

HAYNES BOONE

STATE BAR OF TEXAS
LITIGATION SECTION

Substance over Form: Developments in Summary Judgment Practice

Kent Rutter

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SUMMARY JUDGMENTS IN TEXAS: STATE AND FEDERAL PRACTICE

62 South Texas Law Review 99 (2023)



Judge David Hittner
Lynne Liberato
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Jeremy Dunbar



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- “Whenever possible, we reject form-over-substance requirements that favor procedural machinations over reaching the merits of a case.”
- “Litigants are entitled to have their disputes resolved on the merits, not on unnecessary and arcane points that can sneak up on even the most diligent of attorneys.”

Godoy v. Wells Fargo
(Tex. 2019)

SHAM AFFIDAVITS

Nonmovant can't defeat SJ with an affidavit that contradicts his testimony.

Rule 166a: “no genuine issue as to any material fact”

Trial court has discretion to decide contradiction has been explained

Rule furthers the purpose of SJ practice by screening out “pretend” fact issues

Lujan v. Navistar
(Tex. 2018)



VIDEO EVIDENCE

Can a summary judgment ruling be based on a video?

Nonmovant's sworn testimony told one story; video told another

Could a reasonable person believe the testimony after watching the video?

"We view the facts in the light depicted by the videotape" – citing SCOTUS

Klassen v. Gaines County (Tex. App.—Eastland 2021)



PLEADINGS AS EVIDENCE

When can pleadings provide a basis for granting or denying summary judgment?

Pleadings are not SJ evidence—even if sworn

A party can't rely on its own pleadings—but can point to its opponent's pleadings

Example: pleadings contain judicial admissions

Regency Field Servs. v. Swift Energy Operating
(Tex. 2021)

CAUSE NO. _____		
STATE OF TEXAS,	§	IN THE DISTRICT COURT OF
Plaintiff,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
RESOURCE LIFE	§	
INSURANCE COMPANY,	§	
Defendant.	§	____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, the STATE OF TEXAS, acting by and through the Attorney General of Texas,

PLEADINGS AS EVIDENCE

When can pleadings provide a basis for granting or denying summary judgment?

D: no evidence established that P sustained any injury at all—much less that it did so at any particular time

SJ still available: P's pleadings judicially admit the accrual date

Regency Field Servs. v. Swift Energy Operating
(Tex. 2021)

CAUSE NO. _____		
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Plaintiff,	§	
	§	
v.	§	TRAVIS COUNTY, TEXAS
	§	
RESOURCE LIFE	§	
INSURANCE COMPANY,	§	
Defendant.	§	____ JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff, the STATE OF TEXAS, acting by and through the Attorney General of Texas,

SUMMARY JUDGMENT ON LIMITATIONS



Defendant must...

1. Prove when the claim accrued
 - Traditional MSJ under *Regency Field Services* (Tex. 2021)
2. Negate the discovery rule, if it applies and has been pleaded
 - No-evidence SJ under *Draughon v. Johnson* (Tex. 2021)

PRESERVING OBJECTIONS (#1)

Is a ruling on an MSJ an “implicit” ruling on objections to SJ evidence?

TRAP 33.1: court may rule “either expressly or implicitly”

Was SJ granted because objections were sustained—or because of a fact issue?

Ruling on objections (not just MSJ) is required to preserve error

*Seim v. Allstate Texas
Lloyd’s* (Tex. 2018)



PRESERVING OBJECTIONS (#2)

Must a ruling on objections to SJ evidence be written?

TRAP 33.1 does not require written rulings; oral rulings suffice

But obtaining a written order is the “best practice”

Tip: consider asking for SJ hearing to be on the record

*FieldTurf USA v.
Pleasant Grove ISD*
(Tex. 2022)



PRESERVING OBJECTIONS (#3)

Must a party object to an order sustaining objections to SJ evidence?

Generally, a party that obtains an adverse ruling need not object

But TRAP 33.1 requires a party to make its position clear—either in response to objection, or in objection to ruling

Browder v. Moore
(Tex. 2022)



LATE-FILED RESPONSES

- Responses/affidavits are due 7 days before hearing, unless trial court grants leave
- If the record doesn't reflect leave, the late response was presumably disregarded
- When do recitals in the SJ order reflect that the court considered a late response?



