

Dispositive Motions in the 151st District Court

The Judge's Perspective

Prepared for

Montgomery County Bar Association

Law Day

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"A View from the Bench"

Traditional Summary Judgments

- Governed by TRCP 166a.
- Partial or Final?
 - The title.
 - Who is moving? Who is not moving? What claims are involved? Not involved?
 - Plaintiffs? Plaintiff? Defendant? Intervenor? Counterclaim-Defendant?
 - What capacity is a party moving in? Next friend? Individually? Both? By XYZ Corp?
 - Careful with possessives. Be accurate and consistent.

Traditional Summary Judgments cont.

- Must give at least 21 full days' notice. No longer three days extra for faxing. Electronic filing. I am seeing these on precisely the 21st day after filing. Object if not 21 days. Trial court will almost always require a reset, but not a full 21 more days necessarily.
- Concise summary.
- Write. Rewrite. Edit.
- Clear, linear arguments. Bite sized pieces.
- Clear citations to evidence:
 - *Kang v. Derrick*, 2014 WL 2048424, *7 (Tex. App.—Houston [14th] May 15, 2014, no pet.).
 - “On appeal, Kang and the Lees contend that the trial court erred by “insisting that they somehow denominate what evidence supported which element of their claims and defenses.’ However, this is precisely what rule 166a(i) and our case law require.”
 - Page *9: “let me tell you a logical story...”

Objections to Summary Judgment Evidence

- Make them.
 - But, don't object to everything just because you can.
 - Make objections where warranted to knock out the movant's or respondent's evidentiary support.
 - Give the Court a granulated order as to each objection and subpart.
 - It is therefore ORDERED that Defendant's objection to paragraph 5 of Paul Plaintiff's Affidavit (Exhibit 3) on the ground that the statements therein concerning damages are conclusory is hereby: _____ SUSTAINED _____ OVERRULED
 - If a movant or respondent attaches evidence that was not produced in discovery, but should have been, Rule 166a(d) provides another basis for objection if the party using that evidence has not complied with the deadlines in that Rule.

Your Pleadings in Support of MSJ

- Make sure your pleadings support your motion.
- Amend, and seek leave of court to do so if necessary.
- Failure to seek leave within 8 days of the hearing will usually result in denial of the amendment.
- Seek a written continuance if necessary explaining what you need in discovery or what you are missing that you need in order to properly respond. Be specific and thorough.

Citations to Caselaw

- Be correct.
- Be honest.
- Use parentheticals or explain what the holding is and how the case is analogous to the present case. Don't just cite a case (unless it's one everyone knows, like *Clear Creek*, setting out the summary judgment standard.
- Most judges, per a survey, prefer citations in the body of the motion rather than in endless footnotes.

Tips Specific to the Response to MSJ

- File a response. Timely. With evidence. Cite to specific parts of that evidence that say what you say that it says.
- Seek a continuance if necessary, and explain why you need it.
 - If you haven't been diligent with discovery, you're less likely to get the continuance.
- If a cause of action is truly not viable, concede it. You'll gain credibility. A good example is negligent entrustment.
- Don't confuse "questions of fact" (intent, reasonableness) with "fact issues."
- Distinguish the movant's case law and cite your own and explain it.
- Remember the current caselaw that Ch. 38 attorney's fees may only be awarded against a corporation or individual (not a LLC or LP or other entity).

The Proposed Order

- Give the Court a separate order on the summary judgment evidence objections.
- Give the Court a thorough order on the motion itself.
 - Let the Court grant some of your relief rather than just “Grant” or “Deny” the whole thing if appropriate. Not always appropriate because of how an appellate court reviews MSJs.
 - What does a Grant or Denial mean in your case. It could mean that plaintiff’s case is “dismissed with prejudice,” and that this is a final order resolving all parties and causes of action. Or it could be only partial. Spell that out so you can be sure to start the appellate clock. It helps the Judge and the clerks, too.
 - If it’s a final order, spell out what you’ll be going home with – not just a dismissal, possibly, but attorney’s fees (trial AND appellate), prejudgment interest, taxable costs of court, postjudgment interest, permanent injunction, etc.
 - Be sure to include evidence to support an award of trial and appellate fees (and segregate fees) where appropriate.

New Topic - Certificates of Conference

- Not required for MSJ's, of course.
- Where required by the rules, and the Harris County local rules and the local rules of the 151st, you need a thorough one.
 - An unreturned phone call, without more, is not a conference.
 - An email, without more, is not a conference.
 - Sending a copy of the motion, without more, is not a conference.
 - The idea is to actually confer and see what you can agree on. This is required by the Texas Lawyer's Creed and the newer attorney oath. If the other side won't confer, detail your efforts in your certificate of conference.

No Evidence Motions for Summary Judgment

- Courts have grown to like these motions because they're usually shorter, and "shall" be granted if no response is filed.
 - File a response.
 - Attach and cite to admissible evidence.
- Be sure that, as movant, a sufficient time for discovery has elapsed. Usually in a DCO, or at the end of the first DCO discovery period.
 - If you think your case is an exception, and you should be allowed to file sooner, explain why.

Rule 91a Motions

- New as of 2013.
- It is designed to expeditiously dismiss “baseless” causes of action.
 - Akin to FRCP 12(b)(6), and appellate courts rely on that federal caselaw.
 - But, federal pleading standards are more stringent, and Rule 91a did not revoke Texas’s fair notice pleading standard.
- These are not very common yet.
- Rule 91a does not apply to Family Code cases.
- 45 day deadline to grant or deny is merely harmless error.
- Must give formal notice to the non-movant. It’s not implied that the matter is “ripe” for hearing by the 45th day.

