

PRESERVING ERROR BEFORE TRIAL

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PRESERVING ERROR BEFORE TRIAL

I. INTRODUCTION

“To preserve a complaint for appellate review, a party must present to the trial court a timely request, motion, or objection, state the specific grounds therefore, and obtain a ruling.” *Wal-Mart Stores, Inc. v. McKenzie*, 997 S.W.2d 278, 280 (Tex. 1999); *see also* TEX. R. APP. P. 33.1(a)(1), (2). In simplest terms, this rule translates to “object clearly and get a ruling.” But what does it mean to object clearly? How specific must you be? Must the ruling be in writing? And what do you do if the court refuses to rule? This paper identifies the extent to which Texas courts have and have not answered these questions.

II. GENERAL ERROR PRESERVATION

Rule 33.1 of the Texas Rules of Appellate Procedure answers some, but not all, of these questions. Rule 33.1(a) states that to preserve a complaint for appellate review, the objection must be sufficiently specific “to make the trial court aware of the complaint.” TEX. R. APP. P. 33.1(a)(1), (2). An objection is sufficiently specific if it identifies the issue, allows the trial court to make an informed ruling, and gives the other party an opportunity to remedy the defect. *Osterberg v. Peca*, 12 S.W.3d 39, 40 (Tex. 1999), *cert. denied*, 530 U.S. 1244 (2000); *McKinney v. National United Firestone Co.*, 772 S.W.2d 72, 74 (Tex. 1989).

Rule 33.1 relaxes the error-preservation requirements that existed under former Rule 52. TRAP 33.1(a)(2), unlike former TRAP 52, which required an express ruling by the trial court, permits the trial court’s ruling to be express or implied. *Compare* TEX. R. APP. P. 52(a) (“It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection or motion.”). Moreover, Rule 33.1(c) states that a “signed separate order” is not necessary to preserve error.

Since the enactment of Rule 33, the supreme court has made it clear that no written order is necessary to preserve error if the record indicates the trial court has implicitly ruled on the issue. *See, e.g., In re ZLT*, 124 S.W.3d 163, 165 (Tex. 2003) (“By proceeding to trial without issuing the bench warrant, it is clear that the trial court implicitly denied Thompson’s request [for a bench warrant.]”); *Walker v. Gutierrez*, 111 S.W.3d 56, 60 n.1 (Tex. 2003) (explaining that although the trial court did not explicitly rule on the plaintiffs’ request for a grace period under article 4590i, by granting the dismissal motion, the trial court implicitly denied the grace-period request); *Lenz v. Lenz*, 79 S.W.3d 10, 13 (Tex. 2002) (“In this way, the trial court implicitly

disposed of the motion for judgment notwithstanding the verdict.”).

Notwithstanding the relaxed requirements for obtaining a ruling by the trial court under Rule 33.1, one never wants to find oneself on appeal arguing about what the trial court implicitly intended to rule. Thus, the safest course is to obtain an express, signed order ruling on the motion, objection, or request whenever possible. And, if the court refuses to rule, preserve that complaint for review by further objecting to the court’s refusal to rule. TEX. R. APP. P. 33.1(a)(2)(B).

III. ERROR PRESERVATION IN PARTICULAR PRETRIAL CONTEXTS

In addition to Rule 33.1’s general preservation requirements, there are particular rules applicable to specific pleadings and pre-trial procedures. The remainder of this article addresses both the technical and substantive aspects of preserving error before trial in a variety of contexts, including pleadings, jurisdictional and venue issues, summary judgment, pretrial motions, and sanctions.

A. Pleadings

Error preservation begins with the filing of the very first pleading. Although the pleading requirements in Texas are quite liberal, the plaintiff’s original petition must give fair notice of the claims and plead each independent ground for recovery. *See* TEX. R. CIV. P. 45, 47; *Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 896-97 (Tex. 2000); *Roarke v. Allen*, 633 S.W.2d 804, 809-10 (Tex. 1982); *Stoner v. Thompson*, 578 S.W.2d 679, 683 (Tex. 1979); *see also Castleberry v. Branscum*, 721 S.W.2d 270, 272, 275 n.5 (Tex. 1986). Likewise, it is important for the defendant to plead each applicable defense in the answer to avoid waiving arguments on appeal. TEX. R. CIV. P. 93, 94; *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996). If a party’s pleadings do not fairly state its claims or defenses, there are several mechanisms available to force that party to better articulate its position.

1. Special Exceptions

A defendant may file special exceptions to object to non-jurisdictional defects apparent on the face of the opponent’s pleadings and to force the pleader to clarify the statement of his claim. *Agnew v. Coleman County Elec. Coop. Inc.*, 272 S.W.2d 877, 879 (1954).

