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OBJECTING TO SUMMARY JUDGMENT EVIDENCE IN STATE COURT: Recent Clarifications and Remaining Complications

For something as seemingly simple as objecting to evidence, attempts to do so in a summary judgment proceeding are fraught with complications.[1]

Here are key questions concerning objections to summary judgment evidence:

1. Does the granting of a summary judgment implicitly sustain objections by the winning party (and overrule objections by the loser)?
2. When can evidentiary defects be raised for the first time on appeal?
3. Must rulings on objections be written?
4. What actions should be taken if the trial judge refuses to rule on objections?

To add to the complication, some of these questions have sub-questions that must be answered before reaching the best decision on how to proceed. This year, the Texas Supreme Court in *Seim v. Allstate Texas Lloyds*[2] answered many of these questions. Others linger in the intermediate appellate courts. The answers are detailed below.

Preserving error matters if a summary judgment is appealed.

Rules for error preservation that apply in trial also apply in summary judgment proceedings. To preserve a complaint for appellate review that evidence is inadmissible, (1) a party must complain to the trial court in a timely request, objection, or motion, and (2) the trial court must rule or refuse to rule.[3] But, application of these rules is easier said than done.

Explicit ruling generally required.

Unless the record shows a clearly implied ruling by the trial court, trial courts must expressly rule on evidentiary objections in writing. The supreme court has approved the following practices:

- The party asserting the objections should obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment (or risk waiver);
- Practitioners should incorporate all of their objections to summary judgment evidence in proposed orders granting or denying summary judgment; and
- The trial court should disclose, in writing, its rulings on all objections to summary judgment evidence at or before the time it enters the order granting or denying the summary judgment.[4]

In limited circumstances, a ruling may be implicit.

The supreme court has not closed the door to implicit rulings on objections to summary judgment evidence if the implication of the trial court's decision was "clear." But nothing in the record in *Seim* clearly implied a ruling on the movant's objections. The court noted: "Indeed, even without the objections, the trial court could have granted summary judgment against the [non-movants] if it found that their evidence did not generate a genuine issue of material fact."[5]

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Whether a defect is one of form or substance determines whether it can be waived.

Failure to object to the form of summary judgment evidence waives any defects concerning form. Objections to the substance of summary judgment evidence may be raised for the first time on appeal.[6]

Although providing a limited discussion, the court in *Seim* addressed this distinction between substantive and formal defects. Specifically, it reaffirmed that failure of an affidavit to include a jurat was a defect in form that could not be first complained of on appeal.[7] While *Seim* settled the issue in regard to an affidavit without a jurat, there remain inconsistencies among the courts of appeals concerning characterizations of other defects as defects of form or of substance.[8] Nonetheless, the implication in the *Seim* case is clear from the supreme court's determination that such an obvious defect as the omission of a jurat (or to otherwise show that an affidavit was sworn to) is a defect in form that is waived without a ruling on the related objection. The implication is that the supreme court will look with disfavor on determinations that defects concern substance. The wisest practice is to present all objections in writing and obtain a ruling on them by the trial court.

There are additional requirements to assert objections and secure a written ruling.

The objection to summary judgment evidence must be specific.[9] For example, a court of appeals held that an objection to a paragraph in an affidavit as a legal conclusion was itself impermissibly conclusory, because it failed to identify which statements in the paragraph were objectionable or offer any explanation concerning the precise bases for objection.[10] Concerning the requirement for a written ruling, a docket sheet entry does not meet this requirement.[11] In light of the language by the supreme court in *Seim* consistently referring to a "written" ruling,[12] presumably an oral ruling contained in a reporters record would not be sufficient—although arguably the reporters record itself is "written" and therefore could meet the "written" requirement. Absent a proper order sustaining an objection, all of the summary judgment evidence, including any evidence objected to by a party, is proper evidence that will be considered on appeal.[13]

Obtain a ruling at, before, or very near the time the trial court rules on the motion for summary judgment.

In *Seim*, the supreme court recognizes that it may not be possible to get a ruling at or before the time of the ruling. It emphasized in italics the following quote from the Houston Fourteenth Court of Appeals in *Dolcefino v. Randolph*: "In any context, however, it is incumbent upon the party asserting objections to obtain a written ruling at, before, or very near the time the trial court rules on the motion for summary judgment or risk waiver."[14]

The standard of "very near the time the trial court rules" implies the need to move quickly to obtain a ruling on evidentiary objections if the trial court has not ruled at or before ruling on the summary judgment motion. In addressing the role of the trial court, the supreme court directs that "the better practice is for the trial court to disclose, in writing, its rulings on all objections to summary judgment evidence at or before the time it enters the order granting or denying summary judgment."[15]

Opinions from courts of appeals issued before *Seim* indicate that as long as the ruling is made before the plenary power of the court expires, there should be no waiver if the court rules on objections after its summary judgment ruling.[16]

If the trial court refuses to rule on an objection, file a written objection to its failure to rule.

