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## CHAPTER 6-11A. MOTION FOR TRADITIONAL SUMMARY JUDGMENT

This subchapter discusses motions for traditional summary judgment under Rule 166a, also known as motions for summary judgment as a matter of law. This chapter does not discuss motions for no-evidence summary judgment, motions for hybrid summary judgment, or motions to dismiss under Rule 91a. For a discussion of those topics, see “Motion for No-evidence Summary Judgment,” ch. 6-11B, p.874; “Motion for Hybrid Summary Judgment,” ch. 6-11C, p. 891; and “Motion to Dismiss – 91a – Baseless Claim,” ch. 6-4A, p. 429.

### §1. OVERVIEW

The purpose of summary judgment is to permit a court to promptly dispose of a case that involves unmeritorious claims or untenable defenses. *Hous. v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 n. 5 (Tex.1979); *Gulbenkian v. Penn*, 252 S.W.2d 929, 931 (Tex. 1952). A traditional motion for summary judgment (“MSJ”) requires the moving party to show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Lujan v. Navistar, Inc.*, 555 S.W.3d 79, 82 (Tex. 2018); *Rhone-Poulenc, Inc. v. Kenda Steel*, 997 S.W.2d 217, 222 (Tex. 1999). In other words, the movant must show that neither judge nor jury is necessary (i.e., no trial is necessary) because there are no contested fact issues to be decided. See *Batjet, Inc. v. Jackson*, 161 S.W.3d 242, 245 (Tex.App.—Texarkana 2005, no pet.); see also *Garcia v. John Hancock Variable Life Ins. Co.*, 859 S.W.2d 427, 436 (Tex.App.—San Antonio 1993, writ denied) (MSJ is rarely appropriate when an issue is inherently one for jury or judge, such as cases involving intent, reliance, uncertainty, and discretion). See “Movant’s Burden,” §6, p. 795. Although an MSJ is an efficient path to a final judgment because it avoids a lengthy trial, summary judgment is not intended to deprive litigants of the right to a full hearing on the merits of any real fact issue. See *Clear Creek Basin Auth.*, 589 S.W.2d at 678 n. 5 (Tex. 1979); *Gulbenkian*, 252 S.W.2d at 931; *Pipes v. Hemingway*, 358 S.W.3d 438, 447 (Tex.App.—Dallas 2012, no pet.); see also *Levinthal v. Kelsey-Seybold Clinic, P.A.*, 902 S.W.2d 508, 512 (Tex.App.—Houston [1st Dist.] 1994, no writ) (“Summary judgments deprive litigants of the right to a jury trial and are not to be granted without the procedural protections necessary to provide the nonmovant with due process.”). A court renders a summary judgment based only on written documentation, such as deposition transcripts, interrogatory answers, pleadings, motions, and affidavits. *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d 266, 269 (Tex. 1992); see Tex. R. Civ. P. 166a(c) (“Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.”). See “Summary-Judgment Proof – Kinds,” §21, p. 833. But traditional summary judgment is not intended to provide a trial by deposition or affidavit; instead, it is intended to provide a method to summarily terminate a case when it clearly appears that only a question of law is involved and that there is no genuine issue of material fact. *Gaines v. Hamman*, 358 S.W.2d 557, 563 (Tex. 1962); see *Gulbenkian*, 252 S.W.2d at 931. Because summary judgment is a harsh remedy, Rule 166a must be strictly construed. *Rasheed v. Tex. Fair Plan Ass’n*, No. 01-15-00887-CV (Tex.App.—Houston [1st Dist.] June 2, 2016, no pet.) (mem. op.); *Guinn v. Zarsky*, 893 S.W.2d 13, 780 (Tex.App.—Corpus Christi 1994, no writ). A court can grant final summary judgment on the whole case or it can grant a partial summary judgment on specific claims, leaving material fact issues to be tried at a later date. See Tex. R. Civ. P. 166a(a), (b), (e). When a court denies summary judgment, it denies only the summary judgment relief; it does not adjudicate the underlying claim. E.g., *O’Brien v. Corinthian Point Yacht & Racquet Club, Inc.*, No. 09-13-00331-CV (Tex.App.—Beaumont Aug. 27, 2015, no pet.) (mem. op.) (“by striking the award of damages from the order granting summary judgment, the trial court neither granted nor denied damages”); *Wasserberg v. RES-TX One, LLC*, No. 14-13-00674-CV (Tex.App.—Houston [14th Dist.] Dec. 9, 2014, pet. denied) (mem. op.) (“by striking the attorneys’ fees award from its order granting partial summary judgment, the trial court neither granted nor denied an award of fees”).

In this subchapter, “movant” refers to the party that files the MSJ, and “nonmovant” refers to the party that responds to the MSJ.



## §2. WHO CAN FILE

An MSJ can be filed by any party—plaintiff or defendant—regardless of whether the legal action is a claim, counterclaim, cross-claim, or suit seeking declaratory judgment. Tex. R. Civ. P. 166a(a), (b); *e.g.*, *In re S.T.H.*, No. 04-06-00468-CV (Tex.App.—San Antonio Mar. 7. 2007, no pet.) (mem. op.) (grandparents named in petition for bill of review could file MSJ regardless of their standing on parentage issue because they were named as respondents and were therefore defending parties under Rule 166a(b)).

## §3. TIMELINE TO FILE

Unlike other motions that provide only a deadline for filing, Rule 166a provides a span of time within which a movant can file its MSJ.

**§3.1 Earliest date to file.** The earliest date a party can file an MSJ depends on whether the filing party is the claimant or defending party in the underlying suit.

