Affirmed and Memorandum Opinion filed August 3, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00055-CV

KRISTOFER THOMAS KASTNER, Appellant

V.

GUTTER MANAGEMENT INC., GUTTERMAXX, L.P., FRANK FULCO, JACK HEATH, RUSSELL LUND, AND JIM MCCLAUGHLIN, Appellees

On Appeal from the 127th District Court
Harris County, Texas
Trial Court Cause No. 2007-26559

MEMORANDUM OPINION

The appellant brought suit against his former employer and related entities as well as several other employees seeking to recover damages arising from an alleged assault and allegedly false statements made to the Texas Board of Law Examiners regarding the appellant's application for a law license. The trial court granted the no-evidence summary judgment motions filed by the appellees. On appeal, the appellant asserts that he raised more than a scintilla of evidence to rebut the no-evidence motions and that the trial court erred in granting the motion without a hearing and in denying his motion for a continuance. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellant Kristofer Thomas Kastner, the plaintiff in the trial court, brought suit against his former employer, appellee/defendant Guttermaxx, L.P., and its affiliate, appellee/defendant Gutter Management, Inc. Kastner also brought suit against appellee/defendant Frank Fulco, the owner of Guttermaxx and president of Gutter Management, and appellees/defendants Jack Heath, Russell Lund, and Jim McClaughlin,[1] individually, all of whom are employees of Guttermaxx. According to the live petition dated April 8, 2008, Kastner was employed by Guttermaxx until his employment ended in January 2006, following a dispute in which Heath allegedly "grabbed" Kastner by the arm during the dispute. Kastner alleged in his live petition that this conduct constituted assault, which proximately caused damage to Kastner's reputation, employment, and his application for state licensure to practice law. Kastner asserted that because his employment was terminated, he lost his apartment and became homeless. Kastner claimed that Heath was acting as an agent and that Fulco, Guttermaxx, and Gutter Management were liable for Heath's conduct. From this conduct, Kastner claimed to have suffered reputational damage, damage to his law licensure, damage to his employment prospects, loss of income, personal and emotional damage, loss of consortium, and future damages.

Kastner claimed in his petition to have filed assault charges against Heath for the January 2006 incident. According to Kastner, at a court hearing on those charges, Heath committed slander against him by falsely testifying under oath that he did not grab him. Kastner also alleged that both Lund and McClaughlin committed slander against him at the hearing on the assault charges by falsely testifying under oath that they denied seeing Heath grab him. Kastner claimed that, under principles of respondeat superior, Fulco,

[1] Throughout the record, this individual has been referred to as "Jim McLaughlin" or "Jim McClaughlin." We refer to this individual as "Jim McClaughlin," as reflected in the notice of appeal and the trial court's final judgment.

Guttermaxx, and Gutter Management were liable for the "slander" committed by Heath, Lund, and McClaughlin in their testimony at this hearing.

Kastner also claimed in his petition that, in the process of applying to the Texas Board of Law Examiners for a license to practice law, he was required to disclose Guttermaxx, Heath, Lund, and McClaughlin as his prior employers. Kastner alleged that Lund and McClaughlin committed libel by making materially false statements to the Board of Law Examiners. According to the petition, the statements referred to Kastner as committing the offenses of criminal trespass, assault, and disorderly conduct and falsely stated that the trial judge in the hearing for the assault charges implied that Kastner was incompetent in filing charges against Heath. Kastner also alleged that Fulco, Guttermaxx, and Gutter Management, through Lund and McClaughlin as agents, committed libel regarding these statements. Kastner claimed that all of the appellees committed libel by making false statements to the Board of Law Examiners, indicating that he was terminated for gross insubordination and that he "possessed symptoms of bi-polar disorder and or psychosis based on their personal knowledge and experience." Kastner claimed that the statements negatively affected his licensure with the Board of Law Examiners and proximately caused reputational damages, damage to his law license, damage to his employment prospects, loss of income, personal and emotional damage, loss of consortium, and future damages.

