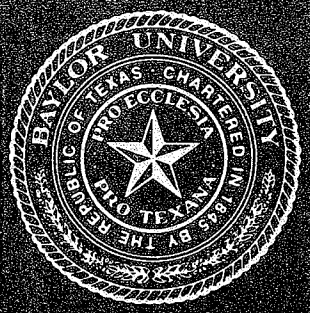

BAYLOR
LAW
REVIEW

THE USE OF PRESUMPTIONS IN SUMMARY JUDGMENT PROCEDURE IN TEXAS AND FEDERAL COURTS

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Reprinted from
Baylor Law Review
Volume 54, Number 3

THE USE OF PRESUMPTIONS IN SUMMARY JUDGMENT PROCEDURE IN TEXAS AND FEDERAL COURTS*

David F. Johnson**

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I. INTRODUCTION

There are many presumptions in the law that allow a party to prove one fact and presume another. A presumption shifts the burden of production from the party relying upon it to the other party regarding the presumed fact. This article addresses whether a party can rely upon a presumption to shift the burden of production to the other party in a summary judgment proceeding in Texas state and federal court. As one commentator has stated: "Whenever a party to a lawsuit invokes a presumption in order to prevail on a motion for summary judgment, the litigation assumes a complex posture; indeed, the laws of evidence and procedure, as well as substantive law, are simultaneously called into question."[1]

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*The Author would like to dedicate this Article to his parents Judge and Mrs. Derwood Johnson of Waco, Texas.

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[1]*See* Steven David Smith, Comment, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101, 1103 (1984).

With the use of a presumption, a summary judgment movant can shift the burden of production to the non-movant so that the non-movant will have the burden to offer summary judgment evidence to contradict the presumed fact. Alternatively, a non-movant can respond to a motion for summary judgment by relying upon a presumed fact. In other words, the non-movant can respond to a motion for summary judgment by proving one fact and presuming the other.

For example, a brother and sister get involved in a will dispute. Their mother passes away and her last will cannot be found. The sister attempts to probate a copy of the mother's last will. The brother, however, wants to probate the second to last will executed by his mother. He files a traditional motion for summary judgment alleging that the last will was revoked and attaches as summary judgment evidence an affidavit from his mother's attorney stating that the will was last seen with his mother and that the will currently cannot be found. There is a presumption that if a will was last seen with the decedent and later turns up missing that the decedent revoked the will. The brother argues that this presumption suffices to meet his initial burden of production as the movant and shifts the burden to his sister to present summary judgment evidence that her mother did not revoke the will. The issue is whether the brother is allowed to file a traditional motion for summary judgment on the ground that his mother revoked the will where he files no direct evidence that his mother revoked it.

Alternatively, two companies get involved in a contract dispute. Company A sues Company B for breach of contract. Company B alleges that the contract is not enforceable because of a lack of consideration. Company B files a no-evidence summary judgment alleging that Company A has no evidence that the contract was supported by consideration. There is a presumption that a properly executed contract is supported by consideration. Company A files a response and files as summary judgment evidence the properly executed contract and argues that the presumption of consideration suffices to meet its burden of production and that the summary judgment should therefore be denied. The issue is whether Company A should be allowed to respond to a no-evidence summary judgment by the use of a presumption and not by evidence.

This article will describe the current state of the law regarding the use of presumptions in state and federal court in Texas, describe summary judgment procedure as it applies to the burden of persuasion and production, and describe the relevant precedent regarding the use of presumptions in summary judgment procedure.

II. PRESUMPTIONS

A. Use of Presumptions in State Court

A presumption is a procedural rule of law that attaches specific probative value to particular facts.[2] A court has defined a presumption as a rule of law "by which the finding of a basic fact gives rise to the existence of the presumed fact, until the presumption is rebutted."[3] Procedurally, a presumption is a device that guides a trial court in locating the burden of production at a particular time.[4] Some examples of presumptions are: (1) a child born in wedlock is presumed legitimate;[5] (2) agents are presumed to act in good faith on behalf of their principals;[6] (3) a party is presumed to know the terms of a signed contract;[7] (4) a party is presumed to intend an act's consequences where he willfully committed it;[8] (5) a presumption arises that evidence would have been unfavorable to a party where he deliberately destroys it;[9] and (6) a person who dies is presumed not to have committed suicide.[10]

A presumption is not evidence—it takes the place of evidence.[11] There are two types of presumptions: conclusive and rebuttable. A conclusive presumption cannot be rebutted, and once it is established, the opposing

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[2]*See* Forder v. State, 456 S.W.2d 378, 387 (Tex. Crim. App. 1970); Combined Am. Ins. Co. v. Blanton, 163 Tex. 225, 353 S.W.2d 847, 849 (1962); Vise v. Foster, 247 S.W.2d 274, 277 (Tex. Civ. App.—Waco 1952, writ ref'd n.r.e.); Fox v. Grand Union Tea Co., 236 S.W.2d 561, 563 (Tex. Civ. App.—Austin 1951, mand. overruled).

[3]Hunter v. Palmer, 988 S.W.2d 471, 473 (Tex. App.—Houston [1st Dist.] 1999, no pet.).

[4]*See* Tex. A&M Univ. v. Chambers, 31 S.W.3d 780, 784 (Tex. App.—Austin 2000, pet. denied); Allred v. Harris County Child Welfare Unit, 615 S.W.2d 803, 806 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

[5]*See* Gravley v. Gravley, 353 S.W.2d 333, 336 (Tex. Civ. App.—Dallas 1961, writ dism.'d w.o.j.).

[6]*See* Reynolds v. Reynolds, 224 S.W. 382, 384 (Tex. Civ. App.—Amarillo 1920, no writ).

