Opinion issued March 22, 2012

In The

Court of Appeals

For The

First District of Texas

NO. 01-11-00042-CV

KRESEDA SCOTT, Appellant

V.

ELEOW HUNT, Appellee

On Appeal from the 269th District Court
Harris County, Texas
Trial Court Case No. 2005-58363C

MEMORANDUM OPINION

This is an appeal of several partial summary-judgment orders made final by severance from the remainder of the case. We reverse the trial court's order granting attorneys' fees to appellee Eleow Hunt as a prevailing party on appellant

Kreseda Scott's Theft Liability Act claim and render judgment that he take nothing on that claim. We affirm the remainder of the trial court's judgment.

BACKGROUND

This litigation has a protracted and complicated history involving numerous claims and parties. We outline here only the facts we deem relevant to our disposition of the issues on appeal.

A. The Parties & Claims

The appellant in this case is plaintiff Kreseda Scott (f/k/a Kreseda Smith), who was previously married to plaintiff Antowaine Smith. In 2005, Smith and Scott sued the appellee in this appeal, defendant Eleow Hunt, as well as several other defendants—Antony Welch, New South Federal Savings Bank, James Ballard, and Herschell Davis Hunt.

Scott and Smith alleged that Welch opened a bank account at New South Federal Savings Bank in Smith's name by forging Smith's signature. Welch then filed fraudulent tax returns in Smith's name for the tax years 1998–2002, had the resulting tax refunds deposited into the New South account, and then withdrew and stole that money. The plaintiffs also alleged that appellee Eleow Hunt, along with defendants Herschell Hunt and James Ballard, assisted and participated in Welch's activities and that all represented the plaintiffs during IRS audits covering the tax years 1999–2000.

The plaintiffs identify appellee Eleow Hunt and defendant Herschell Hunt as brothers. Appellee Eleow Hunt claims to have formed a partnership in 2000 called Capital Tickets with Smith, through Welch (whom Eleow Hunt understood to be Smith's agent). The plaintiffs allege that Herschell Hunt was one of Smith's tax preparers from 1999–2000. James Ballard was Smith's lawyer.

Relevant to this appeal, Scott and Smith essentially claim that the Capital Tickets partnership between Eleow Hunt and Smith was fraudulently backdated by Eleow from 2002 to 2000 to create business losses that Smith could use during the audit of Smith's 2000 return. Among other things, the plaintiffs' petition alleges that "Welch's actions constitute fraud," and that "Welch's conduct constitutes unconscionable conduct under the DTPA." Specific to Eleow Hunt, the plaintiffs claim that he conspired and participated with the other actors to violate the DTPA and commit fraud. The plaintiffs deny that Welch was Smith's agent, and thus complain that Eleow Hunt's forming and operating a partnership in Smith's name was negligent and wrongful. They also claim that, as the purported tax partner of Capital Tickets, Eleow Hunt had a duty to disclose information to the plaintiffs about their tax treatment and about his dealings with Welch.

B. The trial court's orders

1. Fraud Summary Judgment

On April 16, 2007, Eleow Hunt and Herschell Hunt moved for traditional and no-evidence partial summary judgment on plaintiffs' claims for theft, conspiracy, fraud, conversion, theft under the Theft Liability Act, and negligence. The plaintiffs responded on May 1, 2007 with argument and evidence, including an affidavit by Welch. On May 25, 2007, the plaintiffs filed their third amended petition abandoning their Theft Liability Act claim.

The Hunts filed a reply to the plaintiffs' response and a motion to strike Welch's affidavit from the summary judgment evidence as a sham affidavit because it (1) conflicts, with no explanation, with Welch's prior deposition testimony and sworn interrogatory responses, and (2) contains hearsay. On June 15, 2007, the trial court granted the Hunts' motion for summary judgment. The portion of that order granting summary judgment on Scott's fraud, conspiracy to commit fraud, and Theft Liability Act is a subject of Scott's appeal here.

2. DTPA Summary Judgment

On July 20, 2007, Eleow Hunt moved for partial summary judgment on Smith's and Scott's DTPA claims, Declaratory Judgment Act claims, and request for injunctive relief. Smith responded with argument and evidence, and objected to Eleow's summary judgment evidence. Scott, however, did not respond. On

September 10, 2007, the trial court granted Eleow Hunt's motion for summary judgment. This order is a subject of Scott's appeal here.

