

SUBJECT: Burden of proof requirements in motions for summary judgment

COMMITTEE: Civil Practices — committee substitute recommended

VOTE: 6 ayes — Gray, Hilbert, Bosse, Nixon, Roman, Zbranek
0 nays
1 present, not voting — Dutton
2 absent — Alvarado, Goodman

WITNESSES: For — Harold Freeman, Texas Medical Association; Michael White, Greater Houston Partnership; Dinah Welsh, Texas Hospital Association; Anthony Grigsby, Texas Civil Justice League; Robert Kamm, Texas Association of Business and Chambers of Commerce; Richard Trabulsi, Texans for Lawsuit Reform
Against — Hartley Hampton and Mike Slack, Texas Trial Lawyers Association
On — Scott Brister

BACKGROUND : Summary judgment is a procedural device available in both Texas and federal courts for adjudicating civil cases without going through a trial. Summary judgment motions are governed by Rule 166a of the Texas Rules of Civil Procedure. Under the rule, a motion for summary judgment is granted when there is no genuine issue as to any material fact and the judgment must be rendered as a matter of law. Motions for summary judgment are argued in a case before any evidence is presented, but the judgment standards are based on the burden of proof that would be required at trial.

A case at trial also can be decided before it is presented to the jury on a motion for directed verdict. The evidence, even when viewed in the light most favorable to the opposing party, has to conclusively show that no other verdict could be rendered as a matter of law in order for the court to render a

directed verdict. If a case goes to the jury, the burden of proof most often required is a “preponderance of the evidence.”

Texas civil procedure has two other devices affecting summary judgment practice: the general denial and the affirmative defense. Texas law allows the defendant named in a suit to respond with a general statement denying the allegations. Texas procedures also allow a defendant to raise an affirmative defense, negating the plaintiff’s claim by a preponderance of the evidence. Any affirmative defenses must be specifically stated in the defendant’s answer to the plaintiff’s pleadings.

Federal civil procedure does not allow a general denial, but requires the defendant to specifically respond to each and every allegation made by the claimant in the pleadings.

DIGEST:

CSHB 95 would change the burden of proof in summary judgment motions overriding Rule 166a of the Texas Rules of Civil Procedure.

A claimant's motion for summary judgment could be granted if the claimant proved each essential element of the claim and that there was no genuine issue of material fact with respect to the claim or issue. The burden of proof required would be the same as that required for a directed verdict on the claim. The court could not grant the claimant's motion if the defendant showed any issue of fact about any essential element of the claim or about any essential element of an affirmative defense.

A defendant's motion for summary judgment on any claim or issue could be granted if the defendant:

- demonstrated that the claimant could not prove an essential element of the claim for which the claimant had burden of proof at trial;
- disproved an essential element of the claim for which the claimant had burden of proof; or
- proved each essential element of an affirmative defense and showed there was no issue of fact with regard to those elements.

The burden of proof on a defendant's motion for summary judgment would be the same as required for the defendant to receive a directed verdict at trial. If the defendant argued an absence of proof as to any essential element of the claim, the burden would shift to the claimant to show sufficient evidence to submit the question to a jury.

CSHB 95 would take effect September 1, 1997, and apply only to claims filed on or after that date.

**SUPPORTERS
SAY:**

CSHB 95 would allow Texas courts to use federal summary judgment standards. Summary judgment, when used properly, can be a powerful tool to weed out meritless suits at an early date. Federal summary judgment procedures work well in federal courts and in the many other states that have adopted similar standards. In Texas, however, many lawyers regard summary judgment motions as a waste of time, although these same lawyers pursuing the same case in federal court would use a summary judgment motion to attempt to resolve a case as quickly as possible. By adopting federal summary judgment standards, Texas would join a majority of other states that use summary judgments to provide a quick, but procedurally sound, method of adjudicating cases without the need to go to trial.

Texas law on summary judgments hinders the speedy resolution of cases because of the way it treats the motion of a defendant who wishes to dismiss a meritless claim. Rather than having to show that the plaintiff does not have the proof needed, the defendant must show it could prove, without any issue of fact, an affirmative defense that would negate the plaintiff's claims. The standard applied to defendants moving for summary judgment is completely opposite of what their burden would be at trial. At trial, the defendant in a suit does not need to say a word or prove any fact. The burden is on the plaintiff to prove to the jury, by a preponderance of the evidence, that it is entitled to win the claim. If the plaintiff lacks sufficient evidence to prove that claim at trial, the defendant wins the case. However, when deciding a motion for summary judgment in Texas, the court does not look at whether the claimant could ever prove its case at trial, but only at whether, if the plaintiff did, the defendant would still win.

The standard for a defendant to win on a motion for directed verdict is closer to the defendant's burden at trial than for summary judgment. For example,

an essential element of any claim for negligence is causation; the claimant must prove that the defendant was a proximate cause of the claimant's injuries. If the plaintiff shows no evidence to support a finding of causation, the defendant could receive a directed verdict. The defendant would not be required to prove that something else caused the plaintiff's injuries in order to receive a directed verdict. However, this is precisely the standard that is applied on a motion for summary judgment.