[7]*See* Cities Serv. Oil Co. v. Brown, 119 Tex. 242, 27 S.W.2d 115, 115 (1930).

[8]*See* Norris v. Stoneham, 46 S.W.2d 363, 366 (Tex. Civ. App.—Eastland 1932, no writ).

[9]*See* Wal-Mart Stores, Inc. v. Middleton, 982 S.W.2d 468, 470 (Tex. App.—San Antonio 1998, pet. denied).

[10]*See* Reserve Life Ins. Co. v. Estate of Shacklett, 412 S.W.2d 920, 922 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.).

[11]*See* Green v. State, 893 S.W.2d 536, 545 (Tex. Crim. App. 1995) (Clinton, J., dissenting); Republic Nat'l Life Ins. Co. v. Heyward, 536 S.W.2d 549, 558 (Tex. 1976); Empire Gas & Fuel Co. v. Muegge, 135 Tex. 520, 143 S.W.2d 763, 767-68 (1940); Still v. Liberty Leasing Co., Inc., 570 S.W.2d 93, 94 (Tex. Civ. App.—Waco 1978), *aff'd*, 582 S.W.2d 255 (Tex. Civ. App.—Houston [1st Dist.] 1979, no writ).

party cannot offer evidence to contradict it.[12] A rebuttable presumption, however, can be rebutted by evidence.[13] It compels a factfinder to make a conclusion in the absence of any evidence to the contrary.[14] Where there is evidence to the contrary, the presumption simply disappears, and a factfinder cannot weigh it or treat it as evidence.[15] But where the party opposing the presumption fails to produce any contrary evidence, the presumption is established conclusively.[16] A party attempting to use a presumption must prove the underlying facts for the presumption with direct evidence.[17] Where the party opposing the presumption produces contrary evidence and the presumption disappears, the evidence that originally gave rise to the presumption still retains whatever independent evidentiary value that it has and may be considered by the factfinder in determining the issue.[18]

The main reason for a presumption is its impact on the burden of proof. The burden of proof has two separate components. First, the burden of proof means the burden of persuasion, i.e., the burden to persuade the trier of fact that evidence supports a proposition.[19] This burden of persuasion

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[12]*See* Stooksberry v. Swann, 85 Tex. 563, 22 S.W. 963, 966 (1893).

[13]*See* Davis v. Austin, 632 S.W.2d 331, 333 (Tex. 1982); *Empire Gas & Fuel Co.*, 143 S.W.2d at 767; Beken v. Hoffman, 196 S.W.2d 548, 551 (Tex. Civ. App.—Galveston 1946, writ ref'd n.r.e.).

[14]*See Davis*, 632 S.W.2d at 333; Farley v. M.M. Cattle Co., 529 S.W.2d 751, 756 (Tex. 1975); Sanders v. Davila, 593 S.W.2d 127, 130 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.).

[15]*See* White v. Smyth, 147 Tex. 272, 214 S.W.2d 967, 974 (1948); Dodson v. Watson, 110 Tex. 355, 220 S.W. 771, 772 (1920); Perry v. Breland, 16 S.W.3d 182, 186 (Tex. App.—Eastland 2000, pet. denied); Gant v. Dumas Glass & Mirror, Inc., 935 S.W.2d 202, 212 (Tex. App.—Amarillo 1996, no writ); *Sanders*, 593 S.W.2d at 130.

[16]*See* Pete v. Stevens, 582 S.W.2d 892, 894 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); Mitchell v. Stanton, 139 S.W. 1033, 1036 (Tex. Civ. App.—San Antonio 1911, writ ref'd).

[17]*See* Easdon v. State, 552 S.W.2d 153, 155 (Tex. Crim. App. 1977); Pekar v. St. Luke's Episcopal Hosp., 570 S.W.2d 147, 150 (Tex. Civ. App.—Waco 1978, writ ref'd n.r.e.).

[18]*See* Employers' Nat'l Life Ins. Co. v. Willits, 436 S.W.2d 918, 921 (Tex. Civ. App.—Amarillo 1968, writ ref'd n.r.e.); Cimarron Ins. Co. v. Price, 409 S.W.2d 601, 607 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.).

[19]*See e.g.*, Clark v. Hiles, 67 Tex. 141, 2 S.W. 356, 359 (1886); Dwyer v. Cont'l Ins. Co., 57 Tex. 181, 182 (1882); Azores v. Samson, 434 S.W.2d 401, 405 (Tex. Civ. App.—Dallas 1968, no writ); Walter E. Heller & Co. v. Allen, 412 S.W.2d 712, 718-19 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); Gooch v. Davidson, 245 S.W.2d 989, 991 (Tex. Civ. App.—Amarillo 1952, no writ); Finney v. Finney, 164 S.W.2d 263, 266 (Tex. Civ. App.—Fort Worth 1942, writ ref'd w.o.j.).

stays on the same party throughout the trial and never shifts.[20] Secondly, the burden of proof means the burden of production, i.e., the burden to go forward and produce sufficient evidence in order to meet a prima facie case.[21] The burden of production can shift back and forth between the parties depending upon the evidence that is produced.[22] Normally, one party will initially bear both the burden of persuasion and the burden of production, and where the burden of persuasion does not shift to the other party, the burden of production may shift back and forth as each side produces evidence.[23]

Once a presumption is established it only shifts the burden of production, and places the burden on the opposite party to produce evidence to the contrary.[24] A presumption places on the opposing party the burden to produce sufficient evidence to justify a finding that is contrary to the presumed fact.[25] It does not, however, shift the burden of persuasion to the other side.[26] Thereafter, when the party opposing the presumption produces contrary evidence that is sufficient to support a finding contrary to the presumption, the presumption is rebutted and disappears, and the

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[20]*See* Grieger v. Vega, 153 Tex. 498, 271 S.W.2d 85, 90 (1954); Walker v. Money, 132 Tex. 132, 120 S.W.2d 428, 431 (1938).

