

CAUSE NO. 02-0157

JOHN ALFRED DOE #1, ET AL

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IN THE DISTRICT COURT

V.

OF HARRISON COUNTY, TEXAS

EVANGELICAL LUTHERAN CHURCH
IN AMERICA, ET AL

71ST JUDICIAL DISTRICT

**PLAINTIFFS' COLLECTIVE RESPONSE TO
ALL DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

COME NOW Plaintiffs in the above-styled and numbered cause of action and file this, their Collective Response to all Defendants' Motions for Summary Judgment, and would respectfully show this Court as follows:

**I.
INTRODUCTION**

Defendants have filed numerous summary judgment motions. The majority of Defendants purport to have filed both traditional and no-evidence summary judgment motions. These motions essentially seek to deprive the Plaintiffs of their day in court by having Plaintiffs' causes of action summarily dismissed. In order to properly respond to each of the points raised in Defendants' summary judgment motions in an orderly, efficient, and concise manner, Plaintiffs respond herein collectively to all such motions.

The first portion of this Response analyzes the law governing "no-evidence" summary judgment motions and its application to Defendants' motions. This analysis is necessary because all of the Defendants' no-evidence motions are improper, simply allege that there is no-evidence of every single element of every single cause of action, abuse the purpose behind Rule 166a(i), are subject to sanctions and should be denied for their improper form alone.

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The remainder of Plaintiffs' Response will address each cause of action asserted by Plaintiffs and provide competent summary judgment evidence to support each such claim. Based on this evidence, Plaintiffs have sufficiently demonstrated that a genuine issue of material fact exists as to each and every contested element of Plaintiffs' causes of action. As such, Defendants' motions should be denied and the Court should submit each of Plaintiffs' claims to the jury.

II.

LAW ON "NO-EVIDENCE" MOTIONS FOR SUMMARY JUDGMENT

All of the Defendants in this action have moved for summary judgment, at least in part, pursuant to Rule 166a(i) of the Texas Rules of Civil Procedure. Rule 166a of the Texas Rules of Civil Procedure was amended effective September 1, 1997, by adding subsection (i), which allows for a "no-evidence" motion for summary judgment. Subsection (i) allows the parties, "[a]fter adequate time for discovery," to move for summary judgment "on the ground that there is no evidence of one or more essential elements of a claim or defense." TEX. R. CIV. P. 166a(i) (2003). In doing so, the "motion must state the elements as to which there is no evidence." *Id.* If such a motion is filed, Rule 166a(i) requires the party bearing the burden of proof on the issue to produce "summary judgment evidence raising a genuine issue of material fact." *Id.*

Given that Rule 166a(i) is a dramatic departure from prior summary judgment practice, the Texas Supreme Court has afforded unprecedented weight to the Notes & Comments accompanying the Rule. The Texas Supreme Court has explained that "[t]he comment appended to these changes, unlike other notes and comments in the rules, is intended to inform the construction and application of the rule." *See* FINAL APPROVAL OF REVISIONS TO THE TEXAS RULES OF CIVIL PROCEDURE, at 1.¹ In addition, members of the Texas Supreme Court have made

¹ The comment to Rule 166a(i) also expressly provides that "[t]his comment is intended to inform the construction and application of the rule."

several presentations discussing Rule 166a(i), the Notes & Comments, and the Texas Supreme Court's intent in promulgating the Rule and its comments.

In this regard, Justice Gregg Abbot of the Texas Supreme Court, at a conference held shortly after the new no-evidence rule became effective, stated that [referring to the first sentence of the Notes & Comments]:

This comment is intended to inform the construction and application of the Rule. If you will go through the Rules of Procedure you will hardly ever find any sentence in any comment that says anything like this. We added this sentence to clarify to the bar and particularly to the bench when it comes time for them to interpret and apply this Rule that what we said in this Comment is just as meaningful as what we said in the Rule. You are to read everything that we have in this Comment and utilize that when you are at the courthouse trying to convince the judge on how this Rule is to be applied.

Justice Abbot, at 2, attached as Exhibit A.² It is thus clear that the Notes & Comments to Rule 166a(i) are not to be ignored. Rather, they are to be given great weight in the construction and application of the Rule.