LATE-FILED RESPONSES

Does a recital that the trial court considered “evidence” demonstrate that leave was granted?

Nonmovant: *all* the evidence was attached to my late response

Held: recital demonstrates that court granted leave—“especially” where *all* the evidence was late

B.C. v. Steak N Shake
(Tex. 2022)



REVIEW OF SJ DENIALS

No appeal from the denial of SJ,
except...

- Cross-motions for summary judgment
- Immunity
- Media
- Electric utilities
- Highway contractors (2021)

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REVIEW OF SJ DENIALS

No mandamus relief from the denial of SJ, except...

- *In re USAA* (Tex. 2010)
- *In re Academy* (Tex. 2021)
- Some courts of appeals

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REVIEW OF SJ DENIALS

No mandamus relief if the court fails to rule, except...

- *In re Upcurve Energy* (Tex. App.—El Paso 2021)
- *In re Kingman Holdings* (Tex. App.—Corpus Christi 2021)

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REVIEW OF SJ DENIALS

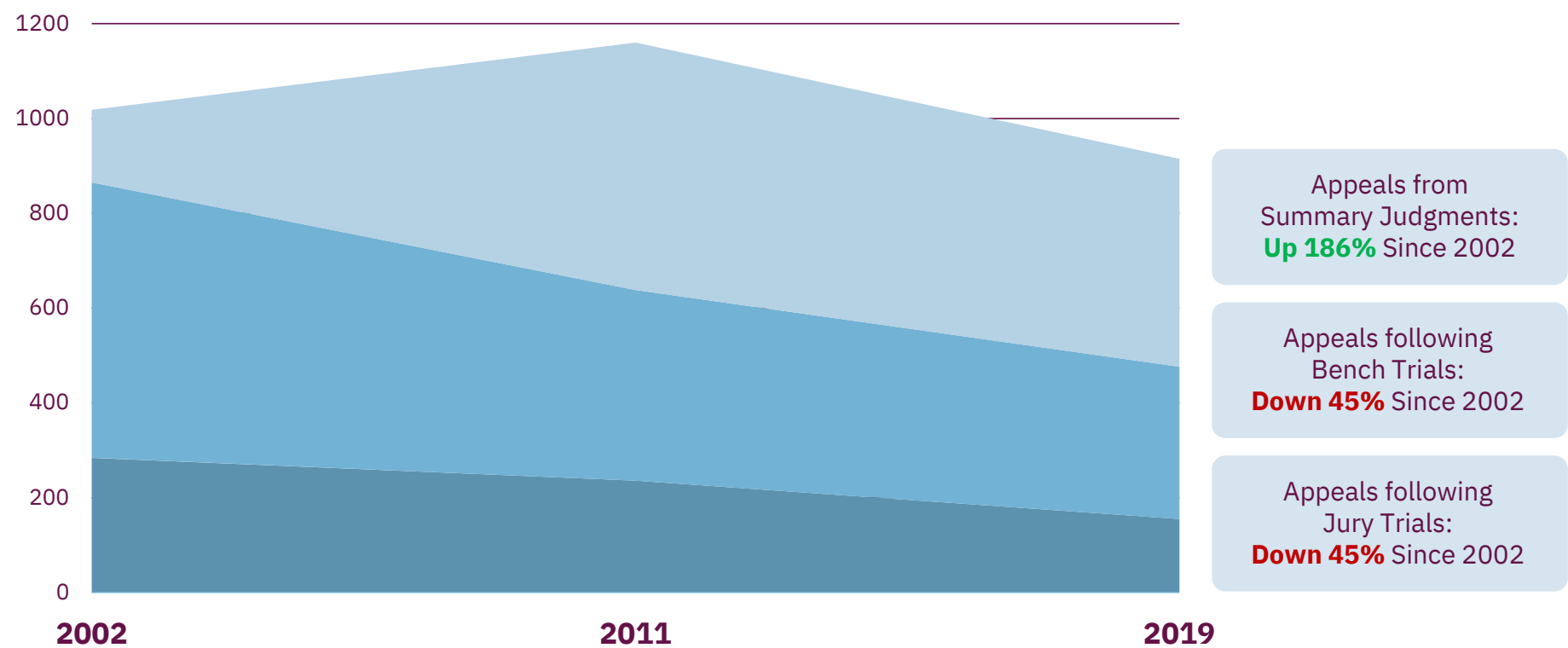
If the court denies SJ on a legal issue, is the issue preserved?

