

**Affirmed and Opinion Filed November 3, 2016**



**In The  
Court of Appeals  
Fifth District of Texas at Dallas**

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**No. 05-16-00003-CV**

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**DENA BURCH, Appellant**

**V.**

**TEXAS HEALTH PRESBYTERIAN HOSPITAL DALLAS, Appellee**

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**On Appeal from the County Court at Law No. 4  
Dallas County, Texas  
Trial Court Cause No. CC-13-06083-D**

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**MEMORANDUM OPINION**

Before Justices Francis, Stoddart, and Schenck  
Opinion by Justice Francis

Dena Burch appeals the trial court's no-evidence summary judgment dismissing her personal injury claims against Texas Health Presbyterian Hospital Dallas. Burch brings two issues challenging the timing and sufficiency of Texas Health's summary judgment motion as well as contending the evidence raised a genuine issue of material fact. We affirm the trial court's judgment.

While visiting her mother who was a patient at Texas Health, Burch slipped and fell in a puddle of liquid on the floor in front of the hospital's elevators. Burch filed suit asserting a claim for negligence. In her petition, Burch specifically stated she was a licensee of Texas Health at the time of the incident. Burch further stated that, as a licensee, Texas Health owed her "a duty to exercise ordinary care with respect to dangerous conditions of which [it] was aware

and [she] was not.” Burch sought approximately \$450,000 in damages for medical expenses, pain, suffering, and mental anguish.

On May 29, 2015, the trial court signed an agreed scheduling order setting the case for trial on December 8, 2015. The discovery period was scheduled to end on November 6. Texas Health filed its motion for no-evidence summary judgment under Texas Rule of Civil Procedure 166a(i) on November 3, three days before the discovery period ended.

In the motion, Texas Health set out the three elements of common law negligence: duty, breach, and damages proximately resulting from the breach. Texas Health then asserted that, because Burch had acknowledged her status as a licensee on the premises, the only duty owed her was (1) to not injure her by willful, wanton, or grossly negligent conduct and (2) to use ordinary care to either warn her or make reasonably safe a dangerous condition of which it was aware and she was not. *See State Dept. of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992). The hospital contended no evidence showed it had actual knowledge of the alleged “dangerous condition” such that it breached the duty of care owed to Burch. The hospital further contended no evidence indicated any misconduct on its part was a substantial factor in bringing about her injuries.

Burch responded to the motion contending Texas Health misstated the no-evidence summary judgment standard by suggesting she was required to produce evidence in support of her claims before the no-evidence motion was filed. Burch also asked the trial court to dismiss or abate the motion to allow the parties to complete discovery. With respect to the substance of her claims, Burch argued that, although she was “technically” a licensee of the hospital, fact issues existed as to whether she became an invitee by virtue of her use of the hospital’s facilities. As an invitee, she argued the hospital owed her a duty to protect her from dangers that it not only knew existed, but that it reasonably should have known existed. *Id.* Burch further argued there

were fact issues as to Texas Health's knowledge of the spill on the floor, and the evidence demonstrated her injuries were caused as a result of her slipping on the spill.

In support of her response, Burch submitted her own affidavit testimony and an affidavit by her husband with photographs taken on the day of the incident. Burch testified in her affidavit that she had been staying overnight at the hospital with her mother when she went to the hospital cafeteria for lunch. As she was returning to her mother's room, she slipped and fell in a "wet substance" in front of the elevators. Several hospital employees were nearby and came to her aid. She went to the hospital's emergency room and was told she did not have a broken arm. Burch said she was later diagnosed with an enclosed fracture and herniated discs that she attributed to the fall. Although she was not a patient of Texas Health, Burch "believed [her] status should be one as caregiver for [her] mother and therefore an invitee." Burch further believed the hospital was responsible for her injuries because "they placed marble flooring in an area where they knew or should have known any type of clear liquid would create a hazardous and dangerous condition where individuals like myself could fall." The photographs submitted by Burch included pictures of her wrist and swollen hand and the floor in the area where she fell.

On November 30, 2015, the trial court signed an order granting Texas Health's motion for no-evidence summary judgment and dismissing Burch's claims with prejudice. Burch brought this appeal.