A. Specificity Is An Absolute Requirement

The Supreme Court's unprecedented Notes & Comments to Rule 166a(i) mandate that a no-evidence motion for summary judgment "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." TEX. R. CIV. P. 166a(i) Notes & Comments (2003) (emphasis added). In addition, the Notes & Comments state that "[t]o defeat a motion made under paragraph (i), the respondent is not required to marshal its proof" *Id.*

² At the beginning of this conference, Justice Abbot explained that "[s]ince issuing this revised Comment, it has become clearer that the Bar and to a lesser extent the bench still does [sic] not have an understanding of what it is that we are intending for how [sic] this Rule is to be applied. And so, my main goal over the next 30 minutes is to clarify for you, both lawyers and judges, exactly what we do mean." Justice Abbott, at 1. It is clear that Justice Abbot's comments were made with the express intention of explaining how the new no-evidence rule is to be applied.

During his conference in September of 1997, Justice Abbot further provided the following commentary regarding the specificity requirements of Rule 166a(i):

[T]he Court intended for the new summary judgment, which is the part (i), the Summary Judgment Rule, to serve as **a bullet, not as a shotgun approach** with regard to filing these motions for summary judgment. It is a bullet to pierce towards a single, fine point concerning one element of a cause of action and in the rare instance when you can tell after the completion of the discovery process that there is no evidence and there will be no evidence to support either the plaintiff's or defendant's claim.

[W]ith no proof requirement upon the shoulders of the movant, **the defendant may be undeterred in launching general and global attacks on the plaintiff's claims** . . . in every case regardless of the merits of the motion for summary judgment. And here is the Court's response to that. First of all, in the Rule itself, the Rule states that the motion must state the elements as to which there is no evidence. Let me repeat it, because this is a key part of this Rule and the way that it is to be applied. The motion filed by the movant must state the elements as to which there is no evidence.

Paragraph (i) does not authorize conclusory motions or general no evidence challenges to an opponent's case. In other words, **trial courts should not tolerate -- trial courts should not accept general and global motions** of parties on either side . . . saying that either plaintiff or defendant does not have any evidence to support their claim or cause of action. A motion like that should be sanctioned. This particular motion is not to be used in every case, and it is **not to be used for an entire case**. This motion is intended to be used rarely and narrowly.

The Supreme Court does not intend for this Rule to be used very often. The Supreme Court **unequivocally does not intend for this Rule to be used as a shotgun approach** and as an arguable alternative to a shotgun approach, it would be impermissible and **it would be improper and it would be an incorrect application of this Rule** if you had a movant utilize this motion not as a shotgun approach but to utilize twenty different rifle shots, taking a different rifle shot as to each element of your causes of action. **Twenty rifle shots constitute a shotgun approach**. That is **not the purpose** of this Rule and if the Rule is utilized in that fashion the Court **expects and anticipates sanctions to be issued**.

Justice Abbot, at 1-7 (emphasis added).

B. "Shotgun" Motions Are To Be Sanctioned

The Notes & Comments to Rule 166a(i) expressly provide that “[a] motion under paragraph (i) is subject to sanctions provided by existing law and rules.” TEX. R. CIV. P. 166a(i) Notes & Comments (citations omitted). In discussing the necessity of sanctioning the improper use of the no-evidence rule, Justice Abbot stated during his conference that:

[W]e all know when you go down to the courthouse in state court it is very difficult to get sanctions out of a state court trial judge. And there seems to be a big difference in the way state court judges apply sanctions as opposed to federal judges. All I can tell you in this regard is that members of the Supreme Court are making it clear at forums like this and at forums where we are talking only to the judges that **we fully expect trial judges to impose sanctions whenever these motions are used improperly** because – I don’t want to be overly redundant but let me repeat – these motions are only to be used rarely and only for specific claims and if they are not done so and **if you have shotgun challenges to pleadings made by way of these motions we expect trial judges to enforce sanctions.**

Justice Abbot, at 5 (emphasis added).

C. The Respondent Is Not Required To Marshal All of Its Proof

The Notes & Comments to Rule 166a(i) also provide that “[t]o defeat a motion made under paragraph (i), the respondent is not required to marshal its proof.” TEX. R. CIV. P. 166a(i) Notes & Comments (2003) (emphasis added). As further explained by Justice Abbot, “[t]he only way you would be responsible for marshalling all of your evidence, bundling it and putting it on the court bench would be in the event that you get a shotgun motion filed by defendant.” Justice Abbot, at 5. And, as demonstrated above, a shotgun motion is inappropriate and a misapplication of Rule 166a(i).