**§3.1.1 Claimant.** An MSJ can be filed by a claimant (i.e., a party seeking to recover on a claim, counterclaim, cross-claim or a party seeking to obtain a declaratory judgment) at any time after the adverse party has appeared or answered. Tex. R. Civ. P. 166a(a); *e.g.*, *Hock v. Salaices*, 982 S.W.2d 591, 594-95 (Tex.App.—San Antonio 1998, no pet.) (court erred in granting MSJ because answer had not been filed, nonmovant had not appeared, and nonmovant was not present or represented at MSJ hearing); *Verkin v. Southwest Center One, Ltd.*, 784 S.W.2d 92, 93 (Tex.App.—Houston [1st Dist.] 1989, writ denied) (movant filed MSJ approximately three weeks after nonmovant filed general denial; motion was timely filed).

**§3.1.2 Defending party.** An MSJ can be filed by a defending party (i.e., a party against whom a claim, counterclaim, or cross-claim is sought or a party against whom a declaratory judgment is sought) at any time. Tex. R. Civ. P. 166a(b); *Nicholson v. Smith*, 986 S.W.2d 54, 58 (Tex.App.—San Antonio 1999, no writ).

### ► Timeline to File Traditional MSJ is not Restricted ◀ by “Adequate Time for Discovery”

Occasionally, a court will reference the need to allow an “adequate time for discovery” before filing a traditional MSJ, but this restriction does not apply to a traditional MSJ. *E.g.* *In the Interest of D.K.M.*, 242 S.W.3d 863, 866 (Tex.App.—Austin 2007, no pet.) (dicta); *see* Tex. R. Civ. P. 166a(a)-(h); *Coleman v. Conway*, No. 13-04-256-CV (Tex.App.—Corpus Christi July 21, 2005, no pet.) (mem. op.). Instead, this standard is limited to a no-evidence MSJ. *See* Tex. R. Civ. P. 166a(i). For a discussion of the timeline to file a no-evidence MSJ, see “Timeline to file,” ch. 6-11B, §3, p. 878. Rule 166a does, however, allow a nonmovant opposing a traditional MSJ to seek additional time for discovery in limited circumstances. See “Requesting additional time to conduct discovery – Rule 166a(g),” §23.1, p. 858.

## §3.2 Latest date to file (i.e., deadline).

**§3.2.1 Generally.** Generally, an MSJ must be filed at least 21 days before the hearing or submission date. Tex. R. Civ. P. 166a(c). The deadline for filing the MSJ is also the deadline for serving the motion, submitting all affidavits, presenting unfiled discovery products, and giving notice of the hearing. *See* Tex. R. Civ. P. 166a(c). See “Deadlines for service & notice,” §15.1, p. 812; “Deadlines for filing & serving evidence,” §20.2, p. 827. The court has discretion under Rule 166a(c) to alter this deadline and accept or consider late filings. Tex. R. Civ. P. 166a(c); *Mowbray v. Avery*, 76 S.W.3d 663, 688 (Tex.App.—Corpus Christi 2002, pet. denied). Specifically, a movant can file an MSJ fewer than twenty-one days before the hearing date only on leave of court, with notice to opposing counsel. Tex. R. Civ. P. 166a(c); *Sartin v. Beacon Mar., Inc.*, No. 09-08-00166-CV (Tex.App.—Beaumont Apr. 23, 2009, no pet.) (mem. op.). Without proper leave of court, an untimely summary-judgment filing is not properly before the court and cannot be



considered. *Ewing Ins. Servs., Inc. v. Tex. Indep. Auto. Dealers Ass'n*, No. 06-18-00090-CV (Tex.App.—Texarkana Feb. 4, 2019, no pet.) (mem. op.); see, e.g., *Mowbray*, 76 S.W.3d at 688 (court granted leave for movant to file late supplemental MSJ in response to nonmovant’s second amended petition, which was filed less than 21 days before MSJ submission date). For a detailed discussion of the 21-day deadline under Rule 166a(c), see “Deadlines for service & notice,” §15.1, p. 812.

**§3.2.2 Exception – Rule 11 agreement.** Parties can alter the deadline for filing an MSJ by Rule 11 agreement. E.g., *D.B. v. K.B.*, 176 S.W.3d 343, 347 (Tex.App.—Houston [1st Dist.] 2004, pet. denied) (parties agreed to extend time for filing their MSJs). For a detailed discussion of using a Rule 11 agreement to alter the MSJ filing and serving deadlines, see “Altering deadlines – Rule 11 agreement,” §15.2, p. 813.

#### §4. SUMMARY JUDGMENT BURDEN-SHIFTING ANALYSIS

In a traditional MSJ, the movant has the burden to submit sufficient evidence to establish that “there is no genuine issue as to any material fact” and that the movant is entitled to judgment as a matter of law; this is accomplished by establishing each element of the claim or defense on which the movant seeks summary judgment. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014). See “Movant’s Burden,” §6, p. 795. If the movant meets its burden, the burden shifts to the nonmovant to defeat the summary judgment by (1) disproving or raising an issue of fact as to at least one of the elements of the movant’s claim or defense or (2) raising a material fact issue on each element of its own affirmative defense. See *Amedisys, Inc.*, 437 S.W.3d at 511; *Am. Petrofina, Inc. v. Allen*, 887 S.W.2d 829, 830 (Tex. 1994). See “Responding to MSJ,” §16, p. 814. If the movant does not satisfy its initial burden, the burden does not shift and the movant is not entitled to judgment as a matter of law. *Chavez v. Kan. City S. Ry. Co.*, 520 S.W.3d 898, 900 (Tex. 2017); *Amedisys, Inc.*, 437 S.W.3d at 511.

#### §5. DUTY TO CONFER BEFORE FILING MOTION

The Texas Rules of Civil Procedure do not require a movant to confer with opposing counsel before filing an MSJ. Thus, whether the movant has a duty to confer will be determined by local rule. See “Duty to Confer,” ch.6-1, §6, p. 273. Most counties that have extended the duty to confer to pretrial motions, however, have expressly excepted a duty to confer for summary-judgment motions. See, e.g., Harris Cty. Ct. Loc. R. 3.3.6 (MSJs excepted); Dallas Cty., Ct. Loc. R. 2.07(d) (same).

