SUMMARY JUDGMENT APPELLATE ISSUES IN TEXAS

DAVID F. JOHNSON
Winstead PC
777 Main St., Suite 1100
Fort Worth, TX 76102

TARRANT COUNTY BAR ASSOCIATION
JANUARY 21, 2011

DAVID FOWLER JOHNSON
DFJOHNSON@WINSTEAD.COM
777 Main St., Suite 1100
Fort Worth, Texas 76102
(817) 420-8223

BOARD CERTIFICATIONS:

*Board Certified – Civil Appellate Law, Civil Trial Law, and Personal Injury Trial Law – Texas Board of Legal Specialization (Fewer Than Twenty Practicing Lawyers Certified In Those Three Areas)

AWARDS AND HONORS:

* Named by Fort Worth Texas Magazine as One of Tarrant County's Best Appellate Lawyers in 2004-2010
* Named by Texas Monthly as a "Texas Rising Star" in 2004, 2006-2010
* Named One of D Magazine's "Best Lawyers Under 40 in Dallas" in 2004, 2006, 2007
* Named One of D Magazine's "Best Lawyers in Dallas" for appellate law in 2008-2010
* Named One of Fort Worth Business Press's "Forty Under Forty" in 2003
* Tech Law Review selected article entitled "Narrowing the Ability to Strike Jurors: The Texas Supreme Court Addresses Important Voir Dire Issues" as the Outstanding Lead Article in 2007.
* 2010 Shareholder Winner of Winstead's "We Strengthens Me" Award.

CURRENT LEGAL EMPLOYMENT:

*Shareholder: Winstead PC
-General Civil Appellate and Trial Practice

EDUCATION:

Baylor University School Of Law, Waco, Texas, Juris Doctor, *Magna Cum Laude*, 1997
Baylor University, Waco, Texas, B.B.A. in Accounting, 1994

ARTICLES AND CLE MATERIALS:

David has published over twenty (20) law review articles on topics including experts, summary judgments, charge practice, preservation of error, voir dire, and other topics. David's articles have been cited as authority by federal courts, the Texas Supreme Court, the Texas courts of appeals located in Waco, Texarkana, Tyler, Beaumont, and Houston, and cited by McDonald and Carlson in their Texas Civil Practice treatise and William V. Dorsaneo in the Texas Litigation Guide and in the Baylor Law Review, South Texas Law Review, and the Tennessee Law Review. David has presented and/or prepared written materials for over fifty (50) continuing legal education courses.

I. INTRODUCTION

This article is meant to be a practical guide for practicing attorneys who must deal with summary judgments on appeal. Almost all attorneys will eventually find themselves asking an appellate court to either affirm or reverse a summary judgment. When in that position, an attorney needs to be aware of a multitude of issues that can drastically affect the fate of the summary judgment on appeal.

II. FINALITY OF SUMMARY JUDGMENT ORDERS

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

A judgment rendered after a trial on the merits is presumed final and appealable, even absent clear language so stating. *See Vaughn v. Drennon,* 324 S.W.3d 560 (Tex. 2010); *John v. Marshall Health Serv., Inc.,* 58 S.W.3d 738, 740 (Tex. 2001); *Martinez v. Humble Sand & Gravel, Inc.*, 875 S.W.2d 311, 312 (Tex. 1994). But "when there has been no traditional trial on the merits, no presumption arises regarding the finality of a judgment." *Crites v. Collins*, 284 S.W.3d 839, 840 (Tex. 2009) (per curiam). For example, summary judgments are not afforded the finality presumption; rather, they are presumed to be interlocutory and not appealable. *See Hood v. Amarillo Nat'l Bank*, 815 S.W.2d 545, 547 (Tex. 1991). Ordinarily, the order granting summary judgment must expressly dispose of all parties and all issues in the case in order for it to be a final, appealable judgment. *See Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 27677 (Tex. 1996); *Park Place Hosp. v. Estate of Milo*, 909 S.W.2d 508, 510 (Tex. 1995); *Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1994). If the order does not dispose of all issues and all parties, it normally will be considered interlocutory and not appealable. *See Park Place Hosp.*, 909 S.W.2d at 510; *see also Mafrige*, 866 S.W.2d at 591.

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

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

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

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

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

Id. at 592.

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

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

B. Reversal of *Mafrige*

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

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

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

> Much confusion can be dispelled by holding, as we now do, that the inclusion of a Mother Hubbard clause – by which we mean the statement, "all relief not granted is denied," or essentially those words – does not indicate that a judgment without a conventional trial is final for purposes of appeal. We overrule *Mafrige* to the extent is states otherwise.

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

Since *Lehman*, the Texas Supreme Court has continued to discuss finality of summary judgment orders. In In re Daredia, a plaintiff obtained a default judgment against one defendant that contained a statement that it disposed of all parties and all claims and was final. 317 S.W.3d 247 (Tex. 2009). The judgment was not final, however, because there was another defendant in the suit. More than 15 months after the default, the plaintiff attempted to file a motion for judgment nunc pro tunc to correct "typographical errors" and clarify that it was interlocutory. After the trial court granted the motion, the defendant filed a petition for writ of mandamus, arguing that the judgment was final and ended the litigation. The Texas Supreme Court agreed with the defendant, stating:

> But the lack of any basis for rendering judgment against Daredia did not preclude dismissing him from the case. Even if dismissal was inadvertent, as American Express insists, it was nonetheless unequivocal, and therefore effective. American Express complains that the trial court never made a substantive disposition of its claims against Daredia, but dismissal is not a ruling on the merits. We conclude that the judgment by its clear terms disposed of all claims and parties and was therefore final.
>
> . . . .
>
> American Express complains that the judgment, if not corrected, will give Daredia a windfall, but being given the relief an opponent requests can hardly be considered a windfall. Further, had American Express acted promptly in pursuing its claim against Daredia, before and after suit, counsel's error in allowing the claim to be dismissed could have been rectified, either by timely moving to reinstate the case, or perhaps by refiling the lawsuit. We conclude that the trial court clearly abused its discretion in setting aside a judgment after its plenary power expired. Daredia has no adequate remedy at law.

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

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

> ExxonMobil argues that the undisputed summary judgment evidence established attorney's fees of $36,167 and expert fees of $1,500, and that the trial court's award of precisely $36,167 means it adjudicated only the former. But the award was a lump sum that did not specify what it was for; that it may have been incorrect if it did not include both fees does not mean it was interlocutory. We

> have never held that an order disposing of all claims can be final only if it itemizes each and every element of damages pleaded. Similarly, a summary judgment order clearly disposing of a suit is final even if it does not break down that ruling as to each element of duty, breach, and causation. Accordingly, we hold this order granting a lump sum for all Ford's claims is final.

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

In *In re Burlington Coat Factory Warehouse of McAllen, Inc*., the Court found that a default judgment was interlocutory because it did not address the plaintiff's claim for punitive damages. 167 S.W.3d 827 (Tex. 2005). Interestingly, the default judgment had statements about issuing writs and executing on the judgment that would indicate it was intended to be a final judgment. But the Court found that this was not sufficient to make it final: "We cannot conclude that language permitting execution 'unequivocally expresses' finality in the absence of a judgment that actually disposes of all parties and all claims." *Id*. at 830.

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

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

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

1) summary judgment disposes of "all claims" between the only existing parties; *Lopez v. Yates*, No. 14-01-00649-CV, 2002 Tex. App. LEXIS 8229 (Tex. App.—Houston [14th Dist.] November 21, 2002, no pet.) (not designated for publication);

2) summary judgment disposes of all of the plaintiff's claims and the defendant's "various counterclaims;" *Clark v. Bula*, No. 05-01-00887-CV, 2002 Tex. App. LEXIS 4548 (Tex. App.—Dallas June 26, 2002, no pet.) (not designated for publication);

3) "all issues and matters between [the parties] have been decided, and that this Order constitutes a final judgment;" *Arredondo v. City of Dallas*, 79 S.W.3d 657 n.7 (Tex. App.—Dallas 2002, pet denied);

4) "[the court] is of the opinion that the Motions for Summary Judgment should be granted as to all claims asserted by Plaintiff;" *Alashmawi v. IBP, Inc*., 65 S.W.3d 162 (Tex. App.—Amarillo 2001, pet. denied);

5) "Judgment on all claims is entered in favor of Defendant;" *Murphy v. Gulf States Toyota, Inc*., No. 01-00-00740-CV, 2001 Tex. App. LEXIS 3774 (Tex. App.—Houston [1st Dist.] June 7, 2001, no pet) (not designated for publication); and

6) "[a]s a result of the other orders signed on this date, this is a final judgment" *Capstead Mortgage Corp. v. Sun America Mortgage Corp*., 45 S.W.3d 233 (Tex. App.—Amarillo 2001, no pet.).

