IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 97-9139

FINAL APPROVAL OF REVISIONS TO THE TEXAS RULES OF CIVIL PROCEDURE

ORDERED that:

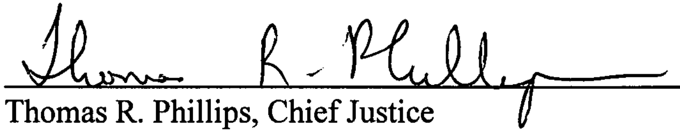
1. Rule 166a of the Texas Rules of Civil Procedure, amended by Order in Misc. Docket No. 97-9067, dated April 16, 1997, 60 TEX. BAR. J. 534 (June 1997), with only the comment changed to reflect public comments received, is attached;

2. The amendments take effect September 1, 1997, and apply to all motions for summary judgment filed on or after that date;

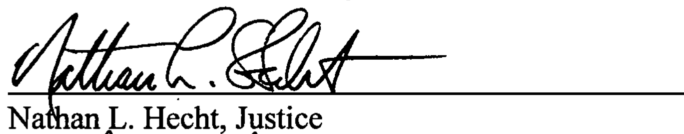
3. The comment appended to these changes, unlike other notes and comments in the rules, is intended to inform the construction and application of the rule; and

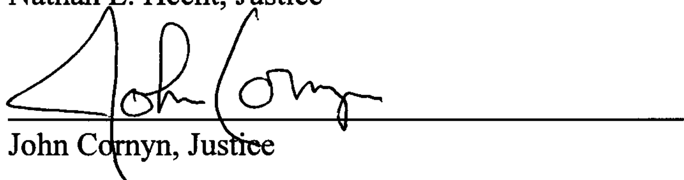
4. The Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

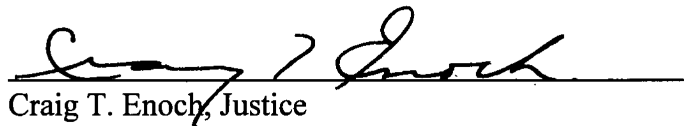
SIGNED AND ENTERED this 15th day of August, 1997.


Thomas R. Phillips, Chief Justice

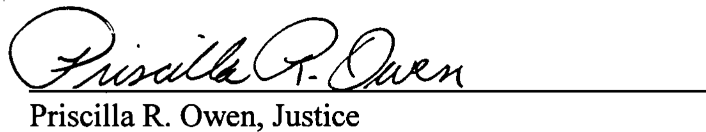
Raul A. Gonzalez, Justice


Nathan L. Hecht, Justice

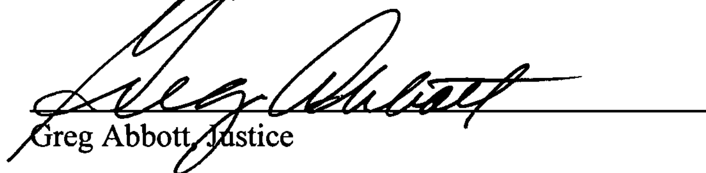

John Cornyn, Justice


Craig T. Enoch, Justice

Rose Spector, Justice


Priscilla R. Owen, Justice

James A. Baker, Justice


Greg Abbott, Justice

RULE 166a. SUMMARY JUDGMENT

(a) For Claimant. [No change.]

(b) For Defending Party. [No change.]

(c) Motion and Proceedings Thereon. [No change.]

(d) Appendices, References and Other Use of Discovery Not Otherwise on File. [No change.]

(e) Case Not Fully Adjudicated on Motion. If summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the judge may at the hearing examine the pleadings and the evidence on file, interrogate counsel, ascertain what material fact issues exist and make an order specifying the facts that are established as a matter of law, and directing such further proceedings in the action as are just.

(f) Form of Affidavits; Further Testimony. [No change.]

(g) When Affidavits Are Unavailable. [No change.]

(h) Affidavits Made in Bad Faith. [No change.]