Rule 91a continued

- For a complaint to survive a Rule 91a motion, it must contain enough facts to state a claim for relief that is plausible on its face.
 - A party may move to dismiss a cause of action on the ground that a cause of action has no basis in law or fact.
 - A COA has no basis in law if the allegations, taken as true, together with inferences reasonably therefrom, do not entitle the claimant to the relief sought.
 - A COA has no basis in fact if no reasonable person could believe the facts pleaded.
 - The court must construe pleadings liberally in favor of the plaintiff, and look to the pleader's intent, and accept the factual allegations as true.
 - A Rule 91a motion is an appropriate vehicle to assert an affirmative defense of immunity in state court (*GoDaddy.com, LLC v. Troups*, 429 S.W.3d 752, 754-55 (Tex. App.—Beaumont 2014, pet. denied).

Chapter 27 – Anti-SLAPP Motions

- CPRC Ch. 27.001 et seq., the Texas Citizens Participation Act, also known as anti-SLAPP motions.
 - SLAPP stands for Strategic Lawsuit Against Public Participation. A lawsuit intended to censor, intimidate, and silence critics by burdening them with the cost of litigation so they'll stop.
 - 2011 legislation ostensibly designed to deter such suits by bolstering First Amendment protections available to defendants.
 - Review and understand deadlines.
 - Must be filed within 60 days of service of the suit (absent additional causes of action or parties).
 - All discovery in the suit is suspended until the Court rules on the motion.
 - The purpose of Ch. 27 is to “encourage and safeguard the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government to the maximum extent.. and... protect the rights of a person to file meritorious lawsuits for demonstrable injury.”

Ch. 27 Motion to Dismiss Use is Growing and Widening

- It is now used in more than simple free speech cases where an activist made a statement or created a petition.
 - Includes public and private speech.
 - Includes speech towards the government and matters of concern to the marketplace.
 - Matters of “public concern” include the provision of medical services.
 - Has been applied to defeat and dismiss breach of contract, breach of fiduciary duty, negligence, gross negligence, malicious prosecution, false imprisonment claims. Almost any kind of case where there is a communication.
 - *Youngkin v. Hines*, 2018 WL 1973661, No. 16-0935 (Tex., April 27, 2018): Applies to protect an attorney’s communication of a Rule 11 agreement into the court’s record, so that he could bring a Ch. 27 motion to dismiss fraud claims arising out of his alleged intent never to comply with the Rule 11 agreement. Because attorney was immune for conduct in entering Rule 11 agreement, dismissal was then mandatory, with attorney’s fees, costs, and potential sanctions. It is on the verge of a new cottage industry allowing for attorney’s fees where none might otherwise be available.

Ch. 27 – Be Ready For It. Advise Your Clients

- A big trap for the unwary
 - In deciding whether to grant the motion to dismiss the action pursuant to Ch. 27, court must determine (1) whether the moving defendant has shown by a preponderance of the evidence (where does the evidence come from if there's no discovery?) that the legal action is based on, relates to, or is in response to the party's exercise of the right of free speech, to petition, or of association (reviewed *de novo*); and
 - Whether the plaintiff, in response, has shown by clear and specific evidence a prima facie case for each essential element of the claim in question. (review of pleadings and evidence in the light most favorable to the Plaintiff).
 - A successful motion to dismiss requires an award of court costs, fees, and other expenses incurred in defending the legal action, plus sanctions "sufficient to deter similar actions."
 - A frivolous motion to dismiss, or one brought solely to delay, can result in attorney's fees awarded to the non-movant (Plaintiff).
 - The bottom line is – be ready to defend an anti-SLAPP TCPA motion to dismiss at the time you file any sort of lawsuit based upon any conceivable communication or alleged wrongful termination (association). It's the new "Health Care Liability Act" that could apply to anything at any time.

Certificates of Merit Dismissal, CPRC 150.001 et seq.

- In any action or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, the plaintiff shall be required to file **with the complaint** an affidavit of a third party licensed architect...surveyor ... or engineer competent to testify...which shall set forth at least one negligent act, error, or omission claimed to exist and the factual basis for each such claim.
 - **Must be with original petition** as to that professional. *Sharp Eng'g v. Luis*, 321 S.W.3d 748, 752 (Tex. App.—Houston [14th Dist.] 2010, no pet.).
 - “...we are bound by the rules of statutory construction—even though it would appear that the legislative draftsmanship has yielded ... only a trap for the unwary rather than a screen for meritless claims.” *Id.* at 754 (Sullivan, J., concurring).

Certificate of Merit cont.

- Dismissal, though mandatory, may be **without prejudice**. 150.002(e) (“This dismissal may be with prejudice”).
- *Pedernal Energy, LLC v. Bruington Eng’g, Ltd.*, 536 S.W.3d 487, 496 (Tex. 2017) (employing an abuse of discretion standard for review of whether the trial court abused its discretion in dismissing without prejudice).
- An order **granting or denying** a motion to dismiss under CPRC 150.001 et seq. is immediately appealable as an interlocutory order. §151.002(f)
- It does not apply to a suit for the payment of fees for the provision of professional services. §150.002(h).
- It does not apply to a third-party plaintiffs or cross-claimants because they are not “the plaintiff.” *Jaster v. Comet II Const. Co.*, 438 S.W.3d 556, 571 (Tex. 2014).

Remainder of My Paper

- The paper goes on to discuss:
 - Pleas to the Jurisdiction
 - Motions to Dismiss for Want of Prosecution (DWOP)
 - Special Exceptions
 - Special Appearances
 - Default Judgment Motions (Top 10 List), and
 - Death Penalty Sanctions.
- Remember: *“No [person] ever reached to excellence in any one art or profession without having passed through the slow and painful process of study and preparation.” ~ Horace (Roman poet, 65 BC – 27 BC)*

THE END