SUMMARY JUDGMENT UPDATE: NO-EVIDENCE SUMMARY JUDGMENTS AND OTHER RECENT DEVELOPMENTS

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This paper will examine several appellate decisions construing and applying the no-evidence summary judgment rule, Rule 166a(i), which went into effect September 1, 1997. Since then, the appellate courts have addressed several questions that have arisen under that Rule, and this paper will present some of the more important and more interesting decisions. Additionally, several interesting cases pertinent to summary judgment practice in general are addressed in the last section.

I. The Text of Rule 166a(i) and Its Comment

> 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.

TEX R. CIV. P. 166a(i). The Comment to this provision states that it is "intended to inform the construction and application of the Rule." *Id.* cmt. to 1997 change. The substantive portion of that Comment states as follows:

> Paragraph (i) authorizes a motion to summary judgment based upon 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).

Id.

II. The Basics: The Standard of Review and Adopting the Federal Standards for "Genuine Issue" and "Material Fact"

The first "no-evidence summary judgment" case to result in a published opinion was *Moore v. K Mart Corp.*, 981 S.W.2d 266 (Tex. App.—San Antonio 1998, pet. denied). The court seized the opportunity to lay out the meaning of the "no evidence" standard in some detail:

> "A no-evidence summary judgment is essentially a pre-trial 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. Judge David Hittner and Lynne Liberato, *No-Evidence Summary Judgments Under the New Rule*, *in* STATE BAR OF TEXAS PROF. DEV. PROGRAM, 20 ADVANCED CIVIL TRIAL COURSE D, D-5 (1997). 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 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; *accord General Mills Restaurants, Inc. v. Texas Wings, Inc.*, 12 S.W.3d 827, 832-33 (Tex. App.—Dallas 2000, no pet.); *Brown v. Blum*, 9 S.W.3d 840, 844 (Tex. App.—Houston [14th Dist.] 1999, pet. filed); *Malone v. E.I. Du Pont de Nemours & Co.*, 8 S.W.3d 710, 714 (Tex. App.—Fort Worth 1999, no pet.*)*; *Laurel v. Herschap*, 5 S.W.3d 799, 802-03 (Tex. App.—San Antonio 1999, no pet.); *Ruiz v. Government Emp. Ins. Co.*, 4 S.W.3d 838, 839-40 (Tex. App.—El Paso 1999, no pet.); *Green v. Industrial Specialty Contractors, Inc.*, 1 S.W.3d 126, 130-31 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *Zapata v. The Children's Clinic*, 997 S.W.2d

745, 747 (Tex. App.—Corpus Christi 1999, pet. filed); *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70-71 (Tex. App.—Austin 1998, no pet.).

The *Moore* court has also led the way by adopting the federal standard of "materiality":

> Materiality is a criterion for categorizing factual disputes in relation to the legal elements of the claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The materiality determination rests on the substantive law, and only those facts identified by the substantive law to be critical are considered material. *See id*. Stated differently, "[o]nly disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment." *Id*.

Moore, 981 S.W.2d at 269; *accord Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App.—Houston [14th Dist.] 1998, no pet.).

The *Moore* court also adopted the federal standard for determining whether a fact issue is "genuine":

> A material fact issue is genuine if the evidence is such that a reasonable jury could find the fact in favor of the non-moving party. *Anderson*, 477 U.S. at 249, 106 S. Ct. 2505; *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). If the evidence simply shows that some metaphysical doubt as to the fact exists, or if the evidence is not significantly probative, the material fact issue is not "genuine." *Anderson*, 477 U.S. at 250-51, 106 S. Ct. 2505; *Matsushita Electric Industrial Co., Ltd.*, 475 U.S. at 587-88, 106 S. Ct. 1348.

Moore, 981 S.W.2d at 269; *accord Isbell*, 983 S.W.2d at 338. It remains to be seen whether the courts will discover any tension between the federal test for determining the "genuineness" of a fact issue and the "scintilla" test described by the *Moore* court in the first block quote set forth above.

III. Answering the Questions Raised by the Rule

A. What is an "adequate time for discovery" ?

Neither Rule 166a(i) nor the Comment to the Rule defines the term "adequate time for discovery." The Comment elaborates only that "[a] discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before." TEX. R. CIV. P. 166a cmt. to 1997 change.

The appellate courts have had almost no occasion to define the limits of the "adequate time for discovery requirement." In one mass-tort case, the court of appeals held that the plaintiffs had had adequate time for discovery when the case had been pending for ten years, and the plaintiffs had had almost year after the filing of the no-evidence motion to conduct additional discovery. *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, orig. proceeding).

In *Dickson Constr., Inc. v. Fidelity & Deposit Co. of Md.*, 5 S.W.3d 353 (Tex. App.—Texarkana 1999, pet. denied), the court held that two years and four months was an adequate time for discovery. There, the defendant obtained summary judgment on all claims two years after suit was filed. The court of appeals remanded only the fraud claim, and the defendant filed a no-evidence motion for summary judgment on that claim four months later. The court held that the plaintiff had had adequate time to conduct discovery. The court further noted that the evidence necessary to defeat the no-evidence motion—reliance and damages—"is the sort of evidence that should be immediately available to a plaintiff." *Id.* at 356. These holdings, although probably correct, will be of little use in disputes over whether 18 or 12 or 9 months is an "adequate time for discovery."