(i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Notes and Comments

Comment to 1997 change: This comment is intended to inform the construction and application of the rule. Paragraph (i) authorizes a motion for summary judgment based on the assertion that, after adequate opportunity for discovery, there is no evidence to support one or more specified elements of an adverse party's claim or defense. A discovery period set by pretrial order should be adequate opportunity for discovery unless there is a showing to the contrary, and ordinarily a motion under paragraph (i) would be permitted after the period but not before. The motion must be specific in

challenging the evidentiary support for an element of a claim or defense; paragraph (i) does not authorize conclusory motions or general no-evidence challenges to an opponent's case. Paragraph (i) does not apply to ordinary motions for summary judgment under paragraphs (a) or (b), in which the movant must prove it is entitled to judgment by establishing each element of its own claim or defense as a matter of law or by negating an element of the respondent's claim or defense as a matter of law. To defeat a motion made under paragraph (i), the respondent is not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements. The existing rules continue to govern the general requirements of summary judgment practice. A motion under paragraph (i) is subject to sanctions provided by existing law (Tex Civ. Prac. & Rem. Code §§ 9.001-10.006) and rules (Tex. R. Civ. P. 13). The denial of a motion under paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under paragraph (c).

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 97- 9139

DISSENTING OPINION ON FINAL APPROVAL OF REVISIONS TO TEXAS RULE OF CIVIL PROCEDURE 166a(i)

JUSTICE SPECTOR, dissenting.

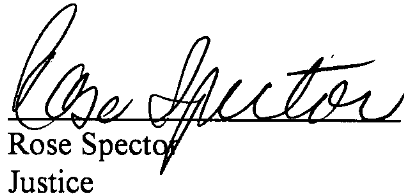
I agree with most of Justice Baker's dissent to the rule the Court adopts today. Although the Court has made some helpful modifications to the comment, it declines to incorporate the recommendations of its own advisory committee in the rule itself. I write separately, however, because, unlike Justice Baker, I do not agree with the basic concept underlying Rule 166a(i).

As this Court has previously noted, our existing summary judgment "procedure eliminates patently unmeritorious cases while giving due regard for the right to a jury determination of disputed fact questions." *Casso v. Brand*, 776 S.W.2d 551, 557 (Tex. 1989). The Court's adoption of Rule 166a(i) effectively discards a well-developed body of summary judgment law that has been available to guide the bench and bar. Trial judges, who lack the resources available to their federal counterparts, will now be required to resolve many more pre-trial disputes without the benefit of that valuable precedent.

Furthermore, I anticipate that the no-evidence rule adopted today will also increase the need for extensive discovery, adding to already skyrocketing litigation costs. In my view, this runs counter to the rule's intended purpose.

Finally, the new rule creates a serious risk that meritorious lawsuits will be summarily

dismissed. My eighteen years on the trial bench, as well as my experience on this Court, have left me convinced that truly frivolous cases are relatively rare and are readily disposed of under the existing rule. I do not believe that any marginal benefit of the new rule in these exceptional cases outweighs the constitutional rights of aggrieved citizens to seek redress. *See* TEX. CONST. art. I, § 15; art. V, § 10. Accordingly, I dissent.



Rose Spector
Justice

OPINION DELIVERED: August 15, 1997

Misc. Docket No. 97- 9139

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 97- 9139

DISSENTING OPINION ON FINAL APPROVAL OF REVISIONS TO TEXAS RULE OF CIVIL PROCEDURE 166a(i)

JUSTICE BAKER, dissenting.

I agree with the basic concept of a no evidence motion for summary judgment. However, I cannot agree with the rule that the Court adopts today. I am concerned that the Court ignores its own Supreme Court Advisory Committee's recommendations and promulgates a rule of its own choosing. In doing so, the Court eliminates the balance, fairness and safeguards the Committee's recommendations provide. Consequently, I respectfully dissent.