#### §6. MOVANT’S BURDEN

To prevail on a traditional MSJ, the movant must conclusively show that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Murphy Exploration & Prod. Co.—USA v. Adams*, 560 S.W.3d 105, 108 (Tex. 2018); see *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858, 865 (Tex. 2018) (party moving for summary judgment bears burden of proof). A fact is “material” only if it affects the outcome of the suit under the governing law. *West Trinity Properties v. Chase Manhattan*, 92 S.W.3d 866, 869 (Tex.App.—Texarkana 2002, no pet.); see *Gómez v. Cooke*, No. 14-15-00010-CV (Tex.App.—Houston [14th Dist.] Mar. 3, 2016, no pet.) (mem. op.). And a matter is conclusively established if reasonable minds cannot differ as to the conclusion to be drawn from the evidence. *Ebrahimi v. Caliber Home Loans, Inc.*, No. 05-18-00456-CV (Tex.App.—Dallas Apr. 15, 2019, pet. denied) (mem. op.); *Cent. Tex. Orthopedic Prods., Inc. v. Espinoza*, No. 04-09-00148-CV (Tex.App.—San Antonio Dec. 9, 2009, pet. denied) (mem. op.). When both parties move for summary judgment, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *Guynes v. Galveston Cty.*, 861 S.W.2d 861, 862 (Tex. 1993); *Microlaser Therapy Corp. v. White*, No. 05-17-00761-CV (Tex.App.—Dallas Nov. 16, 2018, pet. denied) (mem. op.). The requirements necessary to satisfy this burden will vary depending on whether the movant is a claimant or defending party.



### §6.1 Plaintiff as movant – prove essential elements.

**§6.1.1 Generally.** A plaintiff that moves for summary judgment on its own claim can prevail on its MSJ if the plaintiff conclusively proves all essential elements of its cause of action as a matter of law. *Black v. Victoria Lloyds Ins. Co.*, 797 S.W.2d 20, 27 (Tex. 1990); *Casso v. Brand*, 776 S.W.2d 551, 556 (Tex. 1989). A plaintiff-movant is under no initial obligation to negate affirmative defenses raised in the defendant's answer; the mere pleading of an affirmative defense will not prevent summary judgment in favor of a plaintiff that conclusively proves all essential elements of its cause of action as a matter of law. See “*Moore*” *Burger, Inc. v. Phillips Petroleum Co.*, 492 S.W.2d 934, 936-37 (Tex. 1972); *Jourdan v. Jacobs*, No. 04-17-00487-CV (Tex.App.—San Antonio Aug. 1, 2018, no pet.) (mem. op.); *Matkin v. Am. Express Centurion Bank*, No. 05-17-01438-CV (Tex.App.—Dallas Nov. 7, 2018, no pet.) (mem. op.). A plaintiff-movant need only address the opposing party's affirmative defense when it is properly raised in the opposing party's own MSJ or MSJ response. See *TPS Freight Distributors, Inc. v. Tex. Commerce Bank-Dall.*, 788 S.W.2d 456, 459 (Tex.App.—Fort Worth 1990, writ denied); see, e.g., *Jourdan*, No. 04-17-00487-CV (although defendant raised affirmative defense of limitations in her answer to petition, she did not file her own MSJ nor did she file response to MSJ; defendant waived affirmative defense).

#### ► Presumption Cannot Shift Burden to Nonmovant ◀

A summary-judgment movant cannot use a presumption to shift the burden of raising a fact issue to the nonmovant. *Chavez v. Kan. City S. Ry. Co.*, 520 S.W.3d 898, 900 (Tex. 2017); e.g., *Mo.-Kan.-Tex. R.R. Co. v. City of Dall.*, 623 S.W.2d 296, 298 (Tex. 1981) (court erred when it held that movant “enjoyed a number of presumptions” that shifted burden to produce evidence at MSJ hearing away from movants and onto nonmovant); *Hardaway v. Lou Eda Korth Stubbs Nixon*, 544 S.W.3d 402, 409 (Tex.App.—San Antonio 2017, pet. denied) (evidence that is sufficient to establish inferred “ouster” in certain adverse-possession suits cannot be used to establish movant's right to summary judgment as a matter of law; inference cannot be drawn when reviewing grant of summary judgment). The presumptions and burden of proof for an ordinary or conventional trial are immaterial to the burden that a movant for summary judgment must bear. *Chavez*, 520 S.W.3d at 900; *Mo.-Kan.-Tex. R.R. Co.*, 623 S.W.2d at 298.

**§6.1.2 Damages.** Under Rule 166a(a), the movant does not have to prove damages—even when they are an essential element of the claim—if the movant chooses not to include them in the motion. See Tex. R. Civ. P. 166a(a), (c); *Direct Adver., Inc. v. Willow Lake, LP*, No. 13-14-00212-CV (Tex.App.—Corpus Christi Apr. 7, 2016, no pet.) (mem. op.). Instead, the court can render a partial summary judgment on liability and then try the issue of damages on its merits separately. *Direct Adver., Inc.*, No. 13-14-00212-CV; *Petro-Hunt, L.L.C. v. Wapiti Energy, L.L.C.*, No. 01-10-01030-CV (Tex.App.—Houston [1st Dist.] Mar. 8, 2012, pet. denied) (mem. op.); see Tex. R. Civ. P. 166a(a), (c), (e); *Trial v. Dragon*, 593 S.W.3d 313, 324 n.8 (Tex. 2019). See “Partial summary judgment,” §7.2, p. 799. But when damages are not reserved for a later ruling, the court cannot grant summary judgment in its entirety if the claimant has not proven its damages (i.e., if the claimant fails to show there is no genuine fact issue regarding the amount of damages). *Direct Adver., Inc.*, No. 13-14-00212-CV; see *Rosales v. Williams*, No. 01-09-00454-CV (Tex.App.—Houston [1st Dist.] Feb. 11, 2010, no pet.) (mem. op.); see also Tex. R. App. P. 44.1(b) (appellate court “may not order a separate trial solely on unliquidated damages if liability issues are contested”); *Guerra v. M.H. Equities, Ltd.*, No. 02-11-00261-CV (Tex.App.—Fort Worth June 14, 2012, no pet.) (mem. op.) (issue of unliquidated damages is rarely appropriate for MSJ).