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

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

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

C. SUMMARY JUDGMENT GROUNDS

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

1. Traditional Motion For Summary Judgment

The movant must expressly state the specific grounds for summary judgment in the motion. *See id; McLendon v. Detoto*, No. 14-

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

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

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

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

Unaddressed issues or claims cannot be a basis for summary judgment. *See Chessher v. Southwestern Bell Tel. Co*., 658 S.W.2d 563, 564 (Tex. 1983) (per curiam). When a plaintiff amends her pleadings after a defendant has moved for summary judgment, the defendant must ordinarily file an amended motion for summary judgment to be entitled to prevail on the entirety of the plaintiff's case. *See Smith v. Atl. Richfield Co.*, 927 S.W.2d 85, 88 (Tex. App.—Houston [1st Dist.] 1996, writ denied). The portion of a final summary judgment that is rendered on the plaintiff's entire case under these circumstances must be reversed because the judgment grants more relief that requested. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 200 (Tex. 2000); *Postive Feed, Inc. v. Guthmann*, 4 S.W.3d 879, 881 (Tex. App.—Houston [1st Dist.] 1999, no pet.). However, an exception applies when the grounds initially asserted in the motion for summary judgment conclusively negate an element that is common to the

allegation asserted in the amended pleadings. *See Judwin Props., Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 502-03 (Tex. App.—Houston [1st Dist.] 1995, no writ). See Fraud-Tech, Inc. v. Choicepoint, Inc., 102 S.W.3d 366, 387 (Tex. App.—Fort Worth 2003, pet. denied).

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

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

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

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

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

There is one difference in the consequences that attach to a movant's failure to file his motion and supporting brief in the same document and those resulting from a non-movant's failure to file his response and supporting brief in the same document. *See McConnell*, 858 S.W.2d at 343. A non-movant's failure to answer or respond cannot, by itself, entitle the movant to a summary judgment because, even if the non-movant fails to respond, the movant still has the obligation to carry his initial burden. *See id.* at 343. However, this choice is not the most advantageous position for the non-movant because, on appeal, he may only

argue the legal sufficiency of the summary judgment motion. *See id.* Even if the party who is required to file an exception to the motion or response with the trial court does so, that party is still required to present the issue to the appellate court in his appellate brief, or he waives the issue. *See Wilson v. General Motors Acceptance Corp.*, 897 S.W.2d 818, 823 (Tex. App.—Houston [1st Dist.] 1994, no writ). That the motion or response contains the grounds is not the only requirement. The party need not completely brief each ground or issue; he must only notify the opposing party of what they are. *See Golden Harvest Co., Inc. v. City of Dallas*, 942 S.W.2d 682, 691 (Tex. App.—Tyler 1997, writ denied) ("The motion for summary judgment must state specific grounds on which it is made. The grounds in the motion are sufficiently specific if the motion gives 'fair notice' to the non-movant.") (citations omitted) (emphasis omitted). *See also Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 175 (Tex. 1995). Furthermore, if the motion itself states legally sufficient grounds, the trial court does not err in considering a separately filed brief in deciding a summary judgment motion. *See Golden Harvest Co.*, 942 S.W.2d at 692.

2. No-Evidence Motion for Summary Judgment

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

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

> The Bank did not specify whether the part of its motion opposing Tello's counterclaims was a traditional motion or a "no-evidence" motion. At times, the Bank used language applicable to a traditional motion; but at other times, the Bank generally asserted that Tello has "no evidence" to support his various claims or factual allegations. However, the motion did not "state the elements as to which there is no evidence" as required by Rule 166a(i). Because the motion did

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

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

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

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

Id. (internal citation omitted).

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

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

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

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

S.W.3d 110, 117 (Tex. App.—Waco 1999, no pet.); *Roth v. FFP Operating Partners, L.P.*, 994 S.W.2d 190, 194-95 (Tex. App.—Amarillo 1999, pet. denied). *See also Leifester v. Dodge Country, Ltd.*, No. 03-06-00044-CV, 2008 Tex. App. LEXIS 790 (Tex. App.—Austin February 1, 2008, no pet. hist.).

Other courts have held that a no-evidence motion that does not properly challenge an element of the non-movant's claim or defense is legally insufficient and that complaint can be raised for the first time on appeal. *See In re Estate of Swanson,* 130 S.W.3d 144, 147 (Tex. App.—El Paso 2003, no pet.); *Kesyler v. Menil Med. Ctr. of E. Tex.*, 105 S.W.3d 122 (Tex. App.—Corpus Christi 2003, no pet.); *Dentler v. Helm-Perry*, No. 04-02-00034-CV, 2002 Tex. App. LEXIS 8167 (Tex. App.—San Antonio November 20, 2002, no pet.) (not desig. for pub.); *Crocker v. Paulyne's Nursing Home, Inc.*, 95 S.W.3d 416 (Tex. App.—Dallas November 8, 2002, no pet.); *Gross v. Methodist Hosp. Of Dallas*, No. 05-00-02124-CV, 2002 Tex. App. LEXIS 4590 (Tex. App.—Dallas June 27, 2002, no pet.) (not desig. for pub.); *Laparade v. Rivera*, No. 01-99-0723-CV, 2002 Tex. App. LEXIS 3487 (Tex. App.—Houston [1st Dist.] May 16, 2002, no pet.) (not desig. for pub.); *Cuyler v. Minns*, 60 S.W.3d 209 (Tex. App.—Houston [14th Dist.] 2001, pet. denied); *Callaghan Ranch, Ltd. v. Killam*, 53 S.W.3d 1, 3 (Tex. App.—San Antonio 2000, pet. denied). For example, in *Rodriguez v. Gulf Coast & Builders Supply Inc.*, the court held that if a no-evidence motion does not state an element, the complaint about that failure can be raised for the first time on appeal; however, the court noted that other complaints about the motion, e.g., vague, ambiguous, etc., require a special exception to preserve error. No. 14-05-00430-CV, 2006 Tex. App. LEXIS 11073 (Tex. App.—Houston [14th Dist.] December 28, 2006, no pet).

If a movant files a no-evidence motion based on his own affirmative defense, then the non-movant should object or specially except to that impermissible ground. *See Hermann v. Lindsey*, 136 S.W.3d 286, 290 (Tex. App.—San Antonio 2003, no pet.) (movant filed no-evidence ground on its own counterclaim, court found that non-movant waived error by not filing a special exception but reviewed motion under a traditional summary judgment standard of review); *Flameout Design & Fabrication v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App.—Houston [1st Dist.] 1999, no pet.); *but see Kesyler v. Menil Med. Ctr. of E. Tex.*, 105 S.W.3d 122 (Tex. App.—Corpus Christi 2003, no pet.). Therefore, it is important for a non-movant to point out to the trial court any improper burden-shifting by an objection or special exception.

D. Newly Added Claims

After a party files a motion for summary judgment, it is not uncommon for the responding party to file an amended petition that raises new claims. A party may not be granted judgment as a matter of law on a cause of action not addressed in a summary judgment proceeding. *See Espeche v. Ritzell*, 123 S.W.3d 657, 664 (Tex. App.—Houston [14th] Dist. 2003, pet. denied) (citing *Chessher v. Sw. Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983)). In order to get a final appealable summary judgment, the movant will have to amend its motion for summary judgment to address this new cause of action. *See Avary v. Bank of Am., N.A.*, 72 S.W.3d 779, 791 (Tex. App.—Dallas 2002, pet. denied). "In order to be a final, appealable summary judgment, the order granting the motion must dispose of all the parties and all the issues before the court." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 199 (Tex. 2001). If a summary judgment order grants more relief that was requested in the motion, it must be reversed and remanded. *Id*.

But if a motion for summary judgment is sufficiently broad to encompass later-filed claims or defenses, the movant need not amend its motion. *Lampasis v. Spring Center, Inc.*, 988 S.W.2d 428, 436 (Tex. App.—Houston [14th Dist.] 1999, no pet.). If the amended petition only sets forth new facts or new grounds that are totally encompassed by the prior cause of action, i.e., different ways that the movant was negligent, then the original motion for summary judgment will be sufficiently broad to cover the

added grounds and an amended motion for summary judgment will not be necessary. *See O'Kane v. Coleman*, 2008 Tex. App. LEXIS 4908 (Tex. App.—Houston [14th Dist.] July 1, 2008, no pet. hist.); *Dubose v. Worker's Med., P.A.*, 117 S.W.3d 916, 922 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *Gulf Coast Radiology Assocs. v. Malek,* No. 14-02-01126-CV, 2003 Tex. App. LEXIS 3750 (Tex. App.--Houston [14th Dist.] May 1, 2003, no pet.); *Garza v. Minyard Food Stores, Inc*., No. 05-98-02134-CV, 2001 Tex. App. LEXIS 4123 (Tex. App.--Dallas June 22, 2001, no pet.) (not desig. for pub.); *Lampasis v. Spring Center, Inc.*, 988 S.W.2d at 436.

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

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

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

III. STANDARDS OF TRIAL COURT REVIEW

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

A. Traditional Summary Judgment

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

1995); *see also Kassen v. Hatley*, 887 S.W.2d 4, 8 n.2 (Tex. 1994). Further, the court must indulge every reasonable inference in favor of the nonmovant and resolve doubts in his favor. *See Park Place Hosp.*, 909 S.W.2d at 510.

