

RECENT DEVELOPMENTS IN SUMMARY JUDGMENT

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Alistair Dawson became a partner of Beck Redden & Secrest, L.L.P. on January 1, 1998. He graduated *magna cum laude* from Vanderbilt University in 1986 with a degree in International Economics and International Business. He graduated with honors from the University of Texas School of Law in 1989, where he served as an Editor of the *Texas Law Review*, and was also a member of the prestigious Chancellor's Society. Mr. Dawson joined Vinson & Elkins in May 1989, and joined Beck, Redden & Secrest, L.L.P. in March 1993. He is admitted to practice before all state courts in Texas, the United States Supreme Court, United States Court of Appeals, Fifth Circuit, United States District Court for the Southern District of Texas, Western District of Texas, the Northern District of Texas, and the Eastern District of Texas.

Mr. Dawson's practice includes virtually every aspect of commercial litigation. He has defended a Fortune 100 company in a nationwide class action and a major oil company in a suit by the State of Texas for unpaid royalties. Mr. Dawson has also defended numerous Fortune 500 companies in antitrust cases alleging monopolization, conspiracy and predatory pricing. Recently, Mr. Dawson successfully tried a case in New York on behalf of a New York investor involved in an oil and gas prospect in East Texas. Mr. Dawson led a team of ten lawyers and over twenty experts in suits on behalf of AT&T to gain entry into the local phone markets in Texas, Oklahoma and Kansas. Mr. Dawson has handled multi-million dollar cases involving misappropriation of trade secrets, usurpation of corporate opportunities and breaches of fiduciary duty. Mr. Dawson successfully defended Marathon Oil in a multi-million dollar royalty dispute brought in Henderson, Texas (in which more than 200 of the plaintiffs were Henderson residents). Mr. Dawson has served on the Defense Steering Committee in a national mass tort case. He has successfully defended two attorney malpractice cases. He also has extensive experience in product liability cases, including on behalf of several Fortune 500 companies. Mr. Dawson has also handled various oil and gas disputes, involving both breach of contract and take-or-pay issues. Mr. Dawson has been involved in various aspects of environmental litigation, including Superfund clean-ups and issues related to the Environmental Protection Agency and additional experience in labor and insurance disputes.

Mr. Dawson is also active in local and state bar associations. He has served on numerous committees of the Houston Bar Association and currently serves on the Litigation Council of the State Bar of Texas, is a member of the CLE Committee of the State Bar of Texas and is a member of the Supreme Court Advisory Committee. Mr. Dawson also serves on the Commercial and Business Litigation Committee and the Corporate Counsel Committee of the American Bar Association. Mr. Dawson is a member of the International Association of Defense Counsel and the Garland Walker End of Court. Mr. Dawson is also active in local charitable associations, serving on the Board of Theater Under the Stars and the Parish School.

BECK, REDDEN & SECREST, L.L.P.

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I. INTRODUCTION

Since the summary judgment revolution of 1997 when Texas Rule of Civil Procedure 166a(i) was promulgated, summary judgment practice in Texas courts has greatly increased in importance. This article will (1) provide the reader a background on Texas summary judgment practice and (2) bring to the reader's attention cases from 2003 of particular importance to attorneys dealing with summary judgment motions at both the trial and appellate level.

II. TRADITIONAL AND NO EVIDENCE SUMMARY JUDGMENTS

Until 1997, a motion for summary judgment could be granted only when (1) the movant conclusively established each and every element of a claim or defense on which it bore the burden of proof or (2) the movant conclusively negated an element of a claim or defense upon which the non-movant bore the burden. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997).

A. Traditional Summary Judgment

In a traditional motion for summary judgment, the movant has the burden of showing via competent evidence that there are no genuine issues of material fact and, therefore the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Property Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Thus, a plaintiff-movant must conclusively establish that it is entitled to judgment as a matter of law on its claim. *MMP, Ltd. v. Jones*, 710 S.W.2d 59, 60 (Tex. 1986). A defendant-movant has the burden to either (1) conclusively negate at least one element of a plaintiff's cause of action or (2) conclusively establish each element of an affirmative defense. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). An issue is conclusively established if reasonable minds could not differ as to "the conclusion to be drawn from the evidence." *Price v. Am. Nat'l Ins. Co.*, 113 S.W.3d 424, 427 (Tex. App. – Houston [1st Dist.] 2003, no pet.).