[21]*See e.g.*, Ellsworth v. Ellsworth, 151 S.W.2d 628, 633 (Tex. Civ. App.—El Paso 1941, writ ref'd); Cameron Compress Co. v. Kubecka, 283 S.W. 285, 286 (Tex. Civ. App.—Austin 1926, writ ref'd); Producers' Oil Co. v. State, 213 S.W. 349, 353 (Tex. Civ. App.—San Antonio 1919, no writ). Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of a fact in issue. *See* Dodson v. Watson, 110 Tex. 355, 220 S.W. 771, 772 (1920).

[22]*See* Tex. & Pac. Ry. Co. v. Moore, 329 S.W.2d 293, 297 (Tex. Civ. App.—El Paso 1959, writ ref'd n.r.e.); *Ellsworth*, 151 S.W.2d at 628; *Producers' Oil Co.*, 213 S.W. at 353.

[23]*See* Simpson v. Home Petroleum Corp., 770 F.2d 499, 503 (5th Cir. 1985); *Tex. & Pac. Ry. Co.*, 329 S.W.2d at 297; *Producers' Oil Co.*, 213 S.W. at 353.

[24]*See* GMC v. Saenz, 873 S.W.2d 353, 359 (Tex. 1993); Combined Am. Ins. Co. v. Blanton, 163 Tex. 225, 353 S.W.2d 847, 849 (1962); Moore v. Tex. Bank & Trust Co., 576 S.W.2d 691, 695 (Tex. Civ. App.—Eastland 1979), *rev'd on other grounds*, 595 S.W.2d 502 (Tex. 1980); DeMuth v. Head, 378 S.W.2d 389, 390 (Tex. Civ. App.—Dallas 1964, writ ref'd n.r.e.); Amarillo v. Attebury, 303 S.W.2d 804, 806 (Tex. Civ. App.—Amarillo 1957, no writ).

[25]*See* Empire Gas & Fuel Co. v. Muegge, 135 Tex. 520, 143 S.W.2d 763, 767-68 (1940); Gant v. Dumas Glass & Mirror, Inc., 935 S.W.2d 202, 212 (Tex. App.—Amarillo 1996, no writ); *DeMuth*, 378 S.W.2d at 390.

[26]*See DeMuth*, 378 S.W.2d at 390; Nat'l Aid Life Ass'n v. Driskill, 138 S.W.2d 238, 242 (Tex. Civ. App.—Eastland 1940, no writ).

burden of production shifts back to the party originally relying upon the presumption.[27]

B. Use of Presumptions in Federal Court

The use of presumptions in federal court in Texas is very similar to that of the state courts. A presumption is generally defined as a rule of law that deals with the assumption of a certain factual situation based upon proof of other usually logically related facts.[28] A presumption is a procedural device and is not evidence.[29] The United States Supreme Court has stated:

> To establish a "presumption" is to say that a finding of the predicate fact . . . produces "a required conclusion in the absence of explanation" . . . . Thus, the . . . presumption places upon the defendant the burden of producing an explanation to rebut the prima facie case . . . .[30] "If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted," . . . and "drops out of the case."[31]

Further, Federal Rule of Evidence 301 describes the use of presumptions:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.[32]

Once the party relying upon the presumption proves the underlying fact, the presumption shifts the burden of production to the other party to

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[27]*See* First Nat'l Bank of Mission v. Thomas, 402 S.W.2d 890, 893 (Tex. 1965); Southland Life Ins. Co. v. Greenwade, 138 Tex. 450, 159 S.W.2d 854, 857 (1942); *Gant*, 935 S.W.2d at 212; Allred v. Harris County Child Welfare Unit, 615 S.W.2d 803, 806 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

[28]*See* Reeves v. Gen. Foods Corp., 682 F.2d 515, 521 (5th Cir. 1982).

[29]*See* United States v. Fernandez, 496 F.2d 1294, 1298 (5th Cir. 1974).

[30]St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07 (1993).

[31]*Id.* at 507 (quoting Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 (1981)).

[32]FED. R. EVID. 301.

disprove the presumed fact.[33] If the party opposing the presumption fails to produce any contrary evidence, then the presumption is established conclusively.[34] However, if the party opposing the presumption does produce evidence contrary to the presumed fact, then the presumption disappears—it bursts.[35] Similar to Texas state procedure, even though a presumption may shift the burden of production to the opposing party, the burden of persuasion never shifts due to a presumption.[36]

III. THE SUMMARY JUDGMENT MOTION

A. Summary Judgment in State Court[37]

1. Traditional Motion for Summary Judgment

The traditional motion for summary judgment[38] is found in Texas Rule of Civil Procedure 166(a).[39] With the traditional motion for summary judgment, the movant has a burden of production to establish that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law, by submitting competent summary judgment evidence.[40] Further, the movant also has the burden of persuasion in the summary

[33]*See* Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp., 158 F.3d 312, 315 (5th Cir. 1998).

[34]*See* Igloo Prods. Corp. v. Brantex, Inc., 202 F.3d 814, 819 (5th Cir. 2000).

[35]*See* Nunley v. City of Los Angeles, 52 F.3d 792, 796 (9th Cir. 1995) ("Under the so-called 'bursting bubble' approach to presumptions, a presumption disappears where rebuttal evidence is presented."); Allseas Maritime, S.A. v. M/V Mimosa, 812 F.2d 243, 248 (5th Cir. 1987).