Kastner also claimed that Fulco, Guttermaxx and Gutter Management owed a duty to supervise and "maintain employees [t]hat do not commit crimes, intentional torts, and libel employees and former employees" and breached that duty by negligently supervising Heath, Lund, and McClaughlin. As evidence of this breach, in his pleading, Kastner referred to the alleged false statements made by Heath, Lund, and McClaughlin at the hearing on the assault charges, unspecified statements made to other unnamed potential employers, and the statements made by Heath, Lund, and McClaughlin to the Board of Law Examiners. Kastner claimed the following damages proximately caused by the breach: loss of income, reputational damage, personal and emotional damage,

damage to his law licensure and future earning capacity, possible loss of consortium, and exposure to future damage by disclosure of the statements.

The appellees each filed no-evidence motions for summary judgment on Kastner's claims. Kastner filed a single response to the no-evidence motions. Although the record reflects that Kastner moved for a hearing on the motions and subsequently moved for a continuance on the no-evidence motions, the trial court granted the appellees' no-evidence motions without an oral hearing. The trial court awarded a take-nothing final judgment against Kastner and in favor of the defendants. Kastner now challenges that final judgment.

II. ISSUES AND ANALYSIS

A. Did the trial court err in granting the no-evidence motions for summary judgment?

In his first two issues, Kastner asserts that the trial court erred in granting the appellees' no-evidence motions for summary judgment. In reviewing a no-evidence summary judgment, we ascertain whether the non-movant pointed out summary-judgment evidence raising a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206–08 (Tex. 2002). In our de novo review of a trial court's summary judgment, we consider all the evidence in the light most favorable to the non-movant, crediting evidence favorable to the non-movant if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). When, as in this case, the orders granting summary judgment do not specify the grounds upon which the trial court relied, we must affirm the summary judgment if any of the independent

summary-judgment grounds is meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000).

1. Did Kastner present sufficient summary-judgment evidence to raise a genuine fact issue for his claims that the parties made allegedly false statements to the Board of Law Examiners?

The appellees claimed in their no-evidence motions for summary judgment that there was no evidence that the damages claimed by Kastner were proximately caused by any of the allegedly false statements made to the Board of Law Examiners. The essence of these statements, which Kastner characterizes as "libelous per se," include the following:

- Kastner committed criminal trespass, assault by threat, and disorderly conduct,
- The trial judge presiding over the hearing on criminal assault charges implied that Kastner was incompetent for filing a charge against Heath,
- Kastner "possessed symptoms of bi-polar disorder and or psychosis based on their personal knowledge and experience," and
- Kastner was terminated from his employment for gross insubordination.

A plaintiff who is a private figure may prevail upon showing that the defendant negligently made a false statement that was defamatory. *See Dolcefino v. Randolph*, 19 S.W.3d 906, 917 (Tex. App.—Houston [14th Dist.] 2000, pet. denied). However, even if Kastner had proven that the statements made to the Board of Law Examiners were false, Kastner could not prevail because he cannot prove the claimed damages. *See Swate v. Schiffers*, 975 S.W.2d 70, 74 (Tex. App.—San Antonio 1998, pet. denied) (involving a private-figure plaintiff who was libel-proof because of his already tarnished reputation and could not prove the damages he alleged).

The appellees attached evidence demonstrating that in 2000, the Board of Law Examiners made a preliminary determination that Kastner lacked the good moral character required for admission to practice law and suffered from chemical dependency. In making this determination, the Board of Law Examiners provided curative measures

for Kastner to follow and indicated that he could request a redetermination and that a hearing would be held to determine whether those curative measures had been met. The appellees submitted evidence from the Board of Law Examiners reflecting that in 2005, Kastner had applied for reconsideration with the Board of Law Examiners and that Kastner had failed to comply with the initial curative measures for the purpose of reconsideration. The evidence reflects that the Board of Law Examiners permitted Kastner to submit evidence in support of additional curative measures at a hearing. The appellees produced a letter from the Board of Law Examiners, dated January 29, 2007, reflecting that written statements from Heath, which also were signed by Lund and McClaughlin, would not be used in evidence against Kastner. The appellees also produced evidence in the form of discovery responses from the Board of Law Examiners indicating that the investigation of Kastner's application for admission was still ongoing.