Once a movant's motion facially establishes the movant's right to summary judgment, it is the non-movant's burden to raise

a genuine issue of material fact sufficient to preclude summary judgment. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 571, 578 (Tex. 1979).

B. No-Evidence Summary Judgment

The 1997 addition of Tex. R. Civ. P. 166a(i) brought Texas summary judgment procedure more in line with summary judgment practice in the federal courts under Fed. R. Civ. P. 56. Rule 166a(i) states that

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

Tex. R. Civ. P. 166a(i).

When a no-evidence motion for summary judgment is filed, the non-movant has the burden to produce more than a scintilla of evidence that raises a genuine issue of material fact as to each element of its claim. Tex. R. Civ. P. 166a(i) cmt.; *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). The court must construe the evidence in the light most favorable to the non-movant and every reasonable inference or doubt must be indulged in favor of the non-movant. *Rocha v. Faltys*, 69 S.W.3d 315, 320 (Tex. App. – Austin 2002, no pet.). Should the non-movant fail to raise a fact issue as to an element of its claim, the court must grant summary judgment. *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 433 (Tex. App. – Houston [14th Dist.] 1999, no pet.).

A no-evidence summary judgment is essentially the equivalent of a pretrial directed verdict. *King Ranch, Inc. v. Chapman*, 118

S.W.3d 742, 750-51 (Tex. 2003). Thus, a no evidence summary judgment is appropriate when “(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.” *Id.* at 751 (quoting *Havner*, 953 S.W.2d at 711).

III. NO-EVIDENCE SUMMARY JUDGMENTS

Perhaps one of the most factually interesting cases before the Texas Supreme Court this past year was *King Ranch, Inc. v. Chapman*, 118 S.W.3d 752 (Tex. 2003). Before the Texas Supreme Court was whether the court of appeals erred in reversing the district court’s entry of a no-evidence summary judgment due to the existence of genuine issues of material fact.

To understand *Chapman*, we must go back to Texas’s early years of statehood. In the early 1850’s, the heirs of Juan Mendiola received a patent from the State of Texas conveying three-and-one half leagues of land totaling 15,449.4 acres of land in Nueces County known as the Rincon de Santa Gertrudis. *Id.* at 746. Today, the land which made up the Rincon is now parts of the King Ranch, the City of Kingsville, and the Kingsville Naval Air Station. *Id.* Through a series of transfers, Richard King and Major William Warren Chapman came to each own a one-half undivided interest in the Rincon. *Id.*

When Major Chapman died in 1859, he left his estate to his wife Helen. *Id.* In 1879, Helen Chapman sued King in a suit for trespass to try title over the Rincon. *Id.* Helen was represented by several attorneys including Robert Kleberg. *Id.* During the pendency of Helen’s suit, Kleberg represented King on unrelated matters. *Id.* at 748. Helen’s suit against King was settled pursuant to a consent judgment in April 1883. *Id.* at 747. Under the consent judgment, King received the entire title and interest in the Rincon in return for cash payments. *Id.*

In 1995, twenty heirs and devisees of the William and Helen Chapman filed suit against 208 defendants who currently hold interests in the land that made up the Rincon. The plaintiffs sought a bill of review to set aside the 1883 consent judgment on the grounds that Robert

Kleberg, Helen Chapman’s lawyer, conspired with King “to advance the interests of Richard King at the expense of the Estate of Helen Chapman.” *Id.* at 749.

To prevail on a bill of review, the Chapman heirs had to “prove (1) a meritorious defense to the cause of action alleged to support the judgment, (2) that the petitioner was prevented from making by the fraud, accident or wrongful act of his or her opponent, and (3) the petitioner was not negligent.” *Id.* at 752. The defendants moved for summary judgment on the grounds, *inter alia*, that there was no evidence of extrinsic fraud or the Chapman heirs’ lack of negligence. *Id.*

The trial court granted the defendants’ motion for summary judgment. *Id.* at 749. The Corpus Christi Court of Appeals reversed the trial court, finding that the Chapman heirs’ had raised genuine issues of material fact regarding the elements of fraud and negligence. *Id.* In finding fact issues as to fraud, the court of appeals relied on evidence of (1) Kleberg’s representation of King during the pendency of Helen Chapman’s suit against King; (2) the fact that a deed executed in 1856 and necessary to establishing chain of title in the Rincon was found in the possession of King and filed by Kleberg’s nephew in 1904; (3) a letter written in 1880 by Stephen Powers, who also represented King, that advised King that he would not be able to overcome Chapman’s title which supposedly conflicted with Kleberg’s later statements that Chapman could not prove title in the Rincon; (4) notations in Major Chapman’s account book that indicated he had in fact paid King for his interest in the Rincon; and (5) the fact that Mr. Rankin, co-executor of Helen Chapman’s estate, failed to receive authority from the probate court to settle Helen Chapman’s suit against King. *Id.* at 752-55