B. Can a party use Rule 166a(i) to attack an element involving his own intent or state of mind?

In traditional summary-judgment practice, courts have looked askance at parties who have sought summary judgment by negating the element of intent or knowledge with their own affidavits. According to one commentator, "Self-serving statements of interested parties, testifying as to what they knew or intended, are not readily controvertible and will not support summary judgment." TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS: PRACTICE, PROCEDURE AND REVIEW § 6.03[9][b] (2d ed.1996). The question arises whether the courts will be equally skeptical of no-evidence motions challenging the non-movant to produce some evidence of the movant's tortious intent, knowledge, or state of mind.

1. Knowledge of premises defects

To date, courts of appeals have shown little if any skepticism or hostility towards no-evidence motions attacking elements of knowledge or intent. In *Moore v. K Mart Corp.*, the defendant in a trip-and-fall case won a no-evidence summary judgment based on the absence of any evidence that it had actual or constructive knowledge of the premises defect that caused the plaintiff to trip. 981 S.W.2d at 270-71. The court of appeals affirmed without any comment that the issue of the defendant's state of knowledge might be an inappropriate basis for a no-evidence summary judgment.

2. Malice

Similarly, in *Galveston Newspapers, Inc. v. Norris*, 981 S.W.2d 797 (Tex. App.—Houston [1st Dist.] 1998, pet. denied), the defendant in a defamation case sought summary judgment based on the lack of evidence of actual malice. The trial court denied the motion, and the defendant took an interlocutory appeal as permitted by statute. The court of appeal reversed the denial of the motion and rendered judgment in the defendants' favor, finding no evidence of actual malice in the summary judgment record. *Id.* at 800-01.

3. Fraud

The summary judgment on a claim for fraudulent misrepresentation was upheld in *Key v. Pierce*, 8 S.W.3d 704 (Tex. App.—Fort Worth 1999, pet. filed). In that case, Key posted a notice of nonjudicial foreclosure sale on property for which he was the substitute trustee, stating that the property would be sold to the highest bidder for cash. *Id.* at 706. Pierce was the highest bidder at that sale, and returned within the required time period with a cashier's check. *Id.* In the meantime, Key had been advised that the property owners had filed bankruptcy, and that the sale was invalid. *Id.* As it turned out, the property owners had *not* filed bankruptcy, and Pierce tendered the check at the next month's foreclosure sale, but without success. In response to Key's no-evidence summary-judgment motion on fraudulent misrepresentation, Pierce presented an affidavit demonstrating his reliance on the notice of sale, but did not produce any evidence that Key "knew when the property was posted for sale that it would not, in fact, be sold at the December 5, 1995 sale." *Id.* at 709.

4. Undue Influence

All three elements of a claim for undue influence in a will contest proceeding were the subject of a no-evidence motion for summary judgment in *Estate of Davis v. Cook*, 9 S.W.3d 288 (Tex. App.—San Antonio 1999, no pet.). Certain relatives of the testatrix claimed that the testatrix's daughter-in-law exerted undue influence resulting in her inheriting a significant portion of the estate. *Id.* at 291. The trial court granted a no-evidence summary judgment, and the court of appeals affirmed, on all three elements of a claim for undue influence: (1) existence and exertion of an influence, (2) overpowering the testatrix's mind, and (3) no execution of the will "but for" the influence. *Id.* at 293-94. The court of appeals determined that the contestants relied upon inferences rather than direct or circumstantial evidence to support a finding of undue influence. For example, the contestants failed to offer any *specific* facts of how the beneficiary unduly influenced the testatrix. Furthermore, the testatrix changed the provisions of her prior

will after contact with the beneficiary. The court held that this was no evidence of any influence overpowering the testatrix's mind at the time she executed the will.

C. Is any specific form required for a no-evidence motion for summary judgment?

1. The "strict" approach — the Waco Court of Appeals.

Rule 166a(i) says little about the form of the motion except that "[t]he motion must state the elements as to which there is no evidence." TEX. R. CIV. P. 166a(i). The Waco Court of Appeals, however, has taken the position that the movant should adhere to certain other formal requirements if it wants its motion to be reviewed as a no-evidence motion rather than as a "traditional" motion: "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." *Ethridge v. Hamilton County Elec. Coop. Ass'n*, 995 S.W.2d 292, 295 (Tex. App.—Waco 1999, no pet.) (emphases added). The court affirmed the summary judgment in *Ethridge* on "traditional" grounds, i.e., because the movant had conclusively disproved an element of the movant's claims, so the court's discussion of the form of no-evidence motions is dicta.