**§6.2 Defendant as movant.** A defendant can prevail on its MSJ if it either pleads and conclusively establishes each essential element of an affirmative defense or conclusively disproves at least one element of the plaintiff's claim.



**§6.2.1 Establish essential elements of affirmative defense.** When a defendant moves for summary judgment on its own affirmative defense, the defendant can prevail on its MSJ and defeat the cause of action if the defendant pleads and conclusively establishes each essential element of that affirmative defense, leaving no issues of material fact. See *Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 609 (Tex. 2012); see, e.g., *Ryes v. Ross*, No. 01-18-00693-CV (Tex.App.—Houston [1st Dist.] Aug. 20, 2019, no pet.) (mem. op.) (movant did not conclusively establish statute-of-limitations defense); *Hernandez v. Blackburn*, No. 09-17-00452-CV (Tex.App.—Beaumont June 13, 2019, no pet.) (mem. op.) (movant conclusively established all requisite elements of official-immunity defense). An unpled affirmative defense can serve as a basis for summary judgment only when the affirmative defense is raised in the MSJ and the opposing party does not object to the lack of a proper pleading in its written response or before the court renders judgment. *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991); *Perez v. Thomas*, No. 02-18-00253-CV, n.1 (Tex.App.—Fort Worth June 6, 2019, no pet.) (mem. op.); *Walton v. City of Midland*, No. 11-03-00381-CV (Tex.App.—Eastland Aug. 31, 2005, pet. denied) (mem. op.); see Tex. R. Civ. P. 94 (affirmative defenses). See “Live pleadings & MSJ must be in sync,” §9.1, p. 802.

**§6.2.2 Disprove element of plaintiff’s cause of action.** When a defendant moves for summary judgment on the plaintiff’s claim, the defendant can prevail on its MSJ by conclusively disproving at least one essential element of the plaintiff’s cause of action. *Frost Nat’l Bank v. Fernandez*, 315 S.W.3d 494, 508 (Tex. 2010); *Little v. Tex. Dept. of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004); e.g., *Smith v. Harris Cnty.*, No. 01-18-00247-CV (Tex.App.—Houston [1st Dist.] Apr. 18, 2019, no pet.) (mem. op.) (movant disproved causal-connection element of plaintiff’s retaliation claim); *Fernandez v. Peters*, No. 03-09-00687-CV (Tex.App.—Austin Oct. 19, 2010, no pet.) (mem. op.) (movant disproved unlawful-dominion element of plaintiff’s conversion claim).

**§6.3 Counterclaimant (defendant) as movant.** When a defendant moves for summary judgment on its own counterclaim, the burden is the same as for a plaintiff moving for summary judgment on its own cause of action; the defendant can prevail on its MSJ for the counterclaim if the defendant conclusively establishes all essential elements of its claim as a matter of law. *Blue Wave Capital, LLC v. Brownsville Reg’l Hosp.*, No. 13-12-00416-CV (Tex.App.—Corpus Christi Sept. 5, 2013, no pet.) (mem. op.); *Rabe v. Dillard’s, Inc.*, 214 S.W.3d 767, 768 (Tex.App.—Dallas, no pet.). For an explanation of this burden, see “Plaintiff as movant – prove essential elements,” §6.1, p. 796.

**§6.4 Counterclaim respondent (plaintiff) as movant.** When a plaintiff, in the role of counterclaim respondent, moves for a summary judgment on a counterclaim filed by the defendant, the burden is the same as for a defendant moving for summary judgment; the counterclaim respondent can prevail on its MSJ if the respondent either (1) pleads and conclusively establishes each essential element of an affirmative defense or (2) conclusively disproves at least one element of the claimant’s counterclaim. E.g., *Luxurkey Mgmt. LLC v. Fuller*, No. 01-18-00315-CV (Tex.App.—Houston [1st Dist.] June 27, 2019, no pet.) (mem. op.); *Collins v. Bayview Loan Servicing, LLC*, 416 S.W.3d 682, 687 (Tex.App.—Houston [14th Dist.] 2013, no pet.). For an explanation of this burden, see “Defendant as movant,” §6.2, p. 796.

**§6.5 Competing summary-judgment motions.** When competing summary-judgment motions are filed, each party bears the burden of establishing that it is entitled to judgment as a matter of law. *Tarr v. Timberwood Park Owners Ass’n, Inc.*, 556 S.W.3d 274, 278 (Tex. 2018); *City of Garland v. Dall. Morning News*, 22 S.W.3d 351, 356 (Tex. 2000). Neither party can prevail because of the other’s failure to discharge its burden. *Microlaser Therapy Corp. v. White*, No. 05-17-00761-CV (Tex.App.—Dallas Nov. 16, 2018, pet. denied) (mem. op.).





► **Jurisdiction can be Challenged in an MSJ** ◀

The absence of subject-matter jurisdiction, including one premised on sovereign immunity, can be raised in an MSJ. *Town of Shady Shores v. Swanson*, 590 S.W.3d 544, 550 (Tex. 2019); *State v. Lueck*, 290 S.W.3d 876, 884 (Tex. 2009); see *Alamo Heights Indep. Sch. Dist. v. Clark*, 544 S.W.3d 755, 770 (Tex. 2018).