[36]*See* Marcantel v. La. Dep't of Transp. and Dev., 37 F.3d 197, 200 (5th Cir. 1994).

[37]Much of the language in this section of this article is derived from earlier articles by the author. *See* David F. Johnson, *Can a Party File a No-Evidence Motion for Summary Judgment Based Upon an Inferential Rebuttal Defense*, 53 BAYLOR L. REV. 763 (2001); David F. Johnson, *The No-Evidence Motion for Summary Judgment in Texas*, 52 BAYLOR L. REV. 929 (2000), and William J. Cornelius & David F. Johnson, *Tricks, Traps, and Snares in Appealing a Summary Judgment in Texas*, 50 BAYLOR L. REV. 813, 814-19 (1998).

[38]Throughout this article the author will call a Texas Rule of Civil Procedure 166a(b) and (c) motion the traditional motion for summary judgment and a Texas Rule of Civil Procedure 166a(i) motion the no-evidence motion for summary judgment.

[39]*See* TEX. R. CIV. P. 166(a); Tobin v. Garcia, 159 Tex. 58, 316 S.W.2d 396, 400 (1958); 3 MCDONALD TEXAS CIVIL PRACTICE 18.1 (rev. vol. 1992).

[40]TEX. R. CIV. P. 166a(c); *see also* Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995); Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 (Tex. 1991); Nixon v. Mr. Prop. Mgmt. Co., Inc., 690 S.W.2d 546, 548 (Tex. 1985); Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972); Gibbs v. Gen. Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970); Fisher v. Yates, 953 S.W.2d 370, 375 (Tex. App—Texarkana 1997, writ denied) (per curiam); Stevens v. State Farm Fire & Cas. Co., 929 S.W.2d 665, 669 (Tex. App.—Texarkana 1996, writ denied).

judgment proceeding, and the court must resolve against the movant all doubts as to the existence of a genuine issue of fact in that all evidence favorable to the non-movant will be taken as true.[41] Therefore, the traditional summary judgment movant has both the burden of persuasion and burden of production when he files his traditional motion for summary judgment.

As the movant has the burden of production, the non-movant is not required to respond to the movant's traditional motion of summary judgment where the movant fails to present sufficient evidence to shift the burden of production to the non-movant.[42] Stated another way, if the movant does not meet his burden of production, there is no burden on the non-movant.[43] However, if the movant does establish a right to a summary judgment through sufficient summary judgment evidence, then the burden of production shifts to the non-movant.[44] The non-movant must then respond to the traditional summary judgment motion and present the trial court with summary judgment evidence raising a fact issue that would preclude summary judgment.[45] However, the burden of persuasion remains on the movant during all phases of the traditional summary judgment proceeding.[46]

When a party moves for a traditional summary judgment on his own cause of action, he must present competent summary judgment evidence proving each element of his cause of action as a matter of law.[47] When a party moves for a traditional summary judgment against the opposing party's claim or defense, he must either disprove at least one essential element of each theory of recovery pleaded by the opposing party or he

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[41] *See* Park Place Hosp. v. Estate of Milo, 909 S.W.2d 508, 510 (Tex. 1995); Kassen v. Hatley, 887 S.W.2d 4, 8 n.2 (Tex. 1994); *Nixon*, 690 S.W.2d at 548-49; Roskey v. Tex. Health Facilities Comm'n, 639 S.W.2d 302, 303 (Tex. 1982); *Stevens*, 929 S.W.2d at 669.

[42] *See* City of Houston v. Clear Creek Basin Auth., 589 S.W.2d 671, 678 (Tex. 1979); Ellert v. Lutz, 930 S.W.2d 152, 155 (Tex. App.—Dallas 1996, no writ).

[43] *See City of Houston*, 589 S.W.2d at 678.

[44] *See Stevens*, 929 S.W.2d at 669.

[45] *Id*; *see also City of Houston*, 589 S.W.2d at 678-79.

[46] *See* Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492, 495 (Tex. 1991); *Nixon*, 690 S.W.2d at 548-49; *Stevens*, 929 S.W.2d at 669.

[47] *See* MMP, Ltd. v. Jones, 710 S.W.2d 59, 60 (Tex. 1986); Geiselman v. Cramer Fin. Group, Inc., 965 S.W.2d 532, 534-35 (Tex. App.—Houston [14th Dist.] 1997, no writ); Bond v. Crill, 906 S.W.2d 103, 105 (Tex. App.—Dallas 1995, no writ); Al's Formal Wear of Houston, Inc. v. Sun, 869 S.W.2d 442, 444 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

must plead and conclusively prove each essential element of an affirmative defense.[48]

2. No-Evidence Motion for Summary Judgment

Under Texas Rule of Civil Procedure 166a(i), a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of the other party's claim.[49] This, in effect, reverses the traditional burden of production from the movant to the non-movant.[50] Under the no-evidence motion for summary judgment, the movant no longer has the burden to produce evidence; the burden of production is on the non-movant.[51] Once a specific no-evidence motion for summary judgment is filed, the non-movant has the burden of production to present sufficient evidence in order to be entitled to a trial.[52] However, as with a traditional summary judgment, the burden of persuasion remains on the no-evidence movant at all times.[53] Therefore, where a no-evidence motion is filed, initially the burdens of persuasion and production are on different parties. The non-movant has the burden to produce sufficient evidence to create a fact issue as to a challenged element of his claim or defense, and the movant has the burden to persuade the court that the non-movant's evidence does not raise a fact issue as to the challenged element of the non-movant's claim or defense.