In a subsequent case, the Waco court again intimated that a no-evidence movant should not attach any evidence to its motion for summary judgment, and it opined that the attachment of evidence will automatically transform a no-evidence motion for summary judgment into a traditional motion:

> Andrews & Associates and Obenoskey moved for both a traditional summary judgment and a "no-evidence" summary judgment. *See* TEX. R. CIV. P. 166a(i). In support of their motions they attached summary judgment evidence. Because a "no-evidence" motion for summary judgment should be made without presenting any evidence, we examine this appeal under the traditional summary judgment standard of review. *Ethridge v. Hamilton County Elec. Coop. Ass'n*, 995 S.W.2d 292 (Waco, 1999, no pet. h.); *but see Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 70

(Tex. App.—Austin 1998, no pet. h.) (movant attached evidence to "no-evidence" motion for summary judgment).

Grimes v. Andrews, 997 S.W.2d 877, 880 n.1 (Tex. App.—Waco 1999, no pet.).

More recently, however, the Waco court seems to have retreated from this position by accepting that a party may file a single motion containing both no-evidence and traditional points. *Fletcher v. Edwards*, No. 10-98-00226-CV, 2000 WL 353490, at *2 (Tex. App.—Waco Mar. 29, 2000, no pet. h.); *see also Williams v. Bank One, Tex., N.A.*, No. 10-99-077-CV, 1999 WL 1123813, at *6 (Tex. App.—Waco Dec. 8, 1999, no pet. h.).

2. The lenient approach.

Most courts do not seem to be very strict in construing no-evidence motions. The Amarillo Court of Appeals recently rejected a complaint by a losing non-movant that the motion did not give fair notice that it was a no-evidence motion: "While it may be good practice that a no-evidence motion specifically state, in the caption or elsewhere, that it is brought under subparagraph (i), where as here, the words 'no-evidence' appear at least eight times in the four specific allegations, the motion is not defective for failing to expressly recite that it is brought pursuant to subparagraph (i)." *Roth v. FFP Operating Partners, L.P.*, 994 S.W.2d 190, 194 (Tex. App.—Amarillo 1999, pet. denied).

The court accepted a very sloppily drafted no-evidence motion in *Moritz v. Bueche*, 980 S.W.2d 849 (Tex. App.—San Antonio 1998, no pet.). The plaintiffs in that case asserted numerous causes, including fraud and DTPA. *Id*. at 851. The defendants filed a motion for summary judgment that was divided into several sections. *Id*. at 852. One section was entitled "Summary Judgment Pursuant to Rule 166a(i)," and that section did not mention fraud or DTPA. *Id*. A *previous* section of the motion was entitled "Specific Grounds for Summary Judgment," and it addressed only the fraud and DTPA claims. *Id*. In that section, the defendants argued that the plaintiffs "failed to establish the necessary elements" of fraud and DTPA, and they further

asserted that that plaintiffs had adduced no evidence that defendants had made a material misrepresentation, and that the plaintiffs had "failed to establish that they were consumers." *Id*. The court of appeals agreed with the plaintiffs that the defendants' motion was confusing, but it accepted the motion as sufficient to attack one essential element of the plaintiffs' fraud and DTPA claims on no-evidence grounds. *Id*. (The court reversed the summary judgment on the merits. *Id*. at 853-55.)

Also, some courts have expressed distaste for motions that combine no-evidence and traditional points, but they do not seem inclined to hold that this approach is wrong or reversible. *E.g.*, *Grant v. Southwestern Elec. Power Co.*, No. 06-98-00159-CV, 2000 WL 328774, at *2 (Tex. App.—Texarkana Mar. 30, 2000, no pet. h.) ("The rules do not prohibit such a hybrid motion, but 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.").

Contrary to the assertions by the Waco Court of Appeals noted in the previous section, other courts of appeals do not seem to find any procedural irregularity when the no-evidence movant attaches some evidence to its motion. *E.g.*, *Saenz v. Southern Union Gas Co.*, 999 S.W.2d 490, 493 (Tex. App.—El Paso 1999, pet. denied) ("Although it is not required by Rule 166a(i) to submit any evidence, SUG detailed the summary judgment evidence on which it relied . . . . SUG then alleged that no evidence existed to show that it had acted in a discriminatory manner because Saenz pursued a worker's compensation claim.").

When it was unclear whether a motion for summary judgment was brought under Rule 166a(i), however, one court treated the motion as a "traditional" motion. In *Thomas v. Clayton Williams Energy, Inc.*, 2 S.W.3d 734 (Tex. App.—Houston [14th Dist.] 1999, no pet.), the appellee asserted that the court of appeals should review the summary judgment under the "no-

evidence" standard. *Id.* at 737 n.1. Because the court could not determine whether the motion was a traditional or no-evidence motion, the court ruled that the motion failed to give the non-movant "fair notice" that the motion was brought under Rule 166a(i), and instead treated it as a traditional motion. *Id.*

3. The bare minimum.

There is, of course, some minimum of specificity required by the Rule itself, and the Eastland Court of Appeals recently had occasion to find that a no-evidence motion was insufficient:

> The relevant part of McCleskey's motion merely recited the general law under Rule 166a(i) and stated:
>
> > In this case the Plaintiffs have the burden of proving a breach of fiduciary duty, professional negligence, conspiracy, violation of the Texas Deceptive Trade Practices Act, breach of contract, economic duress, and tortious interference. The Affidavit of Don Graf, Exhibit "A" to this motion, clearly shows that as a matter of law Plaintiffs and Intervenors have no cause of action against the Defendants.