Kastner's summary-judgment proof in response to the no-evidence motions consisted of over fifty exhibits spanning over four hundred pages. In response to the no-evidence motions, Kastner referred generally to a ninety-one-page document entitled "Legal Opinion of Kristofer Thomas Kastner" (hereinafter "Legal Opinion"). Kastner did not cite any specific facts or refer to specific portions of the Legal Opinion for support in his response. The non-movant may not merely make reference to summary judgment evidence in order to avoid summary judgment granted in favor of the movant. *See McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341–43 (Tex. 1993) (plurality op.) (providing that a reviewing court cannot "read between the lines, infer or glean from the pleadings or proof"). Kastner also cited several exhibits that he claimed were admitted into evidence at a hearing before the Board of Law Examiners and pertained to his licensure, including an affidavit and letter prepared by Kastner relating to his criminal assault charges against Heath, Heath's responses to Kastner's requests for discovery, and statements from two people regarding the alleged assault. He claims this evidence is proof that the Board of Law Examiners used the statements of Guttermaxx employees against him.

Kastner also referred to a letter from the Board of Law Examiners, dated August 7, 2008, which he claims states that his employment history may be evidence of a negative moral character trait, for which he claims he has "lost wages as a lawyer and reputation" as a result of the appellees' statements to the Board of Law Examiners. However, this letter states that a hearing on Kastner's licensure had been delayed because of multiple lawsuits initiated by Kastner against the Board of Law Examiners, Guttermaxx, and Kastner's former attorneys who represented him at an initial hearing before the Board of Law Examiners. This same letter from the Board of Law Examiners reflects that Kastner had yet to have complied with the Board's requests for an "Authorization and Release Form," apparently required by the Board of Law Examiners for review.

Finally, in his response, Kastner referred to a letter dated October 24, 2008, pertaining to a notice of hearing as evidence that the Board's investigation was complete and that the hearing had been held. However, Kastner does not cite where this letter is located in over 400 pages of summary-judgment evidence attached to his response. *See id.* (providing that a reviewing court cannot "read between the lines, infer or glean from the pleadings or proof" and that a non-movant may not merely reference summary judgment evidence in order to avoid summary judgment granted in favor of movant).

As of the date summary judgment was granted, Kastner had not produced evidence raising a genuine issue of fact that the Board of Law Examiners had completed its investigation or made a determination as to Kastner's admission to practice law or considered the statements as evidence against him.[2] Without evidence of injury, the trial court's order granting summary judgment against Kastner was proper. *See Swate*, 975 S.W.2d at 75.

[2] By reply brief, Kastner attached as an appendix a document that Kastner claims is evidence that he has appealed the Board's decision. Although Kastner attached a letter, dated May 22, 2009, relating to an appeal of a Board of Law Examiners decision to his reply brief, we may consider only those documents contained in the record and may not look to documents attached as exhibits or appendices to briefs or motions not in the record. *See* TEX. R. APP. P. 38.1(f); 38.1(h); 34.1; *see also Silk v. Terrill*, 898 S.W.2d 764, 766 (Tex. 1995); *Sewell v. Adams*, 854 S.W.2d 257, 259, n.1 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Because the Board's investigation into Kastner's moral character was still ongoing at the time the trial court granted summary judgment, the appellees each claimed that Kastner's claims for damages regarding all statements made to the Board of Law Examiners were not ripe. An administrative action must be final before it is ripe for judicial review. *See City of El Paso v. Madero Dev.*, 803 S.W.2d 396, 398–99 (Tex. App.—El Paso 1991, writ denied). A claim is ripe when, at the time a lawsuit is commenced, the facts have developed sufficiently to demonstrate that an injury has occurred or is likely to occur rather than being contingent or remote. *See Patterson v. Planned Parenthood of Houston and Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). Kastner complains on appeal that the appellees' claim of ripeness lacks merit because he produced letters and his Legal Opinion as well as evidence of lost wages, discoverability, and associated damages. However, Kastner has not presented any evidence demonstrating that the Board's investigation was final so that he may seek judicial review. *See, e.g.*, *Kastner v. Tex. Bd. of Law Exam'rs*, 278 F. App'x 346, No. 07-51145, 2008 WL 2048326, at *2 (5th Cir. May 14, 2008) (concluding that Kastner's challenge for purported denial of admission to state bar was not ripe for judicial review because the board had not yet made a final decision on the matter); *Rea v. State*, 297 S.W.3d 379, 384 (Tex. App.—Austin 2009, no pet.) (providing that because an administrative agency had not made a final decision, there was no final appealable decision). On this basis, Kastner's claims for damages relating to allegedly false statements made to the Board of Law Examiners were not shown to be ripe. Therefore, the trial court did not err in granting summary judgment against Kastner on his claims for false statements given to the Board of Law Examiners.

