Tunnel Vision: Appellate Review of A Summary Judgment Order Stating A Specific Ground for the Judgment

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I. Introduction

"I'll prepare an order," you say as the judge notes on his docket sheet that he has rendered summary judgment disposing of your opponent's entire case. Your motion offered three grounds for summary judgment. You know that if the judge signs a general order, your opponent must attack all three grounds on appeal.[1]

"Not so fast, counselor," your opponent responds. He then persuades the judge to direct you to make your order specify the ground the judge relied on in granting the motion. The problem is, the judge adopted the most tenuous of your three arguments. Are you condemned to rely only on that ground on appeal? Can the appellate court affirm the judgment on the other grounds in your motion? This article will address these questions by discussing the status of the law, and advocate that Texas courts adopt the federal approach to this issue.

II. Summary Judgment Must Be Based On Grounds Presented In the Motion For Summary Judgment

If a Texas court signs a general order granting summary judgment, the non-movant on appeal must negate every ground specified in the movant's motion.[2] A general order merely recites that the court found the motion meritorious and rendered summary judgment for the movant. If any ground in the motion for summary judgment will support the judgment, the appellate court will affirm.[3] Thus it is almost always preferable for the movant to prepare a general order.

It is appropriate to note here that the Texas Supreme Court recently held that the specific grounds for a motion for summary judgment must be expressly presented in the *motion* for summary judgment itself and not in a brief filed contemporaneously with the motion or in the summary judgment evidence.[4] However, it appears that a combined motion for summary judgment and brief in support will suffice. The better practice when combining the motion and brief is to caption the first portion of the pleading "Motion for Summary Judgment" and immediately specify the grounds in support of the motion for summary judgment after the introductory paragraph. The portion of the pleading containing your legal arguments should be separated from the motion with a subcaption, such as "Brief in Support of Motion for Summary Judgment."

As in the hypothetical given above, the non-movant will sometimes prevail upon the judge to sign an order specifying the ground upon which he based the judgment. Or perhaps the order will have been prepared by counsel unfamiliar with the advantages of a general order. Hence, the question arises, what is the effect of specifying one ground among several asserted in the motion?

Prior to 1978, one rule governed appellate review of summary judgments in Texas: Parties could assert *any* ground to either support or reverse the judgment on appeal, even if that ground were neither presented in the motion or response thereto, nor specified as the basis of the judgment.[5] Because the non-movant had no duty to specify his opposition to the motion for summary judgment, he could raise new and additional objections to the summary judgment on appeal. This practice resulted in frequent reversals and ultimately rendered summary judgments a useless and abandoned procedure.[6]

In an attempt to make summary judgment a more viable procedure, the State Bar Committee on the Administration of Justice recommended changes to Rule 166A "that would require the non-movant to provide some assistance to the trial judge in narrowing the issues to be decided."[7] The Supreme Court Rules Advisory Committee adopted that recommendation, and in 1977 the supreme court made two important revisions to section (c) of Rule 166A:

> The judgment sought shall be rendered forthwith if ... there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law [1] on the issues as expressly set out in the motion or answer

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> *or other response shall not be considered on appeal as grounds for reversal.*[8]

These revisions are the textual source of the post-1978 rule that a summary judgment can neither be affirmed nor reversed on any issue or ground not specifically "presented" in the summary judgment motion or response.[9] Nothing in the revisions, however, supports the notion that a summary judgment must on appeal "live or die" on the ground chosen by the trial court as the basis for the judgment.

III. Texas Appellate Courts Must Confine Their Review of A Summary Judgment To The Ground Specified, If Any, By The Trial Court In The Judgment

The source for the 1978 revisions to Rule 166a was Federal Rule of Civil Procedure 56.[10] The federal courts have consistently interpreted Rule 56 to permit affirmance of a summary judgment on any ground contained in the motion, regardless of whether that ground was specified in the judgment.[11] In fact, the Fifth Circuit will affirm a summary judgment on any ground, even if it was not presented in the motion.[12] While the Fifth Circuit approach is clearly prohibited by Rule 166a, there is nothing in Rule 166a prohibiting a court from affirming a summary judgment on any of the grounds specified in the motion, whether set forth in the judgment or not.