Smith v. McCleskey, Harriger, Brazill & Graf, L.L.P., No. 11-99-00060-CV, 2000 WL 355518, at *1 (Tex. App.—Eastland Apr. 6, 2000, no pet. h.). Because the movant "failed to the state the elements for which it claimed there was no evidence," the court of appeals held that "the motion was insufficient, and that the trial court erred insofar as it granted a no-evidence summary judgment." *Id.*

The Waco Court of Appeals also recently reversed in part a no-evidence summary judgment because the motion was insufficient. *Fletcher v. Edwards*, No. 10-98-00226-CV, 2000 WL 353490 (Tex. App.—Waco Mar. 29, 2000, no pet. h.). The plaintiff in that case asserted several claims against defendants, including fraud. *Id*. at *1. The defendants filed a motion for summary judgment that included a no-evidence point specifically pointing out that there was no evidence that one of the defendants knew his representations were false. *Id*. at *2. The trial

court granted summary judgment, but the court of appeals reversed. The court acknowledged that the plaintiffs filed no evidence to counter defendants' assertion, which "[o]rdinarily [means that] the trial court has no discretion but to grant the no-evidence motion." *Id*. at *8. However, the scienter element of fraud is satisfied by proof that the defendant knew his representations were false *or* that the defendant was reckless in making the representations without knowledge of the truth. *Id*. Thus, the defendants' motion was insufficient, and summary judgment on plaintiffs' fraud claim on a recklessness theory was improper. The court affirmed the judgment as to plaintiffs' claim for exemplary damages, however, because actual knowledge of falsity is required to recover such damages, and the plaintiffs adduced no evidence of actual knowledge. *Id*. at *9.

In *Weaver v. Highlands Ins. Co.*, 4 S.W.3d 826 (Tex. App.—Houston [1st Dist.] 1999, no pet.), Highlands asserted that its motion was brought under both 166a(c) and (i). *Id.* at 829. After reviewing the evidence, the court of appeals ruled that the motion was *not* a no-evidence motion because it did not specifically allege that the plaintiff lacked evidence, nor did it challenge a particular element of the plaintiff's claim. *Id.* n.2.

Similarly, in *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862 (Tex. App.—Houston [1st Dist.] 1999, pet. filed), the court determined that the defendants' motion for summary judgment on the plaintiff's claim for constructive fraud did not comply with Rule 166a(i) *or* 166a(c) because the movants argued that, "because they did not owe [plaintiff] a fiduciary duty, there could be no claim for constructive fraud." *Id.* at 869.

D. Is there any particular form for the response to a no-evidence motion?

Rule 166a(i) and the Comment provide some guidance for the form and content of a response. The rule simply says that a respondent must "produce[] summary judgment evidence raising a genuine issue of material fact." TEX. R. CIV. P. 166a(i). The Comment provides that to defeat a no-evidence motion "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." *Id.* cmt. to 1997 change.

These provisions were amplified in *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862 (Tex. App.—Houston [1st Dist.] 1999, pet. filed). In that case the court held that a non-movant must present grounds in its response specifically addressing each ground raised in the no-evidence motion and address the evidence it files with the response. There, the non-movant, B&P, did not address the evidence in its summary judgment proof "as it related to the challenged elements of [its] causes of action." *Id.* at 868. B&P merely asserted that its "claims of conspiracy, conversion, actual and constructive fraud, and negligence are all based on [defendants'] breach of a fiduciary duty to [B&P]." *Id.* B&P set out arguments for the existence of a fiduciary duty, but made no further reference to other causes of action or their elements. It merely asserted that "there are genuine issues of material fact." In affirming the judgment, the court held that although B&P stated facts to support conclusions, it made "no effort to connect the facts to the challenged elements of the causes of action." *Id.* at 869.

One court has had occasion to consider the language in the Comment to Rule 166a(i) stating that the non-movant is not required to "marshal its proof." Plaintiffs in a massive toxic tort case successfully resisted a defendant's no-evidence motion for summary judgment attacking causation, in part because they convinced the trial court that the motion would require the plaintiffs to "marshal their proof." *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, orig. proceeding). The court of appeals disagreed:

> To 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. But 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.

Id.