The supreme court addressed each of these categories of evidence and found that none of them raised a genuine issue of material fact. First, the court addressed the Chapman heirs’ argument that that Kleberg’s simultaneous representation of King and Chapman was sufficient evidence of fraud to raise a genuine issue of material fact. The heirs pointed to the following pieces of evidence (1) a letter from Kleberg to his parents stating that King “asked [Kleberg’s law firm] to attend to his legal business for him,” (2) evidence that Kleberg’s

firm represented King in two lawsuits unrelated to Helen Chapman's claims, (3) a fictional account of a conversation between Kleberg and King found in the book *The King Ranch* by Tom Lea in which King offers a \$5000 retainer to Kleberg, and (4) a statement by Bruce Cheeseman, a King Ranch historian, that "Clearly, Kleberg was looking after the interest of his in-state client versus the interests of his out-of-state client" quoted in a 1992 article about the lawsuit between King and Helen Chapman in the *Corpus Christi Caller-Times*.

The court held that even if Kleberg had simultaneously represented King and Helen Chapman on unrelated matters, it did not raise a genuine issue of material fact because such representation was permissible in the 1880's. *Chapman*, 118 S.W.3d at 752-53. The court went on to state that Cheeseman's statement, which it assumed to be accurate for purposes of reviewing the grant of summary judgment, did not raise a genuine issue of material fact because it "says nothing about King's actions or intent and cannot support an inference that King committed extrinsic fraud. Instead, it is a historian's opinion - given over one hundred years after the transaction in issue - questioning Kleberg's actions." *Id.* at 753.

The court then addressed the fact that a deed executed in 1856 that was necessary to prove Helen Chapman's interest in the Rincon was later found in King's possession and not recorded until 1904. The court of appeals found that this was evidence of fraud on the part of King because the omission of the deed from the record strengthened King's position that Major Chapman had never actually paid for his alleged interest in the Rincon. *Id.* The supreme court disagreed noting that under the governing recording statute the deed was valid even though unrecorded and because King had testified to the existence and contents of the deed. *Id.*

Next, the court addressed the letter sent to King from Stephen Powers in 1880. In the letter, Powers advised King to settle the suit against Helen Chapman's estate because he did not "see how [King would be] able to get over Mrs. Chapman's title to the Santa Gertrudis interest." *Id.* at 754. The court of appeals found that this raised a genuine issue of material fact because the court believed it contradicted a statement made by Kleberg in an 1883 letter that Chapman's title in the Rincon could not be

established. *Id.* The court of appeals held that these conflicting statements, combined with from King's decision to settle the claims raised an inference of extrinsic fraud on the part of King. *Id.* The supreme court concluded, however, that the fact that the parties compromised and settled their claims could not give rise to an inference of fraud. *Id.*

The court of appeals also found that notations in Major Chapman's account book suggesting that Major Chapman had in fact paid for his interest in the Rincon was some evidence of extrinsic fraud. *Id.* The supreme court quickly dismissed this argument because, as it noted, whether Major Chapman had paid for an interest in the Rincon was squarely at issue in the lawsuit between Chapman and King and thus was intrinsic to the 1883 consent judgment. *Id.*

Finally, the court of appeals relied on the absence of evidence in the probate court's records that Mr. Ranking, the co-executor of Helen Chapman's estate, ever applied for or received the court's authorization to settle the estate's claims against King. *Id.* The supreme court held that the absence of such evidence could not raise a genuine issue of material fact because the absence of evidence in an ancient court record is insufficient to upset the current title in the Rincon. *Id.* at 755 (citing *Baker v. Coe*, 50 Tex. 429, 437 (1857)).