2. Did Kastner present sufficient summary-judgment evidence to raise a genuine fact issue as to each element of his claims for negligent supervision?

Kastner asserted claims against Fulco, Guttermaxx, and Gutter Management for negligent supervision of Heath, Lund, and McClaughlin, referring to the alleged assault by Heath, the allegedly false statements to the Board of Law Examiners, and the

allegedly false testimony at the criminal hearing on the assault charges. To prevail on his claims for negligent supervision, Kastner must prove that (1) Fulco, Guttermaxx, and Gutter Management owed him a legal duty to supervise employees, (2) that Fulco, Guttermaxx, and Gutter Management breached that duty, and (3) that the breach proximately caused his injuries. *See Knight v. City Streets, L.L.C.*, 167 S.W.3d 580, 584 (Tex. App.—Houston [14th Dist.] 2005, no pet.). To establish that conduct by Fulco, Guttermaxx, and Gutter Management was the proximate cause of his injuries, Kastner also must show that the parties' actions in supervising Heath, Lund, and McClaughlin were the cause-in-fact of his injuries and that the assault, the testimony, and statements to the Board of Law Examiners were foreseeable consequences of Fulco's, Guttermaxx's, and Gutter Management's supervision of the individuals. *See id.*; *Wrenn v. G.A.T.X. Logistics, Inc.*, 73 S.W.3d 489, 496 (Tex. App.—Fort Worth 2002, no pet.).

In no-evidence motions for summary judgment, Fulco and Gutter Management denied employing Kastner. Fulco claimed to be a limited partner of Guttermaxx; Gutter Management claimed to be a general partner of Guttermaxx. In its no-evidence motion for summary judgment, Guttermaxx asserted that it did not authorize either the statements to the Board of Law Examiners or the alleged assault nor was the assault within the scope of Heath's employment. For proof of employment, Kastner referred generally to the following evidence in his response without citing where this evidence could be found within the summary-judgment proof he produced: his Legal Opinion; "statements of Guttermaxx dated 8/26/06/ 08/29/06, and 09/02/06 which show the plaintiff was employed by Guttermaxx," which Kastner did not identify as exhibits attached as summary-judgment evidence; and cancelled checks from Guttermaxx, which Kastner indicated he was awaiting in response to discovery.

The proof offered by Kastner failed to raise a genuine issue of material fact regarding the allegations of negligent supervision. *See Knight*, 167 S.W.3d at 585. None of the evidence demonstrates that Kastner was employed by Fulco or Gutter Management. To the contrary, the evidence to which Kastner referred appears to

demonstrate that he was employed only by Guttermaxx. Furthermore, even if Kastner's evidence demonstrated he was employed by both Gutter Management and Fulco, Kastner presented no evidence that Fulco, Gutter Management, or Guttermaxx knew of, or authorized, the alleged assault, the statements to the Board of Law Examiners, or the testimony at the hearing on assault charges or any evidence that the parties could have intervened. *See id*. On this basis, Kastner has presented no proof that any negligent supervision of Heath, Lund, or McClaughlin was the cause-in-fact of Kastner's alleged injuries or that any of the alleged damages were a foreseeable consequence of negligent supervision of the employees. *See id.* Because Kastner did not produce any summary-judgment evidence to raise a genuine issue of material fact regarding negligent supervision of Heath, Lund, and McClaughlin, the trial court properly granted summary judgment on Kastner's negligent supervision claim. *See id.*

3. Did Kastner present sufficient summary-judgment evidence to raise a genuine fact issue as to each element of his claims based on respondeat superior?

