

**UPDATING THE SUMMARY JUDGMENT PRACTICE**

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## SUMMARY JUDGMENT UPDATE

by

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### I. SCOPE OF DISCUSSION

Even prior to its formal arrival in September 1997, the “no-evidence” motion for summary judgment, now codified as TEX. R. CIV. P. 166a(i), caused a great deal of debate among Texas trial lawyers. Now that “no-evidence” motions for summary judgment are being filed, heard, and ruled on by trial courts, and therefore considered by appellate courts, the rule and its ramifications are just now beginning to be felt. While the debate over the overall effect of the rule continues, there is no doubt that the adoption of the rule has caused many trial lawyers to think about overall discovery and motion strategies to minimize--or maximize, as the case may be--the application of the new rule to particular cases. The debate over the rule itself and its ultimate impact are interesting subjects, but will not and cannot be given justice and addressed to any large extent in this presentation. Instead, taking the new rule as a given, this discussion considers at least some of the potential effect of the rule on the day-to-day administration of lawsuits and overall strategy considerations facing a lawyer. The discussion will attempt to address the following questions that relate to these impact and strategy issues:

- How might you alter discovery strategy with the no-evidence motion in mind?
- Under what circumstances might a no-evidence motion be wise?

- Under what circumstances might a traditional summary judgment motion, or *no* summary judgment motion, be a wiser choice?
- When is the right time to file a no-evidence motion, if any?
- How do you defeat a no-evidence motion?

## II. BACKGROUND OF 166A(I)

A. Evolution of the No-Evidence Motion. The Texas summary judgment rule, TEX. R. CIV. P. 166a, was originally drawn from the equivalent federal summary judgment rule, FED. R. CIV. P. 56. However, at least from 1986 until September 1997, when Rule 166a(i) became effective, actual state and federal summary judgment practice differed to a significant degree. This differences related in large part to the United States Supreme Court's interpretation of the federal summary judgment rule in *Celotex Corp. v. Catrett*, 106 S. Ct. 2548 (1986). In *Celotex*, the United States Supreme Court interpreted the federal summary judgment rule as imposing responsibilities for carrying the burdens of summary judgment proof and persuasion on both the movant and non-movant. Under *Celotex*, a federal court litigant could file the equivalent of a "no-evidence" motion for summary judgment, and file a relatively simple motion essentially containing a legal argument, adequately supported by authority, that the party with the burden of proof on an element at trial did not have evidence sufficient enough to raise a "genuine issue of material fact" to allow that issue to be tried. These motions can be supported by summary judgment evidence, such as deposition excerpts, discovery responses, and documents exchanged in discovery, but do not necessarily have to be for the motion to be granted. *Id.* at

2553. For example, under the federal *Celotex* standard, a defendant movant can merely point out a missing element in a cause of action raised against it and be granted a summary judgment.

The strength of such motions was bolstered by two other United States Supreme Court opinions, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986), and *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986). Both read the “genuine issue” requirement of the federal summary judgment rule as allowing the federal trial judge, on summary judgment, to determine whether the record taken as a whole could lead a “rational” trier of fact to find for the non-movant on that issue. Any such genuine issue had to be “material”--that is, it had to involve a “dispute over facts that might affect the outcome of the suit under the governing law.” *Liberty Lobby*, 106 S. Ct. at 2510.

The Texas Supreme Court declined to follow the lead of *Celotex* and the other 1986 federal summary judgment cases in terms of shifting the burden of summary judgment proof from the movant to the non-movant. Thus, Texas courts continued to place the initial burden of proof on the party moving for summary judgment. *Casso v. Brand*, 776 S.W.2d 551, 555-58 (Tex. 1989). It simply was not enough for the moving party to file a motion containing a legal argument that there was no genuine issue of material fact on a claim the non-moving party had the burden of proof on at trial. The moving party would have to go further and *demonstrate* the *absence* of such a genuine issue as to at least one element of the claim made against it through competent summary judgment evidence. Under the traditional Texas summary judgment motion, the movant was required to