3. Theft Liability Act Attorneys' Fees Summary Judgment

On April 15, 2010, Eleow Hunt moved for partial summary judgment against Scott, seeking an attorneys' fees award for successfully defending against Scott's Theft Liability Act claim. Scott did not file a response to the motion. On May 31, 2010, the trial court granted Eleow Hunt's motion, awarding him $100,000 in attorneys' fees. The trial court's order granting summary judgment awarding Eleow Hunt attorney's fees under the Theft Liability Act is a subject of Scott's appeal here.

4. DTPA Attorneys' Fees Summary Judgment

On October 28, 2010, Eleow Hunt moved for partial summary judgment against Scott, seeking an attorneys' fees award for successfully defending against Scott's DTPA claim. Scott responded, relying in part upon Welch's affidavit. Eleow Hunt filed a reply and requested again that the trial court strike Welch's affidavit from the summary judgment evidence as a sham affidavit because it (1) conflicts, with no explanation, with Welch's prior deposition testimony and sworn interrogatory responses, and (2) contains hearsay. On December 10, 2010, the trial court granted Eleow Hunt's motion for summary judgment, awarding him $28,927 in attorneys' fees.

5. Severance Order, Final Judgment, and Denial of Motion for New Trial

On December 10, 2010, the trial court granted Eleow Hunt's motion to sever the claims between himself and Scott and for entry of final judgment on those claims. That same day, he denied Scott's request for reconsideration/new trial of the court's May 31, 2010 order awarding attorneys' fees under the Theft Liability Act.

THIS APPEAL

Scott brings four issues on appeal.

(1) The trial court erred in granting summary judgment because there are several fact issues regarding the fraud claims and the credibility of Anthony Welch. The trial court erred in striking the affidavit of Anthony Welch.

(2) The trial court erred in granting summary judgment because there are fact issues regarding the fraud claims.

(3) The trial court erred in granting summary judgment because Deceptive Trade Practices Act claims are not frivolous.

(4) The trial court erred in granting summary judgment because a Theft Liability Act claim did not exist.

STANDARDS OF REVIEW

We review the district court's summary judgment de novo. *See Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

The standard governing a traditional motion for summary judgment is well established: (1) the movant for summary judgment has the burden of showing that

no genuine issue of material fact exists and that it is therefore entitled to summary judgment as a matter of law; (2) in deciding whether there is a disputed material fact issue precluding summary judgment, evidence favorable to the nonmovant will be taken as true; and (3) every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in the nonmovant's favor. *See, e.g.*, *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985).

Under the "no-evidence summary judgment" rule, the movant may move for summary judgment if, after adequate time for discovery, there is no evidence of one or more essential elements of a claim or defense on which the nonmovant would have the burden of proof at trial. TEX. R. CIV. P. 166a(i). The motion must state the elements as to which there is no evidence. *Id*. The reviewing court must grant the motion unless the nonmovant produces summary judgment evidence raising a genuine issue of material fact. *Id*. Under the no evidence summary judgment standard, the party with the burden of proof at trial will have the same burden of proof in a summary judgment proceeding. *See, e.g., Esco Oil & Gas, Inc. v. Sooner Pipe & Supply Corp.*, 962 S.W.2d 193, 197 n.3 (Tex. App.—Houston [1st Dist.] 1998, pet. denied).

If the evidence supporting a finding rises to a level that would enable reasonable, fair-minded persons to differ in their conclusions, then more than a scintilla of evidence exists. *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706,

711 (Tex. 1997). Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact and the legal effect is that there is no evidence. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983).

SUMMARY JUDGMENT ON FRAUD CLAIM

In his April 2007 motion, Eleow Hunt moved for both no-evidence and traditional summary judgment on several of Scott's tort claims. His arguments directed at Scott's fraud claims are couched in terms of a traditional summary judgment. His argument challenging Scott's ability to demonstrate that she suffered any damages as a result of tortious conduct (including fraud), however, is couched in terms of no evidence.

Eleow argued that Scott's fraud claim fails as a matter of law because it is "undisputed that Movants never made any representation whatsoever to Plaintiffs." Thus, he contended, "(1) Plaintiffs cannot have relied on any alleged representation by Movants, and (2) Movants did not make a representation with the intent that Plaintiffs act on it and Plaintiffs cannot have suffered any damages because of any alleged misrepresentations of Movants."

Specifically, Eleow pointed to both Scott's and Smith's deposition testimony that, prior to 2005, they never had any communications with Eleow and in fact did not even know him. Because both Scott and Smith denied that Eleow had ever

made any representations to them, Eleow argued he was entitled to judgment on Scott's fraud claim as a matter of law.

In addition, Eleow's summary judgment motion argued that he was entitled to summary judgment because Scott and Smith cannot show that they suffered any damages from Eleow's alleged conduct.