Fulco, Guttermaxx, and Gutter Management in each of their no-evidence motions for summary judgment asserted that they were not liable to Kastner under a theory of respondeat superior for the alleged assault and the allegedly false statements made to the Board of Law Examiners. To hold an employer liable for tortious actions of its employees, a claimant must prove the following: (1) an agency relationship existed between the employee (the tortfeaser) and the employer; (2) the employee committed a tort; and (3) the tort was in the course and scope of the employee's authority. *See Baptist Mem'l Hosp. Sys. v. Sampson*, 969 S.W.2d 945, 947 (Tex. 1998). A tort is within the course and scope of an employee's authority if his action (1) was within the employee's general authority; (2) was in furtherance of the employer's business; and (3) was for the accomplishment of the object for which the employee was hired. *Knight* 167 S.W.3d at 583.

In their no-evidence motions, Fulco and Gutter Management generally denied employing Kastner and denied liability for the alleged assault under principles of respondeat superior. Similarly, Guttermaxx denies liability for the alleged assault under the theory of respondeat superior, claiming that it did not authorize any assault. Generally, commission of an assault is not within the course and scope of an employee's authority. *Tex. & Pac. Ry. Co. v. Hagenloh*, 151 Tex. 191, 197, 247 S.W.2d 236, 239 (1952); *Knight*, 167 S.W.3d at 583. However, an assault by an employee will be found to be within the scope of his employment when the assault is of the same general nature as the conduct authorized by the employer or is incidental to the conduct authorized. *See Smith v. M. Sys. Food Stores, Inc.*, 156 Tex. 484, 297 S.W.2d 112, 114 (1957); *Knight*, 167 S.W.3d at 583. Therefore, if an employer places an employee in a position that involves the use of force, so that the act of using force is in the furtherance of the employer's business, the employer can be found liable for its employee's actions even if the employee uses greater force than necessary. *Hagenloh*, 151 Tex. at 197, 247 S.W.3d at 239; *Knight*, 167 S.W.3d at 583.

In response to the no-evidence motions for summary judgment, Kastner referred generally to his Legal Opinion for support that the assault occurred in the scope of Heath's work as a national call center employee for Guttermaxx and in furtherance of Guttermaxx's objectives for which Heath was hired. However, the Legal Opinion contains a description of the dispute between Heath (a national call center manager) and Kastner, (an employee) as arising from a disagreement over client "leads." Kastner presented no evidence that the use of force was within Heath's scope of employment as manager of a national call center for Guttermaxx. *See Knight*, 167 S.W.3d at 584; *Wrenn*, 73 S.W.3d at 494–95. Considering the evidence in the light most favorable to Kastner, as the non-movant, none of the evidence presented by Kastner creates a fact issue as to whether the assault was in any way authorized by Guttermaxx, Fulco, or Gutter Management. *See Knight*, 167 S.W.3d at 584; *Wrenn*, 73 S.W.3d at 494.

Likewise, in the no-evidence motions, Fulco, Guttermaxx, and Gutter Management each denied authorizing any statements made to the Board of Law Examiners. Kastner alleged that portions of the statements to the Board of Law Examiners were made on Guttermaxx stationery and that Lund, Heath, and McClaughlin listed the titles of their positions in the statements made to the Board of Law Examiners. However, considering these facts in the light most favorable to the non-movant as demonstrating authority to make the statements to the Board of Law Examiners, Kastner presented no evidence that Fulco or Gutter Management employed Lund, Heath, and McClaughlin or that the statements were made in the course and scope of employment as being made either in furtherance of Gutter Management or Fulco's businesses. *See Knight*, 167 S.W.3d at 583 (providing that a tort is within an employer's course and scope of authority if tort was committed within the employee's general authority, in furtherance of the employer's business, and to accomplish an ends for which the employee was hired). Furthermore, as previously discussed, Kastner has not demonstrated that he could prevail in a case based on the statements made to the Board of Law Examiners because he could not prove the claimed damages stemming from the statements. *See Swate*, 975 S.W.2d at 74 (involving a private-figure plaintiff who could not prove the damages he alleged).