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

If the movant does not meet his burden of proof, there is no burden on the nonmovant. *See Clear Creek Basin Auth.*, 589 S.W.2d at 678-79. However, if the movant has established a right to a summary judgment, the burden shifts to the nonmovant. *See Clarendon Nat'l Ins. Co. v. Thompson*, 199 S.W.3d 482, 486-487 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The nonmovant must then respond to the summary judgment motion and present to the trial court summary judgment evidence raising a fact issue that would preclude summary judgment. *Id.* If the non-movant does so, summary judgment is precluded. *See Clarendon Nat'l Ins. Co. v. Thompson,* 199 S.W.3d at 486-487.

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

When both parties move for summary judgment, each party must carry its own burden as the movant. *See Dallas County Cmty. College Dist. v. Bolton,* 185 S.W.3d 868, 871 (Tex. 2005); *Mead v. RLMC, Inc*., No. 02-06-092-CV, 2007 Tex. App. LEXIS 2823 (Tex. App.—Fort Worth April 12, 2007, pet. denied); *James v. Hitchcock Indep. Sch. Dist.*, 742 S.W.2d 701, 703 (Tex. App.—Houston [1st Dist.] 1987, writ denied). Also, to win, each party must bear the burden of establishing that it is entitled to judgment as a matter of law. *See Guynes v. Galveston County*, 861 S.W.2d 861, 862 (Tex. 1993). Each party must also carry its own burden as the nonmovant in response to the other party's motion. *See James*, 742 S.W.2d at 703. Further, when both parties file motions for summary judgment, the court may consider all of the summary judgment evidence filed by either party. *See Commissioners Court v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). *See also Rose v. Baker & Botts*, 816 S.W.2d 805, 810 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

When the plaintiff moves for summary judgment on his own cause of action, he must present competent summary judgment evidence proving each element of his cause of action as a matter of law. *See MMP Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986); *see also Geiselman v. Cramer Fin. Group, Inc.*, 965 S.W.2d 532, 535 (Tex. App.—Houston [14th Dist.] 1997, no writ). If the plaintiff meets his burden, the trial court may grant a final summary judgment or may grant a partial summary judgment on liability alone, and hold a hearing on damages when they are unliquidated. *See* TEX. R. CIV. P. 166a(a). If the defendant asserts a counterclaim, the trial court can grant a final summary judgment for the plaintiff only if the plaintiff disproves at least one of the elements of the defendant's counterclaim in addition to conclusively proving every element of his own cause of action. *See Schafer v. Federal Servs. Corp.*, 875 S.W.2d 455, 456 (Tex. App.—Houston [1st Dist.] 1994, no writ). *See also Adams v. Tri-Continental Leasing Corp.*, 713 S.W.2d 152, 153 (Tex. App.—Dallas 1986, no writ). Alternatively, the plaintiff may move for a partial summary judgment solely on the defendant's counterclaims. *See Adams*, 713 S.W.2d at 153. If the plaintiff carries his burden with respect to his motion for summary

judgment, the defendant, in order to defeat a summary judgment for the plaintiff, must either raise a fact issue about one of the elements of the plaintiff's cause of action, create a fact question about each element of his affirmative defense, or agree to the facts and show that the law does not allow the plaintiff a recovery. *See Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984); *Dillard v. NCNB Texas Nat'l Bank*, 815 S.W.2d 356, 360-61 (Tex. App.—Austin 1991, no writ). *See Hanssen v. Our Redeemer Lutheran Church*, 938 S.W.2d 85, 90-91 (Tex. App.—Dallas 1996, writ denied); *Estate of Devitt*, 758 S.W.2d 601, 603 (Tex. App.—Amarillo 1988, writ denied).

When the defendant moves for summary judgment, he must either disprove at least one essential element of each theory of recovery pleaded by the plaintiff, or he must plead and conclusively prove each essential element of an affirmative defense. *See Friendswood Dev. Co. v. McDade & Co*, 926 S.W.2d 280, 282 (Tex. 1996); *Doe v. Boys Club of Greater Dallas, Inc.*, 907 S.W.2d 472, 476-77 (Tex. 1995). Also, in *Roark v. Stallworth Oil & Gas, Inc.*, the Texas Supreme Court held that a plaintiff must except to the defendant's summary judgment motion to the trial court if he wants to complain on appeal that the defendant's pleading did not support the affirmative defense upon which the summary judgment was based. 813 S.W.2d 492, 494-95 (Tex. 1991). The court stated, "if the non-movant does not object to a variance between the motion for summary judgment and the movant's pleadings, it would advance no compelling interest of the parties or of our legal system to reverse a summary judgment simply because of a pleading defect." *Id*. at 495. If the plaintiff does except to the defendant's answer to the trial court, then the defendant must only amend his answer and add the affirmative defense. If the defendant moves for summary judgment on his own counterclaim rather than on a defensive claim, then he has the same burden as a plaintiff moving for a summary judgment on his cause of action. *See Daniell v. Citizens Bank*, 754 S.W.2d 407, 409 (Tex. App.—Corpus Christi 1988, no writ). Accordingly, a plaintiff can thwart a defendant's summary judgment by either presenting summary judgment evidence creating a fact question on those elements of the plaintiff's case under attack by the defendant, creating a fact question on at least one element of each affirmative defense advanced by the defendant, or conceding the material facts and showing that the defendant's legal position is unsound. *See Torres v. Western Cas. & Sur. Co.*, 457 S.W.2d 50, 52 (Tex. 1970). *Maranatha Temple, Inc. v. Enter. Prods. Co.*, 893 S.W.2d 92, 97 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

B. No-Evidence Motion

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

1. Historical Standard

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

> A motion for summary judgment must be granted if, after adequate time for discovery, the moving party asserts that there is no evidence

> of one or more specified elements of a claim or defense on which the adverse party would have the burden of proof at trial and the respondent produces no summary judgment evidence raising a genuine issue of material fact on those elements.

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

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

More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair minded people to differ in their conclusions. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598. On the other hand, if "the evidence offered to prove a vital fact is so weak as to do no more than create a mere surmise or suspicion of its existence, the evidence is no more than a scintilla and, in legal effect, is no evidence." *Ford Motor Co. v. Ridgway*, 135 S.W.3d at 598.

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

Both direct and circumstantial evidence may be used to establish any material fact. *See Lozano v. Lozano*, 52 S.W.3d 141, 149 (Tex. 2001); *Ford Motor Co. v. Ridgway*, 135 S.W.3d at 598. To raise a genuine issue of material fact, however, the evidence must transcend mere suspicion. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d at 598. Evidence that is so slight as to

make any inference a guess is in legal effect no evidence. *See id*.

2. *City of Keller's* Reasonable Juror Standard

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

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

Id. at 827. This standard shifts the review from a traditional legal sufficiency review to a "reasonable juror" standard. William V. Dorsaneo III, *Evolving Standards of Evidentiary Review: Revising the Scope of Review*, 47 S. TEX. L. REV. 225, 233-43 (2005). For example, in *Wal-Mart Stores, Inc. v. Spates*, the court set forth the standard of review as: "We review a summary judgment for evidence that would enable reasonable and fair minded jurors to differ in their conclusions." 186 S.W.3d 566 (Tex. 2006).

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

> (1) contextual evidence – "The lack of supporting evidence may not appear until all the evidence is reviewed in context;" *Id*. at 811.
>
> (2) competency evidence – "Evidence that might be 'some evidence' when considered in isolation is nevertheless rendered 'no evidence' when contrary evidence shows it to be incompetent;" *Id*. at 813.
>
> (3) circumstantial equal evidence – "When the circumstances are equally consistent with either of two facts, neither fact may be inferred.' In such cases, we must 'view each piece of circumstantial evidence, not in isolation, but in light of all the known circumstances.'" *Id*. at 813-14. ; and
>
> (4) consciousness evidence – when reviewing "consciousness evidence," a no evidence review must encompass "all of the surrounding facts, circumstances, and conditions, not just individual elements or facts."

Id. at 817-18. Accordingly, a court may not disregard certain types of evidence when a reasonable juror could not do so – the scope of

review has been enlarged in the context of legal sufficiency of the evidence after a jury trial.

C. Scope of Review For Summary Judgment Motions

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

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

However, a party filing a no-evidence motion for summary judgment does not have to file any evidence with its motion. Is the scope of review the same as a traditional motion? Texas Rule of Civil Procedure 166a(i) provides that "a party *without presenting summary judgment evidence* may move for summary judgment on the ground that there is no evidence . . ." TEX. R. CIV. P. 166a(i) (emphasis added). One view is that a court can only look to the summary judgment evidence offered by the non-movant, and that any evidence offered by the movant should be disregarded for all purposes. There is language in opinions from the Eastland Court of Appeals that may support this view. *See Padron v. L&M Props*., No. 11-02-001510-CV, 2003 Tex. App. LEXIS 1229 (Tex. App.—Eastland February 6, 2003, no pet.); *Herod v. Baptist Found of Texas*, 89 S.W.3d 689 (Tex. App.—Eastland 2002, no pet.); *Kelly v. LIN TV of Texas*, 27 S.W.3d 564 (Tex. App.—Eastland 2000, pet. denied); *Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614 (Tex. App.—Eastland 2000, pet. denied). These cases dealt with a movant arguing that its evidence proves that the non-movant does not have any evidence to support a challenged element. The courts found that the movant could not do so.