Nevertheless, the Texas Supreme Court has held when the trial court's order explicitly specifies the ground relied on for the summary judgment ruling, an appellate court reviewing the order may *not* consider an independent summary judgment ground not specified in the trial court summary judgment order.[13] The Supreme Court confirmed that when reviewing a summary judgment granted on general grounds, the appellate court may consider whether *any* theories asserted by the summary judgment movant will support the summary judgment. But, where the trial court's order explicitly specifies the ground relied on for the summary judgment ruling, the judgment can be affirmed only if the theory relied on by the trial court is meritorious; otherwise the case must be remanded to allow the trial court to rule on the remaining grounds.[14] The supreme court adopted reasoning first advanced by the Austin Court of Appeals.[15] The Austin Court reasoned that when a party has sought summary judgment on grounds A and B, a judgment expressly granting summary judgment on ground A, without mentioning ground B, can only be construed to mean that the trial court did not consider ground B.[16] Accordingly, to construe such a judgment otherwise would be to permit and encourage an inference that is neither warranted by the record nor in keeping with the spirit of Rule 166a(c).[17]

Bootstrapping, the supreme court then continued that if it were to adopt a practice of affirming on alternate grounds where the trial court specifically ruled on only one ground, non-movants would be required to negate all grounds on appeal, even those not considered by the trial court.[18] The supreme court reasoned that the appealing party would thus be required to argue issues on appeal that the trial court never considered or ruled on. The court defended its holding as "the most judicious procedure."[19]

According to the supreme court, affirming a summary judgment on an independent ground not specifically considered by the trial court usurps the trial court's authority to consider and rule on issues before it and denies the appellate court the benefit of the trial court's decision on the issue.[20] The court suggested that such a practice would result in appellate courts rendering decisions on issues not considered by the trial court and would void the trial court's decision without allowing it to first consider the alternate grounds.[21] The supreme court also made the questionable pronouncement that affirming on grounds raised in the motion but not specifically considered by the trial court would not promote judicial economy. Instead, it would encourage summary judgment movants to obtain a specific ruling from a trial judge on a single issue, try again with alternate theories at the court of appeals, and then assert the same or additional alternate theories before the Supreme Court.[22] The supreme court concluded that our system of appellate review, as well as judicial economy, is better served when appellate courts only consider those summary judgment issues contemplated and ruled on by the trial court.[23]

In concurring and dissenting opinions, Chief Justice Phillips and Justices Cornyn, Hecht, and Gonzalez disagreed with the court's blanket rule prohibiting an appellate court from considering alternate grounds specified in a motion for summary judgment but not specified in the judgment. In their dissenting opinions, Justices Hecht, Cornyn, and Gonzalez cited Texas Rule of Appellate Procedure 81(c), which requires courts of appeals, when reversing a trial court judgment, to render the judgment that should have been rendered, unless a remand is necessary. According to Justices Hecht and Cornyn, this rule authorizes the appeals court to render judgment on a ground urged for summary judgment but not ruled on by the trial court.[24] Justice Hecht argued that by permitting affirmance of a judgment on grounds not relied on by the trial court, Rule 81 encourages trial courts to be specific in their rulings without risking a remand, rather than simply granting summary judgment motions in their entirety in order to enhance the chances of affirmance.[25] None of the dissenting justices, however, would go so far as to hold that an appellate court should always address grounds for summary judgment raised by a motion in the trial court but not expressly adjudicated. Justice Hecht noted that if it appeared that a ground was abandoned in the trial court, or was not fully addressed, or was not fully argued on appeal, it might be inappropriate to render judgment on it.[26]

In a concurring opinion, Chief Justice Phillips argued in favor of adoption of a flexible rule that would be applied on a case-specific basis allowing appellate courts to decide whether a summary judgment should be affirmed on grounds that are not

specified in the judgment but are specified in the motion.[27] Justice Gonzales, in a dissent, pointed out that the courts of appeals were not in full accord on whether the grounds presented by a summary judgment motion but not made the basis of the judgment may be considered by a reviewing court as a basis for affirming the judgment.[28] Justice Gonzales posited that when the issues are properly preserved, the reviewing court should be able to consider alternate grounds for affirming a summary judgment.[29] However, he too was unwilling to hold that an appellate court should always address all grounds for summary judgment presented by a motion in the trial court but not expressly ruled on by the trial court. He joined Justice Hecht in stating that if a ground were abandoned or otherwise withdrawn, it would be improper for the appellate court to render judgment upon it.[30]

Justice Gonzales suggested that judicial economy supports the adoption of a procedure whereby the reviewing appellate court may affirm on grounds specified in the motion but not included in the judgment.[31] He argued that the non-movant not only has the opportunity to raise all issues that preclude judgment at the time the motion is considered, but in fact must do so in order to raise those complaints on appeal.[32]

IV. Courts in Other Jurisdictions Will Affirm a Summary Judgment on Any Viable Ground Specified in The Motion

The U.S. Supreme Court has held that federal courts of appeals may affirm a district court judgment on a ground different than that chosen by the district court.[33] The Fifth Circuit adheres to the rule that a court of appeals may affirm a summary judgment on grounds other than those relied upon by the district court when there is an independent and adequate basis for that disposition.[34] In *Golden Nugget, Inc. v. American Stock Exchange, Inc.*, 828 F.2d 586 (9th Cir. 1987), the Ninth Circuit, discussing its authority to affirm on an alternate basis, stated:

> Whether, as a prudential matter, we should do so depends on the adequacy of the record and whether the issues are purely legal, putting us in essentially as an advantageous a posture to decide the case as would be the district court.[34]

Concluding that the rulings to be made in that case were legal in nature, the court stated that it would foster judicial economy to examine alternative grounds in support of the judgment.[36]

State courts in numerous other jurisdictions also follow the rule permitting affirmance of a summary judgment on grounds other than those specified in the judgment.[37]

V. Texas Courts Should Be Permitted to Affirm A Summary Judgment On Any Ground Specified in The Motion

Plainly, "judicial economy" is best served by a rule that permits the appellate court to affirm the rendition of a summary judgment on any valid ground asserted by the movant regardless of whether that ground was specified as the basis for the trial court's judgment. The (divided) Texas Supreme Court's reasoning that to do so usurps the trial court of its authority is unsound. This reasoning — and the Court's entire opinion — is predicated on the faulty premise that when a trial court specifies one ground for summary judgment it must be assumed the Court did not consider the alternate grounds. The trial court has the opportunity to consider each and every ground presented by the movant in its motion for summary judgment, and the mere fact that the Court selects one ground over others does not warrant an assumption that the trial court did not consider the other grounds. Indeed, the Court's indulgence of this assumption flies in the face of its ruling in another recent case that when a summary judgment contains a standard Mother Hubbard clause it must be presumed that the trial court considered, and intended to dispose of, all claims presented in the motion.[38]

The Texas Supreme Court's reasoning that the proposed rule disserves judicial economy is equally tenuous. If the ground not specified in the summary judgment order supports rendition of judgment for the movant as a matter of law, it would seem more efficient for the appellate court to render judgment rather than waste judicial resources by remanding the case to the trial court. Since the rule adopted by the Supreme Court precludes that result, appellate courts probably will identify the valid ground for the motion for summary judgment (assuming there is one) and then remand the case to the trial court so that the trial court may reconsider the motion for summary judgment and seize upon the ground identified by the appellate court in dicta as an appropriate basis for granting summary judgment. This result — forcing litigants to return to the trial court for a decision on issues already presented both there and on appeal — undermines judicial economy in several important ways.

First, it subverts the primary purpose of summary judgment practice which is to permit either party to obtain the prompt disposition of a case involving "unmeritorious claims or untenable defenses," without the necessity of trial.[39] Indeed, the supreme court's seminal holding in *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex. 1979) emphasizes that Rule 166(a) was amended to insure that more cases could be decided in a summary fashion. Second, in holding that a movant must return to the trial court for a decision on issues already presented both there and on appeal, the Texas Supreme Court's approach not only rewrites Rule 166(a), but actually doubles the burden on all parties, further delays the proceedings, and increases the Court's workload by giving the non-movant a second opportunity to breathe life into a questionable claim by manufacturing a fact

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question in order to avoid summary judgment. For both of these reasons, there is simply no reasoned basis for requiring parties to go back to the trial court when the appellate court can decide the same issues on the same record under the same standard of review.

Conversely, no injustice results when the court of appeals first passes on the alternate grounds. Because the alternate grounds are required to be expressly presented in the motion for summary judgment, the opponent has an opportunity to respond below. Further, the Appellant's burden is the same on appeal as it is at trial, as is the standard for the Court's decision.[40]

Finally, allowing the appellate court to consider alternate grounds finds ample support in related appellate standards of review,[41] and is consonant with the federal practice that allows appellate courts to affirm summary judgment on grounds other than those relied upon by the trial court.

VI. Conclusion

The better rule is to allow the reviewing court to consider all grounds specified in the motion for summary judgment, regardless of whether they were considered by the trial court. Unless and until this rule is adopted, practitioners representing summary judgment movants should always attempt to persuade the trial court to sign a general order granting summary judgment. Conversely, practitioners representing non-movants should seek to persuade the trial court to sign a specific order. In fact, at the hearing, if the court appears inclined to grant the motion for summary judgment, counsel representing the non-movant should identify the most tenuous ground stated in support of the motion for summary judgment and request that the judge, if he or she intends to grant summary judgment, specify that as the basis for the motion for summary judgment.