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[48]*See* Friendswood Dev. Co. v. McDade & Co., 926 S.W.2d 280, 282 (Tex. 1996); Doe v. Boys Clubs of Greater Dallas, Inc., 907 S.W.2d 472, 476-77 (Tex. 1995); Randall's Food Mkts., Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995); Hanssen v. Our Redeemer Lutheran Church, 938 S.W.2d 85, 90 (Tex. App.—Dallas 1996, no writ); Maranatha Temple, Inc. v. Enter. Prods. Co., 893 S.W.2d 92, 97-98 (Tex. App.—Houston [1st Dist.] 1994, writ denied); Marchal v. Webb, 859 S.W.2d 408, 412 (Tex. App.—Houston [1st Dist.] 1993, writ denied); Compton v. Calabria, 811 S.W.2d 945, 949 (Tex. App.—Dallas 1991, no writ); Vest v. Gulf Ins. Co., 809 S.W.2d 531, 533 (Tex. App.—Dallas 1991, writ denied). *See generally*, Dean M. Swanda, *Summary Judgment Practice*, 46 BAYLOR L. REV. 721, 725 (1994).

[49]*See* TEX. R. CIV. P. 166a(i).

[50]*See id.*

[51]*See id.*

[52]*See* Robinson v. Warner-Lambert & Old Corner Drug, 998 S.W.2d 407, 410 (Tex. App.—Waco 1999, no pet.); Lampasas v. Spring Center, Inc., 988 S.W.2d 428, 432 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

[53]*See* Ruiz v. Gov't Employees Ins. Co., 4 S.W.3d 838, 839-40 (Tex. App.—El Paso 1999, no pet.); Aguirre v. S. Tex. Blood & Tissue Ctr., 2 S.W.3d 454, 456 (Tex. App.—San Antonio 1999, pet. denied); McCombs v. Children's Med. Ctr. of Dallas, 1 S.W.3d 256, 259 (Tex. App.—Texarkana 1999, pet. denied); *Robinson*, 998 S.W.2d at 410; Zapata v. Children's Clinic, 997 S.W.2d 745, 747 (Tex. App.—Corpus Christi 1999, pet. denied); Moore v. K-Mart Corp., 981 S.W.2d 266, 269 (Tex. App.—San Antonio 1998, pet. denied).

B. Summary Judgment in Federal Court

In federal court, summary judgments are authorized by Federal Rule of Civil Procedure 56.[54] "[The] purpose of a summary judgment is to 'pierce the pleadings and to assess the proof to determine whether there is a genuine need for trial.'"[55] Summary judgment is proper if the pleadings and summary judgment evidence show that there is no genuine issue about any material fact and that the movant is entitled to judgment as a matter of law.[56] The burden of proof in a summary judgment proceeding is on the party who would bear the burden of proof at trial.[57] When a party resisting a claim or defense moves for summary judgment, he may do so by (1) submitting summary judgment evidence that negates the existence of a material element of the opposing party's claim;[58] or (2) by showing that the opposing party has no evidence to support an essential element of the opposing party's claim or defense.[59] When a party moves for summary judgment on its own claim or defense, it must show that there is no genuine issue of material fact as to each element of its claim or defense as a matter of law.[60]

Therefore, a party can raise a no-evidence ground in a motion for summary judgment against its opponent's claim or defense, placing the burden of production on the non-movant to produce sufficient evidence to raise a fact issue on the challenged claim. The party who files a motion for summary judgment on its own claim or defense will initially carry the burden of production as to every element of its claim or defense, and the burden will not shift until sufficient evidence is produced. Notwithstanding the burden of production, the burden of persuasion

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[54]*See* FED. R. CIV. P. 56.

[55]Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (quoting FED. R. CIV. P. 56 advisory committee's note).

[56]FED. R. CIV. P. 56(c). *See also* Celotex Corp. v. Catrett, 477 U.S. 317, 325-26 (1986).

[57]*See Celotex*, 477 U.S. at 324.

[58]*See id.* at 323-24; Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 178 (5th Cir. 1990) (involving defendant moving on plaintiff's claim); FDIC v. Giammettei, 34 F.3d 51, 54 (2d Cir. 1994) (involving plaintiff moving on defendant's affirmative defense).

[59]*See Celotex*, 477 U.S. at 325; Wallace v. Tex. Tech Univ., 80 F.3d 1042, 1047 (5th Cir. 1996) (involving defendant moving on plaintiff's claim); *Giammettei*, 34 F.3d at 54 (involving plaintiff moving on defendant's affirmative defense).

[60]*See* Crescent Towing & Salvage Co., Inc. v. M/V Anax, 40 F.3d 741, 744 (5th Cir. 1994) (involving defendant moving on its own affirmative defense); Topalian v. Ehrman, 954 F.2d 1125, 1137 (5th Cir. 1992) (involving defendant moved on its counterclaim); Fontenot v. Upjohn Co., 780 F.2d 1190, 1194 (5th Cir. 1986) (involving plaintiff moving on its own claim).

remains on the movant at all times under either scenario—a court must resolve all reasonable doubts about the facts in favor of the non-movant.[61]

IV. USE OF PRESUMPTIONS IN STATE SUMMARY JUDGMENT PROCEDURE

The issue is whether a summary judgment movant or non-movant can use a presumption to shift the burden of production to the opposing party. Historically, Texas courts did not go to great lengths to analyze the appropriateness of a summary judgment movant using a presumption in a summary judgment proceeding to shift the burden of production to the non-movant. Several Texas cases allowed the use of presumptions in summary judgment proceedings.[62] In 1981, however, the Texas Supreme Court did an about-face in *Missouri-Kansas-Texas Railroad Co. v. City of Dallas*, and held that a movant in a traditional summary judgment proceeding could not rely upon a presumption to shift the burden of production to the opposing party:

> The court of civil appeals made the same error by holding that Dallas, as taxing agencies, enjoyed a number of presumptions which then shifted the burden to produce evidence at the hearing away from movants and onto nonmovant Railroad. The presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear.[63]

The Texas Supreme Court basically held that because the burden of proof is always on the movant in a summary judgment proceeding, it would be inconsistent to allow the movant to use a presumption to shift that burden to the non-movant. Though not cited by the Texas Supreme Court, *Brown v. Parrata Sales, Inc.* arguably supports the Court's finding that a movant in a traditional summary judgment proceeding cannot rely upon a presumption to shift the burden of production.[64] This reasoning, however, is flawed. The court failed to distinguish between the burden of persuasion

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[61] *See* Hom v. Squire, 81 F.3d 969, 973 (10th Cir. 1996); Pocchia v. NYNEX Corp., 81 F.3d 275, 277 (2d Cir. 1996).

[62] *See, e.g.*, Pachter v. Woodman, 547 S.W.2d 954, 957 (Tex. 1977); Sudduth v. Commonwealth County Mut. Ins. Co., 454 S.W.2d 196, 197-98 (Tex. 1970); Estate of Galland v. Rosenberg, 630 S.W.2d 294, 296-97 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); Williams v. Hill, 396 S.W.2d 911, 912-13 (Tex. Civ. App.—Dallas 1965, no writ).

[63] 623 S.W.2d 296, 298 (Tex. 1981).

[64] 521 S.W.2d 359, 361-63 (Tex. Civ. App.—Dallas 1975, no writ).

and the burden of production, which are both called the burden of "proof."[65] The use of a presumption by a movant would not shift the burden of persuasion to the non-movant; that burden would remain at all times on the movant. The use of a presumption only shifts the burden of production. If a party has the burden of production to come forward with evidence at trial, but cannot, then there is no reason to make both parties incur the expense of trial when the case can be resolved by a summary judgment motion. Accordingly, a party should be allowed to use a presumption to shift the burden of production in a summary judgment proceeding, just as he or she would be allowed to do at trial. Therefore, there is nothing inconsistent with the use of presumptions in a summary judgment proceeding and the summary judgment rule that the burden of persuasion always remains on the movant.

The Texas Supreme Court confused a presumption with an inference. Inferences and presumptions are conceptually very similar but procedurally very different. An inference is a conclusion that a factfinder can, but is not required to, make from a proved fact.[66] An inference has been described as a natural prompting that is derived directly from circumstances of a particular case; it is a deduction that is sufficient to satisfy understanding and conscience of a factfinder.[67] An inference is an evidentiary tool, rather than a procedural one. A presumption is a procedural or legal tool used to determine which party should have the burden to come forward with evidence, whereas an inference is an evidentiary tool that allows, but does not demand, a factfinder to determine an issue by using evidence of another. In the context of summary judgments, just as the burden of persuasion is always on the movant, a non-movant should be allowed every inference. Furthermore, the movant in a traditional summary judgment proceeding should not be allowed to rely upon an inference to prove his ground.[68] But this does not limit or impact the use of presumptions in the

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[65] *See id.*

[66] *See* Lozano v. Lozano, 52 S.W.3d 141, 148-49 (Tex. 2001) (holding that a jury is entitled to consider the circumstantial evidence, weigh witnesses' credibility, and make reasonable inferences from the evidence it chooses to believe); Mathews v. Warren, 522 S.W.2d 569, 570 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.); Navarro Seed Co., Inc. v. Arant, 428 S.W.2d 152, 153 (Tex. Civ. App.—Amarillo 1968, no writ); Ice Serv. Co. v. Scruggs, 284 S.W.2d 185, 188 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.).

[67] *See* Johnson's Adm'r. v. Timmons, 50 Tex. 521, 535-36 (1878).

[68] *See* MMP, Ltd. v. Jones, 710 S.W.2d 59, 60 (Tex. 1986); Huckabee v. Time Warner Entm't Co. L.P., 19 S.W.3d 413, 434 (Tex. 2000) (Hecht, J., dissenting); McConnell v. Ford & Ferraro, No. 05-99-01932-CV, 2001 Tex. App. LEXIS 4560, at *3-4 (Tex. App.—Dallas July 6,

context of summary judgments. The Texas Supreme Court likely confused the fact that a traditional summary judgment movant cannot use an inference to support his summary judgment ground with the issue of whether the movant could use a presumption to shift the burden of production to the non-movant.

Once again, in a traditional summary judgment proceeding, once the movant produces sufficient evidence to meet his initial burden of production, the burden shifts to the non-movant. The use of a presumption would only short-cut shifting the burden of production to the non-movant. Therefore, a traditional summary judgment movant should be able to rely upon a presumption.

Since the Supreme Court's decision in 1981, courts of appeals have been inconsistent regarding the use of presumptions by movants in traditional summary judgment proceedings. Some courts of appeals have followed the Supreme Court and have held that a traditional summary judgment movant could not rely upon a presumption to shift the burden of production to the non-movant.[69] Seemingly more courts, however, have held that a movant in a traditional summary judgment proceeding can rely upon a presumption to shift the burden of production to the non-movant.[70] However, if the non-movant produces evidence to contradict the

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2001, no pet.) (not designated for publication); Maberry v. Julian, 456 S.W.2d 234, 237-38 (Tex. Civ. App.—Texarkana 1970, writ ref'd n.r.e.).