## §7. SCOPE OF MSJ

**§7.1 All-claims summary judgment.** A party can move for summary judgment on all claims brought in the relevant pleadings. See Tex. R. Civ. P. 166a(a), (b), (e). Although a movant can seek summary judgment on all claims, the court has discretion to render a partial summary judgment instead of an all-claims summary judgment if the evidence warrants such a judgment. Tex. R. Civ. P. 166a(e); *Ayeni v. State*, 440 S.W.3d 707, 712 (Tex.App.—Austin, 2013, no pet.); e.g., *Pinnacle Anesthesia Consultants v. Fisher*, 309 S.W.3d 93, 100-03 (Tex.App.—Dallas 2009, pet. denied) (court granted summary judgment on 13 grounds related to employee’s termination, but reserved 3 grounds for trial); see Tex. R. Civ. P. 166a(a), (b).

**§7.2 Partial summary judgment.** A party can move for summary judgment on some, but not all, issues of a claim or defense and against some, but not all, parties; in other words, a movant is not required to seek summary judgment for all claims or against all opposing parties. See Tex. R. Civ. P. 166a(a), (b), (e); *Thompson v. Bott*, 380 S.W.2d 640, 641 (Tex.App.—Fort Worth 1964, no writ.); see, e.g., *GTFM Co. Inc. v. Rodriguez*, No. 04-12-00188-CV (Tex.App.—San Antonio Oct. 24, 2012, no pet.) (mem. op.) (claimant moved for summary judgment on two of five causes of actions brought in her pleadings). The court is also authorized to render summary judgment on less than all relief sought. Tex. R. Civ. P. 166a(e); *Pegasus Transp. Grp., Inc. v. CSX Transp., Inc.*, No. 05-12-00465-CV (Tex.App.—Dallas Aug. 14, 2013, no pet.) (mem. op.). A partial summary judgment is a decision on the merits, so the issues decided by the judgment cannot be litigated further unless the court sets the partial summary judgment aside. *Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995); see *Morris v. Branch*, No. 05-15-01249-CV (Tex.App.—Dallas Aug. 24, 2017, pet. denied) (mem. op.). Although a partial summary-judgment ruling conclusively disposes of its claims, the ruling is an interlocutory order that cannot be appealed until all other issues are adjudicated or the partial summary-judgment claims are severed from the underlying suit. *Chase Manhattan Bank, N.A. v. Lindsay*, 787 S.W.2d 51, 53 (Tex. 1990); *Pan Am. Petroleum Corp. v. Tex. Pac. Coal & Oil Co.*, 324 S.W.2d 200, 200-01 (Tex. 1959).

**§7.2.1 Disposal of remaining claims & issues.** A partial summary judgment, which is interlocutory when first rendered, can become final and appealable after it has been merged into a final judgment disposing of the whole case (i.e., disposes of all claims and parties). *DeNucci v. Matthews*, 463 S.W.3d 200, 207 (Tex.App.—Austin 2015, no pet.); *State Farm Fire & Cas. Co. v. Griffin*, 888 S.W.2d 150, 153 (Tex.App.—Houston [1st Dist.] 1994, no writ); see *Hyundai Motor Co.*, 892 S.W.2d at 855. See “Express finality,” §27.3.3, p. 866; “By interlocutory appeal,” §29.1, p. 867. For a discussion of whether a partial summary judgment survives a nonsuit, see “Nonsuit after MSJ is filed,” §17, p. 821.

**§7.2.2 Severance of partial summary-judgment claims.** A partial MSJ, which is interlocutory when first rendered, can become final and appealable if the claims that were conclusively disposed of by the summary-judgment ruling are severed from the underlying suit. *Chase Manhattan Bank, N.A.*, 787 S.W.2d at 53; *Willis v. Cantrell*, No. 09-05-00148-CV (Tex.App.—Beaumont Oct. 20, 2005, no pet.) (mem. op.); e.g., *Willborn v. Formosa Plastics Corp.*, No. 13-04-00007-CV (Tex.App.—Corpus Christi July 28, 2005, pet. denied) (mem. op.) (order for partial summary judgment that conclusively disposed of sexual-harassment and hostile-work-environment claims became final and appealable after being severed); see, e.g., *Crowson v. Wakeham*, 897 S.W.2d 779, 783 (Tex. 1995) (appellate timetable commenced for partial summary judgment with date of severance order); see also *Chase Manhattan Bank, N.A.*, 787 S.W.2d at 53 (fact that certain claims are not severable does not “transform the nature of the judgment from interlocutory to final”). The court has broad discretion when determining whether severance should be granted. *Guar. Fed.*



*Sav. Bank v. Horseshoe Operating Co.*, 793 S.W.2d 652, 658 (Tex. 1990); *Marshall v. Harris*, 764 S.W.2d 34, 35 (Tex.App.—Houston [1st Dist.] 1989, orig. proceeding); see Tex. R. Civ. P. 41. For a detailed discussion of how to move for severance, see “Motion for Severance,” ch. 6-7A, p. 602.

## §8. MOTION FOR SUMMARY JUDGMENT

**§8.1 Form.** An MSJ must be in writing. See Tex. R. Civ. P. 166a(c).

**§8.2 Formatting.** See “Formatting,” ch. 6-1, §7.2, p. 279.

**§8.3 Caption page.** Because several kinds of summary-judgment motions exist (i.e., traditional, no-evidence, and hybrid), the title on the caption page should reflect the particular kind of summary-judgment motion or motions being filed. See, e.g., *McConnell v. Coventry Health Care Nat’l Network*, No. 05-13-01365-CV (Tex.App.—Dallas July 30, 2015, pet. denied) (mem. op.) (addressing disparity between title and substance of motion); *Garcia v. Geistweidt*, No. 04-08-00251-CV (Tex.App.—San Antonio Apr. 22, 2009, no pet.) (mem. op.) (addressing alleged ambiguity caused by motion’s title). For a general discussion of the elements necessary for a proper caption page, see “Caption page,” ch. 6-1, §7.3, p. 279.

