



SUMMARY JUDGMENTS IN TEXAS

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Introduction

- Summary judgment practice has exploded over the past twenty years
- There are motions filed in most cases on some or all issues
- Around a third of summary judgments appealed are reversed
- Trial and appellate procedure is very important



Summary Judgment Grounds

- The movant must expressly state the specific grounds for summary judgment in the motion.
- Grounds in a unattached brief are not sufficient.
- A court of appeals cannot review a ground that was not contained in the summary judgment motion to affirm that order.

Summary Judgment Grounds

- If the motion contains no grounds or limited grounds, the nonmovant does not need to specially except and can raise that issue on appeal.
- “An exception is required should a non-movant wish to complain on appeal that the grounds relied on by the movant were unclear or ambiguous.”
- “However, even when a non-movant fails to except, the court of appeals cannot ‘read between the lines’ or infer from the pleadings any grounds for granting the summary judgment other than those grounds expressly set forth before the trial court.”

Summary Judgment Grounds

- 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.
- Thus, the appellate court can affirm on any ground that was included in the ambiguous summary judgment motion.

Summary Judgment Grounds

- A party cannot not rely upon unpled claims or defenses as a ground for summary judgment.
- However, such a claim or defense may be raised in a summary judgment motion where the opposing party does not object to a lack of pleading.
- Trial by consent can apply.

Summary Judgment Grounds

- The no evidence motion should be specific as to the challenged elements to give fair notice to the non-movant as to the evidence it must present.
- 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.

Summary Judgment Grounds

- 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 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.
- Some courts have held that non-movant waived complaint about a no-evidence ground on a claim or defense the movant had the burden of proof on by failing to object or specially except.
- 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.

Summary Judgment Grounds

- 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.
- 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.

Summary Jmt. Response

- Where a traditional summary judgment movant fails to show that there is no genuine issue of material fact, the non-movant can argue that failure on appeal even without a response on file in the trial court.
- However, if the movant carries its burden, the burden shifts to the non-movant to create a genuine issue of material fact.

Summary Jmt. Response

- When a movant files a proper no-evidence motion for summary judgment, the burden shifts to the respondent and unless the respondent produces summary-judgment evidence raising a genuine issue of material fact, the trial court must grant the motion for summary judgment.
- To defeat a no-evidence motion for summary judgment, the non-movant need not marshal her evidence but must point out in her response evidence raising a genuine issue of fact as to the challenged elements.

Summary Jmt. Response

- Non-movant should specifically cite to evidence, do not just attach a mountain and ask the judge to figure it out.
- Non-movant should also raise any special exceptions or objection to the motion and also to any evidence filed by the movant.

Summary Judgment Reply

- A summary judgment movant can file a reply brief and argue why the non-movant did not raise a genuine issue of material fact.
- The movant, however, cannot raise new summary judgment grounds in the reply brief.
- Authority would support a movant asserting new grounds in a reply brief where the non-movant consents to same.
- The movant can also file special exceptions or objections to the response or the evidence filed by the non-movant.

Motion for Reconsideration

- A party may file a motion for new trial or reconsideration regarding a trial court's ruling on a summary judgment.
- Of course, if the trial court originally denies the motion, such a ruling is interlocutory and the movant can re-urge its motion again at a later date.
- In that case, the trial court can change its mind and later grant the motion.
- If the motion is granted, then raising an argument or objection in a motion for new trial or reconsideration for the first time is not sufficient because all issues must be raised in the response.

Trial Court Standards Of Review

- Traditional motion
- Movant must establish that it is entitled to judgment as a matter of law
- Movant has the burden of production and persuasion
- 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 non-movant will be taken as true if a reasonable juror could believe it

Trial Court Standards Of Review

- No-Evidence Motion
- Non-Movant has burden to produce sufficient evidence to raise a genuine issue of material fact
- 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

Trial Court Standards Of Review

- “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.”



Trial Court Standards Of Review

- Under The *City Of Keller*, some evidence contrary to the non-movant's position can not be disregarded:
 - (1) Contextual Evidence;
 - (2) Competency Evidence;
 - (3) Circumstantial Equal Evidence; And
 - (4) Consciousness Evidence.

Scope of Review

- Scope of Review: What evidence can the court review?
- Traditional Motion: All evidence in the record viewed under appropriate standard
- No-Evidence Motion: Only evidence attached to the response? All evidence, but only if it creates a fact question? All evidence as in *City of Keller*?

Scope of Review

- 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.”



Scope of Review

- *City of Keller*. “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.”