To preserve error, the special exception must specifically state how the pleading is defective. *Huff v. Fidelity Union Life Ins. Co.*, 312 S.W.2d 493, 499 (Tex. 1958). To avoid waiver, the specially excepting party must obtain a (nonevidentiary) hearing, bring the special exceptions to the attention of the trial judge before the instructions or charge to the jury or, in a

non-jury case, before the judgment is signed, and obtain a ruling. TEX. R. CIV. P. 90. Failure to specially except waives pleading deficiencies that can be cured by repleading, and the issues raised by the defective pleadings will be tried by consent. *Roarke*, 633 S.W.2d at 809. In the absence of special exceptions, pleadings will be liberally construed in favor of the pleader. *Roarke*, 633 S.W.2d at 809.

If the trial court sustains the special exceptions, the offending party may replead or he may elect to stand on his pleadings, suffer dismissal of the case, and test the trial court's order on appeal. *Sherman v. Triton Energy Corp.*, 124 S.W.3d 272, 281 (Tex. App.—Dallas 2003, pet. denied); *D.A. Buckner Constr., Inc. v. Hobson*, 793 S.W.2d 74, 75-76 (Tex. App.—Houston [14th Dist.] 1990, orig. proceeding). The pleader who repleads waives any error by the trial court in sustaining the special exceptions. *Long v. Tascosa Natl. Bank*, 678 S.W.2d 699, 703 (Tex. App.—Amarillo 1984, no writ).

2. The Answer

As a general rule, Texas law allows a party to answer a petition with a general denial. TEX. R. CIV. P. 92. A party's general denial is sufficient to put at issue the allegations made in the petition. *Id.* However, the failure to specifically plead the affirmative defenses listed in Rule 94 and failure to verify certain defensive pleadings as required by Rule 93 waives the right to assert that defense at trial and on appeal. TEX. R. CIV. P. 93, 94; *Nootsie, Ltd. v. Williamson County Appraisal Dist.*, 925 S.W.2d 659, 662 (Tex. 1996). Nonetheless, if an unpleaded defense is raised at trial without objection, it may be deemed to be tried by consent. *See Roarke*, 633 S.W.2d at 809.

From a practice standpoint, the difficulty often comes in determining whether a theory should be categorized as an affirmative defense. For instance, the plaintiff's failure to plead a cognizable claim would not be a Rule 94 affirmative defense. *See Retzlaff v. Deshay*, 2004 WL 2163173, at *6 (Tex. App.—Houston [14th Dist.] September 28, 2004, no pet.). Additionally, no court appears to have expressly addressed whether a Chapter 33 claim must be pled as an affirmative defense under Rule 94 to avoid waiver.

Chapter 33 applies to all tort actions and, by its express language, appears to be mandatory. TEX. CIV. PRAC. & REM. CODE § 33.002(a)(1) (“This subchapter applies to . . . any cause of action based on tort. . . .”); *id.*, § 33.003 (requiring the “trier of fact” to “determine the percentage of responsibility” for all persons identified in the statute); *id.*, § 33.012 (“the court shall reduce the amount of damages to be recovered by the claimant with respect to a cause of action by a percentage equal to the claimant's percentage of responsibility”).

Despite the mandatory language of Chapter 33, several courts have referred to proportionate responsibility as an affirmative defense. *Estate of Barrera v. Rosamond Village Ltd.*, 983 S.W.2d 795, 799 (Tex. App.—Houston [14th Dist.] 1998, no pet.) (“A defendant is entitled to assert the affirmative defense of proportionate responsibility.”); *Nat'l Union Fire Ins. Co. v. Ins. Co. of N. Am.*, 955 S.W.2d 120, 135 (Tex. App.—Houston [14th Dist.] 1997) (referring to “comparative responsibility” as an affirmative defense), *aff'd sub nom., Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co.*, 20 S.W.3d 692 (Tex. 2000). One court has held that the mere assertion of a Rule 94 proportionate responsibility affirmative defense is not sufficient to preserve a claim that “the trial court erred in adjudging each appellant liable for the full amount of the judgment,” thus implying that the theory must not only be pled, but actually pursued at trial. *Lyman D. Robinson Family Ltd. P'Ship v. McWilliams & Thompson, PLLC*, 143 S.W.3d 518, 521 (Tex. App.—Dallas 2004, pet. denied). And section 33.003(b) precludes the submission of a party's “percentage of responsibility” to the jury in the absence of sufficient evidence to support the submission. *See* TEX. CIV. PRAC. & REM. CODE § 33.003(b). The cautious approach would be to plead Chapter 33 as an affirmative defense, actively pursue a claim of proportionate responsibility, present the issue to the jury, and object to the failure of the court to submit the theory. *See Robinson*, 143 S.W.3d at 521-22.