Under CSHB 95, a defendant faced with a claim that the plaintiff would not be able to prove at trial could move to have that claim dismissed. If the defendant made such a motion, the plaintiff would have to show that there was enough evidence supporting the claim to require that the plaintiff be allowed to proceed to trial. Under these standards, the burden of proof would be exactly the same as if the defendant were making a motion for a directed verdict after the plaintiff had presented its case.

The federal standards that would be applied in Texas were developed by the U.S. Supreme Court in a trio of landmark cases that significantly changed federal summary judgment practice: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industries Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Across the country, a majority of state courts have either expressly adopted or cited with approval the federal standards expressed in these three cases. Texas is among a handful of states that have expressly rejected these standards.

Summary judgment is not used to give a defendant an advantage in the case or to force a plaintiff to reveal its proof early. In modern trial practice, there are no surprises at trial because of the extensive and thorough discovery process. Summary judgment hearings are held after the parties have had a sufficient amount of time to conduct discovery. A summary judgment motion is made only if, in the course of discovery, the parties find evidence proving a claim as a matter of law or determine that there is no evidence to support a claim.

OPPONENTS
SAY:

Texas courts, particularly the Texas Supreme Court, have expressly rejected adopting federal summary judgment standards because of differences in Texas and federal law, *Casso v. Brand*, 776 S.W.2d 551 (Tex. 1989). According to the Texas Supreme Court, summary judgments should be used only to eliminate patently unmeritorious claims and untenable defenses, *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d 671 (Tex. 1979). In federal courts, summary judgments are used as part of an overall scheme to dispose of cases. Texas courts, however, view summary judgment with caution because it involves deciding a case without presenting the case to the jury. Texas courts have placed a tremendous amount of faith in the jury system. If Texas were to use federal summary judgment standards, more cases would be disposed of by judicial decision rather than by juries.

The actual rule used in federal courts and in Texas is very similar; the difference is in the interpretation of that rule. Texas interprets the rule very literally; the party moving for summary judgment must prove that they are entitled to judgment as a matter of law. Therefore, for a defendant to win a motion for summary judgment, the defendant must show that, no matter what evidence the plaintiff presented, the defendant would win as a matter of law. The same burden is applied when plaintiffs move for summary judgment.

Summary judgment is an extreme measure and should involve as many procedural safeguards as possible. Summary judgment motions are decided based on depositions or affidavits and the arguments of the attorneys; there is no live testimony and no opportunity for a jury to judge the credibility of witnesses that present such testimony. Courts have often said that live testimony is superior to written statements because such credibility issues can determine the case. Also, without live testimony, the statements made by a witness would not be subject to impeachment or cross examination.

Just because the *Celotex-Anderson-Matsushita* summary judgment standards are used in federal courts, there is no reason to believe they would work well in Texas courts. Texas procedure is very different from federal procedure because of the state's general denial and the affirmative defense. Texas civil procedure allows a defendant to wait to present any response to the plaintiff's claim until trial unless the defendant plans to present an affirmative defense. Federal courts require defendants to respond to each

claim made by the plaintiff. While this distinction may seem minor to the non-lawyer, the use of the general denial allows defendants to remain in control of the litigation process. In order to determine what evidence the defendant intends to show, the plaintiff must seek out that evidence through the discovery process. In federal procedure, the plaintiff is made aware at the outset what defenses the defendant intends to use. The general denial gives the defendant an advantage, so state standards make it harder for the defendant to receive a summary judgment. This balance would be shifted substantially to the defendant's favor if federal summary judgment standards were adopted in Texas.

The federal court interpretation allows the defendant to make a motion for summary judgment that requires the plaintiff to present enough evidence to prove its case. Under the federal standards, the defendant can use summary judgment motions offensively to force the plaintiff to tip its hand and show the defendant its strategy for trial. Under federal summary judgment practice, the defendant has a distinct advantage. It should be no surprise, therefore, that CSHB 95 is supported by defendants. Under the guise of "tort reform," these defendants hope to gain an advantage and force plaintiffs to show their case early or lose their claim. Adopting these standards would unbalance Texas courts in favor of defendants.

OTHER
OPPONENTS
SAY:

Adopting standards and rules for civil procedure is a power given expressly to the Texas Supreme Court under sec. 22.004 of the Government Code. The rules advisory committee of the Texas Supreme Court has repeatedly addressed the issue of summary judgment standards. In November 1996, the rules advisory committee voted 11-10 to adopt standards similar to federal standards. The recommendations of the advisory committee must still be approved by the Texas Supreme Court. The Legislature should not inject its opinion into civil procedure when it has expressly given that power to the elected members of the Texas Supreme Court. If a change is to be made, it should be up to the court to decide what that change should be, absent extraordinary circumstances.

NOTES:

The original version of the bills would have required courts to grant a motion for summary judgment if the movant met the burden required.

The companion bill, SB 648 by Brown, has been referred to the Senate Jurisprudence Committee.

A similar bill, HB 1352 by Nixon, was filed during the 74th legislative session but was not reported by the House Civil Practices Committee.