

PUBLICATION UPDATE

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Summary Judgments in Texas: Practice, Procedure and Review

Publication 82681

Release 19

November 2018

HIGHLIGHTS

Recent Cases

- Recent decisions from the Texas Supreme Court and the courts of appeals on summary judgment practice and procedure have been added and analyzed throughout this release.

Updated Substantive Discussions

- Multiple chapters have updated with revised substantive discussions.

Revised and Updated Discussions Based on New Rules and Recent Cases.

In this release, *Summary Judgments in Texas—Practice, Procedure and Review* has been updated with revised and improved discussions in numerous areas based on newly adopted and revised rules and recent Texas Supreme Court and courts of appeals cases, including:

Necessity for Motion for Summary Judgment.

As discussed in Ch. 3, the Texas Supreme Court has evidently (albeit vaguely) viewed Rule 166(g) as essentially authorizing the trial court to render a summary judgment without the prevailing party having filed a summary judgment motion. In *JPMorgan Chase Bank, N.A. v. Orca Assets, G.P., L.L.C.*, 546 S.W.3d 648 (Tex. 2018), the Court concluded that Rule 166(g), which authorizes the trial court to convene pre-trial conferences, vests the trial court with the discretion to decide matters that, though ordinarily fact questions, have become questions of law because “reasonable minds cannot differ on the outcome.”

Genuine Issues of Material Fact.

The Texas Supreme Court engaged in a detailed analysis of the concept of a “genuine issue of material fact” in the context of the burden imposed on the non-movant to

defeat a motion for summary judgment as addressed in Ch. 4. Discussing similarities between the state and federal rules on this aspect of summary judgment practice, the Court in *Lujan v. Navistar, Inc.*, ___ S.W.3d ___, 2018 Tex. Lexis 347 (Tex. 2018) stressed that trial courts are obligated to distinguish genuine fact issues, which must be decided at trial, from non-genuine issues, which should not survive summary judgment.

Summary Judgment Evidence—Expert Affidavits.

As discussed in Ch. 6, the Texas Supreme Court in *Starwood Mgmt., L.L.C. v. Swaim*, 530 S.W.3d 673 (Tex. 2017) expanded on how an expert affidavit, while suffering from some unsupported conclusions or lack of detail, may nevertheless qualify as probative summary judgment proof.

Summary Judgment Evidence—Sham Affidavits.

In *Lujan v. Navistar, Inc.*, ___ S.W.3d ___, 2018 Tex. Lexis 347 (Tex. 2018), the Texas Supreme Court resolved a conflict among the courts of appeals and adopted the “sham affidavit rule.” After engaging in a detailed analysis of decisions under Rule 166a and the federal summary judgment rule, the Court concluded: “Under Rule 166a(c), a trial court may conclude that a party does not raise a genuine fact issue by submitting sworn testimony that materially conflicts with the same witness’s prior sworn testimony, unless there is a sufficient explanation for the conflict.” The potential ramifications of the *Lujan* decision are analyzed at length in Ch. 6.

Summary Judgment Evidence—Objections.

In 2017, the Texas Supreme Court held (seemingly unequivocally) that a written order sustaining objections to the form of

summary judgment proof is essential to preclude the appellate court from considering that proof on appeal. In *Seim v. Allstate Texas Lloyds*, 551 S.W.3d 161 (Tex. 2018), the Court first appeared to reaffirm that 2017 decision; but then, the Court evidently assumed that a non-written ruling, i.e., an “implicit ruling,” could be sufficient under appellate Rule 33.1 to preserve evidentiary objections for appellate review—thus arguably creating confusion regarding the extent to which implied rulings on objections to summary judgment evidence are recognized by the supreme court. Resolving a conflict among the courts of appeals on another issue though, the *Seim* court concluded that a written order merely granting a motion for summary judgment does not implicitly sustain objections to summary judgment evidence.

Finality.

Ch. 8 has been updated with the Texas Supreme Court’s recent discussion of the finality and appealability of summary judgments. In *In re Elizondo*, 544 S.W.3d 824 (Tex. 2018), the Court forcefully reaffirmed its 17-year-old decision in *Lehmann*, reiterating the type of language that, if included in a summary judgment, will render that judgment final on its face as well as the circumstances which will authorize the reviewing court to go outside the judgment to determine finality and appealability.

The Record.

As addressed in Ch. 8, the Texas Supreme Court in *Lance v. Robinson*, 543 S.W.3d 723 (Tex. 2018) has seemingly adopted an expansive view of “the summary judgment record” as including materials in the trial court’s “file” at the time of the summary judgment hearing even if those materials were not specifically included as summary judgment proof accompanying a motion or response.

Substantive Law.

Throughout Ch. 9, case law has been added to address recent developments in medical malpractice, negligent entrustment, causation, defamation, limitations, legal malpractice and other substantive legal issues frequently litigated through summary judgment proceedings.

Updated Table of Books, Law Reviews, and Seminar Materials.

This release includes new additions to

Law Reviews and Seminar Materials.

Updated Index and Table of Cases.

The Index and Table of Cases have been completely updated in this release to reflect changes to the text.

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