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

The Texas Supreme Court has previously implied that this view is correct. In *Binur v. Jacobo*, the Court stated: "Similarly, if a motion brought solely under subsection (i) attaches evidence, that evidence should not be considered unless it creates a fact question. . ." 135 S.W.3d 646 (Tex. 2004). This language would support the position that if a movant files evidence with a no-evidence motion, the evidence should be disregarded unless it helps the non-movant and creates a fact issue. Following *Jacobo*, several courts of appeals similarly stated that they would ignore evidence that a movant attached or referred to in its no-evidence motion for summary judgment unless the evidence created a fact issue. *See, e.g.,*

Davis v. Dillard's Dep't Store, Inc., No. 11-06-00027-CV, 2008 Tex. App. LEXIS 3201 (Tex. App.—Eastland May 1, 2008, no pet. hist.); *Poteet v. Kaiser,* 2007 Tex. App. LEXIS 9749, fn. 6 (Tex. App.—Fort Worth Dec. 13, 2007, pet. filed); *Southtex 66 Pipeline Co. v. Spoor*, 238 S.W.3d 538 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *Dunlap-Tarrant v. Association Cas. Ins. Co*., 213 S.W.3d 452, 453 (Tex. App.—Eastland 2006, no pet.); *DeLeon v. DSD Devel. Inc*., 2006 Tex. App. LEXIS 7799 (Tex. App.—Houston [1st Dist] August 31, 2006, pet. denied); *Green v. Lowe's Home Centers, Inc.*, 199 S.W.3d 514, 518 (Tex. App.—Houston [1st Dist.] 2006, pet denied); *Seaway Prods. Pipeline Co. v. Hanley,* 153 S.W.3d 643, 650 n.7 (Tex. App.—Fort Worth 2004, no pet.). Most recently, one court stated thusly:

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

SP Midtown, Ltd v. Urban Storage, L.P., 2008 Tex. App. LEXIS 3364 (Tex. App.—Houston 14th Dist. May 8, 2008, no pet. hist.).

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

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

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

> In practice, however, a different scope of review applies when a

> summary judgment motion is filed without supporting evidence. *In such cases, evidence supporting the motion is effectively disregarded because there is none; under the rule, it is not allowed.* Thus, although a reviewing court must consider all the summary judgment evidence on file, in some cases that review will effectively be restricted to the evidence contrary to the motion. *Id.*

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

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

The court concluded that the motion solely sought traditional grounds.

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

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

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

However, the Texas Supreme Court recently indicated that the enlarged scope of review may apply to no-evidence summary judgment proceedings. In *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572 (Tex. 2006) the Court held that the plaintiff's expert testimony had been properly excluded, and therefore, a no-evidence motion for summary judgment was correctly granted on causation grounds. The Court stated:

> A summary judgment motion pursuant to Tex. R. Civ. P. 166a(i) is essentially a motion for a pretrial directed verdict. Once such a motion is filed, the burden shifts to the nonmoving party to present evidence raising an issue of material fact as to the elements specified in the motion. We review the evidence presented by *the motion and response* in the light

> most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.

Id. at 581-82. In a *per curiam* opinion, the Court has recently reaffirmed that: "An appellate court reviewing a summary judgment must consider *all* the evidence…." *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754 (Tex. 2007) (emphasis added). In *Goodyear*, the Court reversed a court of appeals that disregarded uncontroverted evidence in reversing a traditional and no-evidence motion for summary judgment. *See id*.

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

One exception is the Dallas Court of Appeals, which stated that with regards to a no-evidence motion the "scope of our review includes both the evidence presented by the movant and the evidence presented by the respondent." *Highland Crusader Offshore Partners., L.P. v. Andrews & Kurth, L.L.P*., 248 S.W.3d 887 (Tex. App.—Dallas 2008, no pet. hist.). Therefore, that court is using the expanded *City of Keller* standard with regards to a no-evidence motion review.

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

IV. STANDARDS OF APPELLATE REVIEW

A. Traditional Summary Judgment

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

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

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

B. No-Evidence Summary Judgment

There has been some confusion and disagreement about the appropriate standard of review over a no-evidence motion for summary judgment. Some appellate courts hold that a no-evidence motion should have a *de novo* standard of review just like a traditional motion for summary judgment. *See Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150 (Tex. 2004); *Simulis, L.L.C. v. GE Capital Corp*., 2008 Tex. App. LEXIS 2731 (Tex. App.—Houston [14th Dist.] Apr. 17, 2008, no pet.); *Baize v. Scott & White Clinic,* No. 03-05-00780-CV, 2007 Tex. App. LEXIS 366 (Tex. App.—Austin January 22, 2007, pet. denied); *Diaz v. Goodman Manf. Co., L.P*., 214 S.W.3d 672 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *In re Estate of Wallace*, No. 04-05-00567-CV, 2006 Tex. App. LEXIS 10603 (Tex. App.—San Antonio December 13, 2006, no pet.); *Aiken v. Hancock,* 115 S.W.3d 26 (Tex. App.—San Antonio 2003, pet. denied); *Leonard v. Coastal States Crude Gathering Co.,* No. 04-02-00238, 2003 Tex. App. LEXIS 4094 (Tex. App.—San Antonio May 14, 2003, pet. denied); *Jones v. City of Hitchcock*, No. 01-02-00676-CV, 2003 Tex. App. LEXIS 3353 (Tex. App.—Houston [1st Dist.] April 17, 2003, pet. denied); *Kesyler v. Menil Med. Ctr. of E. Tex*., 105 S.W.3d 122 (Tex. App.—Corpus Christi 2003, no pet.); *Taub v. Aquila Southwest Pipeline Corp*., 93 S.W.3d 451 (Tex. App.—Houston [14th Dist.] October 17, 2002, no pet.); *United Plaza-Midland v. Chase Bank of Tex. N.A.*, No. 14-01-0210-CV, 2002 Tex. App. LEXIS 6030 (Tex. App.—Houston [14th Dist.] June 6, 2002, no pet.) (not desig. for pub.); *Delgado v. Jim Wells County*, 82 S.W.3d 640 (Tex. App.—San Antonio 2002, no pet.); *Hight v. Dublin Veterinary Clinic*, 22 S.W.3d 614 (Tex. App.—Eastland 2000, pet denied); *Shull v. UPS*, 4 S.W.3d 46 (Tex. App.—San Antonio 1999, pet. denied); *see also, Sarah B. Duncan, No-Evidence Motion for Summary Judgment: Harmonizing Rule 166a(i) and its Comments*, 41 S. TEX. L. REV. 873, 907 (2000).

Other courts, however, have determined that a no-evidence motion should have a legal sufficiency standard of review — the same as the review over a directed verdict motion. *See King Ranch v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003); *Butler v. McDonald's Corp*., No. 11-05-00323-CV, 2007 Tex. App. LEXIS 64 (Tex. App.—Eastland January 5, 2007, no pet.);

Ross v. Womack, No. 13-04-571-CV, 2006 Tex. App. LEXIS 10656 (Tex. App.—Corpus Christi December 14, 2006, no pet.); *Entravision Communs. Corp. v. Belalcazar*, 99 S.W.3d 393 (Tex. App.—Corpus Christi 2003, pet. denied); *Diversified Fin. Sys. v. Hill*, 99 S.W.3d 349 (Tex. App.—Fort Worth 2003, no pet.); *DRC Parts & Accessories, L.L.C v. VM Mortori, S.P.A.*, No. 14-01-00507-CV, 2002 Tex. App. LEXIS 7431 (Tex. App.—Houston [14th Dist.] October 17, 2002, no pet.); *Trevino v. Goss*, No. 03-01-0521-CV, 2002 Tex. App. LEXIS 4462 (Tex. App.—Austin June 21, 2002, pet. denied) (not desig. for pub.); *Lattrell v. Chrysler Corp*., 79 S.W.3d 141 (Tex. App.—Texarkana 2002, pet. denied); *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28 (Tex. App.—Fort Worth 2002, no pet.); *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 904 (Tex. App.—Dallas 2001, pet denied); *Vargas v. KKB Inc*., 52 S.W.3d 250, 254 (Tex. App.—Corpus Christi 2001, pet denied); *General Mills Rest., Inc. v. Texas Wings, Inc*., 12 S.W.3d 827, 832-33 (Tex. App.—Dallas 2000, no pet.); *Gomez v. Tri-City County Hosp., Ltd.,* 4 S.W.3d 281, 283 (Tex. App.—San Antonio 1999, no pet.); *Zapata v. Children's Clinic*, 997 S.W.2d 745, 747 (Tex. App.—Corpus Christi 1999, pet. denied); *Roth v. FFP Operating Partners*, 994 S.W.2d 190, 195 (Tex. App.—Amarillo 1999, pet. denied); *Jackson v. Fiesta Mart*, 979 S.W.2d 68, 70 (Tex. App. —Austin 1998, no pet.); *see also Mack Trucks v. Tamez*, 206 S.W.3d 572 (Tex. 2006).