The appellate rules direct that if the trial court refuses to rule on a timely objection, "the complaining party [must] object[ ] to the refusal" to rule.[17] Therefore, if a party properly objects to the summary judgment evidence and the trial court fails to or refuses to rule in writing, that party should object in writing to the trial court's refusal. Simply re-urging the original evidentiary objection is not sufficient.[18]

In a case issued before *Seim*, the nonmovant for summary judgment complained in his motion for new trial of the trial court's refusal to rule, and, in doing so, the court of appeals held that he preserved his complaint for review.[19]

Nonetheless, in light of *Seim*, which endorses the timing standard that a ruling must be obtained "very near the time the trial court rules on the motion for summary judgment," careful practice would be to object earlier than the time for filing the motion for new trial. Indeed, based on this timing standard, the Houston First Court of Appeals held that a party waived his complaint about

the trial court's failure to rule on his objections to summary judgment evidence by not objecting to the failure until almost one year after the court's initial ruling on the partial summary judgment and six months after its amended ruling, even though he objected before final judgment issued and again in a motion for new trial.[20]

When dealing with objections to evidence, as is true for so many summary judgment practices, the biggest difficulty may not be showing that the movant is entitled to summary judgment relief. Rather, it may be complying with the technical procedures necessary to keep (or reverse) a summary judgment.[21]

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Endnotes

1. *See generally* Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas: State and Federal Practice*, scheduled for publication in S. Tex. L. Rev. (Feb. 2019), previously 52 Hous. L. Rev. 773 (2015).
2. __ S.W.3d __, No. 17-0488, 2018 WL 3189568 (Tex. 2018) (per curiam).
3. *Id.* at *2 (citing Tex. R. App. P. 33.1(a)).
4. *Id.* at *4.
5. *Id.* at *4-5 (citing *In re Z.L.T.*, 124 S.W.3d 163, 165 (Tex. 2003)). *In re Z.L.T.* involved a request by an inmate for the court to issue a bench warrant, not a summary judgment. In evaluating whether the ruling was sufficient to present an issue for appellate review, the supreme court explained that by proceeding to trial without a bench warrant, it was clear that the trial court implicitly denied the inmate's request. 124 S.W.3d at 165. Even in the courts of appeals, there are limited examples of holdings that a ruling on summary judgment evidence was implicit. In one such case, the court of appeals held that the trial court implicitly overruled the appellant's objection to an affidavit by granting leave to file a supplemental affidavit. Atkins v. Tinning, No. 13-99-821-CV, 2001 WL 997389, at *3 (Tex. App.—Corpus Christi May 3, 2001, pet. denied).
6. *Seim*, 2018 WL 3189568 at *2, *4. An example of a substantive defect is an objection that evidence is conclusory. E.g., *McMahan v. Greenwood*, 108 S.W.3d 467, 498 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *Choctaw Props., L.L.C. v. Aledo I.S.D.*, 127 S.W.3d 235, 241-42 (Tex. App.—Waco 2003, no pet.).
7. *Seim*, 2018 WL 3189568 at *5.
8. For example, there is a split of authority as to whether an affiant's lack of personal knowledge is a defect in form or substance. *Washington DC Party Shuttle, LLC v. IGuide Tours*, 406 S.W.3d 723, 731-36 (Tex. App.—Houston [14th Dist.] 2013, pet. denied) (en banc) (gathering authorities).
9. *Stewart v. Sanmina Tex. L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet.).
10. *Womco, Inc. v. Navistar Int'l Corp.*, 84 S.W.3d 272, 281 n.6 (Tex. App.—Tyler 2002, no pet.).
11. *Utils. Pipeline Co. v. Am. Petrofina Mktg.*, 760 S.W.2d 719, 723 (Tex. App.—Dallas 1988, no writ).
12. *Seim*, 2018 WL 3189568 at *2, *4.
13. *Allen ex rel. B.A. v. Albin*, 97 S.W.3d 655, 663 (Tex. App.—Waco 2002, no pet.).
14. *Seim*, 2018 WL 3189568 at *4 (quoting Dolcefino v. Randolph, 19 S.W.3d 906, 926 (Tex. App.—Houston [14th Dist.] 2000, pet. denied)).
15. *Id.* (quoting Dolcefino, 19 S.W.3d at 926).
16. *Wolfe v. Devon Energy Prod. Co.*, 382 S.W.3d 434, 447-48 (Tex. App.—Waco 2012, pet denied) (gathering authorities and holding that objections to summary judgment evidence were not waived despite a month elapsing between the signing of the judgment and the signing of the order sustaining the evidentiary objections).
17. Tex. R. App. P. 33.1(a)(2)(B).
18. *Ermisch v. HSBC Bank USA*, No. 03-16-00080-CV, 2016 WL 6575232, at *2 n.3 (Tex. App.—Austin Nov. 4, 2016, pet. denied) (mem. op.).
19. *Alejandro v. Bell*, 84 S.W.3d 383, 388 (Tex. App.—Corpus Christi 2002, no pet.).
20. *Vecchio v. Jones*, No. 01-12-00442-CV, 2013 WL 3467195, at *13 (Tex. App.—Houston [1st Dist.] July 9, 2013, no pet.).
21. Lynne Liberato & Kent Rutter, Reasons for Reversal in the Texas Courts of Appeals, 48 Hous. L. Rev. 993, 1038 app. B, fig. 13 (2012) (showing that there is a relatively high number of reversals (18%) for procedural defects where the summary judgment may have been fundamentally sound but was reversed because of failure to follow proper procedures).