SUBSTANCE OVER FORM: DEVELOPMENTS IN SUMMARY JUDGMENT PRACTICE

KENT RUTTER, *Houston*
Haynes and Boone, LLP

State Bar of Texas Litigation Section
December 5, 2023

Kent Rutter

Haynes and Boone, LLP
1221 McKinney Street, Suite 2100
Houston, Texas 77010

kent.rutter@haynesboone.com
(713) 547-2211

Education and Clerkships

J.D., University of Michigan Law School, 1996, *cum laude*

B.A., Duke University, 1993

Judge David Hittner, United States District Court, Southern District of Texas

Recognized by Chambers USA in Texas for appellate litigation, 2018-2023, Kent Rutter is an accomplished appellate advocate with more than 25 years of experience. Clients turn to Kent for his trusted advice regarding the chances of reversal in a potential appeal. His analyses draw on his experience in the appellate courts and from coauthoring an award-winning empirical study of the factors that most frequently result in reversal in the Texas appellate courts.

A true authority on the topic of evaluating appeals, Kent is a frequent lecturer on the topic, as well as on other areas of appellate practice. He has given presentations to hundreds of trial lawyers, appellate lawyers, and in-house counsel.

As a civil appellate specialist who is board certified by the Texas Board of Legal Specialization, Kent served as president of the Texas Association of Civil Trial and Appellate Specialists (TACTAS), an organization of board-certified attorneys, 2020-2021. He was the elected chair of the Appellate Section of the State Bar of Texas, an organization of more than 2,000 attorneys, 2019-2020. Kent also served as chair of the Appellate Practice Section of the Houston Bar Association, 2010-2011.

Kent is also active in the community at large. As a longtime member of the Alexis de Tocqueville Society of the United Way of Greater Houston, Kent has mentored young professionals with an interest in bettering their communities and supported a wide array of organizations that serve families in need.

Professional Recognition

- Ranked in Chambers USA, Chambers and Partners, Litigation: Appellate, Texas, 2018-2023
- Recognized in Best Lawyers in America, Woodward/White, Inc., for Appellate Practice, 2019-2023
- Board Certified in Civil Appellate Law, Texas Board of Legal Specialization
- Selected for inclusion in Texas Super Lawyers, Thomson Reuters (2012-2020, 2022); Named to the list of Top 100 Houston Super Lawyers (2013-2015, 2020)

Professional and Community Activities

- Chair, Appellate Section of the State Bar of Texas (2019-2020)
- President, Texas Association of Civil Trial and Appellate Specialists (2019-2020)
- Chair, Appellate Practice Section of the Houston Bar Association (2010-2011)

TABLE OF CONTENTS

Page

SUBSTANCE OVER FORM: DEVELOPMENTS IN SUMMARY JUDGMENT PRACTICE

I. INTRODUCTION

Summary judgments in Texas were once rare. But times have changed in Texas and elsewhere. "Every year the [federal] courts of appeals decide hundreds of cases in which they must determine whether … evidence provided by a plaintiff is just enough to survive a motion for summary judgment or not quite enough." *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1277 (2017) (Alito, J., concurring). Likewise, Texas intermediate appellate courts review hundreds of summary judgment appeals every year. *See* Kent Rutter & Natasha Breaux, *Reasons for Reversal in the Texas Courts of Appeals*, 57 Hous. L. Rev. 671 (2020) (counting 439 appeals from summary judgment grants during the 2018-19 term). Jurisprudential developments over the past four decades have contributed greatly to the substantial increase in summary judgment practice.

Most recently, the Texas Supreme Court has reinforced its directives that summary judgment rules and doctrines should be construed and applied liberally. That approach of elevating substance over form has been a feature of the court's decisions in recent years. "Whenever possible," the court has explained, "we reject form-over-substance requirements that favor procedural machinations over reaching the merits of a case." *Godoy v. Wells Fargo Bank, N.A.*, 575 S.W.3d 531, 536 (Tex. 2019) (quoting *Dudley Constr., Ltd. v.Act Pipe & Supply, Inc.*, 545 S.W.3d 532, 538 (Tex. 2018)).