THE ADVISORY COMMITTEE'S RECOMMENDATIONS - THE COURT'S RULE

The Supreme Court Advisory Committee consists of trial and appellate judges and seasoned practitioners on both sides of the docket - all appointed by this Court. After debate over a period of months, that committee made four substantive recommendations for the proposed no evidence summary judgment rule to the Court. They are:

- That a party may file a no evidence summary judgment motion "(1) after expiration of an applicable discovery period, or (2) if there is no applicable discovery period, after a period set by the Court."
- That a party filing a no evidence summary judgment motion must file a "certificate that the

movant's attorney has reviewed the discovery and that, in the attorney's opinion, the discovery reveals no evidence to support the specified elements."

- That to raise a material fact issue, a respondent to a no evidence summary judgment must produce "summary judgment evidence or discovery product or other material that can be reduced to summary judgment evidence."
- That the rule provide for sanctions — so: "If a motion under this subdivision of denied, and the court finds that the motion did not have an objectively reasonable basis when it was filed, the court may award reasonable attorney's fees to the respondent for defending the motion."

The Court rejects these recommendations, and unwisely so, I believe.

Instead, the rule the Court promulgates provides that:

- "After adequate time for discovery" a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial.
- The trial court must grant the motion unless the respondent produces "summary judgment evidence" raising a genuine issue of material fact.

The rule the Court promulgates omits the Committee's recommended certificate of no evidence and sanctions in the form of attorney's fees for defending a motion that had no objectively reasonable basis when filed.

WHEN TO FILE

I believe the Committee's recommendation, establishing a bright line test for the benefit of the bench and bar, is preferable to the discretionary language the Court adopts. The Committee's recommendation avoids the necessity to determine whether the respondent has had "an adequate time

for discovery." The Committee's recommendation avoids the uncertainty that would result from the appellate courts' frequently unpredictable application of the abuse of discretion standard to a trial judge's determination of "an adequate time for discovery."

The Committee's recommendation permits the trial court the opportunity to issue a pre-trial or other order setting a date after which a party could file a no evidence motion for summary judgment. Such an order could be entered on a party's motion or a trial court's own initiative. If a respondent has not had adequate time for discovery the trial court could grant a continuance upon the particularized discovery needed to meet a no evidence motion.

SUMMARY JUDGMENT PROOF

The Committee's recommendation is broader than the Court's promulgated language. The transcripts of the Committee's meetings show that its membership was not in agreement about the definition of "summary judgment evidence" in the context of responding to a no evidence summary judgment motion. However, I agree with those Committee members that believe that "summary judgment evidence" means all the materials specifically identified in Rule 166a(c) plus all other discovery products with probative value referred to in Rule 166a(d). See TEX. R. CIV. P. 166a(c),(d). The Committee's recommendation accomplishes that object while the Court's language does not.

CERTIFICATE OF NO EVIDENCE

The Committee's recommendation provides for the movant's attorney to certify that all discovery has been reviewed and that in the attorney's opinion, the discovery reveals no evidence to support the specified elements of the claim or defense. The Court rejects that language. I believe the Committee's recommendation serves a salutary purpose.

The Committee's recommendation would act as a deterrent to abuse of the no evidence

summary judgment rule and curb the filing of frivolous no evidence emotions. Given the costs of an appeal relative to the costs of a no evidence motion, disincentives in the form of the Committee's recommended language should be included in Rule 166a(i). To do so would prevent a flood of no evidence motions that would further burden our already overburdened trial and intermediate appellate courts. Neither our trial or intermediate appellate courts have the discretion to refuse to consider frivolous matters, and neither have the resources to handle a new deluge of any variety.

SANCTIONS

The Committee's recommendation provides the trial court the express authority to assess attorney's fees against the movant if, when denying a no evidence motion, the trial court finds the motion had no objectively reasonable basis when filed. The Court rejects that language, and chooses to provide only in the comment that a Rule 166a(i) motion is subject to sanctions provided by existing law and rules.