If the movant has brought a specifically targeted motion, then, and only then, does the burden of proof shift to the respondent. At that point, the respondent need only point out evidence that raises a fact issue on that challenged matter. *See* TEX. R. CIV. P. 166a(i). In raising this fact issue, the respondent may utilize the same evidence that it would use with regard to responding to a traditional motion for summary judgment under Rule 166a(c). “[T]he

summary judgment evidence under Rule 166a(i) is the same as that under Rule 166a(c) . . . it would be all evidence that has been developed in the case whether it be by deposition [or] whatever nature, [and] if you want to submit an affidavit that is fine.” Justice Abbot, at 6. Thus, the respondent is clearly entitled to use any and all evidence as set forth in Rule 166a.

As demonstrated below in Sections III, *infra*, Defendants’ motions for summary judgment should be denied on the basis that such motions are fatally defective because they constitute general “shotgun” no-evidence motions for summary judgment.³

III. **DEFENDANTS’ NO-EVIDENCE MOTIONS FOR SUMMARY JUDGMENT ARE** **IMPERMISSIBLE GENERAL “SHOTGUN” MOTIONS**

As discussed under Section II(A), *supra*, a “no-evidence” motion for summary judgment must state with specificity the elements as to which there is no evidence, and the rule prohibits conclusory motions or general no evidence challenges to an opponent’s case. None of the Defendants’ no-evidence motions satisfy the specificity requirements of Rule 166a(i). Rather, the Defendants’ motions constitute general “shotgun” motions. Frankly, the Defendants’ motions are more aptly described as “sawed-off shotgun” or “blunderbuss” motions. Defendants have each filed no-evidence motions attacking virtually every element of every cause of action asserted by Plaintiffs. As stated by Justice Abbot of the Texas Supreme Court, such global no-evidence motions are clearly impermissible and should be sanctioned. *See* Section II(A), *supra*.

Plaintiffs anticipate that these Defendants will argue that, simply because they challenge the entirety of Plaintiffs’ cases, their motions are not global and impermissible. Defendants will likely contend that they have satisfied the specificity requirements of Rule 166a(i) because they

³ It should also be noted that a court’s order denying a defendant’s no-evidence motion for summary judgment is not reviewable by mandamus. The Texas Supreme Court has made the point clear in the Notes & Comments by providing that “[t]he denial of a motion under Paragraph (i) is no more reviewable by appeal or mandamus than the denial of a motion under Paragraph (c).” TEX. R. CIV. P. 166a(i) Notes & Comments (1998); Furthermore, as stated by Justice Abbott, the rules have “never been applied as far as I know to allow mandamus from the denial of a motion for summary judgment” Justice Abbott, at 6.

have identified all the specific elements of all of the Plaintiffs' causes of action that are being challenged.⁴ Such an argument, however, completely misses the mark.

Justice Abbot clearly stated that a defendant cannot turn a shotgun motion into a proper motion simply by taking twenty different rifle shots at the plaintiff's case. *See* Justice Abbot, at

7. As explained by Justice Abbot:

[I]t would be improper and it would be an incorrect application of this Rule if you had a movant utilize this motion not as a shotgun approach but to utilize twenty different rifle shots, taking a different rifle shot as to each element of your causes of action. **TWENTY RIFLE SHOTS CONSTITUTE A SHOTGUN APPROACH.** That is not the purpose of this Rule and if the Rule is utilized in that fashion the Court expects and anticipates sanctions to be issued.

Id.

The scenario described above by Justice Abbot is the precise situation before this Court. The Defendants' motions fire numerous shots at the Plaintiffs' causes of action. These motions clearly violate the specificity requirements of Rule 166a(i). Therefore, Plaintiffs respectfully request that Defendants' motions for summary judgment be denied and that Plaintiffs be granted such further relief as this Court deems fair and just, including their attorneys' fees associated with responding to these improper sanctionable motions.

IV. PLAINTIFFS' SUMMARY JUDGMENT EVIDENCE

In support of Plaintiffs' Collective Response to All Defendants' Motions for Summary Judgment, Plaintiffs offer the following summary judgment evidence, which is attached hereto and incorporated herein by reference for all purposes as if set out fully therein:

[list exhibits and depositions]

Exhibits:

⁴ Defendants could have saved themselves, Plaintiffs, and the Court a substantial amount of time and paper. Defendants motions are tantamount to a one-page motion which states: "Plaintiff has no evidence of any of the elements of any of the causes of action he has asserted." Defendants should not be entitled to any leeway by the Court simply because they went to the "effort" of typing out each element of each cause of action and then stating that Plaintiffs have no evidence of any of the elements.