATORY JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code (Uniform Declaratory Judgment Act) Charles W. Reynolds, who, for purposes of this suit, is hereinafter designated as Plaintiff, files this *Original Petition for Declaratory Judgment* against Gretchen A. Hazard, who is designated as the Defendant in this suit. As the basis for his request for a declaratory judgment, Charles W. Reynolds would show this Court the following:

1. ***Discovery Level***

Discovery in this case is intended to be conducted under level 2 of rule 190 of the Texas Rules of Civil Procedure.

2. ***Parties***.

Charles Wilson Reynolds, the Plaintiff in this case, is a individual resident citizen of Harrisburg, Virginia.

Defendant, Gretchen Ann Reynolds is an individual resident citizen of Timberville, Virginia. Citation may be duly served upon Gretchen Ann Reynolds at her residence address, 124 North Main Street, Timberville, Virginia.

3. ***Jurisdiction and Venue***.

In accordance with the laws of the State of Texas, this court has jurisdiction over the parties and subject matter of this suit, and this action may be properly maintained in this county. The

specific jurisdictional facts giving rise to this Court's authority to adjudicate these claims are set forth below and are incorporated herein by reference as if fully set forth at length.

4. ***Basis for Suit***

The parties to this suit have previously resided in this state. In 1979, Plaintiff and Defendant moved from Texas and ultimately established their residence and domicile in Virginia. Texas law recognizes the existence of informal or "common law" marriages. Virginia does not. The state of Virginia will, however, afford full faith and credit to a valid marriage established in another state.

Gretchen A. Hazard has asserted that she and Charles W. Reynolds were informally married prior to their departure from the state of Texas in 1979 and has indicated that she intends to file a divorce action in Virginia to dissolve the common law marriage between the parties. Pursuant to Chapter 37 of the Texas Civil Practice & Remedies Code, Charles W. Reynolds requests that the Court determine the validity of Defendant's assertion of the existence of an informal marriage between the parties and that the Court render a declaratory judgment establishing, as a matter of law, that Charles W. Reynolds and Gretchen A. Hazard are not husband and wife.

Specifically, Charles W. Reynolds would allege the any assertion or claim that the parties were informally married in Texas prior to their departure from the state in 1979, is barred by the applicable statute of limitations. Furthermore, by way of alternative argument, Charles W. Reynolds would respectfully allege that any assertion or claim that the parties were informally married in Texas prior to their departure from the state in 1979 is invalid for the reason that the statutory requisites necessary to establish an informal marriage were not established prior to the parties' departure from the state in 1979.

5. ***Costs and Attorney's Fees***.

Plaintiff has been required to obtain the services of the undersigned attorneys to prosecute this suit. Pursuant to Section 37.009 of the Texas Civil Practice & Remedies Code, Plaintiff is entitled to collect costs and reasonable and necessary attorneys incurred in connection with the

prosecution of this case. Accordingly, Plaintiff pleads for costs and all attorney's fees that are reasonable and necessary for the trial of this case and any appeal thereof.

WHEREFORE, ABOVE PREMISES CONSIDERED, Plaintiffs pray that citation be issued and that upon trial of this cause, this Court render a declaratory judgment establishing, as a matter of law, that Charles W. Reynolds and Gretchen A. Hazard are not married. In addition to the above, Plaintiff prays for costs of court, attorney's fees and for such other and further relief to which he may be justly entitled.

Respectfully submitted,

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