Endnotes

1. *Rogers v. Ricene Enter., Inc.*, 772 S.W.2d 76, 79 (Tex. 1989).
2. *Id.*
3. *Id.*
4. *McConnell v. Southside School District*; 858 S.W.2d 337 (Tex. 1993).
5. *See Womack v. Allstate Ins. Co.*, 156 Tex. 467, 296 S.W.2d 233, 237 (1956); *Phil Phillips Ford, Inc. v. St. Paul Fire & Mar. Ins. Co.*, 465 S.W.2d 933, 937 (Tex. 1971)(if the summary judgment evidence is sufficient, the appellate court can affirm the judgment on grounds different from those specified in the motion); *Swilley v. Hughes*, 488 S.W.2d 64, 67-68 (Tex. 1972)(without filing any response or even appearing at the hearing, appellant could raise ground of insufficiency of summary judgment proof).
6. *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671, 675 (Tex. 1979); *Combs v. Fantastic Homes, Inc.*, 584 S.W.2d 340, 343 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.).
7. *Clear Creek*, 589 S.W.2d at 675.
8. *Id.* at 676. Italics in the original.
9. *Id.*; *Central Educ. Agency v. Burke*, 711 S.W.2d 7, 9 (Tex. 1986) (court of appeals erred in reversing summary judgment on grounds not raised in response to motion for summary judgment); *Hall v. Harris County Water Control & Imp. Dist.*, 683 S.W.2d 863, 867 (Tex. App.—Houston [14th Dist.] 1984, no writ) ("We refuse to address the additional [grounds] because they were not expressly presented in the motion for summary judgment").
10. The comments to Rule 166a disclose that Federal Rule 56 was the source of Rule 166a; therefore, the construction placed on the federal rule was previously adopted by the Supreme Court and should instruct its interpretation of Rule 166a. *Fennell v. Trinity Portland Cement Co.*, 204 S.W. 796, 797 (Tex. Civ. App.—Texarkana 1919, writ ref).
11. *See* 8 C. Wright and A. Miller, Federal Practice and Procedure § 2716 at 657 (1981) (citing cases).
12. *Pitts v. American Security Life Ins. Co.*, 931 F.2d 351, 357 (5th Cir. 1991).
13. *State Farm Fire & Cas. Co. v. S. S. & G. W.*, 858 S.W.2d 374, 380 (Tex. 1993).
14. *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 484 n.6 (Tex. 1993).
15. *E. A. Carlisle v. Phillip Morris, Inc.*, 805 S.W.2d 498, 518 (Tex. App.—Austin 1991, writ denied).
16. *Id.* at 518.
17. *State Farm*, 858 S.W.2d at 381.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 387.
25. *Id.*
26. *Id.*
27. *Id.* at 382.
28. *Id.* at 384.
29. *Id.*
30. *Id.* at 384 n.2.
31. *Id.* at 384.
32. *Id.*
33. *Thigpin v. Roberts*, 468 U.S. 27, 30 (1984); *Schweiker v. Hogan*, 475 U.S. 569, 684-85 (1982).
34. *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435 (5th Cir. 1993); *Morales v. Dept. of Army*, 947 F.2d 766 (5th Cir. 1991).
35. 828 F.2d at 590.
36. *Id.* at 590.
37. *See, e.g., Bryce v. St. Paul Fire & Marine Co.*, 783 P.2d 246 (Ct. App. Arizona 1989, rev. denied); *Wright v. State*, 824 P.2d 718, 720 (Alaska 1992); *Kniaz v. Benton Burough*, 535 A.2d 308, 309-10 (Pa. CMWLTH 1988); *Landis v. Allstate Ins. Co.*, 516 So.2d 305, 307 n. 3 (Ct. App. Fla. [3rd Dist.] 1987), *op. approved*, 546 So.2d 1051 (Fla. 1989); *In re Marriage of McFarlane*, 513 N.E.2d 1146 (Ct. App. Ill. [2d Dist.] 1987).
38. *See Mafrige v. Ross*, 866 S.W.2d 590 (Tex. 1993).
39. *See Gulbenkian v. Penn*, 151 Tex. 412, 415, 252 S.W.2d 929, 931 (Tex. 1952).
40. *Gibbs v. General Motors Corporation*, 450 S.W.2d 827, 828 (Tex. 1970) "[T]he question on appeal, as well as in the trial court ... is whether the summary judgment proof establishes as a matter of law that there is no genuine issue of fact as to one or more of the essential elements of the plaintiff's cause of action").
41. Texas Rule of Civil Procedure 324(c) provides that when judgment is rendered notwithstanding the verdict, the appellee may bring forward by cross point "any ground which would have vitiated the verdict or would have prevented an affirmative judgment had one been rendered by the trial court in harmony with the verdict ...." *See Motsenbocker v. Wyatt*, 369 S.W.2d 319 (Tex. 1963). Similarly, when "reviewing the judgment of the trial court where there are no findings of fact and conclusions of law requested or filed, the judgment must be upheld upon any legal theory that finds support in the evidence." *Strackbein v. Prewitt*, 671 S.W.2d 37, 38 (Tex. 1984).