3. Amendments

If pleadings do not include all theories going to trial and all questions going to the jury, amend. Either party must obtain leave of court to amend pleadings within seven days of the trial setting. *Carr v. Houston Business Forms, Inc.*, 794 S.W.2d 849, 851 (Tex. App.—Houston [14th Dist.] 1990, no writ). However, the trial court lacks authority to refuse a pleading amendment, even post-trial, “unless (1) the opposing party presents evidence of surprise or prejudice; or (2) the amendment asserts a new cause of action or defense, and thus is prejudicial on its face.” *Chap & Chapin, Inc. v. Tex. Sand & Gravel Co.*, 844 S.W.2d 664, 665 (Tex. 1992); *see* TEX. R. CIV. P. 67 (“In such case [when an issue is tried by consent] such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury. . . .”); *Whole Foods Market Southwest, L.P. v. Tijerina*, 979 S.W.2d 768, 777 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) (permitting a post-verdict amendment). To preserve the right to complain when a pleading is untimely filed, a party must move to strike. *See Forscan Corp. v. Dresser Ind.*, 789 S.W.2d 389 (Tex.

App.—Houston [14th Dist.] 1990, writ denied). To preserve the right to complain about the court's error in granting a motion for leave to amend, move for a continuance alleging surprise and seek attorneys' fees. *See* TEX. R. CIV. P. 70; *State Bar of Texas v. Kilpatrick*, 874 S.W.2d 656, 658 (Tex. 1994).

B. Jurisdiction/Venue

1. Plea to the Jurisdiction

The court's subject matter jurisdiction is one of those rare issues that cannot be waived. Ordinarily, subject matter jurisdiction should be challenged through a plea to the jurisdiction in the trial court. *Texas Highway Dept. v. Jarrell*, 418 S.W.2d 486, 488 (Tex. 1967). However, an error concerning subject matter jurisdiction can be raised for the first time on appeal. *Texas Ass'n of Business v. Texas Air Control Bd.*, 852 S.W.2d 440, 441 (Tex. 1993).

The Texas Supreme Court has recognized that evidence related to the court's jurisdiction, but not to the merits of the underlying claims, should be considered in disposing a plea to the jurisdiction. *Bland Ind. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554 (Tex. 2000). For example, in ruling on a plea to the jurisdiction challenging an organization's standing to sue, the trial court was permitted to conduct "an evidentiary inquiry into the nature and purpose of the organization sufficient to determine standing does not involve a significant inquiry into the substance of the claims." *Id.* Likewise, in ruling on a plea to the jurisdiction based on sovereign immunity, the trial court was permitted to consider evidence regarding whether the case involved "motor-driven equipment" under the Texas Tort Claims Act. *Tex. Natural Res. Conservation Comm'n v. White*, 46 S.W.3d 864, 868 (Tex. 2001).

2. Special Appearance

To challenge the court's jurisdiction over the person a party must file a special appearance *before any other plea, pleading or motion*, and any other pleading must be urged subject to the special appearance or the special appearance is waived. TEX. R. CIV. P. 120a; *see, e.g., Liberty Enters. v. Moore*, 690 S.W.2d 570, 571-72 (Tex. 1985) (stating that a defendant has waived special appearance by filing a motion to set aside a default judgment and agreeing to an order granting the motion); *Exito Elecs. Co. v. Trejo*, 142 S.W.3d 302, 305 (Tex. 2004) (holding that a Rule 11 agreement to extend a defendant's time to file an initial responsive pleading does not waive a special appearance and that a defective verification and affidavit does not waive a special appearance); *HMS Aviation v. Layale Enters., S.A.*, 149 S.W.3d 182, 189-90 (Tex. App.—Fort Worth 2004, no pet.) (holding that defendant's motion to increase sequestration bond

was made subject to special appearance and was not heard before the special appearance was determined and therefore the special appearance was not waived).

The special appearance must be verified and factual allegations should be supported by affidavit. TEX. R. CIV. P. 120a(1)(3); *see Casino Magic Corp. v. King*, 43 S.W.3d 14, 18 (Tex. App.—Dallas 2001, pet. denied). "[A] challenge to personal jurisdiction by special appearance, which is a dilatory plea, almost always requires consideration of evidence, and the rules of procedure set out the process for adducing such evidence." *Bland*, 34 S.W.3d at 555 (citing TEX. R. CIV. P. 120a). The trial court determines the special appearance on the basis of the pleadings, stipulations, affidavits and attachments, discovery products, if any, and any testimony. TEX. R. CIV. P. 120a(3). Use of discovery to obtain evidence regarding a special appearance does not waive the special appearance. TEX. R. CIV. P. 120a(1) ("The issuance of process for witnesses, the taking of depositions, the serving of requests for admissions, and the use of discovery processes, shall not constitute a waiver of such special appearance."). Rule 120a does not limit discovery to the special appearance; rather, courts have held that discovery beyond personal jurisdiction issues does not waive a special appearance. *Minucci v. Sogevalor*, 14 S.W.3d 790, 800 (Tex. App.—Houston [1st Dist.] 2000, no pet.) (holding that filing a notice of oral hearing on a motion to dissolve writ of garnishment and asking a deposition witness questions relating to the writ of garnishment did not waive special appearance); *Case v. Grammar*, 31 S.W.3d 304, 311 (Tex. App.—San Antonio 2000, no pet.) (following plain language of Rule 120a and holding that seeking discovery that exceeds the scope of the jurisdictional issue did not waive special appearance).