“disprove, as a matter of law, one of the essential elements of each of plaintiffs’ causes of action.” *Lear Sigler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991) (emphasis in original). The only time the summary judgment burden ever shifted to the non-movant (at least formally, as opposed to practically) under the Texas summary judgment rule prior to September 1997 was when the movant had “conclusively” proved its entitlement to summary judgment on an issue on which the *movant* had the burden of proof at trial, such as a cause of action or an affirmative defense. *Casso*, 776 S.W.2d at 556. For example, if a defendant “conclusively” proved a statute of limitations defense, the plaintiff against whom the defense was made would have the burden of overcoming that proof with competent summary judgment evidence of its own.

With the advent of Rule 166a(i), the gap between federal and state summary judgment practice has narrowed significantly. In fact, several Texas appellate courts have cited federal case law for guidance in applying the new rule. *See, e.g., Moore v. K Mart Corp.*, 981 S.W.2d 266 (Tex. App. – San Antonio 1998, pet. denied).

[**PRACTICE NOTE:** In fact, given the existence of a great deal more federal case law on “no evidence” summary judgments than state case law, you might consider citing some federal cases that are “on point” to the facts of a particular matter.]

B. The No-Evidence Rule. Rule 166a(i) states the following:

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.

The rule itself is supplemented by a comment which, pursuant to the Texas Supreme Court order approving the rule amendment, “is intended to inform the construction and application of the rule,” “unlike other notes and comments in the rules.” *See* August 15, 1997 Order, 948-49 S.W.2d (Tex. Cases) xxxv (Tex. 1997). The comment contains several important qualifiers to application of the rule which should be cited by parties in support of or in opposition to no-evidence summary judgment motions, and which should be followed by trial courts in ruling on these no-evidence motions. These qualifiers are discussed below.

C. “Adequate Time for Discovery.” The rule itself does not define how much time must pass in a lawsuit to constitute “adequate time” for discovery, but the comment to the rule does give a fairly straightforward rule of thumb:

A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a [no-evidence] motion would be permitted after the period but not before.

TEX. R. CIV. P. 166a cmt. (comment to the 1997 changes). As indicated below, there may be circumstances under which a party might try to move for a no-evidence summary judgment prior to a discovery cut-off, but the comment itself casts a cloud over any such motion. Furthermore, as indicated below, filing a no-evidence motion prior to a discovery cut-off is an invitation to the non-movant to supplement discovery prior to the cutoff or file a motion for continuance to

further develop discovery. It is clear that courts will require non-movants to be diligent in their efforts to obtain discovery. For example, in *Dickson Constr. Co. v. Fidelity & Deposit Co. of Maryland*, 5 S.W.3d 353, 355-57 (Tex. App. – Texarkana 1999, pet. denied), the court found that the trial court did not abuse its discretion in refusing to grant a continuance to allow the non-movant to develop evidence to support a response to a no-evidence motion, when the case had been on file for two years. Likewise, in *Specialty Retailers, Inc. v. Fuqua*, 29 S.W.3d 140, 145 (Tex. App. – Houston [14th Dist.] 2000, pet. denied), the court of appeals found that the trial court did not abuse its discretion in granting a no-evidence motion when the case had been on file for 16 months and the trial court had already granted one extension of the discovery period. (The facts of *Specialty Retailers* are particularly telling; the plaintiff had not deposed the defendant with eight days to go before the reset discovery cutoff.)

D. “Without Presenting Summary Judgment Evidence.” This language makes clear that under Rule 166a(i) motions, the movant does not have to produce *any* summary judgment evidence. If the motion is adequately stated, the *entire* burden of producing evidence will be on the non-movant, who must then produce competent summary judgment evidence that raises a genuine issue of material fact.