This article provides an overview of recent developments. A complete guide to summary judgment practice in Texas, on which this article is based, was recently published in the South Texas Law Review. *See* Judge David Hittner, Lynne Liberato, Kent Rutter & Jeremy Dunbar, *Summary Judgments in Texas: State and Federal Practice*, 62 S. Tex. L. Rev. 99 (2023), https://www.stcl.edu/wp-content/uploads/2023/06/Summary-Judgments-in-Texas-Hittner-62.2.pdf.

II. RECENT DEVELOPMENTS

A. Sham Affidavits

The sham affidavit doctrine provides that "the nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony." *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984). The doctrine has long been recognized in federal courts, but until relatively recently, state courts were split over whether to recognize the sham affidavit rule. *See id.*; *see also Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 84 (Tex. 2018). Eight Texas courts of appeals had recognized the rule; four had not. *Lujan*, 555 S.W.3d at 86 & n.1.

In *Lujan*, the Texas Supreme Court resolved the split by adopting the sham affidavit rule. The rule derives from Texas Rule of Civil Procedure 166a(c), which provides for summary judgment where there is "no genuine issue as to any material fact." *Id.* at 86. The court explained that the "key word is 'genuine,'" "which means 'authentic or real.'" *Id.* "A 'sham' is, by definition, 'not genuine.'" *Id.* (citing Webster's New Int'l Dictionary (3d ed. 1961)).

The *Lujan* court, though emphatic that the sham affidavit rule is part of Texas summary judgment practice, cautioned that the rule is "a flexible concept" rather than "a free-standing rule of procedure to be mechanistically applied in the same way to every case." *Id.* at 88. The rule "does not authorize trial courts to strike every affidavit that contradicts the affiant's prior sworn testimony." *Id.* at 85. For example, a contradition between an affidavit and witness testimony may be adequately explained by newly discovered evidence or the witness's confusion. *Id.* at 85–86. Nor does the rule authorize trial courts to "contravene the longstanding principle that the trial court is 'not to weigh the evidence or determine its credibility.'" *Id.* at 87 (quoting *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952)).

The "flexible" nature of the sham affidavit rule has an important consequence in summary judgment appeals. Although summary judgments are subject to de novo review on appeal, the trial court's application of the sham affidavit rule—like other rulings excluding summary judgment evidence—is reviewed for an abuse of discretion. *Id.* at 90.

Lujan is noteworthy not only for its adoption of the sham affidavit rule, but also for its emphasis on substance over form. While the unanimous court grounded its decision in the text of Rule 166a, it further explained why the sham affidavit rule furthers the purpose of summary judgment practice. The court explained that "allowing manufactured affidavits to defeat summary judgment would thwart the very object of summary judgment, which 'is to separate real and genuine issues from those that are formal or pretended.'" *Id.* at 85 (quoting *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975)). "Rewarding a party who seeks to defeat summary judgment by 'contradicting his own prior testimony . . . would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.'" *Id.* (quoting *Perma Res. & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)).

That approach was a sign of things to come. Since *Lujan*, the court has continued this trend of interpreting the summary judgment rules in light of their purpose and the realities of modern litigation.

B. Pleadings as Evidence; Limitations

The general rule in Texas has been that a party's pleadings—even if sworn or verified—are not permissible summary judgment evidence. *Laidlaw Waste Sys. (Dall.), Inc. v. City of Wilmer*, 904 S.W.2d 656, 660 (Tex. 1995). "Clearly a party cannot rely on its *own* pleaded allegations as evidence of facts to support its summary-judgment motion or to oppose its opponent's summary-judgment motion." *Regency Field Servs., LLC v. Swift Energy Operating, LLC*, 622 S.W.3d 807, 818–19 (Tex. 2021).