Obtain a ruling on the special appearance or it is waived. Any affidavits must be based on personal knowledge and filed at least seven days before the hearing. *Slater v. Metro Nissan of Montclair*, 801 S.W.2d 253, 254-55 (Tex. App.—Fort Worth 1990, writ denied). The appellate court will consider all the evidence that was before the trial court at the hearing on the motion. Without a record, the appellate court must presume that the evidence was sufficient to support the trial court's judgment. *Matthews v. Proler*, 788 S.W.2d 172, 174 (Tex. App.—Houston [14th Dist.] 1990, no writ).

Findings of fact and conclusions of law may be requested but are not required on appeal. *See id.* When a trial court does not file findings of fact in a special appearance, all questions of fact are presumed to support the judgment. *BMC Software, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). Such implied findings are reviewed only for legal and factual sufficiency. *Id.* The standard of review on appeal is de novo. *North Coast Commercial Roofing*

Systems, Inc. v. RMAX, Inc., 130 S.W.3d 491, 495 (Tex. App.—Dallas 2004, no pet.). Whether to request findings of fact should be considered in light of the fact that the court of appeals will in any event “examine de novo whether the facts negate all bases for personal jurisdiction.” *Id.*

3. Motion to Transfer Venue

As the party filing suit, the plaintiff initially chooses venue. “If the plaintiff’s venue choice is not properly challenged through a motion to transfer venue, the propriety of venue is fixed in the county chosen by the plaintiff.” *Wilson v. Texas Parks & Wildlife Dep’t*, 886 S.W.2d 259, 260 (Tex. 1994). If a defendant objects to the plaintiff’s venue choice and properly challenges that choice through a motion to transfer venue, the question of proper venue is raised. *In re Masonite*, 997 S.W.2d 194, 197 (Tex. 1999) (orig. proceeding).

A motion to transfer venue must be filed concurrently with or prior to any other plea, pleading or motion except a special appearance. Otherwise, the objection is waived. TEX. CIV. PRAC. & REM. CODE § 15.063; TEX. R. CIV. P. 86(1). The motion should be accompanied by affidavits supporting the venue facts alleged but it need not be verified. *GeoChem Tech Corp. v. Verseskes*, 962 S.W.2d 541, 543 (Tex. 1998); TEX. R. CIV. P. 86(3). The motion must: (a) specifically deny the facts pleaded by the plaintiff, and (b) state the legal and factual bases asserted for the transfer by either specifying the county of proper venue and stating that the county chosen by the plaintiff is not proper, or that venue is mandatory in the allegedly proper county by virtue of a specific statute, which must be clearly indicated in the motion. TEX. R. CIV. P. 87(3)(a).

It is questionable whether the trial court must allow an oral hearing before ruling on a motion to transfer venue. *Orion Enters., Inc. v. Pope*, 927 S.W.2d 654, 657-58 (Tex. App.—San Antonio 1996, no pet.). Rule 87 merely requires the court to make its determination “promptly” and seems to contemplate the possibility of a hearing by written submission. *Id.*; TEX. R. CIV. P. 87 (trial court shall consider the pleadings, stipulations, the motion to transfer and response, and all affidavits and discovery products, if any, on file); *but see Flores v. Arietta*, 790 S.W.2d 75 (Tex. App.—San Antonio 1990, writ denied) (record was required for appellate review). To obtain a hearing, the movant has a duty to request a setting. TEX. R. CIV. P. 87(1); *see also Grozier v. L-B Sprinkler & Plumbing Repair*, 744 S.W.2d 306, 309-10 (Tex. App.—Fort Worth 1988, writ denied). If the trial court refuses a request to set the motion for a hearing, the movant will not waive its right to complain of venue on appeal by failing to re-urge its request or by failing to request a continuance.

Marshall v. Mahaffey, 974 S.W.2d 942, 946 (Tex. App.—Beaumont 1998, pet. denied). To preserve error on the grounds of inadequate time to conduct discovery or prepare for a hearing on venue, move for a continuance. *See Beard v. Gonzalez*, 924 S.W.2d 763, 765 (Tex. App.—El Paso 1996, no writ).