E. Is the denial of an ordinary no-evidence motion reviewable by mandamus?

The Comment to Rule 166a(i) clearly says no: "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)." TEX. R. CIV. P. 166a cmt. to 1997 change. The mandatory language of Rule 166a(i) (i.e., "The court ***must*** grant the motion . . . ."), however, has been too enticing for some litigants to resist seeking mandamus. Not surprisingly, the courts of appeals have held the line. *In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d 459, 460 (Tex. App.—Corpus Christi 1999, orig. proceeding) ("Though Rule 166a(i) plainly states that the motion 'must' be granted absent a proper response, under the construction of Rule 166a(i) required by the comments, we do not have the authority by mandamus to review a denial of that motion or to require the trial court to grant the present 'no evidence' motion for summary judgment."); *see also In re Mohawk Rubber Co.*, 982 S.W.2d at 497 ("We conclude that we cannot order the [trial] court to rescind its order overruling the summary judgment motion because, in the circumstances here, that order is not reviewable on mandamus.").

The Corpus Christi Court of Appeals did hold that it could compel a trial court to *rule* on a no-evidence motion for summary judgment, even though the courts of appeals cannot compel the trial court to reach any particular result. *In re Mission Consol. Indep. Sch. Dist.*, 990 S.W.2d at 461 ("[T]he trial court's refusal to rule on a motion for summary judgment within a reasonable time after it is filed and heard may amount to an abuse of discretion, and entitle the complaining party to a writ of mandamus compelling the trial court to rule.").

Also, an interlocutory appeal from the denial of a no-evidence motion will lie if the movant can trigger one of the circumstances enumerated in the interlocutory-appeal statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(a) (Vernon Supp. 2000). In one case, the plaintiff sued the defendants for defamation and tortious interference, and the defendants filed a no-evidence motion arguing that there was no evidence of actual malice. *Galveston Newspapers,*

Inc. v. Norris, 981 S.W.2d 797, 799 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). The trial court denied the motion, and the court of appeals held that it had jurisdiction to hear the defendants' interlocutory appeal under section 51.014(a)(6) of the Civil Practice and Remedies Code. *Id*. at 798-99. Incidentally, the court of appeals reversed and rendered in favor of the defendants, finding no evidence of actual malice in the summary-judgment record. *Id*. at 800-01.

F. Can the movant attack the non-movant's evidence with *Daubert*/*Robinson* challenges?

Most definitely. A good example is *Weiss v. Mechanical Associated Servs., Inc.*, 989 S.W.2d 120 (Tex. App.—San Antonio 1999, pet. denied), a "sick building" case in which Weiss sued one of other tenants of her office building for allegedly exposing her to a chemical called glutaraldehyde. *Id*. at 123. The defendant filed a no-evidence summary-judgment motion, contending that there was no evidence that there was any glutaraldehyde in the building, that Weiss had been exposed to the chemical, or that her illnesses were caused by that chemical. *Id*. Weiss's experts admitted that they could not detect any glutaraldehyde in the building, but they still testified that Weiss's illnesses were probably caused by glutaraldehyde exposure. *Id*. Her experts satisfied few of the *Robinson* factors, however, and they were unable to rule out other possible causes of her illnesses. *Id*. at 125-26. Accordingly, the trial court permissibly disregarded their testimony under *Robinson*, as well as other leading cases forbidding "inference-stacking," and the court of appeals affirmed the summary judgment.

G. Will a presumption suffice as "evidence" to defeat a no-evidence motion?

Yes. As the Texarkana Court of Appeals recently stated, "[t]he [non-movant] may raise a fact issue on causation by presenting evidence in support of causation or by relying on a presumption of causation." *Stewart v. Transit Mix Concrete & Materials Co.*, 988 S.W.2d 252, 255 (Tex. App.—Texarkana 1998, pet. denied). In that case, a products-liability plaintiff relied on the rule of law that the manufacturer's failure to provide any warnings with its product creates

a presumption that proper warnings would have been heeded. *Id*. at 256. The defendant filed a no-evidence motion attacking causation and won, but the court of appeals reversed. The court of appeals held that the plaintiff had adduced some evidence that no warning was given, and thus some evidence that it was entitled to the presumption of causation. *Id*. at 257.

H. How precise must the "fit" between the non-movant's evidence and its cause of action be?

This question is easier to illustrate than to state in the abstract. In one case, a lawyer's office was raided by the National Insurance Crime Bureau, and substantial publicity was generated. *Milam v. National Ins. Crime Bureau*, 989 S.W.2d 126, 128 (Tex. App.—San Antonio 1999, no pet.). One NICB agent made two remarks about the raids that were published to the public, and plaintiff Milam sued him for defamation and tortious interference. *Id*. The agent moved for and won summary judgment on the tortious interference claim on the ground that Milam could produce no evidence that the agent's statements damaged Milam's business. *Id*. at 131. On appeal, Milam argued that he had raised a fact issue by adducing evidence that some of his clients fired him as a result of the publicity, and that his business dried up after the publicity occurred. *Id*. Milam did not, however, adduce any evidence tracing his injuries *specifically* to the agent's remarks, as opposed to the raid itself and the negative publicity occasioned thereby; thus, his evidence constituted no evidence that the agent's remarks had caused him actual harm. *Id*.

IV. A Sample of Causes of Action Which Have Been the Subject of No-Evidence Motions for Summary Judgment

Not surprisingly, no-evidence motions have been brought on a broad array of causes of action. Below is a list of several different types of causes of action that were the subject of no-evidence motions. Unless expressly stated, the appellate court upheld the summary judgment.