In response, Scott argued that she must only establish that Eleow and Herschell Hunt "made a representation to a third party, i.e., Anthony Welch, or each other with the intention or expectation that it be repeated to deceive" Scott and Smith. As summary judgment evidence, Scott relied upon Welch's affidavit testimony that Eleow prepared Capital Ticket partnership tax returns in 2002 and backdated the returns to 2000 to be used in Smith's IRS audit. These returns, according to Scott, were prepared so that "they could be relied on by Antowain Smith's attorneys and representatives."

According to Scott, the "affidavit of Anthony Welch clearly established that he and Mr. [Eleow] Hunt conspired to commit tax fraud." The summary judgment response does not allege any financial harm specific to Scott, but argues that Smith had to pay lawyers and tax preparers to correct the problems caused by Eleow's fraud, and that Smith incurred approximately $300,000 in penalties and interest that are a proximate result of the Hunts' actions.

In reply, Eleow Hunt and Herschell Hunt filed a motion to strike Welch's affidavit, arguing that it was a "sham affidavit" that contradicted Welch's prior deposition and interrogatory testimony, and that it contained hearsay. They further argued that, even considering the affidavit and the plaintiffs other summary judgment evidence, the evidence establishes as a matter of law that the plaintiffs suffered no injury or damages, and that there was no evidence of damages.

On appeal, Scott argues that the trial court erred by striking Welch's affidavit and granting summary judgment because summary judgment is inappropriate when the credibility of a witness or party is central to the case. *Wilcox v. Marriott*, 103 S.W.3d 469, 475 (Tex. App.—San Antonio 2003, pet denied). She argues that just because Welch gave a sworn statement to her, rather than to Eleow's counsel, that is no reason to disregard and strike the affidavit.

Eleow responds that "the trial court correctly disregarded the same Affidavit of Anthony Welch because it directly contradicted his prior testimony without any explanation whatsoever for the change." His brief then chronicles all the inconsistencies between the affidavit and Welch's prior testimony.

Alternatively, Eleow argues that even if the sham affidavit is considered, summary judgment was still proper because "it does not create a fact issue as to Scott's fraud claim because it does not identify a single misrepresentation purportedly made to Scott." He also points to the fact that Smith settled his claims

against Eleow as part of a settlement of separate counter-claims brought by Eleow against Smith, and that Smith agreed to entry of an agreed judgment requiring him to pay to Eleow $100,000. Thus, he argues, "Scott cannot attempt to avoid summary judgment on her fraud claim based on her trumped up allegations of a conspiracy to defraud Smith (not Scott), and which Smith has judicially admitted did not exist."

A. Applicable Law

Under the sham-affidavit doctrine, a party cannot file an affidavit to create a fact issue that contradicts his own deposition testimony without any explanation for the change in testimony. *Farroux v. Denny's Rests.*, Inc., 962 S.W.2d 108, 111 (Tex. App.—Houston [1st Dist.] 1997, no pet.). Unless a party explains why he has filed an affidavit that contradicts his previous testimony (for example, because he was confused or has discovered additional materials), we will assume that the party has filed the affidavit solely to defeat summary judgment and will therefore disregard the affidavit. *Id*.

An objection that an "affidavit is a sham affidavit because it contradicts [the affiant's] earlier deposition testimony is an objection complaining to a defect in form of his affidavit." *Hogan v. J. Higgins Trucking, Inc.*, 197 S.W.3d 879, 883 (Tex. App.—Dallas 2006, no pet.). A party must object in writing and obtain an express or implied ruling from the trial court to preserve a complaint about the

form of summary judgment evidence. TEX. R. CIV. P. 166a(f); TEX. R. APP. P. 33.1(a)(2)(A); *Grand Prairie I.S.D. v. Vaughan*, 792 S.W.2d 944, 945 (Tex. 1990). "[A] trial court's ruling on an objection to summary judgment evidence is not implicit in its ruling on the motion for summary judgment." *Delfino v. Perry Homes*, 223 S.W.3d 32, 35 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

"The elements of fraud are: (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury." *Aquaplex, Inc. v. Rancho La Valencia, Inc.*, 297 S.W.3d 768, 774 (Tex. 2009) (per curiam).

B. Analysis

Both parties' arguments assume that the trial court struck Welch's affidavit. The parties' record cites, however, do not support that conclusion. The trial court's order granting summary judgment states, in its entirety, "On this day, the Court considered Defendants Eleow Hunt and Herschell Davis Hunt's Motion for Partial Summary Judgment. After considering the Motion and the response, the Court finds the Motion is meritorious and should be GRANTED." We have not

located any order in the record ruling on the Hunt's objection to Scott's summary judgment evidence.