But pleadings can provide a basis for granting or denying summary judgment in other ways. The Texas Supreme Court has long recognized that because "pleadings 'outline the issues,'" courts "may grant summary judgment based on deficiencies in an *opposing party's* pleadings." *Id.* at 819 (quoting *Hidalgo v. Surety Savs. & Loan Ass'n*, 462 S.W.2d 540, 543 (Tex. 1971)). As the court explained in *Regency* and reaffirmed in *Weekley Homes, LLC v. Paniagua*, a defendant can "establish that it [is] entitled to summary judgment by treating the plaintiff's pleaded allegations about the timeline of certain events 'as truthful judicial admissions and rely on them to define the issues and determine whether the plaintiff's claims necessarily accrued beyond the limitations period.'" *Weekley Homes*, 646 S.W.3d at 828 (quoting *Regency*, 622 S.W.3d at 819–20).

The Texas Supreme Court recently explained that a summary judgment on limitations may be based on the pleadings. To obtain a traditional summary judgment on limitations—an affirmative defense—the defendant "must (1) conclusively prove when the cause of action accrued, and (2) negate the discovery rule, if it applies and has been pleaded or otherwise raised, by proving as a matter of law that there is no genuine issue of material fact about when the plaintiff discovered, or in the exercise of reasonable diligence should have discovered, the nature of its injury. *KPMG Peat Marwick v. Harrison Cnty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999).

In *Regency*, the court addressed the first burden: how a party seeking summary judgment may prove when the claim against it accrued. 622 S.W.3d at 818–19. This requirement poses a dilemma: if the defendant denies that the plaintiff was injured at all, how can it prove when the claim accrued? In *Regency*, the movant "[did] not seriously contend that the *evidence* conclusively established that [the plaintiff] sustained any legal injury, much less that it did so at any particular time." *Id.* at 821. The movant explained that it "has no interest in or desire to prove that [the plaintiff] suffered any legal injury or has any valid claim whatsoever." *Id.* The plaintiff maintained that summary judgment could not be granted because it must be based on evidence. *Id.* at 818. The Texas Supreme Court disagreed, holding that "for summary judgment purposes, [the movant] could treat [the nonmovant's] pleaded allegations as truthful judicial admissions and rely on them to define the issues and determine whether [the] claims necessarily accrued beyond the limitations period." *Id.* at 819 (footnote omitted).

In *Draughon v. Johnson*, the supreme court addressed the second burden. It explained that although the defendant must negate the discovery rule or other tolling doctrine that the plaintiff would have the burden to prove at trial, it need not present evidence to do so. 631 S.W.3d 81, 92 (Tex. 2021). Instead, the defendant may file a hybrid motion for summary judgment. *Id.* at 96 (citing Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, 60 S. Tex. L. Rev. 1, 154 (2019)). The traditional summary judgment would seek to conclusively establish with evidence that the plaintiff filed its suit after the expiration of the statute of limitations, while the no-evidence motion would challenge the discovery rule and require the plaintiff to present evidence raising a genuine issue of material fact. *Id.* (citing Hittner & Liberato, 60 S. Tex. L. Rev. at 154).

C. Preserving Error on Objections to Summary Judgment Evidence

The Texas Supreme Court has recently issued several decisions clarifying the prerequisites for preserving error regarding evidentiary objections.

In *Seim v. Allstate Texas Lloyds*, the court resolved a split among the courts of appeals as to whether a trial court "implicitly" rules on objections to summary judgment evidence when it rules on the summary judgment motion itself. 551 S.W.3d 161, 164 (Tex. 2018). Under the pre-1997 version of the Texas Rules of Appellate Procedure, the answer was clearly no: an explicit ruling was required. *Id.* But in 1997, the error-preservation rule, Rule 33.1, was amended to provide that a trial court may rule on an objection "either expressly or implicitly." *Id.* The Second Court of Appeals in Fort Worth held that a trial court "implicitly" rules on objections by ruling on the merits of the summary judgment motion, while the Fourth Court of Appeals in San Antonio and the Fourteenth Court of Appeals in Houston reached a contrary conclusion. *Id.* at 164–66.