Kastner failed to produce any summary-judgment evidence to raise a genuine issue of material fact as to whether Heath acted within the course and scope of his employment when he allegedly assaulted Kastner. *See Knight*, 167 S.W.3d at 584. Similarly, Kastner failed to produce any summary-judgment evidence that Fulco and Gutter Management authorized any statements made by its employees. *See id*. Even if Kastner had demonstrated that the statements made to the Board of Law Examiners were authorized by Guttermaxx, as we have determined, Kastner has not demonstrated that he suffered the claimed damages. *See Swate*, 975 S.W.2d at 74. Therefore, we conclude that the trial court did not err in granting summary judgment against Kastner on the

claims against Fulco, Guttermaxx, and Gutter Management under principles of respondeat superior.

4. Did Kastner present sufficient summary-judgment evidence to raise a genuine fact issue for his claims that the parties offered allegedly false testimony in a prior criminal hearing?

All of the appellees asserted in their no-evidence motions for summary judgment that they were not liable to Kastner for any allegedly false testimony at the criminal hearing on the assault charges on the basis that those who testified at the criminal hearing received "immunity." The summary-judgment record reflects that the statements Kastner characterizes as slander per quod were made in in the course of prior criminal proceedings relating to the assault charge against Heath. All proceedings in courts of this state receive absolute privilege and cannot serve in any way as grounds for an action involving defamation. *Ross v. Arkwright Mut. Ins. Co.*, 892 S.W.2d 119, 132 (Tex. App.—Houston [14th Dist.] 1994, no writ). Nothing in the summary-judgment record suggests that any of the statements characterized by Kastner as slander were made outside the context of the criminal proceedings. *See id.* Accordingly, the trial court did not err in granting summary judgment against Kastner on these claims. *See id.*

5. Did Kastner present sufficient summary-judgment evidence to raise a genuine fact issue as to each element of his claim for the assault?

Heath, Lund, and McClaughlin asserted in their no-evidence motion for summary judgment that there is no proximate cause for the assault damages alleged by Kastner. To prevail on a claim for civil assault, the plaintiff must establish the same elements required for criminal assault. *Johnson v. Davis*, 178 S.W.3d 230, 240 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Under Texas Penal Code section 22.01(a)(3), an assault occurs when a person intentionally or knowingly causes physical contact with another when the person knows or should reasonably believe that the other will regard the contact as offensive or provocative. TEX. PENAL CODE ANN. § 22.01(a)(3) (Vernon Supp. 2009).

Kastner responded to the no-evidence motions with the following statements:

> The plaintiff has offered a legal opinion in this cause. The legal opinion provided more than a scintilla of evidence to show the plaintiff has been damaged by the grab of Mr. Heath ad [sic] had his reputation employment and law license damaged.

Kastner's response to the no-evidence motions included no legal argument as to the elements for the alleged assault. *See Johnson*, 73 S.W.3d at 207 (providing that the "minimum requirements of Rule 166a(i)" included argument and evidence addressing the particular issue raised in the motion for summary judgment). On appeal, Kastner makes reference to numerous pages within his Legal Opinion as raising both legal argument and facts. A motion does not state grounds for summary judgment if it merely makes reference to an accompanying document of authorities that contains grounds for summary judgment. *See McConnell*, 858 S.W.2d at 341 (providing that a motion for summary judgment must "stand or fall on the grounds expressly presented"); *Coastal Cement Sand Inc. v. First Interstate Credit Alliance, Inc.*, 956 S.W.2d 562, 565 (Tex. App.—Houston [14th Dist.] 1997, writ denied) (involving a memorandum of authorities in support of grounds not expressly presented in motion for summary judgment).