- **YES IN FEDERAL COURT**
Dupree v. Younger (U.S. 2023)
- **BUT NO IN STATE COURT**
UPS v. Tasdemiroglu (Tex. App.—Houston [14th Dist.] 2000)

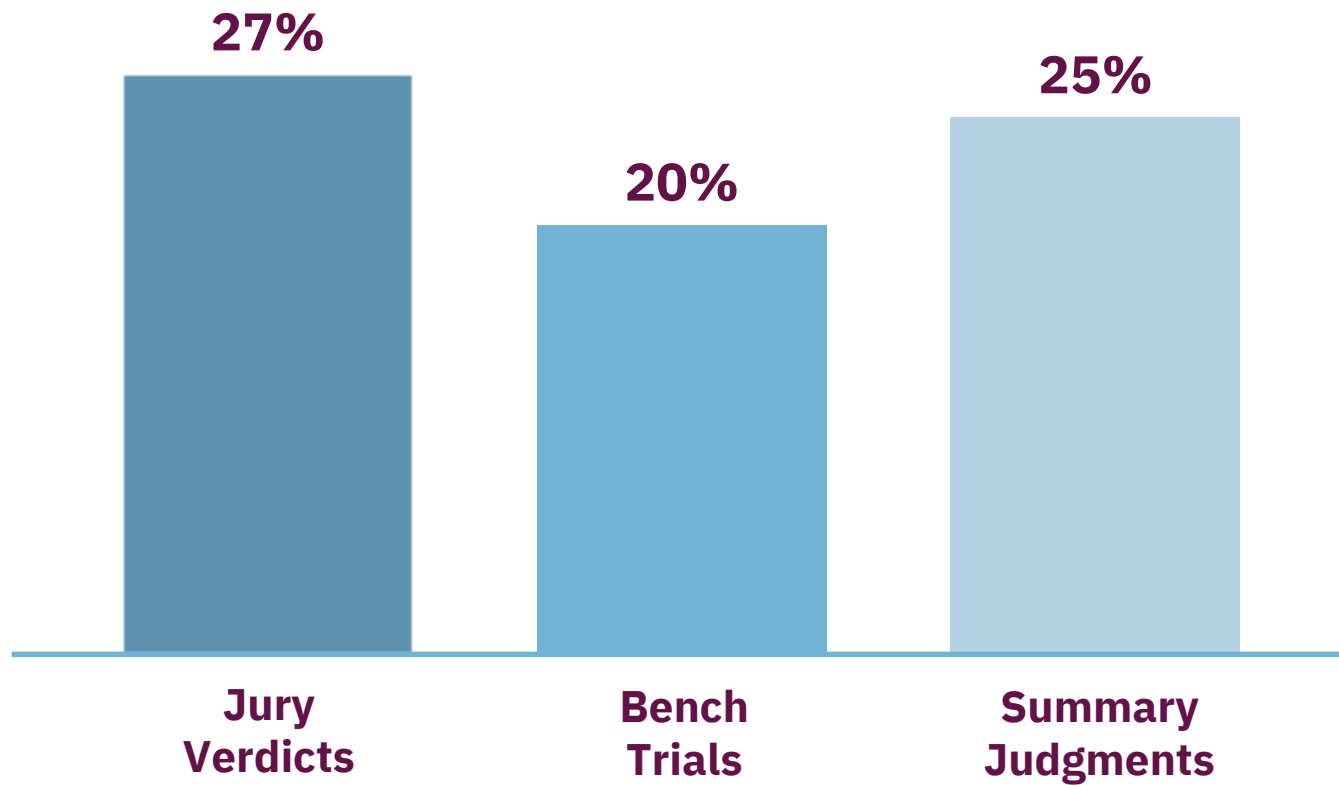
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