Scope of Review

- *Mack Trucks*: “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.”



Scope of Review

- In *City of Dish v. Atmos Energy*, the Court did not expressly discuss the scope of review issue but used evidence attached to a dual motion to show that the plaintiff had no evidence. No. 15-0613, 2017 Tex. LEXIS 466 (Tex. May 17, 2017).
- In a nuisance case, a defendant argued that it was not the same as the other defendants and did not contribute to the complained-of activities.
- The Court referred to evidence filed by the defendant showing that it that it did not have any emissions or noise, and showed that the plaintiffs did not present any evidence to establish that the pipeline company (as opposed to the other defendants) did anything wrong.
- Though there was no express discussion by the Court regarding the use of evidence filed by the movant to support a no-evidence motion, the Court did just that.

Scope of Review

- Scope of Review?
- Some courts of appeals have cited to *City of Keller* and held that movant's evidence must be disregarded unless it creates fact issue
- Other courts have quoted *Mack Trucks* without any analysis of the issue
- Final answer is still unresolved

Finality of Summary Judgments

- Judgment after trial is presumed final
- Judgment after summary judgment is not presumed final
- Summary judgment order must expressly dispose of all parties and all claims to be final
- Otherwise, order is presumed interlocutory and not appealable

Finality of Summary Judgments

- Does inclusion of Mother Hubbard clause create finality?
- “All relief not expressly granted herein is denied.”
- *Mafrige v. Ross*: yes, it creates a final judgment



Finality of Summary Judgments

- *Lehman v. HarCon Corp.*: No, it does not create finality in an otherwise interlocutory order.
- But, language such as “this judgment finally disposes of all parties and all claims and is appealable” does create finality.
- **Trick Or Trap:** What if an interlocutory order states that it disposes of all parties and all claims, but does not? Is it final and appealable?

Appellate Standards of Review

- Traditional Motion: *De Novo*
- No-Evidence Motion: *De Novo* vs. Legal Sufficiency
- Adequate Time For Discovery: Abuse of Discretion
- Continuance Motions: Abuse of Discretion
- Evidence Rulings: Abuse of Discretion (But Why?)

Appeal of Denial Of Motion

- Generally, no right to appeal.
- Issues not preserved in denied motion.
- If cross motions, denied motion can be appealed.
- Can appeal if specific statutory grant.
- Permissive appeal is an option.
- Can get mandamus to order trial court to rule but generally not how to rule.

Mandamus Of Denial

- Generally, courts do not allow mandamus relief to review the denial of a summary judgment motion.
- The Texas Supreme Court granted mandamus review to reverse a trial court's denial of a summary judgment. *In re USAA*, 307 S.W.3d 299 (Tex. 2010).
- Since *In re USAA*, courts of appeals have not generally been receptive to mandamus petitions from summary judgment denials absent the showing of some extraordinary issue.

Preservation of Error Hot Topics

- Does a party have to get an express ruling to summary judgment evidence objection?
- 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
- Split in courts of appeals—to be safe, get an express, written ruling

Preservation of Error Hot Topics

- Do discovery rules apply in summary judgment cases to potentially bar expert testimony?
- There used to be a split in the courts of appeals, but the Texas Supreme Court supports the application of discovery rules.

Summary Judgment Record

- Currently, clerk has duty to prepare record.
- Rule 34.5(a) defines what must appear in the clerk's record.
- Rule 34.5(a) does not specifically list motions for summary judgment or supporting evidence as required contents of the clerk's record.
- 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.

Briefing Issues

- Specific Judgment vs. General Judgment
- If specific judgment based on ground not raised in motion, appellant should raise issue in brief complaining of that error.
- Specific judgment can be affirmed on ground in motion not mentioned in judgment.
- Appellee should raise cross issue on alternative grounds.

Briefing Issues

- General judgments must be challenged via adequate issues/points of error.
- *Malooly* issue: “Trial court erred in granting summary judgment.”
- If appellant uses specific issues, it should challenge all grounds in judgment.
- Otherwise, court of appeals should summarily affirm.

Briefing Issues

- A party challenging a general judgment must argue in brief against all potential grounds.
- Otherwise, the dreaded unassigned error.
- Court of appeals will presume unchallenged ground was correct and affirm.
- Texarkana exception: general point of error, and trial court response argues against all grounds.

Conclusion

- Summary Judgment Procedure Is Onerous – Some Might Say Tricky.
- That is Fair Considering Party Is Losing Day In Court In Front of Fact Finder.