1. **Civil Conspiracy.** Plaintiff produced no evidence of meeting of the minds, an unlawful purpose, or unlawful means to accomplish unlawful purpose elements of a civil

conspiracy claim. *Brewer & Pritchard, P.C. v. Johnson*, 7 S.W.3d 862, 868 (Tex. App.—Houston [1st Dist.] 1999, pet. filed).

2. Fraud.

- No evidence existed that plaintiff took action in reliance on the representation. The plaintiffs' affidavits did not "show any action they took in reliance on defendant's statements. . . ." *Malone v. E.I. Du Pont de Nemours & Co.*, 8 S.W.3d 710, 714 (Tex. App.—Fort Worth 1999, no pet.).

- In a fraudulent misrepresentation case, the plaintiff did not offer "evidence defendants made misrepresentations with intent to deceive and with no intention of performing as represented." There was no evidence that the defendants knew that when the property was posted for sale it would not, in fact, be sold at the sale. *Key v. Pierce*, 8 S.W.3d 704, 709 (Tex. App—Fort Worth 1999, pet. filed).

- Plaintiff presented no evidence of reliance and damages. *Dickson Constr., Inc. v. Fidelity & Deposit Co. of Md.*, 5 S.W.3d 353, 356 (Tex. App.—Texarkana 1999, pet. denied).

3. Undue Influence in Will Contest. Judgment upheld on all three elements of undue influence: (1) the existence and exertion of an influence; (2) the effective operation of such influence so as to subvert or overpower the mind of the testator at the time the testament is executed; and (3) the execution of a testament which the maker thereof would not have executed but for such reliance. *Estate of Davis v. Cook*, 9 S.W.3d 288, 292-95 (Tex. App.—San Antonio 1999, no pet.)**.**

4. Negligent Misrepresentation.

- In nonjudicial foreclosure sale, plaintiff presented no evidence that defendant failed to exercise reasonable care or competence when stating that he would sell the property or striking off the property from the list of property subject to foreclosure. *Key v. Pierce*, 8 S.W.3d 704, 709 (Tex. App—Fort Worth 1999, pet. filed).

- No evidence of any fact that would trigger coverage, even if the policy was ambiguous as to whether the car accident in Mexico was covered under the policy. *Ruiz v. Government Emp. Ins. Co.*, 4 S.W.3d 838, 843 (Tex. App.—El Paso 1999, no pet.).

5. Medical Malpractice—Proximate Cause.

- Plaintiff's expert affidavit that the *plaintiff* did not cause his own injury was no evidence that defendant physician did cause the injury. *Blan v. Ali*, 7 S.W.3d 741, 748-49 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

- Expert affidavit did not state causation within reasonable medical probability, but stated that the breach of the standard of care "may have" or "possibly" caused the injuries at issue. *Steinkamp v. Caremark*, 3 S.W.3d 191, 199 (Tex. App.—El Paso 1999, pet. filed).

6. **Medical Malpractice—Assumption of Duty.** No-evidence summary judgment *reversed* because plaintiff presented evidence that raised a fact issue as to whether non-surgeon physician assumed responsibility over a portion of the surgery that allegedly caused injury. *Kimber v. Sideris*, 8 S.W.3d 672, 677-78 (Tex. App.—Amarillo 1999, no pet.).

7. **Medical Malpractice—Standard** of **Care.** Plaintiff produced no evidence of standard of care regarding whether a hospital must report results from a blood culture lab report to the treating physician. *McCombs v. Children's Med. Ctr. of Dallas*, 1 S.W.3d 256, 260 (Tex. App.—Texarkana 1999, pet. filed).

8. **General Negligence—Causation.**

- No-evidence summary judgment *reversed* because plaintiff farmer was competent to testify that the defendant's herbicides did not control weeds like others he had used, and because he had sufficient knowledge that excessive weeds routinely reduce crop yield, thus supporting his claim for damages. *Cole v. Central Valley Chemicals, Inc.*, 9 S.W.3d 207, 211-12 (Tex. App.—San Antonio 1999, pet. filed).

- Plaintiff produced no evidence that electric company breached a duty to remove damaged appliances or could have reasonably foreseen that the appliances would shock plaintiff. *Grant v. Southwestern Elec. Power Co.*, No. 06-98-00159-CV, 2000 WL 328774 (Tex. App.—Texarkana Mar. 30, 2000, no pet. h.).

9. **Exercise of Control (Over Dangerous Activity Giving Rise to Duty of Reasonable Care).** Plaintiff's deposition testimony did not connect any control by the defendant over the activity that caused injury. *Laurel v. Herschap*, 5 S.W.3d 799, 802-03 (Tex. App.—San Antonio 1999, no pet.).

10. **Slander.** Plaintiff produced no evidence of publication or that statements were slanderous. *Rodriguez v. NBC Bank*, 5 S.W.3d 756, 766 (Tex. App.—San Antonio 1999, no pet.).