In 2003, the legislature enacted a new venue-appellate statute permitting interlocutory review of venue orders in cases involving multiple plaintiffs and intervening plaintiffs. *See* TEX. CIV. PRAC. & REM. CODE § 15.003(c). Significantly, this statute changes the standard of review from “abuse of discretion” to “de novo.” *Id.* The availability of interlocutory review on the narrow question of venue (as opposed to review after final judgment involving multiple substantive and procedural issues) further highlights the importance of properly presenting a venue motion to the trial court.

C. Jury Demand/Waiver

A jury demand requires a written request and payment of a fee. TEX. R. CIV. P. 216; *see Forscan Corp. v. Dresser Indus., Inc.*, 789 S.W.2d 389, 392 (Tex. App.—Houston [14th Dist.] 1990, writ dismissed). The party must comply with these rules within “a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance.” TEX. R. CIV. P. 216(1). A request and payment of the fee is presumed timely if the requirements are satisfied more than 30 days before the case is set for trial. *Halsell v. Dehoyos*, 810 S.W.2d 371, 371 (Tex. 1991). This presumption can only be rebutted if the granting of a jury trial would harm the opposing party or interfere with the court’s management of its docket. *Id.*

With respect to contractual jury waivers, the Texas Supreme Court held in *In re Prudential*, 148 S.W.3d 124, 134-35 (Tex. 2004) (orig. proceeding) that contractual jury waivers are enforceable by mandamus review. One issue that has arisen on the heels of this decision is when a motion to enforce the jury waiver must be presented to the trial court. In a recent case in the Dallas court of appeals, the defendant moved to quash the jury immediately after the issuance of *Prudential*, and the trial court granted the motion. *See In re C-Span Entertainment, Inc.*, 162 S.W.3d 422, 426 (Tex. App.—Dallas 2005, orig. proceeding). On mandamus review, the plaintiff urged that the defendant had waived the right to enforce the contractual jury-waiver provision based on the timing of the motion to quash. The court of appeals denied mandamus relief, noting the “evolving nature of the law” regarding jury waivers and concluding that the defendant was not obligated “to urge a motion to quash until the supreme court resolved the issue in a different fashion from this Court’s resolution.” *Id.* at 426 (holding that the plaintiff did not establish waiver as a matter of law).

D. Summary Judgment Practice

1. Presentation of the Grounds for Summary Judgment

A summary judgment must “state the specific grounds therefore.” TEX. R. CIV. P. 166a(c). If the moving party does not expressly present the grounds for summary judgment in the motion itself, the motion is inadequate as a matter of law. *McConnell v. Southside Ind. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993). Likewise, the nonmovant must expressly present the reasons summary judgment should not be granted in a written response. *Id.* at 343. Nevertheless, if the movant’s grounds will not support summary judgment *as a matter of law*, a written response or answer is not necessary and a motion for new trial is sufficient to preserve error. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex. 1979); *Castellow v. Swiftex Mfg. Corp.*, 33 S.W.3d 890, 895 (Tex. App.—Austin 2000, no pet.), *abrogated on other grounds*, *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544 (Tex. 2001) (not reaching the summary judgment issue).

Special exceptions are “required” if a nonmovant wants to complain “that the grounds relied on by the movant were unclear or ambiguous.” *See McConnell v. Southside Ind. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993). Notwithstanding Rule 33.1’s relaxed preservation standards, courts have required an express ruling on special exceptions complaining about the specificity of the summary judgment grounds to preserve the issue for appeal. *Franco v. Slavonic Mut. Fire Ins. Ass’n*, 154 S.W.3d 777, 785 (Tex. App.—Houston [14th Dist.] 2004, no pet.) (“In light of the relevant rules and caselaw, we simply are unable to infer from the record in this case that the trial court implicitly overruled or implicitly made any ruling regarding appellants’ special exception.”). But “no special exception would be required to preserve an appellate complaint about a total lack of grounds in the motion.” *Segal v. Emmes Cap., L.L.C.*, 155 S.W.3d 267, 272 (Tex. App.—Houston [14th Dist.] 2004, pet. abated).

With respect to no-evidence summary judgment motions under Texas Rule of Civil Procedure 166a(i), the motion must state the elements of the opposing party’s claim or defense as to which there is no evidence. TEX. R. CIV. P. 166a(i). A no-evidence motion that states “there is no evidence of causation . . . adequately identified causation as the challenged element.” *In re Mohawk Rubber Co.*, 982 S.W.2d 494, 498 (Tex. App.—Texarkana 1998, orig. proceeding) (no-evidence motion challenging causation is sufficient). However, a no-evidence motion that simply states there is no evidence of negligence, without identifying the specific elements being attacked will not suffice. *Oasis Oil Corp. v. Koch Refining Co.*, 60 S.W.3d 248, 255 (Tex. App.—Corpus

Christi 2001, pet. denied) (motion challenging “other elements” of a claim is insufficient).