The Texas Supreme Court agreed with the Fourth and Fourteenth Courts, quoting the Fourth Court as follows: "Rulings on a motion for summary judgment and objections to summary-judgment evidence are not alternatives; nor they are concommittants. Neither implies a ruling—or any particular ruling—on the other." *Id.* at 165 (quoting *Well Sols. v. Stafford*, 32 S.W.3d 313, 317 (Tex. App.—San Antonio 2000, no pet.) (alterations omitted)). In *Seim*, "even without the objections, the trial court could have granted summary judgment against the [plaintiffs] if it found that their evidence did not raise a genuine issue of material fact." *Id.* at 166. The court asked: "if sustaining the objections was not necessary for the trial court to grant summary judgment, how can the summary-judgment ruling be an implication that the objections were sustained?" *Id.* The answer, the court concluded, is that the summary judgment ruling is not a ruling—implicit or otherwise—on the evidentiary objections. *Id.*

A related question confronted the court in *FieldTurf USA, Inc. v. Pleasant Grove Independent School District*: must a ruling on summary judgment evidence be in writing, or does an oral ruling on the record suffice preserve error? 642 S.W.3d 829, 830–31 (Tex. 2022). The court concluded that a written order is preferred, but not required: an "on-the-record, unequivocal oral ruling on an objection to summary judgment evidence qualifies as a ruling under Texas Rule of Appellate Procedure 33.1, regardless of whether it is reduced to writing." *Id.* at 838. The court recognized that "[b]ecause issues, grounds, and testimony in support of and in opposition to summary judgment may not be presented orally, a reporter's record of such a hearing is generally unnecessary for appellate purposes." *Id.* Therefore, "the best practice for a party objecting to summary judgment evidence is to secure a written order on the objection from the trial court." *Id.* at 838–39. But because an oral ruling may substitute for a written order, it appears increasingly prudent to request that summary judgment hearings be transcribed.

In *Browder v. Moore*, the court may have resolved another question involving the preservation of objections to summary judgment evidence: when a trial court sustains objections, must the proponent of the evidence object to the ruling? 659 S.W.3d 421, 423-34 (Tex. 2022). The Dallas and El Paso courts of appeals had required such an objection to preserve error. *See Brooks v. Sherry Lane Nat'l Bank*, 788 S.W.2d 874, 878 (Tex. App.—Dallas 1990, no pet.); *Cmty Initiatives, Inc. v. Chase Bank*, 153 S.W.3d 270, 281 (Tex. App.—El Paso 2004, no pet.). The Fort Worth court of appeals had not. *See Miller v. Great Lakes Mgmt. Serv., Inc.*, No. 02-16-00087-CV, 2017 WL 1018592, at *2 n.4 (Tex. App.—Fort Worth Mar. 16, 2017, no pet.). Although *Browder* did not involve summary judgment evidence, it appears to answer this question. *Browder* endorsed a "common sense approach to error preservation," explaining that "neither our procedural rules nor this Court's decisions require a party that has obtained an adverse ruling from the trial court to take the further step of objecting to that ruling to preserve it for appellate review." 659 S.W.3d at 423.

Note, however, that the Texas rules and case law do provide that error is preserved only if a party made "a timely request that makes clear—by words or context—the grounds for the request and by obtaining a ruling on that request, whether express or implicit." *Id.* (quoting *In re Commitment of Hill*, 334 S.W.3d 226, 229 (Tex. 2011) and citing Tex. R. App. P. 33.1). Thus, although an objection is not always required, if the proponent of the evidence has not articulated the basis for admission to the trial court at all, he still "might worry of the looming specter of waiver." Ryan Philip Pitts, *A Couple Developments in Preserving Evidentiary Errors in Summary Judgment Practice*, Hous. Bar. Ass'n App. Law. (July 20, 2022), https://appellatelawyerhba.org/acouple-developments-in-preserving-evidentiary-errors-in-summary-judgment-practice/. If the proponent of the evidence did not fully explain its position when opposing the objection before the ruling, it would be wise to do so by lodging its own objection after the ruling.