11. **Tortious Interference with Contract.** Plaintiff produced no evidence that defendant bank purposely injected itself into ownership dispute between plaintiff and a third person. *Id.*

12. **Breach of Contract.** Plaintiff produced no evidence that defendant bank was permitted under depository agreement with plaintiff to debit plaintiff's account once the bank's provisional payment was revoked. ***Id.***

13. **Products Liability.** Plaintiffs produced no evidence that the defendant's vaccine caused a false positive test result for human t-cell lymphtropic virus (due in large part to a portion of plaintiff's summary judgment evidence being stricken). *Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407, 412 (Tex. App.—Waco 1999, no pet.).

V. Other Developments in Summary Judgment Practice

A. Written rulings on objections to summary judgment evidence.

Traditionally, a party objecting to summary judgment evidence must obtain a written ruling on the objection to preserve any error for appellate review. *Eads v. American Bank, N.A.*, 843 S.W.2d 208, 211 (Tex. App.—Waco 1992, no writ); *El Paso Assoc., Ltd. v. J.R. Thurman Co.*, 786 S.W.2d 17, 19 (Tex. App.—El Paso 1990, no writ); *Util. Pipeline Co. v. American Petrofina Mktg.*, 760 S.W.2d 719, 722-23 (Tex. App.—Dallas 1988, no writ). An oral ruling contained in the reporter's record is generally insufficient to preserve error. *Manoogin v. Lake Forest Corp.*, 652 S.W.2d 816, 819 (Tex. App.—Austin 1983, writ ref'd n.r.e.). A docket notation is also not sufficient. *Eads*, 843 S.W.2d at 211.

The Fort Worth Court of Appeals has held that the 1997 amendment to Texas Rule of Appellate Procedure 33.1 has changed the rule that a written ruling on objections to summary judgment evidence is necessary to preserve error. *Frazier v. Yu*, 987 S.W.2d 607, 609-10 (Tex. App.—Fort Worth 1999, pet. denied). Rule 33.1 of the Texas Rules of Appellate Procedure recognizes that error is preserved if the trial court rules on a "request, objection, or motion, either expressly or implicitly." TEX. R. APP. P. 33.1(a)(2)(A). The *Frazier* court held that a trial court's order granting a motion for summary judgment and stating that it had reviewed all "competent" summary judgment evidence was an implicit ruling on (and sustaining of) the movant's objections. 987 S.W.2d at 610. Because the non-movant did not challenge the implicit sustaining of the objections on appeal, the court held that it could not consider the non-movant's summary judgment evidence, and it affirmed the summary judgment. *Id.* at 611. The *Frazier* court cited its earlier ruling in *Blum v. Julian*, 977 S.W.2d 819 (Tex. App.—Fort Worth 1998, no pet.). Although the court in *Blum* found that the excluded summary judgment evidence was actually competent, the court held that the granting of a motion for summary judgment "creates an inference that it implicitly reviewed and overruled [the] objections." *Id.* at 823-24.

Since the promulgation of Rule 33.1, courts have found other types of error preserved by the implicit overruling of an objection or request. *See, e.g., Chilkewitz v. Hyson,* 43 Tex. Sup. Ct. J. 52, 53, 1999 WL 959162 (Oct. 21, 1999) (trial court impliedly overruled defendant's motion for JNOV by rendering judgment for plaintiff); *Hardman v. Dault,* 2 S.W.3d 378, 381 (Tex. App.—San Antonio 1999, no pet.) (party's motion to strike non-jury setting implicitly overruled when court proceeded with bench trial).

B. A party's use of its own interrogatory answers.

A party's reliance on his own interrogatory answer was recently held to constitute "fundamental error" that could be raised for the first time on rehearing in the court of appeals. In *Garcia v. National Eligibility Express, Inc.,* 4 S.W.3d 887 (Tex. App.—Houston [1st Dist.] 1999, no pet.), NEE filed both a traditional and no-evidence motion for summary judgment. It attached the complete set of Garcia's interrogatory answers in support of its traditional motion. In its no-evidence motion, NEE claimed that Garcia could show no evidence of damages. In response, Garcia relied on his interrogatory answer setting forth his claimed damages. NEE complained in the trial court and in its appellate brief that this evidence was "conclusory." NEE raised for the first time on rehearing that Garcia was barred from using his own interrogatory answers under the predecessor to Rule 197.3 of the Texas Rules of Civil Procedure ("Answers to interrogatories may be used only against the responding party."). Relying upon the supreme court's per curiam denial of the petition for writ of error in *Fisher v. Yates*, 953 S.W.2d 370 (Tex. App.—Texarkana 1997), *writ denied per curiam*, 988 S.W.2d 730 (Tex. 1998), the court held that Garcia's interrogatory answers were not competent evidence, even though NEE had relied upon them in the same summary judgment proceeding. *Id.* at 890-91. The court held that a trial court's reliance on Garcia's interrogatory answers was a form of "fundamental error" that could be raised at any time. The court is actually holding that a party's own interrogatory answers are *not competent* and thus can *never* constitute evidence.