**§8.4 Type of summary judgment being sought.** The body of the motion should give fair notice to the nonmovant of its summary-judgment burdens by asserting the type of judgment being sought: a traditional MSJ under Rule 166a(c) (i.e., MSJ as a matter of law); a no-evidence MSJ under Rule 166a(i); or both (i.e., a hybrid motion). *Martinez v. Wilson Plaza Assoc., L.P.*, No. 13-02-00697-CV (Tex.App.—Corpus Christi Nov. 4, 2004, no pet.) (op. on reh’g) (mem. op.); see, e.g., *Garza v. CTX Mortg. Co., LLC*, 285 S.W.3d 919, 922 (Tex.App.—Dallas 2009, no pet.) (court treated motion as traditional MSJ because motion asserted movant was entitled to judgment “as a matter of law” rather than specifically moving for no-evidence MSJ); *Waite v. Woodard, Hall & Primm*, 137 S.W.3d 277, 281 (Tex.App.—Houston [1st Dist.] 2004, no pet.) (movant’s MSJ did not refer to Rule 166a(c) or attempt to establish that there was no issue of material fact; motion was not MSJ under Rule 166a(c)). See “Motion for No-evidence Summary Judgment,” ch. 6-11B, p. 874; “Motion for Hybrid Summary Judgment,” ch. 6-11C, p. 891. Generally, the court will consider the title, text, and substance of the motion to determine what kind of MSJ is being sought. See, e.g., *McConnell v. Coventry Health Care Nat’l Network*, No. 05-13-01365-CV (Tex.App.—Dallas July 30, 2015, pet. denied) (mem. op.) (considering title, standards relied on in motion, and absence of no-evidence standards to determine motion was traditional MSJ); *Garcia v. Geistweidt*, No. 04-08-00251-CV (Tex.App.—San Antonio Apr. 22, 2009, no pet.) (mem. op.) (considering caption, motion’s introductory paragraph, motion’s substance, and lack of evidence attached to motion to determine motion was no-evidence MSJ); see also *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013) (as long as motion clearly sets forth its grounds and otherwise meets the requirements under Rule 166a(c) or (i), it is sufficient). When the motion is unclear about what kind of summary judgment is being sought, the nonmovant should seek clarification by filing special exceptions with the court. See *Grace Interest, LLC v. Wallis State Bank*, 431 S.W.3d 110, 123 (Tex.App.—Houston [14th Dist.] 2013, pet. denied); *Martinez*, No. 13-02-00697-CV. When a court does not rule specifically on special exceptions to an MSJ but does grant the motion, the special exceptions are treated as having been effectively overruled. *Gonzalez v. VATR Constr. LLC*, 418 S.W.3d 777, 782 n.2 (Tex.App.—Dallas 2013, no pet.); *Martinez, L.P.*, No. 13-02-00697-CV. For a discussion of how to file special exceptions, see “Raising special exceptions,” §16.8, p. 819.

**§8.5 Body of motion – general matters.** See “Body of motion – general matters,” ch. 6-1, §7.4, p. 281.

**§8.6 Grounds.** The motion must state the grounds for relief. Tex. R. Civ. P. 21(a), 166a(c). For a discussion of the grounds that can be asserted, see “Movant’s Burden,” §6, p. 795.

**§8.7 Technical requirements for MSJ grounds.** The motion must adhere to certain requirements when presenting the substantive grounds for summary judgment; failure to follow these requirements can



result in the MSJ being legally insufficient as a matter of law and denied by the court. For a discussion of these requirements, see “Technical Requirements for MSJ Grounds,” §10, p. 803.

**§8.8 Relief.** The motion should state whether the movant is seeking a partial summary judgment or summary judgment of all claims. *See* Tex. R. Civ. P. 166a(a), (e); *see also* Tex. R. Civ. P. 21(a) (motion must state relief sought).

**§8.8.1 All-claims summary judgment.** When the movant seeks summary judgment on all claims, the language used in the MSJ will depend on whether the movant is bringing the claim or defending against it. If the movant is the claimant (e.g., plaintiff, counterclaimant), the movant should ask the court to grant its MSJ and request judgment in its favor on all claims being sought in the movant’s pleadings. *E.g., Christensen v. Coursetrends, Inc.*, No. 03-12-00821-CV (Tex.App.—Austin Sept. 3, 2014, pet. denied) (mem. op.); *Perex v. Sentry Ins.*, No. 04-13-00258-CV (Tex.App.—San Antonio Dec. 11, 2013, no pet.). If the movant is a defending party (e.g., defendant, counter-defendant), the movant should ask the court to grant its MSJ and request that the claimant take nothing. *E.g., Hercules Offshore, Inc. v. Guthrie*, No. 01-10-00968-CV (Tex.App.—Houston [1st Dist.] Feb. 28, 2013, pet. denied); *Sanders v. Shelton*, 970 S.W.2d 721, 723 (Tex.App.—Austin 1998, pet. denied). This is commonly referred to as a “take-nothing summary judgment.” *E.g., Adi v. Rapid Bail Bonding Co.*, No. 01-08-00290-CV (Tex.App.—Houston [1st Dist.] Feb. 18, 2010, no pet.) (mem. op.); *Stack v. Richman*, 286 S.W.3d 44, 45 (Tex.App.—Dallas 2009, pet. denied).

**§8.8.2 Partial summary judgment.**

**[1] Specific claims.** When the movant seeks partial summary judgment, the language used in the MSJ will depend on whether the movant is bringing the claim or defending against it. If the movant is the claimant (e.g., plaintiff, counterclaimant), the motion should ask the court to grant its MSJ and request judgment on the specific claims identified in its MSJ, as pled in the claimant’s petition. *See, e.g., Schwartzott v. Maravilla Owners Ass’n*, 390 S.W.3d 15, 19 (Tex.App.—Houston [14th Dist.] 2012, pet. denied); *Nelson’s Legal Investigating & Consulting v. Myrick*, No. 04-11-00158-CV (Tex.App.—San Antonio Dec. 7, 2011, no pet.) (mem. op.) (claimant moved for summary judgment on all claims except claim for attorney fees). If the movant is a defending party (e.g., defendant, counter-defendant), the motion should ask the court to grant its MSJ and request that the claimant take nothing on the specific claims identified in its MSJ, as pled in the claimant’s petition.