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

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

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

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

A trial court's determination on whether there has been an adequate time for discovery is reviewed under an abuse of discretion standard because that determination encompasses a balancing and weighing of factors that is best left in the discretion of the trial court. *See McLendon v. Detoto*, No. 14-06-00658-CV, 2007 Tex. App. LEXIS 5173 (Tex. App.—Houston [14th Dist.] July 3, 2007, pet. denied);

First Select Corp. v. Grimes, No. 2-01-257-CV, 2003 Tex. App. LEXIS 604 (Tex. App. —Fort Worth January 23, 2003, no pet.); *Carter v. MacFaddyen*, 93 S.W.3d 307 (Tex. App. — Houston [14th Dist.] August 8, 2002, pet. denied); *Restaurant Teams International, Inc. v. MG Securities Corp*., 93 S.W.3d 336 (Tex. App.—Dallas June 18, 2002, no pet.); *Dickson Const. v. Fidelity & Deposit Co.*, 5 S.W.3d 353, 357 (Tex. App.-Texarkana 1999, pet. denied).

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

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

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

V. APPEAL OF DENIAL OF SUMMARY JUDGMENT MOTION

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

But if both parties file motions for summary judgment and the trial court grants one party's motion but denies the other's, the party whose motion the court denied may appeal both the granting of his opponent's motion and the denial of his motion. *See Tobin v. Garcia*, 159 Tex. 58, 316 S.W.2d 396, 400 (1958). *See also Amerivest, Inc.*, 897 S.W.2d at 515 n.1. It is important to note in this circumstance that if the party whose summary judgment motion was denied appeals only the trial court's granting of his opponent's motion, the appellate court can only reverse the summary judgment and remand the case to the trial court. *See City of Denison v. Odle*, 808 S.W.2d 153, 156-57 (Tex. App.—Dallas 1991), *rev'd on other grounds*, 833 S.W.2d 935 (Tex. 1992). If the appellant wants the appellate court to reverse his opponent's summary judgment and at the same time render and grant appellant's summary judgment, he must appeal not only the trial court's granting of the opponent's summary judgment, but also the denial of his summary judgment motion. *See id. See also Grainger v. Western Cas. Life Ins. Co.*, 930 S.W.2d 609, 614 (Tex. App.—Houston [1st Dist.] 1996, writ denied).

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

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

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

Even though an appellate court cannot review the denial of a no-evidence motion for summary judgment, it can order a trial court to rule on a properly filed motion. *See In re Mission Consolidated Indep. Sch. Dist.*, 990 S.W.2d 459, 461 (Tex. App.—Corpus Christi 1999, orig. proceeding) (where motion had been filed for eight months with no response and trial court refused to rule, the movant was entitled to a writ of mandamus ordering the trial court to rule on the motion).

Generally, the courts do not allow mandamus relief to review the denial of a summary judgment motion. *See Tilton v. Marshall*, 925 S.W.2d 672, 695 (Tex. 1996) (Enoch, J., concurring in part and dissenting in part). In *Tilton v. Marshall*, however, the Texas Supreme Court held that a mandamus was appropriate to review the denial of a summary judgment under the specific facts of that case. *Id.* at 682. In *Tilton*, the plaintiffs, members of Robert Tilton's church, sued Tilton on the basis of fraud. *Id.* at 675-76. They claimed that

Tilton had fraudulently promised to pray for them, and that he made insincere religious representations. *See id.* at 676. The Texas Supreme Court held that the claim of insincere religious representations conflicted directly with Tilton's constitutional right of freedom of religion. *See id.* at 682. Therefore, the court held that the trial court should have granted Tilton's summary judgment motion due to the importance of his constitutional rights and the lack of an adequate remedy by appeal, and then the court granted Tilton's motion for mandamus. *See id.* This case seemingly stands for the proposition that when a trial court abuses its discretion in denying a summary judgment motion, and a full trial on the merits would violate a defendant's important constitutional rights, an appellate court may issue a mandamus directing the trial court to grant the defendant's summary judgment motion.

VI. STANDARD FOR CHALLENGING A DEFAULT SUMMARY JUDGMENT

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

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

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

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

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

VII. TIMING ISSUES REGARDING MOTION, RESPONSE, REPLY AND HEARING

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

The day of service is not included in the twenty-one day period, but the day of the hearing is included. *See Lewis v. Blake*, 876 S.W.2d 314, 315-16 (Tex. 1994); *Lee v. Palo Pinto County*, 966 S.W.2d 83 (Tex. App.—Eastland 1998, pet. denied). Therefore, the movant starts counting on the day after he files his no-evidence motion, and the hearing can be on the twenty-first day thereafter. Further, if service is completed by mail pursuant to Texas Rule of Civil Procedure 21a, the movant will have to add three additional days to the twenty-one day period, which makes it a twenty-four day period. *See Id*. at 315. Therefore, if the movant serves the motion by use of the mail, the day after it is mailed is day one, and the hearing can be held on day twenty-four or later.

The non-movant must file and serve the response, accompanying evidence or special exceptions or objections to the movant's no-evidence motion not later than seven days before the hearing. *See McConnell v. Southside Indep. Sch. Dist*., 858 S.W.2d 337, 341 (Tex. 1993); *Crews v. Plainsman Trading Co.*, 827 S.W.2d 455 (Tex. App.—San Antonio 1992, writ denied). The non-movant can file the response on the seventh day before the hearing – there does not have to be seven full days. *See Thomas v. Medical Arts Hosp*., 920 S.W.2d 815, 817-18 (Tex. App.—Texarkana 1996, writ denied); *Wright v. Lewis*, 777 S.W.2d 520, 521 (Tex. App.—Corpus Christi 1989, no writ); *Benger Builders, Inc. v. Business Credit Leasing, Inc*., 764 S.W.2d 336, 338 (Tex. App.—Houston [1st Dist.] 1988, writ denied). Pursuant to Texas Rule of Civil Procedure 5, the non-movant can also use the mail to file his response, and if he

does, it is considered timely filed on the day it is deposited in the mail so long as it reaches the clerk no more than ten days after it is due. *See Geiselman v. Cramer Fin. Group*, 965 S.W.2d 532 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Clendennen v. Williams*, 896 S.W.2d 257, 259 (Tex. App.—Texarkana 1995, no writ). However, the non-movant who uses the mail to file and serve his response does not have to add three days to the seven day period pursuant to Texas Rule of Civil Procedure 21a. *See Lee v. Palo Pinto County*, 966 S.W.2d 83 (Tex. App.—Eastland 1998, pet. denied); *Holmes v. Ottawa Truck, Inc*., 960 S.W.2d 866, 869 (Tex. App.—El Paso 1997, pet. denied). In essence, the timing sequence implemented by Rule 166a is designed to provide the non-movant with fourteen days to review the summary judgment motion and to serve a response. *See Wilhite v. H.E. Butt Co.*, 812 S.W.2d 1, 3 (Tex. App.—Corpus Christi 1991, no writ).

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

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

Lastly, the movant is entitled to file a reply to the non-movant's response. However, Rule 166a does not set forth any time requirements for filing a movant's reply based solely upon legal arguments. *See* TEX. R. CIV. P. 166A; *Knapp v. Eppright*, 783 S.W.2d 293, 296 (Tex. App.—Houston [14th Dist. 1989, no writ). The movant could file this reply the very day of the hearing on his motion. *See Knapp v. Eppright*, 783 S.W.2d at 296; *Wright v. Lewis*, 777 S.W.2d 520, 522 (Tex. App.—Corpus Christi 1980, no writ). However, if the movant raises any special exceptions to the non-movant's response, it must file and serve those special exceptions not less than three days before the hearing on his motion for summary judgment. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 343 n. 7 (Tex. 1993).

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

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

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

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

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

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

judgment, then later sua sponte grants it without any notice, that is fine.

Finally, after the hearing, trial courts are widely recognized to have "considerable discretion" in the time they take to issue a summary judgment decision. *See Bayou City Fish Co. v. S. Tex. Shrimp Processors, Inc.,* 2007 Tex. App. LEXIS 9148 (Tex. App.—Corpus Christi Nov. 20, 2007, no pet. h.)*; Zalta v. Tennant*, 789 S.W.2d 432, 433 (Tex. App.—Houston [1st Dist.] 1990, orig. proceeding) (refusing to grant mandamus relief to relator because the trial court's over one-year-long wait to decide on a motion for summary judgment was not an abuse of discretion). However, one court of appeals issued mandamus relief and ordered a trial court to rule on a motion where a no-evidence motion had been on file for eight months with no response and trial court refused to rule. *See In re Mission Consolidated Indep. Sch. Dist.*, 990 S.W.2d 459, 461 (Tex. App.—Corpus Christi 1999, orig. proceeding).