The court's conclusion is eminently reasonable and completely understandable. The court was faced with parties seeking to upset a 120 year old judgment settling title in real property based largely on the absence of evidence and incomplete records. The court further noted that each piece of evidence standing alone failed to raise a fact issue and that even aggregating them together they still failed to raise a fact issue. *Id.* As the court noted, "some suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence." *Id.* (quoting *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1993)). Furthermore, the court also appeared to be strongly influenced by the presumption in favor of ancient judgments and titles. *Id.*

IV. TRADITIONAL SUMMARY JUDGMENTS

In *Price v. American National Insurance Company*, the court of appeals, reversed the grant of summary judgment in favor of the

American National Insurance Company (“ANICO”). *Price v. Am. Nat’l Ins. Co.*, 113 S.W.3d 424 (Tex. App. – Houston [1st Dist.] 2003, no pet.). Price filed suit to recover benefits under a life insurance policy for which she was the beneficiary. ANICO had denied coverage on the grounds that Price’s father’s, the insured party, death was the result of suicide and thus fell within the policy’s suicide exclusion.

ANICO filed a motion for summary judgment on the basis that Mr. Price’s death was the result of suicide and fell within the policy’s suicide exclusion. Under Texas law, there is a legal presumption against suicide. *Id.* at 428. As such, ANICO had the burden to conclusively establish that the insured’s death was the result of suicide. *Id.* In its motion, ANICO relied upon (1) the inquest finding of the justice of the peace, (2) an uncertified death certificate, (3) an autopsy report, and (4) the Chambers County Sheriff’s Department investigative report. *Id.* The trial court granted ANICO’s motion. *Id.* at 426.

The court of appeals examined each piece of evidence to determine if they were conclusive evidence of summary judgment. The court first found that the inquest finding that the gunshot wound was self-inflicted was not conclusive evidence of suicide because it was rendered prior to (1) the autopsy, (2) the completion of a toxicology report and forensic examination of the evidence, and (3) the completion of witness interviews by the investigating officer. *Id.* at 428. The court held that in light of these facts, the inquest finding was not conclusive of suicide. *Id.* The court additionally noted that even if the inquest finding were sufficient to show that the wound was self-inflicted, it would still not be conclusive as to suicide because the evidence that the wound was self-inflicted was also consistent with an accidental shooting. *Id.*

The court next found that the uncertified death certificate listing the cause of death as suicide was not conclusive because it was based only upon the opinion of the justice of the peace. *Id.* at 428-29. The court stated that this testimony was not conclusive because, even though it was uncontradicted, it was opinion evidence regarding a subject that is solely decided by expert testimony, and thus not binding on the trier of fact. *Id.* at 429.

Finally, the court held that the autopsy report of a forensic pathologist that stated that in his opinion Mr. Price committed suicide was not conclusive evidence of suicide. *Id.* The court held that the report was inconclusive because while the pathologist’s opinion was “accompanied by a detailed description of medical findings, nothing in the medical report indicates what findings are consistent with or prove that the insured committed suicide.” *Id.*

Finally, the court held that the sheriff’s department investigative file containing affidavits, interviews, and reports were not competent summary judgment evidence. The court held the affidavits were incompetent because each one stated that “to the best of [the affiant’s] knowledge the statement is true and correct.” *Id.* The court held that this was not sufficient to show the affidavit was “made on personal knowledge” as required by Rule 166a(f). *Id.* at 430 (citing *Hall v. Stephenson*, 919 S.W.2d 454, 466 (Tex. App. – Fort Worth 1996, writ denied)). Furthermore, ANICO conceded that the narrative reports were admissible only to show the extent of the investigation and not to prove the truth of the matters asserted therein. *Id.* The court readily concluded that such evidence was irrelevant in the absence of a conclusion. *Id.*

From the practitioner’s standpoint, there are two noteworthy aspects of this opinion. First, the court’s decision seems to imply that in determining whether a movant conclusively established an issue, the proper inquiry is whether any individual piece of evidence is conclusive. If this is in fact what the court was saying, this would seem to be at odds with the rules governing summary judgment. Rule 166a(c) clearly contemplates that in determining whether a movant is entitled to summary judgment, the court is to look to all of the admissible evidence filed in support of the motion as well as any pleadings and stipulations in the record. *See* TEX. R. Civ. P. 166a(c). However, the court in *Price*, extensively discussed the evidence filed by both Price and ANICO which raised a genuine issue of material fact. *Price*, 113 S.W.3d at 430-31. This suggests that what the court was saying was that no single piece of evidence submitted by ANICO was conclusive and that in light of other evidence in the record there was a genuine issue of material fact.