D. Video Evidence

Due to recent societal and technological advancements (for example, an increased prevalence of law enforcement body cameras, smartphone cameras, and security surveillance), video footage has become a more common form of summary judgment evidence—especially in cases involving qualified immunity or personal injury.

Federal and state courts have grown more receptive to the use of video footage in summary judgment proceedings in light of *Scott v. Harris*, 550 U.S. 372 (2007). In *Scott*, the U.S. Supreme Court held that when a nonmoving party's "version of events is so utterly discredited" by video evidence, "so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a summary judgment motion." *Id.* at 380. Rather, in such situations, the district court should review "the facts in the light depicted by the videotape." *Id.* at 381. Recently, for example, the Fifth Circuit relied on video evidence, including smartphone and security camera footage, in reviewing a summary judgment on qualified immunity. *Buehler v. Dear*, 27 F.4th 969, 983–85 (5th Cir. 2022).

A Texas state court of appeals invoked *Scott* in *Klassen v. Gaines County*, No. 11-19-00266-CV, 2021 WL 2964423 (Tex. App.—Eastland July 15, 2021, no pet.). There, the plaintiff alleged that two county sheriff's deputies used excessive force by throwing him on the ground and jumping on his back to handcuff him. 2021 WL 2964423, at *4. "In these types of cases," the court of appeals noted, "we are usually required to adopt the plaintiff's version of the facts." *Id.* Under *Scott*, however, "this general rule may change if the record contains video evidence capturing the events." *Id.* "When the record contains video evidence of the events and 'opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for ruling on a motion for summary judgment.'" *Id.* (quoting *Scott*, 550 U.S. at 380). The court of appeals therefore viewed the video evidence, concluding: "No reasonable person could, after viewing the video recording of the incident, find that [the deputy] threw [the plaintiff] to the ground or jumped on [his] back to handcuff him." *Id.* The court affirmed the summary judgment because "we 'view the facts in the light depicted by the videotape.'" *Id.* (quoting *Scott*, 550 U.S. 381) (alteration omitted).

E. Late-Filed Responses

Rule 166a(c) provides that "[e]xcept on leave of court, the adverse party, not later than seven days prior to the day of hearing may file and serve opposing affidavits or other written response." Tex. R. Civ. P. 166a(c). Thus, the nonmovant must obtain leave of court to file a late response. *Id.* Where nothing in the record indicates that the trial court granted leave, it is presumed the trial court did not consider a late-filed response. *Benchmark Bank v. Crowder*, 919 S.W.2d 657, 663 (Tex. 1996). A court granting leave "must affirmatively indicate in the record acceptance of the late filing." *Farmer v. Ben E. Keith Co.*, 919 S.W.2d 171, 176 (Tex. App.—Fort Worth 1996, no pet.).

In *B.C. v. Steak N Shake Operations, Inc.*, the Texas Supreme Court considered whether a judgment's boilerplate language that the court considered "'evidence and arguments of counsel,' without any limitation, is an 'affirmative indication' that the trial court considered [the nonmovant's] response and the evidence attached to it." 598 S.W.3d 256, 261 (Tex. 2020). According to the plaintiff, she attempted to electronically file her summary judgment response, including 461 pages of evidence, on the day it was due. *Id.* at 259. However, the filing was rejected because one of the exhibits was not formatted for optical character recognition. *Id.* She re-filed the following day but did not seek leave of court or move to continue the hearing. *Id.* The defendant objected to the untimeliness of the response, but there was no record that the trial court ruled on the objection. *Id.*

The plaintiff argued that the trial court's recital that it considered "evidence" was sufficient to demonstrate that it granted leave. She reasoned that the word "evidence," without limitation, demonstrated that the trial court considered "all the evidence." *Id.* at 260. She further reasoned that *all* the evidence was submitted late, so "had the trial court not considered [the late-filed] evidence, it would not have considered any evidence in opposition to the no-evidence motion." *Id.* The court agreed, holding that "a court's recital that it generally considered 'evidence'—especially when one party objected to the timeliness of all of the opposing party's evidence—overcomes the presumption that the court did not consider it." *Id.* at 261.