VIII. PRESERVATION OF ERROR

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

A. Preserving Error Regarding Objections to Summary Judgment Evidence

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

Additionally, Rule 33.1(a) states that in order to preserve a complaint for appellate review, the record must show that the trial court either expressly or implicitly ruled on an objection that was sufficiently specific to make the trial court aware of the complaint. *See* TEX. R. APP. P. 33.1(a) (1)-(2). There has been great debate in Texas' courts of appeals about whether a court of appeals can imply a ruling on an objection to summary judgment evidence due to the trial court's granting of the motion. Some courts hold that under the facts of the case, an implied ruling can exist in a summary judgment context. *See Praytor v. Ford Motor Co.*, No. 14-01-00734-CV, 2002 Tex. App. LEXIS 8013 (Tex. App.—Houston [14th Dist.] November 7, 2002, no pet.) (not desig. for pub.) (holding that movant/appellee is not required to preserve complaint as to non-movant/appellant's

summary judgment evidence where trial court grants summary judgment motion); *Trusty v. Strayhorn*, 87 S.W.3d 756 (Tex. App.—Texarkana September 13, 2002, no pet.); *Clement v. City of Plano*, 26 S.W.3d 544, 550 n.5 (Tex. App.—Dallas 2000, no pet.), *disapproved on other grounds by Telthorster v. Tennell,* 92 S.W.3d 457 (Tex. 2002); *Dagley v. Haag Eng'g*, 18 S.W.3d 787, 795 n.9 (Tex. App.—Houston 14th Dist.] 2000, no pet); *Columbia Rio Grande Reg'l Hosp. v. Stover*, 17 S.W.3d 387, 395-96 (Tex. App.—Corpus Christi 2000, no pet); *Williams v. Bank One*, 5 S.W.3d 119, 114-15 (Tex. App.—Waco 1999, no pet); *Frazier v. Yu*, 987 S.W.2d 607, 609-10 (Tex. App.—Fort Worth 1999, no pet.); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.). Under this standard, in granting a summary judgment motion, a trial court implicitly sustains the movant's objections to evidence that, if considered, would create a fact issue and implicitly denies the non-movant's objections to evidence that is necessary to support the summary judgment. Either way, the timely raised objections are simply preserved for appellate review. Otherwise, an appellate court infers that the trial court intentionally granted a summary judgment motion when it knew the "evidence" created a fact issue.

But most courts hold that a court of appeals cannot imply a ruling. *See Arellano v. Americanos USA, LLC,* No. 08-08-00305-CV, 2010 Tex. App. LEXIS 9372 (Tex. App.—El Paso November 29, 2010, no pet. history); *Duncan-Hubert v. Mitchell*, 310 S.W.3d 92 (Tex. App.—Dallas 2010, pet. denied); *Gellatly v. Unifund CCR Partners,* 2008 Tex. App. LEXIS 5018 (Tex. App.—Houston [1st Dist.] July 3, 2008, no pet. hist.); *Anderson v. Limestone County,* 2008 Tex. App. LEXIS 5041 (Tex. App.—Waco July 2, 2008, no pet. hist.); *Delfino v. Perry Homes,* 223 S.W.3d 32, 35 (Tex. App.—Houston [1st Dist.] 2007, no pet.); *Hixon v. Tyco Int'l, Ltd*., No. 01-04-01109-CV, 2006 Tex. App. LEXIS 9494 (Tex. App.—October 31, 2006, no pet.); *Strunk v. Belt Line Road Realty Co.*, 225 S.W.3d 91, 99 (Tex. App.—El Paso 2005, no pet.); *Palacio v. AON Props., Inc*. 110 S.W.3d 493, 496 (Tex. App.—Waco 2003, no pet.); *Mitchell v. Baylor Univ. Med. Ctr.*, 109 S.W.3d 838, 842-43 (Tex. App.—Dallas 2003, no pet.); *Sunshine Mining & Ref. Co. v. Ernst & Young, L.L.P.,* 114 S.W.3d 48 (Tex. App.—Eastland June 12, 2003, no pet.); *Wilson v. Thomason Funeral Home, Inc.*, No. 03-02-00774-CV, 2003 Tex. App. LEXIS 6358 (Tex. App.—Austin July 24, 2003, no. pet.); *Allen v. Albin*, 97 S.W.3d 655 (Tex. App.—Waco 2002, no pet.); *Jones v. Ray Ins. Agency*, 59 S.W.3d 739, 752-53 (Tex. App.—Corpus Christi 2001, pet. denied); *Rogers v. Continental Airlines, Inc*., 41 S.W.3d 196, 200 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Ball v. Youngblood*, 2001 Tex. App. LEXIS 5660 (Tex. App.—Dallas 2001, no pet.) (not desig. for pub.); *Chapman Children's Trust v. Porter & Hedges*, L.L.P., 32 S.W.2d 429, 435-36 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 316-17 (Tex. App.—San Antonio 2000, pet. denied); *Hou-Tex., Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Taylor Made Hose, Inc. v. Wilkerson*, 21 S.W.3d 484, 487 (Tex. App.—San Antonio 2000, pet. denied). For example, the San Antonio Court of Appeals disagreed with implicit rulings and held:

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

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

In general, there is great confusion regarding when objections to summary judgment evidence are preserved. Many commentators have noted the conflict among the courts of appeals on this important issue. *See, e.g., Judge David Hittner & Lynee Liberato, Summary*

Judgments in Texas, 47 SOUTH TEXAS L. REV. 409, 447-48 (2006) ("There is dispute among the courts of appeals concerning what constitutes an implicit holding, and even if an objection may be preserved under Texas Rule of Civil Procedure 33.1(a)(2)(a) by an implicit ruling."); *Judge David Hittner & Lynee Liberato, Summary Judgments in Texas*, 54 BAYLOR L. REV. 1, n. 194 (2006); *Omar Kilany & Prescott Scot, Implied Rulings on Summary Judgment Objections: Preservation of Error and Appellate Rule 33.1(a)(2)(A)*, 15 APPELLATE ADVOCATE ST. B.TEX. APPELLATE SEC. REP. 4 (2002) (published online at www.tex-app.org); *David F. Johnson, The No-Evidence Summary Judgment In Texas*, 52 BAYLOR L. REV. 930, 966 (2000); *Charles Frazier, et. al.*, *Recent Development: Celotex Comes To Texas: No-Evidence Summary Judgments And Other Recent Developments In Summary Judgment Practice*, 32 TEX. TECH. L. REV. 111, 132 (2000). *See also* WILLIAM V. DORSANEO, TEXAS LITIGATION GUIDE: APPELLATE REVIEW, § 145.03[2][a] (2007); MCDONALD & CARLSON, TEXAS CIVIL PRACTICE, § 18.20 (2nd Ed. Supp. 2007); MICHOL O'CONNOR, O'CONNOR'S TEXAS RULES, CIVIL TRIAL, 499-500 (2007) (five courts find that there can be implicit rulings, eight courts find that there cannot be implicit rulings – some of the courts from both groups are the same); *Tim Patton, Selected Unsettled Aspects of Summary Judgment Practice and Procedure*, 2-5, ADVANCED CIVIL TRIAL COURSE, (State Bar of Texas 2003).

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

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

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

Notwithstanding, until the Texas Supreme Court clears this confusion, a cautious party will request express rulings, and submit proposed rulings on summary judgment evidence in either a separate order or a the order granting a summary judgment. Further, if the trial court still refuses to rule, the party should object to the trial court's failure to rule. *See* TEX. R. APP. P. 33.1(a)(2)(B); *Allen v. Albin*, 97 S.W.3d 655 (Tex. App.—Waco 2002, no pet.).

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

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

App.—Austin 2005, no pet.); *Villegas v. Texas Dept. of Transp.*, 102 S.W.3d 26 (Tex. App.—San Antonio 2003, pet. denied); *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268, 273 (Tex. App.—Austin 2002, pet denied).

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

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

C. Preserving Error Regarding Adequate Time for Discovery

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

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

S.W.2d 909, 912 (Tex. App.—Fort Worth 1992, writ denied).

The motion for continuance must have affidavits or sworn testimony to prove up all factual allegations. *See* TEX. R. CIV. P. 166a(g); *Casey v. Interstate Building Maintenance, Inc*., No. 03-99-00524-CV, 2000 Tex. App. LEXIS 2555 (Tex. App.—Austin April 20, 2000, no pet.) (not desig. for pub.); *Crow v. Rockett Special Util. Dist*., 17 S.W.3d 320 (Tex. App.—Waco 2000, pet. denied). The safest practice is to request a hearing and present sworn proof as to the need for a continuance following the above listed requirements. *See Roob v. Von Bergshasy*, 866 S.W.2d 765, 766 (Tex. App.—Houston [1st Dist.] 1993, writ denied).

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

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

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

E. Preserve Complaint Regarding Notice of Hearing

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

F. Preserving Right To Correct Defects In Evidence

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

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

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

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

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

IX. SUMMARY JUDGMENT RECORD

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

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

the court of appeals if the trial court made oral rulings on objections to summary judgment evidence that are in the party's favor.

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

X. ADVERSE EFFECTS FROM MOTIONS, RESPONSES, OR EVIDENCE MISSING FROM THE RECORD

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

A. Historically

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

v. Ritter Homes, Inc., 633 S.W.2d 626, 628 (Tex. App.—Houston [14th Dist.] 1982), *aff'd in part, rev'd in part on other grounds*, 646 S.W.2d 168 (Tex. 1983).

B. Currently

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

> The trial court clerk is responsible for preparing, certifying, and timely filing the clerk's record if:
>
> a notice of appeal has been filed; and
>
> the party responsible for paying for the preparation of the clerk's record has paid the clerk's fee, has made satisfactory arrangements with the clerk to pay the fee, or is entitled to appeal without paying the fee.