Some courts have held that a no-evidence motion that fails to identify each element as to which there is no evidence is legally insufficient and that the nonmoving party can raise this complaint for the first time on appeal. *See, e.g., Cuyler v. Minns*, 60 S.W.3d 209, 213 (Tex. App.—Houston [14th Dist. 2001], pet. denied). Other courts have held that the nonmoving party has the burden to challenge an insufficient no-evidence motion in the trial court. *See, e.g., Walton v. Phillips Petroleum Co.*, 65 S.W.3d 262, 268 n.1 (Tex. App.—El Paso 2001, no pet.).

2. Additional Time for Discovery

In the traditional summary judgment context, the nonmoving party may seek additional time for discovery. *See* TEX. R. CIV. P. 166a(g). Rule 166a(i) permits a party to move for a no-evidence summary judgment “after adequate time for discovery.” TEX. R. CIV. P. 166a(i). In a traditional summary judgment, the nonmovant has the burden of seeking additional time for discovery. *See Tenneco Inc. v. Enter. Prod. Co.*, 925 S.W.2d 640, 647 (Tex. 1996). “When a party contends that it has not had an adequate opportunity for discovery before a summary judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance.” *Tenneco*, 925 S.W.2d at 647.

The no-evidence rule does not expressly address whether Rule 166a(g) applies although most Texas courts have held that the burden for obtaining additional time for discovery, even in the face of a no-evidence summary judgment motion, is on the nonmovant. *Quesada*, 2003 WL 1889602, at *2, *quoting Tenneco Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996); *see also Blanche v. First Nationwide Mortgage Corp.*, 74 S.W.3d 444, 451 (Tex. App.—Dallas 2002, no pet.). This is consistent with Rule 166a(i)’s provision placing the burden of overcoming a no-evidence summary judgment on the nonmoving party. *See* TEX. R. CIV. P. 166a(i). Thus, in the no-evidence summary judgment motion context, the prudent practice is for the nonmoving party to raise the issue of whether there has been an adequate time for discovery. *See, e.g., Quesada v. Am. Garment Finishers, Corp.*, 2003 WL 1889602, at *2 (Tex. App.—El Paso April 17, 2003, no pet.) (nonmoving party must raise the “adequate time for discovery” issue in the trial court); *Dolcefino v. Randolph*, 19 S.W.3d 906, 917 n.6 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (same).

Courts have typically held that a trial court implicitly overrules a continuance motion or a complaint that the nonmoving party lacks adequate time for discovery when it decides the summary judgment motion. *See* TEX. R. APP. P. 33.1(a)(2)(A);

Dagley v. Haag Eng'g Co., 18 S.W.3d 787, 795 n.1 (Tex. App.—Houston [14th Dist.] 2000, no pet.). Nevertheless, the most cautious approach is to obtain a signed order from the trial court.

3. Denial or Grant of Motion

Generally, there is no right to appeal the denial of summary judgment, even after trial on the merits. *Cincinnati Life Ins. v. Cates*, 927 S.W.2d 623, 625 (Tex. 1996).

When the trial court grants a summary judgment for one party and denies the opposing party's motion for summary judgment, the appellate court can review both the grant and the denial. *Embrey v. Royal Ins. Co. of America*, 22 S.W.2d 415, 415-16 (Tex. 2000). When the trial court grants a partial summary judgment dismissing some but not all claims, the party appealing the partial summary judgment after trial on the merits must include in the appellate record the pleadings containing the causes of action dismissed by summary judgment, or risk waiver. *Worthy v. Collagen Corp.*, 967 S.W.2d 360, 365-66 (Tex. 1998).

4. Specific Complaints

To preserve a complaint that an opposing party violated Texas Rule of Civil Procedure 63 by filing a pleading within seven days of the summary judgment hearing, a party must *both* demonstrate surprise *and* request a continuance. *Fletcher v. Edwards*, 26 S.W.3d 66, 74 (Tex. App.—Waco 2000, pet. denied).

To preserve a complaint that a party did not receive 21-days notice before the summary judgment hearing under Texas Rule of Civil Procedure 166a, a party must promptly bring the error to the trial court's attention, usually by filing a motion for continuance and a post-trial motion complaining of lack of notice. *Walker v. Gonzales County Sheriff's Dept.*, 35 S.W.3d 157, 160 (Tex. App.—Corpus Christi 2000, pet. denied); *White v. Wah*, 789 S.W.2d 312, 319 (Tex. App.—Houston [1st Dist.] 1990, no writ).

To preserve a complaint that movant's pleadings do not support the requested summary judgment, raise the defect in the trial court, usually in the non-movant's summary judgment response. *Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991).