In reaching that conclusion, the court analogized to late-filed amended pleadings in advance of a summary judgment hearing. *Id.* Much as Rule 166a provides that a party must file a summary judgment response at least seven days before the hearing except with leave of court, Rule 63 provides that a party may not amend its pleadings within seven days of a summary judgment hearing without leave of court. *Id.* The court had previously held that "leave of

court is presumed when a summary judgment states that all pleadings were considered, and when, as here, the record does not indicate that an amended pleading was not considered, and the opposing party does not show surprise." *Id.* (citing *Cont'l Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 276 (Tex. 1996)).

Steak N Shake is undoubtedly a victory of substance over form. For nonmovants, however, relying on this ruling should be considered first aid, not best practice. The prudent nonmovant should continue seeking an order specifically granting leave. For movants, the lesson of *Steak N Shake* is that it is essential to not only lodge an objection to the late-filed response, but also seek and obtain a ruling on the objection before or after the trial court's order. *See id.* at 262.

In addition to its holding about late-filed responses, *Steak N Shake* also provided another victory of substance over form. The court observed that "reviewing courts, when presented with combined motions for traditional and no evidence summary judgment, generally address the no-evidence point first." *Id.* at 260. The court clarified, however, that trial courts are not required to consider no-evidence motions before traditional motions. *Id.*

F. Continuances

Two recent cases—one state and one federal—illustrate the need to be specific when seeking a continuance of a summary judgment hearing.

In state court, two provisions in Rule 166a bear on continuances. Rule 166a(g) addresses all types of summary judgment continuances directly: "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Tex. R. Civ. P. 166a(g). Elsewhere, Rule 166a(i) addresses continuances indirectly. Even though there is no specific minimum amount of time that a case must be pending before a trial court can consider a no-evidence motion, Rule 166a(i) provides the basis for a continuance of a no-evidence summary judgment when it authorizes the granting of a no-evidence summary judgment only "[a]fter adequate time for discovery." Tex. R. Civ. P. 166a(i).

Nonmovants seeking additional time for discovery must state what specific depositions or discovery products are material and show why they are material. *Perrotta v. Farmers Ins. Exch.*, 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The need for specificity was demonstrated in a recent case in which the appellate court determined that the trial court did not abuse its discretion in denying a motion for continuance. *Pena v. Harp Holdings, Inc.*, No. 07-20-00131-CV, 2021 WL 4207000, at *26–30 (Tex. App.—Amarillo Sept. 16, 2021, no pet.) (mem op.). Although the nonmovant's affidavit "stated her need for additional depositions of 'crucial fact witnesses,'" the affidavit specifically identified only one witness and failed to explain how that witness's testimony would be material. *Id.*

In federal court, the Fifth Circuit has previously commented that "a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course." *Six Flags, Inc. v. Westchester Surplus Lines Ins. Co.*, 565 F.3d 948, 963 (5th Cir. 2009) (quoting *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1267 (5th Cir. 1991)). However, such relief is not automatic, and a party's failure to timely file or to articulate specific facts in support of its motion for continuance are grounds for denial. *See Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 257 (5th Cir. 2013) (affirming the district court's denial of a motion for continuance that was filed late and that failed to state specific facts in support); *Am. Fam. Life Assurance Co. v. Biles*, 714 F.3d 893–95 (5th Cir. 2013) (evaluating the sufficiency of the purported discovery—a deposition—to conclude that the district court's denial was not an abuse of discretion, given that the deposition would not have influenced the outcome of the case).