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

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

This question should be answered by determining who has the burden to produce the document. The only provision that may impose on the trial court clerk the responsibility to include a summary judgment motion, response, or reply, if the appellant has not made a designation, is the provision that the trial court clerk has the responsibility to include all pleadings in the record on which the trial was held. *See* TEX. R. APP. P. 34.5(a)(1). Pleadings are alternating formulations of the parties' contentions. The pleadings consist of the original petition, the original answer, and each supplemental or amended petition or answer. A motion is not a pleading. Therefore, Rule 34.5 does not specifically list motions for summary judgment or supporting evidence as required contents of the clerk's record. *See* TEX. R. APP. P. 34.5. If the appellant fails to request any pertinent part of the summary judgment record, the court of appeals will presume that the omitted portion supported the judgment and affirm. *See Sparkman v. ReliaStar Life Ins. Co*., 2008 Tex. App. LEXIS 3517 (Tex. App.—Corpus Christi May 15, 2008, no pet. hist.); *Mallios v. Standard Ins. Co.*, 237 S.W.3d 778, 782 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

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

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

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

Furthermore, in *Pierson v. SMS Financial II, L.L.C.*, the appellate court dealt with an appeal from a partial summary judgment when the appellant's summary judgment response was not in the appellate record. 959 S.W.2d 343, 348 (Tex. App.—Texarkana 1998, no pet.). Further, the appellant did not designate his response for inclusion in the clerk's record. *See id.* The appellate court concluded that, because a summary judgment response is not a pleading, and because there was no other category that would have placed a burden on the trial court clerk to include the response in the appellate record, the appellant had a duty to designate it. *See id.* Because the appellant did not designate the missing response, the appellate court used the traditional presumption case law to conclude that the missing summary judgment response would be presumed in favor of the trial court's judgment. *See id.* In doing so, the court stated that "we must review the summary judgment as if appellant did not respond to the motion" and then proceeded to apply a legal sufficiency review of the partial summary judgment. *Id.* This case affirms that, although less likely, the traditional presumptions continue to apply to missing evidence, motions, and responses in some cases. "This waiver presumption rule will still apply in certain instances, but the new rules will make it much less likely that parties will forfeit grounds of error due to the failure to file a complete record." *Cayce,* at 928.

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

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

> This is not a case of a simple oversight of tangential or insignificant information that could be easily overlooked. This is a case of continued neglect of information crucial to a proper appellate review. This neglect continued for over eleven months. The burden was

> on Zoya (1) to ensure that all the documents it needed for this Court to fully review the correctness of the summary judgment were in the record, and (2) to timely pay for the supplemental record once it realized necessary documents were excluded. Zoya did not carry its burden.
>
> As a result, we refuse to consider the documents contained in the post-submission supplemental record. Instead, we will consider Zoya's issues on the record that was before us on the submission day.

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

XI. ADVERSE EFFECTS DUE TO APPELLATE BRIEFING INADEQUACIES

A. Specific Judgments Versus General Judgments

1. General Definitions

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

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

There are occasions when the trial court may inform the parties on what grounds it is granting a summary judgment, but the actual order itself does not state the grounds. For example, the trial court sometimes informs the parties the grounds on which it is granting the summary judgment after oral argument or in a letter sent to each party. *See, e.g.*, *Stevens v. State Farm Fire & Cas. Co.*, 929 S.W.2d 665, 669 (Tex. App.—Texarkana 1996, writ denied); *Richardson v. Johnson & Higgins of Texas, Inc.*, 905 S.W.2d 9, 11 (Tex. App.—Houston [1st Dist.] 1995, writ denied); *Martin v. Southwestern Elec. Power Co.*, 860 S.W.2d 197, 199 (Tex. App.—Texarkana 1993, writ denied). In these circumstances, where should the appealing party look to determine if the judgment is specific or general? Texas precedent requires that a party look only to the judgment to determine the grounds, if any, identified by the court as the basis of its judgment. *See Hailey v. KTBS, Inc.*, 935 S.W.2d 857, 859 (Tex. App.—Texarkana 1996, no writ); *see also Stevens*, 929 S.W.2d at 669; *Shannon v. Texas Gen. Indem. Co.*, 889 S.W.2d 662, 664 (Tex. App.—Houston [14th Dist.] 1994, no writ); *Martin*, 860 S.W.2d at 199; *Taylor v. Taylor*, 747 S.W.2d 940, 944 (Tex. App.—Amarillo 1988, writ denied); *Frank v. Kuhnreich*, 546 S.W.2d 844, 847 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.); *Brazos River Auth. v. Gilliam*, 429 S.W.2d 949, 951 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.). "It is the court's order that counts, not the stated reason or oral qualifications." *Richardson*, 905 S.W.2d at 11. Even if the trial

court sends a letter detailing the grounds on which the summary judgment was granted with the notice of judgment to each party, the letter is not a part of the judgment and cannot make a general judgment a specific one. *See Shannon*, 889 S.W.2d at 664. This rule can be harsh, but it has the prophylactic effect of ensuring that the plain meaning of a court's formal order or judgment is not disputed. *See Richardson*, 905 S.W.2d at 12.

B. Specific Judgments

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

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

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

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

The Texas Supreme Court has expressly stated that a trial court may not grant a summary judgment on a cause of action not addressed in a summary judgment proceeding. *See Mafrige v. Ross*, 866 S.W.2d 590, 591 (Tex. 1993). *See also Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983); *Smith v. Atlantic Richfield Co.*, 927 S.W.2d 85, 88 (Tex. App.—Houston [1st Dist.] 1996, writ denied). A summary judgment motion must "stand or fall on the grounds specifically set forth in the motion(s)." *Ortiz v. Spann*, 671 S.W.2d 909, 914 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.). But this requirement can be waived. *See Toonen*, 935 S.W.2d at 942. The appellant will waive his objection if he fails to bring forward a point of error in his appellate brief complaining of the trial court's error or arguing that excess relief was improperly granted. *See id.*; *see also Gilchrist v. Bandera Elec. Coop., Inc.*, 924 S.W.2d 388, 389 (Tex. App.—San Antonio 1996), *rev'd on other grounds*, 946 S.W.2d 336 (Tex. 1997); *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 342 (Tex. App.—San Antonio 1988, writ denied). Thus, if an appellant wants to complain that the trial court granted a summary judgment on a ground that was not presented in the motion for summary judgment, the appellant should raise this complaint to the appellate court in the brief by a point of error and argument with citation to authority.

2. Appellate Courts May Affirm On Any Ground In Motion

If the appellate court concludes that the trial court erred in granting summary judgment on one ground, may it look to other grounds to affirm the judgment even though the trial court may not have considered them? In *State Farm Fire & Casualty Co. v. S.S.*, the Texas Supreme Court addressed this issue in a plurality opinion. 858 S.W.2d 374 (Tex. 1993). The trial court granted summary judgment for the defendant insurance company on the specific basis that, as a matter of law, the homeowner's policy provided no coverage for any of the plaintiff's claims. *See id.* at 376. The plaintiff appealed, and the appellate court held that the trial court erred in granting the motion for summary judgment on the "no coverage" ground. *See id.* The defendant appealed to the supreme court and argued that the court of appeals erred in failing to affirm the summary judgment on a different and independent ground that was raised in the summary judgment motion. *See id.* at 380. The supreme court held that when a trial

court's order expressly specifies the ground relied on for the summary judgment, the judgment can be affirmed only "if the theory relied on by the trial court is meritorious, otherwise the case must be remanded." *Id.* at 380-81. The court based this result on two policy considerations. First, if appellate courts could affirm a summary judgment on grounds that were not relied on by the trial court, the appellant would be required on appeal to challenge every ground raised in the motion for summary judgment, even though many of the grounds were not considered or ruled on by the trial court. *See State Farm*, 858 S.W.2d at 381. Second, if an appellate court was to consider grounds that were never considered by the trial court, the appellate court would usurp the trial court's authority to consider and rule on all issues before it. *See id.* at 381-82. The court stated:

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

Id.

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

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

> The court of appeals refused to consider whether Baker Hughes's second motion for summary judgment should have been granted, citing the general rule that a denial of summary judgment is interlocutory and not appealable. But as we recognized in *Cincinnati Life Insurance Co. v. Cates*, the rule does not apply when a movant seeks summary judgment on multiple grounds and the trial court grants the motion on one or more grounds but denies it, or fails to rule, on one or more

> other grounds presented in the motion and urged on appeal. In *Cates* we held that the appellate court must review all of the summary judgment grounds on which the trial court actually ruled, whether granted or denied, and which are dispositive of the appeal, and may consider any grounds on which the trial court did not rule.

Id. (internal citations omitted).