Does this language allow the movant to merely allege generally in the no-evidence motion that there is an absence of evidentiary support for one or more elements of a claim or defense? The commentary clearly indicates that such a general allegation is *not* sufficient:

The motion must be specific in challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case.

TEX. R. CIV. P. 166a cmt. One way to think about this distinction is to say that although the burden of summary judgment evidence may get shifted through the filing of a no-evidence summary judgment, the burden of persuasion initially (and ultimately) remains on the moving party. As discussed further below, this burden of persuasion will require the moving party to set out the elements of the challenged claim or defense and an explanation of how the evidence developed in the case to that point does not raise a “genuine issue of material fact.” Despite the advent of no-evidence summary judgments, Texas courts will still “accept as true evidence in favor of the non-movant, indulging every reasonable inference in favor of the nonmovant and resolving any doubts in his or her favor.” *Randall's Food Mkts. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995); see *Van Polen v. Wisch*, 23 S.W.3d 510, 514 (Tex. App. – Houston [1st Dist.] 2000, pet. denied) (reversing no-evidence summary judgment when conflict in summary judgment evidence is found); *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App. – Houston [1st Dist.] 1999, no pet.). “We review the evidence in the light most favorable to the respondent against whom the no-evidence summary judgment was rendered, disregarding all contrary evidence and inferences.” *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App. – San Antonio 1998, pet. denied); see *Sonnenberg v. Mike Smith Auto Plaza*, 8 S.W.3d 850, 851 (Tex. App. – Beaumont 2000). “A no-evidence summary

judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact.” *Moore*, 981 S.W.2d at 269. Thus, no lawyer (and no court) should interpret the no-evidence rule as imposing *no* burden whatsoever on the moving party. The “burden of establishing that it is entitled to judgment as a matter of law,” *Gynes v. Galveston County*, 861 S.W.2d 861, 862 (Tex. 1993), should remain on the movant. Furthermore, as indicated below, the comment (with the force of the rule) indicates in no uncertain terms that a groundless no-evidence motion is subject to sanctions.

E. “State the Elements as to Which There Is No Evidence.” This language from the rule itself, as well as the related commentary, indicates that the proper no-evidence motion must meet this initial burden of persuasion, rather than merely making a general allegation about the lack of evidence to support the opponent’s claim or defense. *Specialty Retailers*, 29 S.W.3d at 147; *Fields v. Teamsters Local Union No. 988*, 23 S.W.2d 517, 523 (Tex. App. – Houston [1st Dist.] 2000, pet. denied). In order to state the elements as to which there is no evidence, the movant can either list all of the elements of the claim or defense, or indicate only those that are challenged. The bottom line is that the challenged elements must be “specified.” TEX. R. CIV. P. 166a cmt. This element will especially come into play in those circumstances in which a party opposing summary judgment files an amended petition in response to a no-evidence summary judgment and adds new causes of action, because the motion must address each such cause of action. *See Specialty Retailers*, 29 S.W.3d at 148.

However, a no-evidence motion may still be effective in the face of a newly amended petition that “merely reiterates the same essential elements in another fashion.” *Lampasas v. Spring Center, Inc.*, 988 S.W.2d 428, 437 (Tex. App. – Houston [14th Dist.] 1999).

F. “Raising a Genuine Issue of Material Fact.” The incorporation of this standard into the no-evidence rule should make clear (if there was ever any doubt) that the rule amendment does not affect the standard for granting a motion for summary judgment, which is that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See, e.g., U.S. Fire Ins. Co. v. Williams*, 955 S.W.2d 267, 268 (Tex. 1997). After the no-evidence motion has been made, the trial court “may not grant a no-evidence summary judgment if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact.” *Jim Rutherford Investments, Inc. v. Terramar Beach Community Ass’n*, 25 S.W.3d 845, 850 (Tex. App. – Houston [14th Dist.] 2000, pet. denied); *see Quanim v. Frasco Restaurant & Catering*, 17 S.W.3d 30, 41 (Tex. App. – Houston [14th Dist.] 2000, pet. denied); *Robinson v. Warner-Lambert & Old Corner Drug*, 998 S.W.2d 407, 409 (Tex. App. – Waco 1999, no pet.); *Flameout Design & Fabrication, Inc. v. Pennzoil Caspian Corp.*, 994 S.W.2d 830, 834 (Tex. App. – Houston [1st Dist.] 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.’” *Dolcefino v. Randolph*, 19 S.W.3d 906, 917 (Tex. App. – Houston [14th Dist.] 2000, pet. denied) (quoting *Merrill Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex.