5. Evidentiary Objections

Objections that a summary judgment motion or a response contains inadmissible evidence must be preserved by written objection filed in the trial court. *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Dolenz v. A.B.*, 742 S.W.2d 82, 83-84 n.2 (Tex. App.—Dallas 1987, writ denied). Objections to form, such as authentication, challenges to the form of the affidavit, and hearsay objections, are waived if not raised in the

trial court. See *Stewart v. Sammina Texas, L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.) However, objections to the substance of the testimony or evidence provided in the affidavit – the type of complaints that go to whether the moving party has met its summary judgment burden – are not waived by failing to state them expressly in the trial court. *Id.* “Substantive defects are those that leave the evidence legally insufficient, and include affidavits which are nothing more than legal or factual conclusions.” *Id.*

As discussed *supra*, under Texas Rule of Appellate Procedure 33.1, rulings can be implied and need not be in writing. Despite the rule change, courts have disagreed about whether a trial court's ruling on a motion for summary judgment impliedly disposes of objections to summary judgment evidence. Some courts have held that a party may preserve error regarding objections to summary judgment evidence based on an implied ruling. See *Mowbray v. Avery*, 76 S.W.3d 663, 689 n.45 (Tex. App.—Corpus Christi 2002, no pet.); *Frazier v. Yu*, 987 S.W.2d 607, 610 (Tex. App.—Fort Worth 1999, pet. denied); *Blum v. Julian*, 977 S.W.2d 819, 823 (Tex. App.—Fort Worth 1998, no pet.). Other courts, however, have disagreed and have held that a party must obtain a written order with respect to summary judgment evidence objections. *Stewart*, 146 S.W.3d at 106; *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 435 (Tex. App.—Houston [14th Dist.] 2000, pet. denied); *Well Solutions, Inc. v. Stafford*, 32 S.W.3d 313, 316 (Tex. App.—San Antonio 2000, no pet.); *Dolcefino v. Randolph*, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Courts have also held that a party fails to preserve error regarding the trial court's exclusion of summary judgment evidence by not raising the issue in the trial court. See *Community Initiatives, Inc. v. Chase Bank of Texas*, 153 S.W.3d 270, 281 (Tex. App.—El Paso 2004, no pet.) (“Accordingly, to preserve complaints regarding the exclusion of summary judgment evidence, the proponent must inform the trial court of the purposes for which the evidence was offered and the reasons why it was admissible.”); *Brooks v. Sherry Lane Nat'l Bank*, 788 S.W.2d 874, 878 (Tex. App.—Dallas 1990, no writ); *Margione v. Gov't Personnel Mut. Life Ins. Co.*, 2002 WL 1677457, at *4-5 (Tex. App.—San Antonio 2002, writ denied) (not designated for publication).

Finally, one appellate court has held that a prevailing summary judgment movant “is required to object to claimed defects in the form of summary judgment affidavits” and obtain a ruling on such an objection. *Trusty v. Strayhorn*, 87 S.W.3d 756, 763-64 (Tex. App.—Texarkana 2002, no pet.). Because the defendants did not obtain a ruling from the trial court on their objections to the plaintiff's summary judgment evidence, the defendants waived their argument that

the affidavit was not proper summary judgment evidence. *Id.*

E. Pretrial Motions And Hearings

Many rules require the filing of written motions. Even if not specifically required by the rules, the best practice is always to file a written motion to preserve your requests or objections on appeal. As a general rule, to preserve arguments in opposition to any pretrial motion, file a response, oppose the motion at hearing, and get a record. *See Moore v. Wood*, 809 S.W.2d 621, 622-23 (Tex. App.—Houston [1st Dist.] 1991, orig. proceeding).

1. Hearings

If there is no evidence presented, error is not waived by failure to obtain a hearing on the motion. *See Martin v. Cohen*, 804 S.W.2d 201, 203 (Tex. App.—Houston [14th Dist.] 1991, no writ). If the motion requires presentation of evidence, and no hearing is held, any error is waived. You may be entitled to findings of fact and conclusions of law when the trial court grants a pretrial motion. *Hopkins v. NCNB Texas Nat'l Bank*, 822 S.W.2d 353, 345-55 (Tex. App.—Fort Worth 1992, no writ). To be on the safe side, present the appellate court with a record reflecting a timely request for findings and conclusions and, if necessary, a reminder. TEX. R. CIV. P. 296.

2. Record

Make a record of all evidentiary hearings. On appeal, the appellant has the burden to present a record showing error requiring reversal. TEX. R. APP. P. 33.1(a). Absent a record, the evidence is presumed to support the trial court's order. *Pyles v. United Services Auto. Assn.*, 804 S.W.2d 163, 164 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

3. Motion for Continuance

The motion for continuance must be in writing and must strictly comply with the rules. *See* TEX. R. CIV. P. 251; *City of Houston v. Blackbird*, 658 S.W.2d 269, 272-73 (Tex. App.—Houston [1st Dist.] 1983, writ dismissed). It must be verified or accompanied by affidavits. Failure to verify is fatal. *Rogers v. Continental Airlines*, 41 S.W.3d 196, 200-01 (Tex. App.—Houston [14th Dist.] 2001, no pet.); *Blackbird*, 658 S.W.2d at 272.