The plain language of Rule 56(d) requires specific reasons to support a motion for continuance. Fed. R. Civ. P. 56(d). For example, the Fifth Circuit has recently reversed a district court's order denying a Rule 56(d) motion when the plaintiff had articulated the precise discovery needed to controvert the allegations in the movant's supporting affidavit, including discovery of the documents referenced therein. *Bailey v. KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 401–02 (5th Cir. 2022). On the other hand, the Fifth Circuit has also recently affirmed the denial of a Rule 56(d) motion when the plaintiff had "simply asserted that 'no depositions have been held, nor have interrogatories, requests for admission, nor requests for documents been exchanged between the parties.'" *MDK Sociedad de Responsabilidad*

Limitada v. Proplant, Inc., 25 F.4th 360, 366–67 (5th Cir. 2022). It is therefore clear that the mere fact that discovery has not been conducted is insufficient. *Id.*

G. Mandamus and Interlocutory Appeals

Generally, an order denying a summary judgment motion is not appealable. *See Novak v. Stevens*, 596 S.W.2d 848, 849 (Tex. 1980). However, there are exceptions. When parties file cross-motions for summary judgment and one is granted, an appellate court may review both the grant and the denial. *Tex. Mun. Power Agency v. Pub. Util. Comm'n*, 253 S.W.3d 184, 192 (Tex. 2007). In addition, the Texas Legislature has created limited exceptions to the rule that denials of motions for summary judgment are not appealable. Tex. Civ. Prac. & Rem. Code § 51.014(a)(5), (a)(6), (a)(8), (a)(13). As of 2021, there is a new legislative exception: an interlocutory appeal may be taken from the denial of a motion for summary judgment filed in certain suits by contractors that construct or repair highways, roads, or streets for the Texas Department of Transportation. Tex. Civ. Prac. & Rem. Code § 51.014(a)(15).

Where there is no right to appeal the denial of summary judgment, there has traditionally been no right to mandamus relief, either. But in 2010, the supreme court cracked open the door to allow mandamus challenges to the denial of motions for summary judgment. *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299, 314 (Tex. 2010). The procedural background of the case was unusual: it had already been tried once in county court, resulting in a judgment that was reversed because the amount in controversy exceeded the county court's jurisdictional maximum, and the case was set to be tried again in district court, but the supreme court held that limitations barred the second trial. *Id.* at 304–05, 314. The supreme court noted that "mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion," *id.* at 314 (quoting *In re McAllen Med. Ctr.*, 275 S.W.3d 458, 465–66 (Tex. 2008)), but concluded that "the extraordinary circumstances here merit extraordinary relief." *Id.*

More than a decade passed before the court again granted mandamus relief from the denial of summary judgment in *In re Academy, Ltd.*, 625 S.W.3d 19 (Tex. 2021). *Academy* grew out of the Sutherland Springs church mass shooting. Victims sued the retailer that sold the perpetrator the semi-automatic rifle used in the murders. The court focused on the "no adequate remedy by appeal" requirement for mandamus relief: "Absent mandamus relief, [the retailer] will be obligated to continue defending itself against multiple suits barred by federal law. As in *United Services*, this case presents extraordinary circumstances that warrant such relief." *Id.* at 32, 36 (citing *In re United Servs. Auto. Ass'n*, 307 S.W.3d 299 (Tex. 2010)).

The eleven-year gap between *United Services* and *Academy* should discourage practitioners from holding out much hope that a summary judgment denial will be corrected by mandamus. So should the paucity of decisions in which intermediate courts of appeals have granted mandamus relief from denials of summary judgment. *See In re Kingman Holdings, LLC*, No. 13-21-00217-CV, 2021 WL 4301810, at *5–6 (Tex. App.—Corpus Christi–Edinburg Sept. 22, 2021, orig. proceeding) (mem. op.); *In re Hoskins*, No. 13-18-00296-CV, 2018 WL 6815486, at *9 (Tex. App.—Corpus Christi–Edinburg Dec. 27, 2018, orig. proceeding) (mem. op.); *In re S.T.*, 467 S.W.3d 720, 729–30 (Tex. App.—Fort Worth 2015, orig. proceeding).