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

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

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

Robertson v. Church of God, Int'l, No. 12-96-00083-CV, 1997 WL 555626, at *4 (Tex. App.-Tyler Aug. 29, 1997, pet. denied) (not released for publication) (citation omitted). The Tyler court mentioned that the ground must be preserved, but seemed to suggest that the appellee does so by solely raising the ground in his summary judgment motion. *See id*. Further, the Tyler court did not discuss whether the appellee reargued the alternative ground in its appellate brief. *See id.* These interpretations

omit the important requirement that the appellee must preserve the ground for appellate argument by raising the ground in an appellate brief, thereby allowing appellate courts to review sua sponte the motion for summary judgment and affirm on any ground that was meritorious. Therefore, a party defending a specific summary judgment on appeal should argue both the grounds on which the trial court based its judgment, and all other grounds that were included in the summary judgment motion. This action will afford the best chance of the specific summary judgment being affirmed on appeal.

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

C. General Judgments

When the trial court grants a general summary judgment and does not specify the ground on which it granted the judgment, the appellant must argue that every ground of the summary judgment motion is erroneous. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996). Further, the appellate court must affirm the summary judgment if any one of the movant's theories has merit. *See Western Invs., Inc. v. Urena*, 162 S.W.3d 547 (Tex. 2005); *Dow Chem. Co. v. Francis*, 46 S.W.3d 237 (Tex. 2001); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 624 (Tex. 1996).

1. Specific Points of Error Versus General Points of Error

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

2. Specific Points of Error

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

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

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

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

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

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

3. General Points of Error

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

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

> We hold that when a trial court grants summary judgment on a ground not contained in the motion for summary judgment, an assertion on appeal that fact issues remain on that ground is sufficient under the Texas Rules of Appellate Procedure to raise a challenge to the excess relief--without any request for summary judgment on a claim,

> nothing exists in the trial court record to controvert an appellant's contention on appeal that facts exist to support it.

Id. at 819.

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

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

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

In *Morriss v. Enron Oil & Gas Co.*, the defendant based its motion for summary judgment on the failure of one of the elements of the plaintiff's contract claim and on the affirmative defense of the statute of limitations. 948 S.W.2d 858, 863 (Tex. App.—San Antonio 1997, no writ). In his summary judgment response, the plaintiff only argued that the statute of limitations was tolled by the discovery rule. *See id.* at 871. The trial court signed an order granting the defendant's motion for summary judgment but failed to assign any particular basis for so doing. *See id.* On appeal, the plaintiff used a general point of error and alleged that the trial court erred in granting the summary judgment but only briefed and argued that the statute of limitations was tolled by the discovery rule. *See id.* The court stated that by using a general point of error, the plaintiff "could present argument on all grounds on which he contends that summary judgment was inappropriate." *Id.* The court noted, however, that the plaintiff did not take advantage of this opportunity; rather, he focused his briefing on the issue of limitations. *See id.* Thus, the court ruled that "failure to take advantage of the opportunity to present argument on the alternative ground results in waiver." *Id.*

Other courts have similarly found that a broad issue only allows an appellant the opportunity to brief and argue all grounds, it does not relieve a party of the obligation to brief all grounds that the trial court could have used to support the order. *See, e.g., McCoy v. Rogers,* 240 S.W.3d 267 (Tex. App.—Houston [1st Dist]. 2007, pet. denied); *Cruikshank v. Consumer Direct Mortgage, Inc*., 138 S.W.3d 497, 502-03 (Tex. App.—Houston [14th Dist.] 2004, pet. denied); *Pena v. State Farm Lloyds*, 980 S.W.2d 949, 958-59 (Tex. App.—Corpus Christi 1998, no pet.) (concluding that *Malooly* allowed the non-movant to argue broadly on appeal under a general point of error, but it did not relieve an appellant of the burden to challenge the grounds for the summary judgment and to present argument for his case

on appeal). *See also Judson 88 Partners v. Plunkett & Gibson, Inc*., 2000 Tex. App. LEXIS 3308, No. 14-99-00287-CV, 2000 WL 977402, *2 n.2 (Tex. App.—Houston [14th Dist.] May 18, 2000, no pet.) (not designated for publication) (noting that *Malooly* holds that "even a broad point of error must still be supported by argument challenging each independent summary judgment ground. . . . Otherwise, the assertion of a broad point of error would shift the burden to the appellate court to search the record for grounds on which to reverse the summary judgment.").

There is limited guidance from Texas courts as to the second situation. The Texas Supreme Court has authored a number of opinions that relate to this topic, but it has never directly addressed the situation when a non-movant attacks every ground in his response to the trial court and then only attacks a few of those grounds in his brief to the appellate court. In *Inpetco, Inc. v. Texas American Bank*, the non-movant appealed an adverse summary judgment to the appellate court using a general point of error. 729 S.W.2d 300 (Tex. 1987) (per curiam). The appellate court held that the non-movant had waived the appeal because the point of error was too broad and there was insufficient argument and authorities under the point of error. *See Inpetco, Inc. v. Texas Am. Bank/Houston*, 722 S.W.2d 721, 721-22 (Tex. App.—Houston [14th Dist.] 1986), writ ref'd n.r.e. per curiam, 729 S.W.2d 300 (Tex. 1987). The supreme court reversed the appellate court stating that it had erred in affirming the trial court's judgment on the basis of briefing inadequacies without first ordering the non-movant to rebrief. *See Inpetco*, 729 S.W.2d at 300.

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

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

In *Bonham State Bank v. Beadle*, the Texas Supreme Court held that when an appellant had raised an issue challenging the summary judgment on an independent ground with the trial court but failed to raise it in the appellate brief, he waived that issue. 907

S.W.2d 465, 470 (Tex. 1995). *Beadle*, however, did not deal with a situation when the appellant lost the entire appeal due to the waiver. The appellate court simply chose not to consider the independent issue that the appellant raised to the trial court but failed to raise in the appellate court. *See id. See also General Servs. Comm'n v. Little-Tex Insulation Co.,* 39 S.W.3d 591 (Tex. 2001); *Standard Fruit & Vegetable Co. v. Johnson,* 985 S.W.2d 62 (Tex. 1998).

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

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

Id.

"In essence, [the Texarkana court] ruled that because the appellant used a general point of error, he challenged all the grounds on which the summary judgment could have been based." *Shivers*, 965 S.W.2d at 732. Due to the *de novo* standard of review on appeal, the appellate court, like the trial court, may consider the clerk's record and the appellant's summary judgment response, "wherein he presumably briefed and challenged every argument that the appellee raised in his summary judgment motion." *Id.* Further, there is no presumption of corrections in the summary judgment context. After a trial on the merits, a trial court's judgment is presumed correct. But in summary judgment cases, no presumption of correctness attaches to the trial court's judgment and the movant still must carry his burden at the appellate court level. *See Gillespie v. Fields*, 958 S.W.2d 228, 231 (Tex. App.—Tyler 1997, pet. denied) ("The presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear.") (citing *Missouri Kansas-Texas R.R. Co. v. City of Dallas*, 623 S.W.2d 296, 298 (Tex. 1981)). Because unlike a judgment after a trial on the merits, there is no presumption applicable to a summary judgment. Thus, the briefing standards should also be different, with summary judgment appeals given more liberal treatment. *Compare King v. Graham Holding Co.*, 762 S.W.2d 296, 298-99 (Tex. App.—Houston [14th Dist.] 1988, no writ) (noting that *Inpetco* dealt with a summary judgment appeal where the more liberal *Malooly* briefing rules apply and that Inpetco did not create a general right to rebrief).

Following the rule that the appellant waives appeal by not briefing every possible ground would require an appellate court to affirm a summary judgment even if the trial court erred in finding that the movant's summary judgment grounds were legally sufficient, and the non-movant challenged the summary judgment in its entirety by a general point of

error. *See Shivers*, 965 S.W.2d at 732. *See also Bean v. Reynolds Realty Group, Inc*., 192 S.W.3d 856 (Tex. App.—Texarkana 2006, no pet.).

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

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

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

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

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

4. Criticism of General Points of Error

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

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

A party appealing an adverse summary judgment should brief the appeal as thoroughly as possible. First, the general point of error should state, "The Trial Court Erred In Granting The Motion For Summary Judgment." *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). As discussed above, this allows the appellant to attack every ground relied on by the motion for summary judgment. Because the appellate courts and their staffs will find sub-points of error helpful, the appellant should also raise a sub-point of error stating, "The trial court erred in granting the summary judgment on ground X because of Y." An example of such a brief is contained in *Davis v. Pletcher*, where the court states: By a plethora of points, appellant . . . assails the action of the trial court in partially granting the summary judgment. In the first of the 59 points of error, appellant complains simply that the court erred in granting the motion. The following 41 points elaborate on this first point in a multitude of ways and are addressed by appellant in seven groups of from one to thirteen points. 727 S.W.2d 29, 32 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.). This language will act as a road map and insure that the appellate court will not overlook any argument or authorities that may be dispositive. The appellant should brief and argue every ground raised in the summary judgment motion, and should place these contentions in sub-points of error. This should be done whether the appeal is from a general or specific summary judgment order. If the order is specific, the appellate court can still affirm the summary judgment on grounds not considered by the trial court. It is wise for an appellant to clearly set out opposition to every possible ground on which the appellate court can affirm a summary judgment. If the summary judgment order is general, the appellant should assert as a sub-point of error and brief every possible ground to avoid waiving his appeal.

XII. CONCLUSION

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