**[2] Established facts & further direction.** In a motion for partial summary judgment, the motion should ask the court to specify which facts are established as a matter of law and to direct further proceedings in the suit. *See* Tex. R. Civ. P. 166a(e); *Pegasus Transp. Grp., Inc. v. CSX Transp., Inc.*, No. 05-12-00465-CV (Tex.App.—Dallas Aug. 14, 2013, no pet.) (mem. op.) (n. 3); *Gustilo v. Gustilo*, No. 14-93-00941-CV (Tex.App.—Houston [14th Dist.] July 3, 1996, no pet.) (mem. op.); *e.g., Camarillo v. Cabinets by Michael, Inc.*, No. 02-17-00154-CV (Tex.App.—Fort Worth June 28, 2018, pet. denied) (mem. op.) (in limited motion to reconsider, movants asked court to order that two facts were established as a matter of law).

**§8.8.3 Attorney fees.** When relevant, the motion should ask for attorney fees. A party can recover attorney fees only if provided for by statute or by contract. *Gulf States Utilities Co. v. Low*, 79 S.W.3d 561, 567 (Tex. 2002); *Worldwide Asset Purchasing v. Rent-a-Center*, 290 S.W.3d 554, 570 (Tex.App.—Dallas 2009, no pet.); *see, e.g., Cossio v. Delgado*, No. 01-17-00704-CV (Tex.App.—Houston [1st Dist.] June 28, 2018, no pet.) (mem. op.) (under CPRC §38.001, movant who prevailed on breach-of-contract claim was entitled to reasonable attorney fees only if his summary-judgment evidence conclusively established amount of fees). attorney fees can often result in a fact issue that cannot be resolved by summary judgment and must be tried by a jury or submission. *See GTFM Car Co. v. Rodriguez*, No. 04-12-00188-CV (Tex.App.—San Antonio Oct. 24, 2012, no pet.) (mem. op.); *see, e.g., CSFB 1998-PI Buffalo Speedway Office, Ltd. P’ship v. Amtech Elevator Servs. Co.*, No. 01-08-00639-CV (Tex.App.—Houston [1st Dist.] Aug. 19, 2010, no pet.).



(mem. op.) (attorney’s affidavit, at minimum, raised fact question regarding reasonable amount of attorney fees). The proof necessary to sustain an award of attorney fees in a summary-judgment case must meet the same standard of proof as required for any other cause of action subject to summary judgment. See *Grimes v. Corpus Christi Transmission Co.*, 829 S.W.2d 335, 339-40 (Tex.App.—Corpus Christi 1992, writ denied); *Bakery Equip. & Serv. Co., Inc. v. Aztec Equip. Co.*, 582 S.W.2d 870, 873 (Tex.App.—Corpus Christi 1979, no writ). In other words, attorney fees can be awarded in a summary judgment only if the evidence is conclusive. *Top Cat Ready Mix, LLC v. All. Trucking, L.P.*, No. 05-18-00175-CV (Tex.App.—Dallas Jan. 22, 2019, no pet.) (mem. op.); *Tex. Black Iron, Inc. v. Arawak Energy Int’l Ltd.*, 566 S.W.3d 801, 824 (Tex.App.—Houston [14th Dist.] 2018, pet. denied). An attorney’s affidavit regarding the reasonableness of legal fees is proper summary-judgment evidence. *GTFM Car Co.*, No. 04-12-00188-CV; see Tex. R. Civ. P. 166a(c), (f); see, e.g., *Sundance Minerals, L.P. v. Moore*, 354 S.W.3d 507, 514-15 (Tex.App.—Fort Worth 2011, pet. denied) (evaluating attorney’s affidavit submitted as evidence to support award of attorney fees); *Amtech Elevator Serv. Co.*, No. 01-08-00639-CV (same). If the affidavit sets forth the attorney’s qualifications, opinion regarding reasonable attorney fees, and the basis for the opinion will generally be sufficient to support summary judgment, if uncontroverted. *Top Cat Ready Mix, LLC*, No. 05-18-00175-CV; *In re Macy Lynne Quintanilla Tr.*, No. 04-17-00753-CV (Tex.App.—San Antonio Oct. 10, 2018, no pet.) (mem. op.). See “Affidavits,” §21.3, p. 835. For a general discussion of proving up attorney fees, see “Proving Up Attorney Fees,” ch. 6-5E, p. 572.

**§8.8.4 Costs.** The motion should ask for costs. Rule 131, which provides that a successful party to a suit is entitled to recover costs from the opposing party unless otherwise provided, applies to summary-judgment proceedings. See Tex. R. Civ. P. 131; *Saudi Refining, Inc. v. Combs*, No. 03-07-00379-CV (Tex.App.—Austin Oct. 12, 2007, no pet.) (mem. op.); *Straza v. Friedman, Driegert & Hsueh*, 124 S.W.3d 404, 406 (Tex.App.—Dallas 2003, pet. denied); *Tex. River Barges v. City of San Antonio*, 21 S.W.3d 347, 358 (Tex.App.—San Antonio 2000, pet. denied); see, e.g., *Ajudani v. Walker*, 232 S.W.3d 219, 224 (Tex.App.—Houston [1st Dist.] 2007, no pet.) (TRCP 131 was inapplicable to movant’s MSJ because Tex. Prob. Code §34A provided otherwise). The court is not required to assess costs for the summary judgment to be a final, appealable order. *Saudi Refining, Inc.*, No. 03-07-00379-CV; *Straza*, 124 S.W.3d at 406.

### §8.9 Certificates.

**§8.9.1 Certificate of service.** The motion should include a certificate of service if service is being accomplished by the party or the attorney of record. See “Certificate of service,” ch. 6-1, §7.7.1, p. 288.