A related question is whether mandamus relief is available when the trial court, rather than denying a summary judgment motion, fails to rule on it. The traditional understanding has been that "there is generally no procedure by which litigants can compel the trial court to rule on a pending motion for summary judgment." *C/S Sols., Inc. v. Energy Maint. Servs. Grp., LLC*, 274 S.W.3d 299, 30 8 (Tex. App.—Houston [1st Dist.] 2008, no pet.). One court explained that "even though the delay in ruling on the motion causes expense and inconvenience to the litigants, mandamus is not available to compel the trial judge to rule on the pending motion for summary judgment." *In re Am. Media Consol.*, 121 S.W.3d 70, 74 (Tex. App.—San Antonio 2003, no pet.).

But that is not a hard-and-fast rule either. Recently, the El Paso court of appeals granted mandamus relief to compel a trial court to rule on pending motions for summary judgment. *In re UpCurve Energy Partners, LLC*, 632 S.W.3d 254 (Tex. App.—El Paso 2021, orig. proceeding). And in another recent case, where the trial court failed to rule on motion to reconsider denial of summary judgment, the Corpus Christi court of appeals granted mandamus relief and directed that summary judgment be granted. *In re Kingman Holdings, LLC*, No. 13-21-00217-CV, 2021 WL 4301810 (Tex. App.—Corpus Christi Sept. 22, 2021, orig. proceeding).

H. Preservation of Error in Federal Court

In *Dupree v. Younger*, the U.S. Supreme Court decided an appellate preservation issue that had divided lower federal courts: whether raising and losing a purely legal issue at summary judgment preserves the issue for appeal, or whether the issue must be renewed on a post-trial motion. 143 S. Ct. 1382, 1389 (2023).

In the Fifth Circuit, the rule had been that "following a jury trial on the merits, this court has jurisdiction to hear an appeal of the district court's legal conclusions in denying summary judgment, but only if it is sufficiently preserved in a Rule 50 motion." *Feld Motor Sports, Inc. v. Traxxas, L.P.*, 861 F.3d 591, 596 (5th Cir. 2017). The U.S. Supreme Court overruled *Feld Motor Sports* in *Dupree*, holding that a Rule 50 motion is not required.

The Court in *Dupree* noted that it had answered a related question in *Ortiz v. Jordan*, 562 U.S. 180 (2011). There, the question was whether a summary judgment denial on sufficiency-of-the-evidence grounds suffices for preservation purposes. The answer is no, because factual challenges "depend on, well, the facts, which the parties develop and clarify as the case progresses from summary judgment to a jury verdict." 143 S. Ct. at 1388. "Thus, 'once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.'" *Id.* at 1388–89 (quoting *Ortiz*, 562 U.S. at 184) (alterations omitted). It follows that a party must raise a sufficiency-of-the-evidence claim in a post-trial motion to preserve it for appeal. *Id.* at 1389.

Different reasoning applies, the Court explained, when the summary judgment denial is based on "purely legal issues—that is, issues that can be resolved without reference to any disputed facts." *Id.* "Trials wholly supplant pretrial factual rulings, but they leave pretrial legal rulings undisturbed. The point of a trial, after all, is not to hash out the law." *Id.* "That difference explains why a summary-judgment motion is sufficient to preserve legal but not factual claims." *Id.*

The *Dupree* rule is in conflict with practice in Texas state courts, where a trial court's denial of a summary judgment on a purely legal issue does not preserve error, and where the unsuccessful movant must raise the issue anew at trial or via post-trial motion. *See, e.g.*, *United Parcel Serv., Inc. v. Cengis Tasdemiroglu*, 25 S.W.3d 914, 916-17 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *C&F International, Inc. v. Interoil Services, LLC*, 2020 WL 1617261, *4 (Tex. App.—Houston [14th Dist.] Apr. 2, 2020, no pet.) (mem. op.).