Even if Kastner had produced sufficient reasons as to why summary judgment would have been improper, he still was required to support the reasons with evidence. *San Saba Energy, L.P. v. Crawford*, 171 S.W.3d 323, 329 (Tex. App.—Houston [14th Dist.] 2005, no pet.) ("If a non-movant's response fails to set forth valid reasons why summary judgment should not be granted and if the motion and summary judgment evidence show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law on the grounds asserted in the motion, then the trial court should simply grant summary judgment."). To the extent Kastner asserted in the motion that he provided more than a scintilla of evidence, broad conclusory statements without factual support are neither credible nor constitute valid summary-judgment evidence. *Doherty v. Old Place, Inc.*, —S.W.3d —, No. 14-08-00494-CV, 2010 WL 2852850, at *3 (Tex. App.—Houston [14th Dist.] July 22, 2010, no pet. h.) (op. on reh'g). Aside from the general reference to his Legal Opinion, Kastner did not

specifically refer to any other evidence in response to the no-evidence motions for support of this claim. Although Kastner urges this court to consider the Legal Opinion, legal opinions and conclusions made within an affidavit attached as summary-judgment evidence are not considered competent summary-judgment evidence and are insufficient to raise an issue of fact in response to a motion for summary judgment. *See Mercer v. Daoran Corp.*, 676 S.W.2d 580, 583 (Tex. 1984); *Green v. Unauthorized Practice of Law Comm.*, 883 S.W.2d 293, 297 (Tex. App.—Dallas 1994, no writ).

Furthermore, Kastner's general reference to his Legal Opinion within the voluminous summary-judgment record that does not direct the trial court and the parties to the evidence on which the movant relies is insufficient. *See McConnell*, 858 S.W.2d at 341 ("[I]ssues a non-movant contends avoid the movant's entitlement to summary judgment must be expressly presented by written answer to the motion or by other written response to the motion and are not expressly presented by mere reference to summary judgment evidence."); *see also Guthrie v. Suiter*, 934 S.W.2d 820, 826 (Tex. App.—Houston [1st Dist.] 1996, no writ) (holding trial court did not abuse its discretion in refusing to consider 500-page deposition attached to summary-judgment motion when party did not direct trial court to portions on which party was relying). A trial court does not abuse its discretion when it does not consider summary-judgment proof to which a movant does not specifically direct the trial court's attention. *See Guthrie*, 934 S.W.2d at 826. Kastner has not presented any evidence demonstrating that the damages alleged were proximately caused by Heath's alleged assault on Kastner. On this basis, the trial court did not err in granting summary judgment against Kastner on his claim for assault. *See id.*

Kastner challenges the no-evidence summary-judgment motions on the basis that the motions are unsigned; however, the record reflects that the motions are signed. Thus, Kastner's argument lacks merit.

Kastner also asserts that in granting the no-evidence motions, the trial court granted more relief than requested. He claims that the no-evidence motions do not address the statements allegedly made by McClaughlin and Lund. The record reflects that each of the motions addressed the alleged false testimony of McClaughlin and Lund.

To the degree Kastner challenges the trial court's granting of summary judgment as being in violation of the Texas and United States Constitutions in his reply brief, Kastner has provided no argument, analysis, citations to the record, or legal authority. By failing to brief this argument, Kastner has waived it. *See* TEX. R. APP. P. 38.1(h); *San Saba Energy, L.P.*, 171 S.W.3d at 338 (holding that even interpreting briefing requirements liberally and reasonably, a party asserting error on appeal must still put forth some specific argument and analysis citing the record and authorities in support of the party's argument).

By reply brief, Kastner also contends that because the record does not contain the trial court's order on summary judgment for Gutter Management Inc., final judgment in this case was "impossible," void, invalid, unconstitutional, and in violation of the Texas and United States Constitutions. The record contains a final judgment stating the following:

> On December 12, 2008, separate orders granting motions for summary judgment by all parties and causes of action were signed. This Final Judgment is signed.
>
> It is therefore ORDERED, ADJUDGED and DECREED that KRISTOFER THOMAS KASTERNER [sic] take nothing as to GUTTERMAXX, L.P. and its general partner GUTTER MANAGEMENT INC., FRANK FULCO, JACK HEATH, RUSSEL LUND, and JIM MCCLAUGHLIN. All costs are taxed to Plaintiff.

To the extent Kastner's complaint could be construed as a challenge to the finality of the trial court's judgment, the judgment states with unmistakable clarity that the trial court granted summary-judgment motions as to all parties and causes of action, thereby disposing of all claims. *See Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 205 (Tex.