[69] *See* Garcia v. John Hancock Variable Life Ins. Co., 859 S.W.2d 427, 435 (Tex. App.—San Antonio 1993, writ denied); Mayhew v. Town of Sunnyvale, 774 S.W.2d 284, 287 (Tex. App.—Dallas 1989, writ denied), *subsequent opinion at* 905 S.W.2d 234, *rev'd on other grounds*, 964 S.W.2d 922 (Tex. 1998); McCord v. Avery, 708 S.W.2d 954, 956 (Tex. App.—Fort Worth 1986, no writ) (involving presumption that doctor performed duties properly was not applicable to summary judgment proceeding); Garcia v. Fabela, 673 S.W.2d 933, 937 (Tex. App.—San Antonio 1984, no writ) (involving presumption that dealing between fiduciary and principal was unfair was not applicable in summary judgment proceeding).

[70] *See e.g.*, Hunter v. Palmer, 988 S.W.2d 471, 473 (Tex. App.—Houston [1st Dist.] 1999, no pet.); Speegle v. Crowder, 1997 Tex. App. LEXIS 814, at *10-11(Tex. App.—Houston [1st Dist.] 1997, no pet.) (not designated for publication); *see In re* J.A.M., 945 S.W.2d 320, 322-23 (Tex. App.—San Antonio 1997, no pet.); Milligan v. Homeowner Ass'n of Bellfort Place, No. 14-95-00764-CV, 1996 Tex. App. LEXIS 2115, at *2-3 (Tex. App.—Houston [14th Dist.] May 23, 1996, no writ) (not designated for publication); Maewal v. Adventist Health Sys., 868 S.W.2d 886, 891-92 (Tex. App.—Fort Worth 1993, writ denied); Masterson v. Hogue, 842 S.W.2d 696, 697 (Tex. App.—Tyler 1992, no writ); Grossman v. Grossman, 799 S.W.2d 511, 513 (Tex. App.—Corpus Christi 1990, no writ); Hancock v. State Bd. Of Ins., 797 S.W.2d 379, 382 (Tex. App.—Austin 1990, no writ); Simpson v. MBank Dallas, N.A., 724 S.W.2d 102, 107 (Tex. App.—Dallas 1987, writ ref'd n.r.e.); First Nat'l Bank of Libby, Mont. v. Rector, 710 S.W.2d 100, 103 (Tex. App.—Austin 1986, writ ref'd n.r.e.).

presumption, the presumption disappears and summary judgment is not appropriate.[71]

Lastly, a no-evidence summary judgment movant does not need to use a presumption to shift the burden of production because the burden is already on the non-movant.[72]

Texas courts have always allowed a non-movant, in either a traditional or no-evidence summary judgment proceeding, to use a presumption to rebut a summary judgment motion, i.e., to create a fact question on a challenged claim by shifting the burden of production back to the movant by way of a presumption.[73] For example, the Texas Supreme Court held that a trial court erred in granting summary judgment where the movant failed to rebut the presumption that a release between an attorney and the client is presumptively unfair.[74] If the movant fails to rebut the presumption as a matter of law, then a fact issue is raised and summary judgment is not appropriate.[75] Under traditional summary judgment procedure, if a movant rebuts a non-movant's presumption as a matter of law, then the presumption disappears and summary judgment can be granted.[76] Therefore, in a traditional summary judgment motion proceeding, the burden of production can shift back and forth until one side wins as a matter of law. Presumably, however, after a few rocks, there should be a fact issue as there is likely evidence on both sides of the issue.

A no-evidence summary judgment is different in this respect. Once the non-movant meets his initial burden of production and it shifts to the movant, the movant cannot then shift the burden back to the non-movant

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[71] *See Milligan*, 1996 Tex. App. LEXIS 2115, at *2-3.

[72] *See* TEX. R. CIV. P. 166a(i).

[73] *See* Keck v. Nat'l Union Fire Ins. Co., 20 S.W.3d 692, 699 (Tex. 2000); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984); Stewart v. Transit Mix Concrete & Materials Co., 988 S.W.2d 252, 255-56 (Tex. App.—Texarkana 1998, pet. denied); Swate v. Schiffers, 975 S.W.2d 70, 74-75 (Tex. App.—San Antonio 1998, pet. denied); Ruiz v. City of San Antonio, 966 S.W.2d 128, 132 (Tex. App.—Austin 1998, no pet.); York v. Flowers, 872 S.W.2d 13, 15 (Tex. App.—San Antonio 1994, writ denied); Cable v. Estate of Cable, 480 S.W.2d 820, 821 (Tex. Civ. App.—Fort Worth 1972, no writ); *see also* Charles T. Frazier, Jr. et al., *Celotex Comes to Texas: No-Evidence Summary Judgments and Other Recent Developments in Summary Judgment Practice*, 32 TEX. TECH. L. REV. 111, 126 (2000).

[74] *See Keck*, 20 S.W.3d at 699.

[75] *See* Brown v. Big D Transp., Inc., 45 S.W.3d 703, 705 (Tex. App.—Eastland 2001, no pet.); *Cable*, 480 S.W.2d at 821.

[76] *See* Alexander Oil Co. v. Fawnwood Mart, Inc., No. 07-00-0447-CV, 2001 Tex. App. LEXIS 4862, at *4-6 (Tex. App.—Amarillo July 24, 2001, no pet.) (not designated for publication); *Swate*, 975 S.W.2d at 74-75.

because a court cannot review a movant's summary judgment evidence to support a no-evidence motion.[77] Therefore, once the non-movant shifts the burden back to the movant by way of a presumption, the court must deny the no-evidence motion.[78] Of course, there is no rule that limits the movant to only filing a no-evidence motion—he could file a traditional motion with summary judgment evidence that contradicts the non-movant's presumption.