The Committee's reçommended language is based upon an objective standard. Thus, the Committee's recommendation avoids the unwieldy burden facing trial judges of determining subjective intent in sanction motions hearings. The Committee's recommended language provides for the limited sanction of the respondent's reasonable attorney's fees for defending the motion[1], rather than the broad array of sanctions available under "existing law and rules." Placing the sanction authority and the sanction available in the Rule itself clearly establishes the standard that applies to

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[1]I suggest that the Committee's recommendation does not go far enough. The trial court should also have the authority to order the unsuccessful movant to reimburse the respondent's actual reasonable and necessary costs incurred in defending the motion.

the trial court's exercise of its discretion and the limits of the exercise of that discretion.

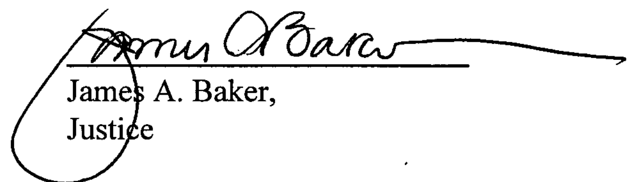
THE ORDER AND THE COMMENT

The Court's Order of Final Approval of Rule 166a(i) states that the comment "unlike other notes and comments to the rules is intended to inform the construction and application of the rule." The opening sentence of the comment makes that statement. I am the second junior justice on the Court, and therefore my institutional knowledge is necessarily limited. However, I am informed by justices senior to me that the quoted language has *never* been included in a comment to the Rules.

In my view, this unprecedented language in the comment does not correct what I believe is the fault of the rule the Court adopts. The comment does not achieve the balance, fairness and safeguards that would result from including the Committee's recommendations in the rule itself.

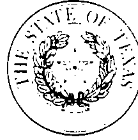
CONCLUSION

As stated, I am concerned about why the Court continues to use the Supreme Court Advisory Committee with the resultant expenditure of time, efforts and money by its own appointed members, when all recent indications suggest the Court prefers to write its own rules without outside assistance. While I agree with the concept of a no evidence summary judgment rule, for the reasons expressed, I do not agree with the specific rule the Court adopts today. I dissent.



James A. Baker,
Justice

OPINION DELIVERED: August 15, 1997



THE SUPREME COURT OF TEXAS

CHIEF JUSTICE
THOMAS R. PHILLIPS

JUSTICES
RAUL A. GONZALEZ
NATHAN L. HECHT
JOHN CORNYN
CRAIG ENOCH
ROSE SPECTOR
PRISCILLA R. OWEN
JAMES A. BAKER
GREG ABBOTT

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CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
NADINE SCHNEIDER

September 25, 1997

Office of the Secretary of State
Statutory Filings Division
1019 Brazos Street
Austin, Texas 78701

Please find enclosed, a copies of Misc. Docket No. 97-9134, Misc. Docket No. 97-9145 and Misc. Docket No. 97-9159, pertaining to Texas Rules of Appellate Procedure. Also enclosed is a copy of Misc. Docket No. 97-9139, pertaining to the Rules of Civil Procedure.

Originals of 97-9134 and 97-9139 are not yet available and will be forwarded as soon as possible. In the interim, please accept these certified copies.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

THE SUPREME COURT OF TEXAS

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CLERK
JOHN T. ADAMS

EXECUTIVE ASS'T
WILLIAM L. WILLIS

ADMINISTRATIVE ASS'T
NADINE SCHNEIDER

August 15, 1997

Mr. Antonio Alvarado
Executive Director
State Bar of Texas
1414 Colorado Street
Austin, Texas 78701

Dear Mr. Alvarado,

Please find enclosed, a copy of an order of the Supreme Court of Texas of this date. Per this order, a copy is to be published as soon as possible in the Texas Bar Journal. You may contact the undersigned if there are any questions in this matter.

Sincerely,

SIGNED

John T. Adams
Clerk

Encl.

cc: Ms. Kelley Jones