2001). Therefore, the judgment is a final judgment from which a party may appeal. *See id.* We overrule Kastner's first and second issues.

B. Did the trial court err in granting the no-evidence motions for summary judgment without a hearing and in failing to grant a continuance on the hearing for summary judgment?

In his third issue, Kastner contends that the trial court erred in granting the no-evidence motions without a hearing. In his fourth issue, Kastner claims the trial court erred in failing to grant a continuance for a summary-judgment hearing.

A no-evidence motion for summary judgment may be filed and heard after "adequate time for discovery." *See* TEX. R. CIV. P. 166a(i). A party opposing such a motion, claiming inadequate time for discovery as in this case, must file either an affidavit explaining the need for further discovery or a verified motion for continuance. *See* TEX. R. CIV. P. 166a(g); *Rogers v. Continental Airlines, Inc.*, 41 S.W.3d 196, 200–01 (Tex. App.—Houston [14th Dist.] 2001, no pet.). A trial court may rule on summary-judgment motions without holding a hearing. *Bowles v. Cook*, 894 S.W.2d 65, 67 n.1 (Tex. App.—Houston [14th Dist.] 1995, no writ) (involving a trial court that properly granted summary judgment without a hearing). The trial court can decide a motion for summary judgment on submission without an appearance by the attorneys before the court. *Martin v. Martin, Martin & Richards, Inc.*, 989 S.W.2d 357, 359 (Tex. 1998). On this basis, Kastner's third issue is overruled.

A party who opposes summary judgment may file a motion to continue the summary-judgment hearing in order to conduct additional discovery. TEX. R. CIV. P. 166a(g). The grant or denial of a motion for continuance is within the sound discretion of the trial court. *Villegas v. Carter*, 711 S.W.2d 624, 626 (Tex. 1986). A motion for continuance shall not be granted except for sufficient cause supported by affidavit or by consent of the parties or by operation of law. TEX. R. CIV. P. 251.

According to Kastner's motion, he sought a continuance to obtain additional discovery, including a deposition of a Board of Law Examiners employee and an order from the Board of Law Examiners as to his pending law license on the basis that his moral character was currently unknown, all of which Kastner alleged was dispositive of the no-evidence motions. However, the record does not reflect that the trial court granted or denied this motion. A party moving for continuance of a summary-judgment hearing or submission must obtain a written ruling on its motion in order to preserve the complaint for appellate review. *See* TEX. R. APP. P. 33.1(a); *Mitchell v. Bank of Am., N.A.*, 156 S.W.3d 622, 625–26 (Tex. App.—Dallas 2004, pet. denied); *Direkly v. ARA Devcon, Inc.*, 866 S.W.2d 652, 656 (Tex. App.—Houston [1st Dist.] 1993, writ dism'd w.o.j.). Kastner does not point to any place in the record, and our independent review of the record does not reflect, that Kastner secured a ruling from the trial court on this motion. *See Sw. Country Enters., Inc. v. Lucky Lady Oil Co.*, 991 S.W.2d 490, 492–93 (Tex. App.—Fort Worth 1999, pet. denied). Although in his reply brief, Kastner refers to the trial court's docket sheet, reflecting the entry "M/Continuance denied," a notation in a docket sheet is not a final order or judgment. *See In re Bill Heard Chevrolet, Ltd.*, 209 S.W.3d 311, 315 (Tex. App.—Houston [1st Dist.] 2006, orig. proceeding) ("A docket-sheet entry cannot contradict or take the place of a written order or judgment."). Accordingly, Kastner has failed to preserve this complaint for appellate review.

Notwithstanding the failure to preserve error, to the degree Kastner asserts that by denying his motion for continuance and in granting the no-evidence motions, the trial court has violated provisions in the Texas and United States Constitutions, Kastner has failed to provide legal authority, citations to the record, or analysis in support of these arguments or shown that he raised these complaints in the trial court. *See* TEX. R. APP. P. 38.1(h); *San Saba Energy, L.P*, 171 S.W.3d at 338. Therefore, these arguments are waived. Kastner's fourth issue is overruled.

Having overruled each of appellant's issues, we affirm the trial court's judgment.

/s/ Kem Thompson Frost
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.