Burch first contends the trial court erred in granting summary judgment in favor of Texas Health because the hospital's motion for no-evidence summary judgment was filed three days before the expiration of the discovery deadline. Rule 166a(i) requires only that an "adequate time for discovery" pass before a no-evidence motion is filed. *See* TEX. R. CIV. P. 166a(i). Burch makes no argument and cites no authority to show that a no-evidence motion may not be filed before the trial court's discovery deadline has passed or that less time for discovery than set

out in a trial court's scheduling order is inadequate as a matter of law. Nor does Burch discuss the status of discovery at the time the motion was filed, what further discovery was needed, or in what way the time for discovery before the motion was filed was inadequate. Because Burch failed to address any of the relevant factors used to determine whether she had an adequate time for discovery, we conclude this issue is not sufficiently briefed and presents nothing for review. *See Robertson v. Sw. Bell Yellow Pages, Inc.*, 190 S.W.3d 899, 902–03 (Tex. App.—Dallas 2006, no pet.).

Burch next contends Texas Health's motion misstated her burden of proof under rule 166a(i). Burch argues the hospital's assertions that "no evidence has been provided" and that she "has failed to offer any evidence" with respect to certain elements of her claim improperly suggested she had a burden to produce evidence before the motion was filed. Burch's argument is not well taken.

Texas Health's motion for summary judgment quoted the language of rule 166a(i) in its entirety, including the requirement that the court must grant the motion "unless the respondent produces summary judgment evidence raising a genuine issue of material fact." *see* TEX. R. CIV. P. 166a(i). The motion went on to state that "once the movant has stated the elements as to which there is no evidence, the burden shifts to the non-movant to produce evidence that raises a fact issue on the challenged elements." *See Howell v. Hilton Hotels Corp.*, 84 S.W.3d 708, 711–12 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). The language in the motion concerning Burch's failure to provide evidence in support of certain elements of her claim prior to the motion being filed merely set out a reason for Texas Health to believe no evidence supported the challenged elements. Nothing in the motion suggested Burch could not defeat summary judgment by submitting sufficient evidence in response to the motion and Burch makes no showing that the trial court misapplied the burden of proof. Indeed, Burch fails to specify any

error on the part of the trial court in connection with this argument. Burch's response to the motion discussed the elements challenged by Texas Health and her summary judgment evidence purported to relate to those elements. Because the motion outlined the proper standard and our review does not show the trial court misapplied the burden of proof, Burch has failed to show how the trial court erred or how the statements about which she complains caused the rendition of an improper judgment. *See* TEX. R. APP. P. 44.1.

Finally, Burch contends the trial court erred in granting summary judgment because the evidence she submitted raised a fact issue with respect to whether she was she was a licensee or an invitee of the hospital at the time of the incident. Burch specifically alleged in her petition, however, that she was on the hospital's premises as a licensee. An admission of status in an unretracted pleading may be considered a judicial admission that is legally binding on the party making it. *See Procom Energy, L.L.A. v. Roach*, 16 S.W.3d 377, 382 (Tex. App.—Tyler 2000, pet. denied); *Blankenship v. County of Galveston*, 775 S.W.2d 439, 441 (Tex. App.—Houston [1st Dist.] 1989, no writ).

Furthermore, regardless of whether Burch was a licensee or an invitee, she was required to show that the hospital's failure to exercise ordinary care was a proximate cause of her injuries. *See Payne*, 838 S.W.2d at 237. Texas Health's motion specifically asserted it was entitled to summary judgment because Burch had no evidence to support the element of causation. The trial court's judgment does not specify the ground or grounds on which it was based and Burch has not raised either a general or separate issue challenging the ground of no evidence of causation as a basis for the judgment. If an appellant does not challenge each possible ground for summary judgment, we must uphold the judgment on the unchallenged ground. *See Wilhite v. Glazer's Wholesale Drug Co., Inc./Glazer Family of Cos.*, 306 S.W.3d 952, 954 (Tex. App.—Dallas 2010, no pet.). Accordingly, because Burch has not asserted any error with respect to

granting summary judgment on the ground of no evidence of causation, we must affirm the judgment on that basis.

We resolve Burch's issues against her and affirm the trial court's judgment.

/Molly Francis/  
MOLLY FRANCIS  
JUSTICE

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**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

DENA BURCH, Appellant

No. 05-16-00003-CV      V.

TEXAS HEALTH PRESBYTERIAN  
HOSPITAL DALLAS, Appellee

On Appeal from the County Court at Law  
No. 4, Dallas County, Texas

Trial Court Cause No. CC-13-06083-D.

Opinion delivered by Justice Francis.

Justices Stoddart and Schenck participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee TEXAS HEALTH PRESBYTERIAN HOSPITAL DALLAS recover its costs of this appeal from appellant DENA BURCH.

Judgment entered November 3, 2016.