V. USE OF PRESUMPTIONS IN FEDERAL SUMMARY JUDGMENT PROCEDURE

Federal courts allow a party to rely upon a presumption in a summary judgment proceeding.[79] As one court has stated, "A party moving for summary judgment is entitled to the benefit of any relevant presumptions that would be available at trial, provided that the facts giving rise to the presumption are undisputed."[80] If controverting evidence is produced by the party opposing the presumption, however, the presumption disappears.[81] Further, the use of presumptions is just as available to the summary judgment non-movant as it is to the movant.[82] It should be noted that one commentator has disagreed with the use of presumptions in the context of a summary judgment proceeding in federal court.[83]

In a diversity case, a non-movant may argue that Texas state law should prevail and that a movant should not be able to rely upon a presumption to shift the burden of proof. It is true that federal courts sitting in diversity

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[77] *See* Hight v. Dublin Veterinary Clinic, 22 S.W.3d 614, 618-19 (Tex. App.—Eastland 2000, pet. denied).

[78] *See Brown*, 45 S.W.3d at 705.

[79] *See* Gasmark Ltd. Liquidating Trust v. Louis Dreyfus Natural Gas Corp., 158 F.3d 312, 315 (5th Cir. 1998); Liquid Controls Corp. v. Liquid Control Corp., 802 F.2d 934, 935 (7th Cir. 1986); Long v. Comm'r, 757 F.2d 957, 959 (8th Cir. 1985); Sandoz v. Fred Wilson Drilling Co., 695 F.2d 833, 839 (5th Cir. 1983); Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250, 1253 (9th Cir. 1982); United States v. Gen. Motors Corp., 518 F.2d 420, 441-42 (D.C. Cir. 1975); Johnson v. Henderson, No. C-00-4618EDL, 2001 U.S. Dist. LEXIS 14705, at *28 (N.D. Cal. September 14, 2001); *see also* Boe v. AlliedSignal Inc., 131 F. Supp. 2d 1197, 1199 (D.C. Kan. 2001); Sea-Roy Corp. v. Parts R Parts, 1997 U.S. Dist. LEXIS 21809 (D.C.N.C. 1997); Urantia Found. v. Maaherra, 895 F. Supp. 1338, 1341 (D.C. Ariz. 1995).

[80] *Johnson*, 2001 U.S. Dist. LEXIS 14705, at *28.

[81] *See Liquid Controls Corp.*, 802 F.2d at 934.

[82] *See* Ennis v. United of Omaha Life Ins. Co., 825 F. Supp. 962, 963 (D.C. Kan. 1993).

[83] *See* Steven David Smith, Comment, *The Effect of Presumptions on Motions for Summary Judgment in Federal Court*, 31 UCLA L. REV. 1101, 1133-38 (1983).

cases should look to state law to determine whether a presumption exists.[84] However, under *Erie Railroad Co. v. Tompkins*, the federal court should not look to state law to determine whether the presumption applies in a federal summary judgment proceeding.[85] Accordingly, whether a federal case is based on diversity or some other jurisdictional statute, a party should be able to use a presumption to shift the burden of production to the opposing party.

VII. CONCLUSION

In Texas federal court, a party can rely upon a presumption to shift the burden of production to his opponent. This is true whether the party relying upon the presumption is the movant or non-movant. In Texas state court, summary judgment non-movants can similarly rely upon presumptions to respond to a traditional or no-evidence motion for summary judgment. However, the issue of whether a traditional summary judgment movant can rely upon a presumption in state court to shift the burden of production to the non-movant is not as clear. The Texas Supreme Court has expressly held that a traditional summary judgment movant is not allowed to use a presumption to shift the burden of "proof." Notwithstanding this decision, many courts have allowed traditional summary judgment movants to rely upon presumptions to shift the burden of production. Further, a proper analysis of the very definition and effect of a legal presumption would justify its use in the context of summary judgment procedure.

Presumptions assist courts in determining which party should have the initial burden of production on an issue. They do not affect the burden of persuasion. The party who has the burden of persuasion on a claim or defense will continue to have that burden regardless of which party has the burden of production at any given time. A summary judgment motion is simply a procedural tool that tests a party's claim or defense in a pretrial setting. If a party cannot support his claim or defense by competent summary judgment evidence, then there is no need to incur the expense and time of a trial. Because the summary judgment takes the case out of a factfinder's hands, however, all evidentiary inferences should be given to

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[84] *See* Md. Cas. Co. v. Williams, 377 F.2d 389, 394-95 (5th Cir. 1967).

[85] 304 U.S. 64, 69-78 (1938); *see also* Herron v. S. Pac. Co., 283 U.S. 91, 92-93 (1931); Cater v. Gordon Transp., Inc., 390 F.2d 44, 46 (5th Cir. 1968); Judy M. Cornett, *The Legacy of Byrd v. Hall: Gossiping about Summary Judgment in Tennessee*, 69 TENN. L. REV. 175, 212 n.235 (2001).

the non-movant, i.e., the burden of persuasion is always on the movant. In other words, how evidence is interpreted should be shaded as strongly for the non-movant as is reasonable. But as a presumption only deals with the burden of production and not how evidence is interpreted, there is no logical reason to limit its use to only full trials. If a party has the burden of production to come forward with evidence at trial, but cannot, there is no reason to make both parties incur the expense of trial when the case could have been resolved by a summary judgment motion. Accordingly, a party should be allowed to use a presumption to shift the burden of production in a summary judgment proceeding—just as he would be allowed to do at trial.