**§8.9.2 Certificate of conference.** The motion should include a certificate of conference if the movant is required by local rule to confer with opposing counsel before filing the motion. See “Duty to Confer Before Filing Motion,” §5, p. 795; “Certificate of conference,” ch. 6-1, §7.7.2, p. 288.

**§8.10 Notice of hearing.** The motion can include a notice of hearing or submission if local rules permit the notice to be included in the motion. For a discussion of giving notice of an MSJ hearing, see “Serving motion & notice,” §15, p. 812. For a general discussion of giving notice, see “Notice of hearing,” ch. 6-1, §7.8, p. 290.

### §8.11 Attachments.

**§8.11.1 Supporting evidence.** All claims should be supported by admissible evidence that can include deposition transcripts, interrogatory answers, discovery responses, pleadings, admissions, affidavits, stipulations of the parties, and authenticated or certified public records. For a detailed discussion of summary-judgment proof, see “Summary-Judgment Proof – Mechanics,” §20, p. 826; “Summary-Judgment Proof – Kinds,” §21, p. 833. For a general discussion of supporting evidence, see “Referencing supporting evidence,” ch. 6-1, §7.4.2, p. 282, and “Supporting evidence,” ch. 6-1, §7.9.1, p. 286.



§8.11.2 **Proposed order.** The motion should be accompanied by a proposed order if required by local rule. See “Proposed order,” ch. 6-1, §7.9.2, p. 287.

## §9 LIVE PLEADINGS

The court determines an MSJ, in part, based on the pleadings (i.e., petition and answer) that are on file at the time of the hearing; these are known as “live pleadings.” See Tex. R. Civ. P. 166a(c); *Krainz v. Kodiak Res., Inc.*, 436 S.W.3d 325, 329 (Tex.App.—Austin Aug. 30, 2013, pet. denied).

§9.1 **Live pleadings defined.** An amended pleading, timely filed or granted by leave of court, supersedes all earlier pleadings and becomes a party’s controlling petition or answer in the case; once an amended pleading has been filed, the court must disregard the earlier versions of the pleadings. See Tex. R. Civ. P. 65; *Sosa v. Central Power & Light*, 909 S.W.2d 893, 895 (Tex. 1995) (per curiam); *Carto Props., LLC v. Briar Capital, L.P.*, No. 01-15-01114-CV (Tex.App.—Houston [1st Dist.] June 13, 2017, pet. denied) (mem. op.); *Western Riders Leasing, Inc. v. Facey Enterprises NV, Ltd.*, No. 13-03-057-CV (Tex.App.—Corpus Christi June 3, 2004, pet. denied) (mem. op.). In other words, a pleading that has been superseded by an amended pleading no longer constitutes a pleading in the case. See *MBank Brenham, N.A. v. Barrera*, 721 S.W.2d 840, 842 (Tex. 1986); *Kirk v. Head*, 152 S.W.2d 726 (Tex. 1941). At an MSJ hearing, the most recent pleading that was timely-filed or allowed by court is considered to be the live pleading, regardless of what pleading was live at the time the MSJ was filed. *Western Riders Leasing, Inc.*, No. 13-03-057-CV; see *Taylor v. Langham*, No. 09-14-00193-CV (Tex.App.—Beaumont Nov. 21, 2014, no pet.) (mem. op.). For an explanation of filing amended pleadings in an MSJ case, see “Amending Pleadings,” §12, p. 806. For a thorough explanation of amended pleadings generally, see “Amending Pleadings,” ch. 2-7, §6, p. 168.

### ► Trial by Consent Applies to Summary Judgment ◀

Generally, unpled claims or defenses that are tried by express or implied consent of the parties are treated as if they were raised by the pleadings; summary judgment is no different. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 756 n.1 (Tex. 2007) (per curiam); *Roark v. Stallworth Oil and Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991). Trial by consent is limited to exceptional circumstances in which the record reflects that both parties were aware of an unpled issue, the issue was actually tried, and the other party did not object. See *John C. Flood of DC, Inc. v. Supermedia, L.L.C.*, 408 S.W.3d 645, 655 (Tex.App.—Dallas 2013, pet. denied); *PAS, Inc. v. Engel*, 350 S.W.3d 602, 610-11 (Tex.App.—Houston [14th Dist.] June 28, 2011, no pet.); *Maswoswe v. Nelson*, 327 S.W.3d 889, 895 (Tex.App.—Beaumont 2010, no pet.). If a party does not object to a variance between the MSJ and the pleadings (e.g., the nonmovant does not object to an unpled issue), an appellate court will not reverse a summary judgment simply because of a pleading defect. *Roark*, 813 S.W.2d at 494-95; *Irwin v. Nortex Found. Designs, Inc.*, No. 02-08-00436-CV (Tex.App.—Fort Worth Aug. 13, 2009, no pet.) (mem. op.); see *Pathak v. Harris Cty. Hosp. Dist.*, No. 14-08-00020-CV (Tex.App.—Houston [14th Dist.] Mar. 24, 2009, no pet.) (mem. op.). But at least one court has found that if a non-movant does not respond to the MSJ at all, trial by consent is inappropriate because the issue is never “tried” in the summary-judgment context. *Maswoswe*, 327 S.W.3d at 895-96.

§9.2 **Live pleadings & MSJ must be in sync.** The grounds in the live pleadings must support the MSJ. See Tex. R. Civ. P. 166a(c); *Owens v. McLeroy, Litzler, Rutherford, Bauer & Friday, P.C.*, 235 S.W.3d 388, 391 (Tex.App.—Texarkana 2007, no pet.); see, e.g., *Simmons v. Priority Bank, N.A.*, No. 05-16-01130-CV (Tex.App.—Dallas Jan. 29, 2018, no pet.) (mem. op.) (although nonmovant alluded to claim of misrepresentation in her MSJ response, she never amended her pleading to allege this cause of action or seek relief for that claim, so claim was never presented to court). It is not uncommon for a court to identify the