1997), *cert. denied*, 523 U.S. 1119 (1998)). “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 a fact, and the legal effect is that there is no evidence.” *Jackson v. Fiesta Mart, Inc.*, 979 S.W.2d 68, 71 (Tex. App. – Austin 1998, no pet.) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)); *see Grant v. Joe Myers Toyota, Inc.*, 11 S.W.3d 419, 422 (Tex. App. – Houston [14th Dist.] 2000, no pet.). Put another way, the device of a no-evidence motion for summary judgment essentially allows the court to make, in the context of a summary judgment motion, the same type of decision it would face in hearing a “no-evidence” motion for directed verdict at the close of the evidence presented by the party with the burden of proof at trial. “‘A no-evidence summary judgment is essentially a pretrial directed verdict,’ and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict.” *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App. – San Antonio 1998, pet. denied) (quoting David Hittner & Lynne Liberto, *No-Evidence Summary Judgments Under the New Rule*, in STATE BAR OF TEXAS PROF. DEVELOPMENT PROGRAM, 20 ADV. CIVIL TRIAL COURSE D, D-5 (1997)); *see Malone v. E.I. Du Pont de Nemours & Co.*, 8 S.W.3d 710, 714 (Tex. App. – Fort Worth 1999). To the extent that a “no-evidence” directed verdict motion is equivalent to a no-evidence summary judgment motion, the trial judge should be allowed to grant summary judgment when the available evidence would allow a reasonable jury to draw only the one conclusion favorable to the summary judgment movant. *Fields*, 23 S.W.3d at 523; *Van Polen*, 23 S.W.3d at 514. For

example, in the context of a no-evidence motion directed to an affirmative defense, “[t]he relevant inquiry is whether the non-movants asserting an affirmative defense have raised a fact issue upon each element of that defense by evidence which would be admissible upon the trial of the case.” *Jim Rutherford Investments*, 25 S.W.3d at 850-51. *Cf. Vance v. My Apartment Steak House*, 677 S.W.2d 480, 483 (Tex. 1984); *Williams v. Bennett*, 610 S.W.2d 144, 145 (Tex. 1980). However, once again, the advent of the no-evidence summary judgment rule should not change the general summary judgment rule that the court will take all evidence favorable to the non-movant as true for summary judgment purposes. *Moore*, 981 S.W.2d at 269. At least two courts of appeals have outlined the general areas in which the summary judgment evidence (or lack thereof) merits granting a no-evidence motion: “(a) there is a complete absence of proof of a vital fact; (b) the court is barred by rules of law or evidence from giving weight to the only proof offered to prove a vital fact; (c) the proof offered to prove a vital fact is no more than a mere scintilla; or (d) the proof conclusively establishes the opposite of the vital fact.” *Sonnenberg v. Mike Smith Auto Plaza*, 8 S.W.3d 850, 851-52 (Tex. App. – Beaumont 2000); *Blan v. Ali*, 7 S.W.3d 741, 757 (Tex. App. – Houston [14th Dist.] 1999, no pet.). In short, a response to a no-evidence summary judgment motion “need only ‘point out’ evidence that raises a fact issue on the challenged elements.” *Van Polen*, 23 S.W.3d at 514.

G. Does the No-Evidence Rule Really Change a Court’s Summary Judgment Analysis? Although the no-evidence summary judgment rule does change the procedure associated with certain forms of summary judgment

