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Breakfast Buffet:
Summary Judgment Update

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BREAKFAST BUFFET: SUMMARY JUDGMENT UPDATE

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I. INTRODUCTION

Review of summary judgment was mostly business as usual at the appellate courts during the past year, but a few cases offer new insights and introduce novel language that creative practitioners can use to strengthen a position on appeal.

II. State Courts

A. Supreme Court of Texas: Court Retreats from *Nall* by Deeming Issue Unpreserved; Holds Plaintiffs' Failure to Specify Relief Sought Against . . . Defendant?

Rule 166a requires a motion to state the "specific grounds" entitling the movant to summary judgment and further provides, "Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal." TEX. R. CIV. P. 166a(c). For decades, the Court has strictly applied the standard, declining to entertain any arguments not expressly raised in the motion for summary judgment—even if addressed in detail in supporting briefs or other written materials. *City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671 (Tex. 1979). *See also McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 345 (Tex. 1993).

A few years ago, the Court offered hope for appellate litigators needing to raise arguments not addressed in the motion for summary judgment, holding that sometimes an argument is so inherent in the written motion that a court of appeals may entertain the argument. *Nall v. Plunkett*, 404 S.W.3d 552 (Tex. 2013).

But the Court recently retreated from the *Nall* approach, declining to entertain an argument seemingly inherent in the motion filed below. *ExxonMobil Corp. v. Lazy R Ranch, L.P.*, 511 S.W.3d 538 (Tex. 2017). The case involved claims arising out of ExxonMobil's oil and gas operations on the Lazy R Ranch. *Id.* at 539. When ExxonMobil sold its operations in 2008, the Ranch retained a registered environmental engineer to investigate whether the Ranch had been contaminated. *Id.* The resulting report identified four sites where hydrocarbon contamination levels exceeded the levels set by state law and stated that the contamination could threaten groundwater. *Id.* at 540. Two of the four sites identified in the engineer's report had long been abandoned, but the remaining two sites had been in use more recently. *Id.*

In October of 2009, the Ranch sued ExxonMobil for damages estimated to reach $6.3 million in remediation costs. *Id.* Perhaps recognizing that these costs would exceed any decrease in value to the Ranch property, and thus become unrecoverable under the value-loss limitation rule, the Ranch amended its pleadings to drop the claim for damages and instead to seek only an injunction ordering ExxonMobil to remediate the conditions causing the contamination. *Id.* at 541.

ExxonMobil moved for no-evidence and traditional summary judgment, contending the claims are barred by the statute of limitations and the Ranch is not entitled to any requested relief. *Id.* ExxonMobil's motion did not expressly mention the injunctive relief, although that was the only relief requested at the time the motion was filed. *Id.* ExxonMobil instead explained that damages were the only remedy available under Texas law, and that the Ranch had produced no evidence of those damages. *Id.* Ranch responded that the surface contamination was a continuing nuisance, that injunction is an appropriate remedy, and that the continuing nature of the nuisance brought the claim within the statute of limitations. *Id.*

At the hearing on the motion, both parties presented argument regarding injunctive relief. *Id*. at 542. ExxonMobil argued that the Ranch should not be allowed to use a request for injunctive relief to evade the value-loss limitation rule, and again emphasized that the Ranch had not produced evidence of that loss. *Id*. The trial court granted the motion without stating the basis for its decision. *Id*. The court of appeals reversed, concluding that fact issues existed regarding the limitations defense, and choosing not to reach arguments regarding injunction, holding that those arguments had not been properly presented to the trial court. *Id*.

Chief Justice Hecht authored a unanimous opinion reversing in part and remanding the case for further proceedings. With respect to the two long-abandoned sites, the evidence conclusively established the contamination had occurred more than four years before the lawsuit was filed, and not at any time thereafter. *Id*. at 543–44. Although the Ranch argued that the discovery rule should apply, the Court held otherwise because soil contamination from oil spills is not inherently undiscoverable within the limitations period. *Id*. at 544. The Court also rejected the Ranch's argument that limitations should be tolled based on fraudulent conduct, finding no evidence of such conduct. *Id*. Therefore, the Court held that ExxonMobil was entitled to partial summary judgment and dismissal of any claims related to the two abandoned sites. *Id*. at 545. With respect to the other two sites, the Court agreed with the court of appeals that the contamination had begun by 2005 at the latest, but identified outstanding questions of fact regarding whether the contamination had continued within the limitation period. *Id*.

Finally, the Court agreed with the court of appeals that ExxonMobil had not properly preserved its arguments regarding injunctive relief because it failed to include those arguments in its motion for summary judgment:

> While ExxonMobil's motion for summary judgment did mention that the Ranch should not be entitled to its requested relief, [and] the relief the Ranch was then requesting included injunctive relief[,] ExxonMobil's motion for summary judgment did not address the availability of injunctive relief. A motion for summary judgment must state the specific grounds entitling the movant to judgment, identifying or addressing the cause of action or defense and its elements. And while the availability of injunctive relief was discussed at the hearing on the motion, the motion itself did not "present[]" the issue, as the rule requires.

Id. at 545–46. In addition, the Court explained, "The Ranch's apparent adjustments in its position on appeal"—referring to the fact that the Ranch had repeatedly changed its description of the injunctive relief sought—"muddle the issue further." *Id*. at 546.

The *Lazy R* Court did not cite *Nall*, so it is not clear how the Court distinguishes the two cases. But it seems the record in the case should dictate the same outcome. In both motions, the defendant made a categorical assertion that, as a matter of law, an essential element of the plaintiff's claim is precluded by Texas precedent. In both motions, the defendant primarily focused on the legal theory offering the strongest support for the existence of that element, directly rebutting the theory while relegating alternate theories to the margins or to other briefing. And in both cases, the trial court recognized the broader scope of the defendant's argument before granting summary judgment without explaining the basis for its decision.

In fact, unlike in *Nall*, in this case both parties ***agreed*** the issue had been properly presented to the trial court. As the Ranch explained to the court of appeals, "In short, Exxon argued [in its motion] that injunctive relief was inappropriate for the reason that Plaintiffs' only remedy was money damages in the form of the diminished value of the property and that because Plaintiffs were not

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