C. The competency of hearsay as summary-judgment evidence.

The Amarillo Court of Appeals recently reaffirmed that, on summary judgment, hearsay statements in affidavits, and affidavits based on hearsay, are substantively defective and constitute no evidence whether or not the opposing party objects. *Natural Gas Clearinghouse v. Midgard Energy Co.*, No. 07-99-0038-CV, 1999 WL 989596 (Tex. App.—Amarillo Oct. 22, 1999, pet. filed).[1] This decision is in some tension with the portion of Texas Rule of Evidence 802 that provides, "Inadmissible hearsay admitted without objection shall not be denied probative value merely because it is hearsay." TEX. R. EVID. 802. It also directly conflicts with holdings by other courts of appeals that the presence of hearsay in an affidavit is merely a formal defect that can be waived by failure to raise an objection. *Einhorn v. LaChance*, 823 S.W.2d 405, 410 (Tex. App.—Houston [1st Dist.] 1992, writ dism'd w.o.j.); *Denison v. Haeber Roofing Co.*, 767 S.W.2d 862, 865 (Tex. App.—Corpus Christi 1989, no writ).

The Amarillo court found support for its decision in a pair of old Texas Supreme Court cases, *Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230 (Tex. 1962), and *Box v. Bates*, 346 S.W.2d 317 (Tex. 1961). In *Youngstown*, the court stated, "Hearsay may not be made the basis of a summary judgment, and the trial judge should not be required to speculate as to whether the affiant could establish the facts stated in his affidavit if he were testifying from the witness stand." 363 S.W.2d at 233. In *Box*, the court stated, "An affidavit based on hearsay and statements contained in affidavits that are but mere conclusions of law are insufficient to warrant the overruling of a motion for summary judgment." 346 S.W.2d at 319. Of course, *Youngstown* and *Box* both pre-date the adoption of Rule of Evidence 802 in 1983, so the question remains whether Rule 802 modifies the statements of law made in those cases. The Amarillo court also cited one other case, a 1988 no-writ case from the Houston Fourteenth Court of Appeals, in

which the court stated, "These hearsay statements by appellant [recited in her responsive summary-judgment affidavit] do not constitute summary judgment proof. [citing *Youngstown* and several pre-1983 court of appeals cases] TEX.R.CIV.P. 166–A(e) requires that affidavits in summary judgment proceedings be made on personal knowledge and 'shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated herein.'" *Lopez v. Hink*, 757 S.W.2d 449, 451 (Tex. App.—Houston [14th Dist.] 1988, no writ).

Rule 166a(f) still mandates that "[s]upporting and opposing affidavits ***shall*** be made on personal knowledge," so the Amarillo court's holding in *Natural Gas Clearinghouse* (which does cite that requirement) can be defended on the theory that the general rule of evidence regarding unobjected-to hearsay is trumped by the specific contrary rule governing summary judgments. It seems a strange result, however, that parties cannot win or defeat summary judgment based on unobjected-to evidence that would be accorded probative value at trial.

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[1] This holding appears in the court's supplemental opinion on rehearing issued Jan. 3, 2000, which appears separately in Westlaw at 2000 WL 12874. Because the version of the opinion appearing at 1999 WL 989596 includes both the original opinion and the supplemental opinion, we refer to that document instead.

ADDENDUM
PUBLISHED OPINIONS FROM THE FIFTH DISTRICT COURT OF APPEALS AT DALLAS

***General Mills Restaurants, Inc. v. Texas Wings, Inc.*,**
12 S.W.3d 827, 832-34 (Tex. App.—Dallas 2000, no pet.)

In its motion for summary judgment, Defendant alleged that there was no evidence that its agents, employees, officers, directors, or representatives committed any acts of trespass. After reviewing the evidence, the court of appeals concluded that there was more than a scintilla of evidence of trespass and damages resulting therefrom. Accordingly, the court of appeals reversed the no-evidence summary judgment.

***Anderson v. Taylor Publ'g Co.*,**
13 S.W.3d 56, 61 (Tex. App.—Dallas 2000, no pet.)

Appellee moved for summary judgment on appellant's age discrimination claim under both Rule 166a(c) and Rule 166a(i). The trial court granted appellee's motion without stating whether it was doing so under Rule 166a(c) or Rule 166a(i). On appeal, appellant contended that the trial court erred in granting a no evidence summary judgment in favor of appellee because he presented evidence that raised genuine issues of material fact about the reason for his termination. The court of appeals concluded that the trial court properly granted summary judgment in favor of appellee under Rule 166a(c), as well as Rule 166a(i), and affirmed.

***Vallance v. Irving C.A.R.E.S., Inc.*,**
No. 05-99-00655-CV, 2000 WL 302789, at *2-4
(Tex. App.—Dallas Mar. 24, 2000, no pet. h.)

The court of appeals concluded that the appellant "failed to show the existence of evidence creating a fact question concerning whether she was terminated for filing a workers' compensation claim." Thus, the court of appeals affirmed the no-evidence summary judgment.

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