To preserve error regarding a motion for continuance sought to complete discovery (including the absence of a witness), include the following in the motion: (a) allege and prove the testimony is material; (b) show your diligence in attempting to obtain it; (c) explain the cause of your failure to obtain it, if known; (d) show the evidence is not available from other sources; and (e) state that the continuance is not for delay only, but so that justice will be done. TEX. R.

CIV. P. 251; *See, e.g., Laughlin v. Bergman*, 962 S.W.2d 64, 65-55 (Tex. App.—Houston [1st Dist.] 1997, pet. denied); *McAx Sign Co. v. Royal Coach, Inc.*, 547 S.W.2d 368, 370 (Tex. Civ. App.—Dallas 1977, no writ).

To preserve error on the denial of a motion for continuance based on the absence of counsel, show: (a) counsel's absence was not the party's fault and did not occur through his lack of diligence, *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984) and (b) no other attorney could handle the case. *Echols v. Brewer*, 524 S.W.2d 731, 734 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

4. Expert Issues

Typically, the threshold inquiry as to an expert's qualifications and the reliability of her testimony is addressed pretrial. *See E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556-57 (Tex. 1995). Regardless of whether the trial court holds such a pretrial hearing on an expert's qualifications, a party seeking to exclude expert testimony should object both before trial in a motion to exclude expert testimony and at trial. The Texas Supreme Court has seemingly endorsed the idea that a party may object to expert testimony "before trial or when the evidence is offered." *See Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1996) (emphasis added). The Texas Supreme Court has also held that a motion to strike expert testimony can be raised as late as "immediately after cross-examination when the basis for the objection becomes apparent." *Kerr-McGee Corp. v. Helton*, 133 S.W.3d 245, 252 (Tex. 2004) (emphasis added).

There may be risks associated with objecting only before trial. For example, the court may conclude that the objection is premature. *See Farm Servs., Inc. v. Gonzalez*, 756 S.W.2d 747, 750 (Tex. App.—Corpus Christi 1998, writ denied). In addition, the basis for the objection may not be apparent until the expert testifies at trial. *Kerr-McGee Corp.*, 133 S.W.3d at 252. Keep in mind that filing a motion in limine does not preserve error on appeal. *See, e.g., Methodist Hosps. of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 883 (Tex. App.—Dallas 1991, no writ). Instead, if the party is seeking to object to expert testimony a motion to exclude expert testimony is necessary. *See Huckaby v. A.G. Perry & Son, Inc.*, 20 S.W.3d 194, 203-04 (Tex. App.—Texarkana 2000, pet. denied) (distinguishing a motion to exclude from a motion in limine in the expert testimony context).

There are also circumstances in which an objection – either before or at trial – is unnecessary. If the party's complaint is that the expert testimony is conclusory or speculative and thus no evidence, an objection is not required. *Coastal Transport Co. v.*

Crown Central Petroleum Corp., 136 S.W.3d 227, 231-33 (Tex. 2004).

F. Sanctions

A party who does not obtain a pretrial ruling on a discovery dispute existing before trial has waived a claim of sanctions based on the alleged misconduct. *See Remington Arms Co. v. Caldwell*, 850 S.W.2d 167, 170 (Tex. 1993) (orig. proceeding).

A party seeking to challenge the trial court's sanctions ruling on appeal should be careful to bring the complaint to the trial court's attention. *See, e.g., Garcia v. Mireles*, 14 S.W.3d 839, 843 (Tex. App.—Amarillo 2000, no pet.) (appellant's failure to raise the sanctions issue in the trial court and to request findings of fact and conclusions of law waives its appellate complaint); *Kiefer v. Continental Airlines, Inc.*, 10 S.W.3d 34, 41 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (when an attorney does not complain of the trial court's sanction order and does not request the trial court to reconsider its order, the attorney has waived any appellate complaint about the sanctions order). In *Cire v. Cummings*, 134 S.W.3d 835 (Tex. 2004), a case in which the Texas Supreme Court set aside the court of appeals' reversal of the trial court's death penalty sanctions, the court agreed that “doing nothing in the face of a pending [discovery] motion and then complaining on appeal runs afoul of the policy underlying Appellate Rule 33.1.” *Id.* at 844, quoting *Cummings v. Cire*, 74 S.W.3d 920, 924 n.1 (Tex. App.—Amarillo 2003).

IV. CONCLUSION

To preserve error for appeal, the complaining party must object timely and specifically, obtain a ruling from the trial court, and establish a record. But these are only the baseline requirements for preserving error. As this article demonstrates, despite changes in the rules aimed at liberalizing error preservation, preserving error for appeal remains complex and requires trial and appellate lawyers to carefully assess what steps are necessary to preserve error in a particular context.