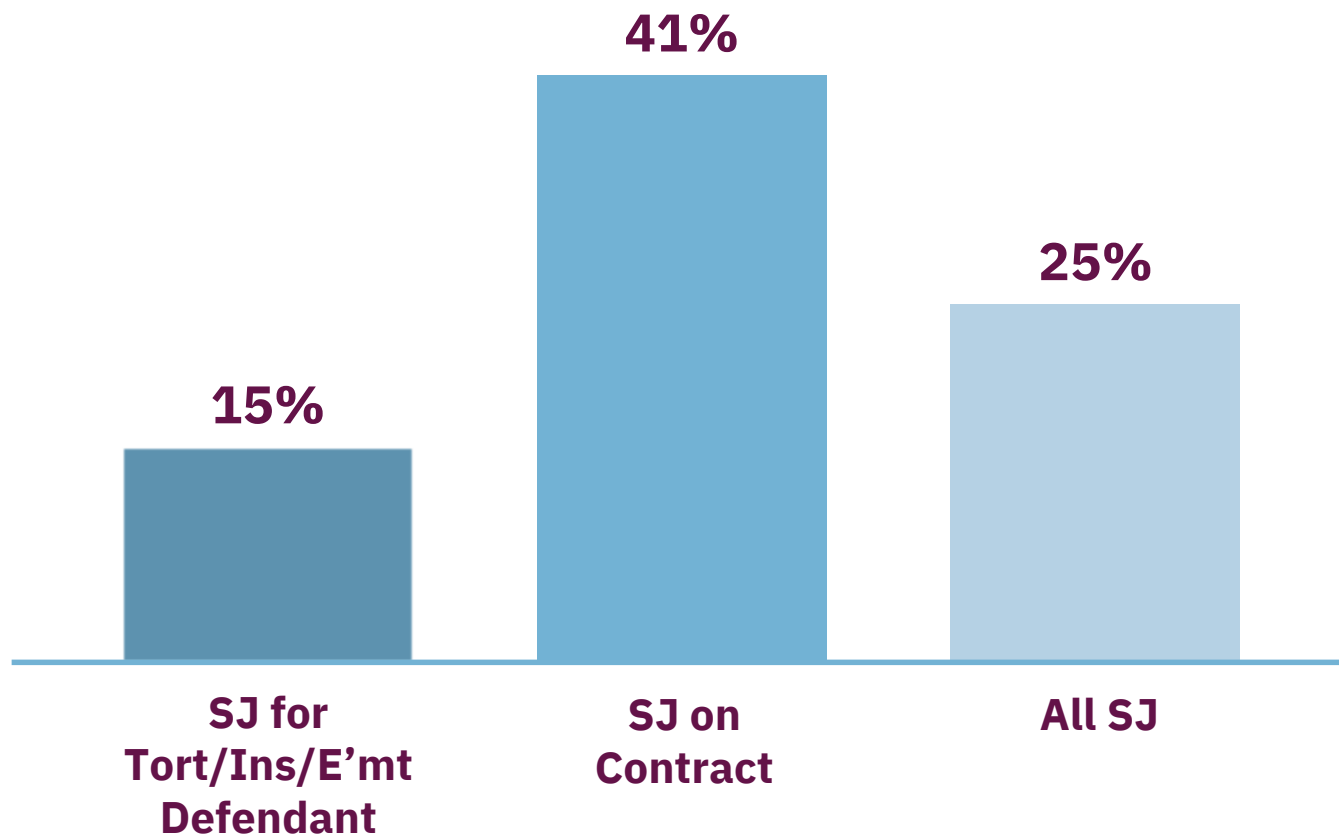
SJ APPEALS



SJ APPEALS



SJ APPEALS



REASONS FOR REVERSAL IN THE TEXAS COURTS OF APPEALS

57 Houston Law Review 671 (2020)



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