Because Scott's objections to Welch's affidavit—that it was a sham affidavit and that it contained hearsay—are objections to form, not substance, *Hogan*, 197 S.W.3d at 883, it was incumbent upon Eleow to obtain an express or implied ruling on those objections from the trial court. *Grand Prairie I.S.D.*, 792 S.W.2d at 945. Because there is no indication in the record that he did so, we cannot disregard the affidavit on appeal. *Delfino*, 223 S.W.3d at 35.

We conclude, however, that even considering Welch's affidavit, the trial court's summary judgment on Scott's fraud claim is supported by the summary-judgment evidence. Scott does not argue that Eleow made any representations to her; instead Scott's entire argument in support of her position that the trial court's summary judgment was erroneous is as follows:

> Fraud can be the basis of a conspiracy claim. *Ernst & Young v. Pacific Mut. Life*, 51 S.W.3d 573, 583 (Tex. 2001). It is undisputed that Mr. Welch committed an unlawful act. It is also undisputed that Mr. Welch and Mr. Hunt are the only two people that discussed this alleged partnership. It is also undisputed that Eleow Hunt's own documents show that this alleged partnership was created in 2002. It is also undisputed that Mr. Welch used these "partnership" losses to created fraudulent losses for tax years 2000-2003. It is also undisputed that these actions caused Ms. Scott to incur damages to clear up her financial accounts.

The only record cite provided for the assertion that Mr. Welch used partnership losses to create fraudulent losses for 2000–2003 is a page in the clerk's

record from a plea bargain Welch entered that was not part of the summary judgment evidence before the trial court when it granted summary judgment. Scott does not assert that Welch created fraudulent losses that were reported on her tax return. In fact, she testified to the opposite, i.e., that she did not file joint returns with Smith during the years relevant to her claims here.

In support of her argument that she nonetheless incurred "damages to clear up her financial accounts," she cites an April 4, 2011 judgment she obtained against Welch, in absentia, following a bench trial where she was awarded $2,000 "as damages for hiring financial representatives." Even if we were to causally connect the claims forming the basis of that judgment with Scott's claims against Eleow Hunt here, we note that the judgment was entered almost four years after the summary judgment we are reviewing here, and thus was not before the trial court as evidence of anything.

Because there is no evidence of damages to Scott, and because the evidence establishes that Eleow Hunt never made any representation to Scott, we affirm the trial court's summary judgment on Scott's fraud claims.

We overrule appellant's first and second issues.

SUMMARY JUDGMENT ON DTPA CLAIM

On June 8, 2007, Smith and Scott filed their fourth amended petition, adding DTPA claims, as well as a Declaratory Judgment Act claim and request for

injunctive relief. On July 20, 2007, Eleow Hunt moved for summary judgment on the DTPA claims, arguing that the (1) "There is no evidence that the Movant had any connection with any alleged consumer transaction by Plaintiffs," (2) "the undisputed summary judgment evidence established that Movant never made any false representation to Plaintiffs," (3) "there is no representation that could constitute a producing cause of Plaintiffs' alleged damages," (4) "Plaintiffs cannot show they suffered any damages at all as a result of the allegations made the basis of their lawsuit," (5) "Plaintiffs cannot have detrimentally relied on any alleged representation by Movant," and (6) the DTPA claim "is barred by the applicable two-year statute of limitations in that Plaintiffs judicially admitted that by April 2005 they became aware of Movant's alleged involvement in the matters made the basis of their lawsuit."

Smith responded to Eleow's motion for summary judgment, but Scott did not. On September 10, 2007, the trial court granted Eleow Hunt's motion for summary judgment on the plaintiffs' DTPA claims.

On October 28, 2010, Eleow Hunt filed another motion for summary judgment, seeking $100,000 in attorneys' fees from Scott for defending against her DTPA claim, arguing that Scott knew the claim to be frivolous. On November 29, 2010, Scott filed a response, arguing that her claims were not frivolous, and that

$100,000 in fees is excessive. On December 10, 2010, the trial court granted Eleow's motion and awarded him $28,927.00 in attorneys' fees.

On appeal, Scott appears to challenge only the granting of the December 2010 summary judgment awarding attorneys' fees. She cites again the judgment she obtained against Welsh for DTPA violations and argues that the trial court thus must have concluded that she was a consumer of Welch's. Because two or more people can be held liable for conspiracy to violate the DTPA, she argues that her "DTPA claim is not frivolous and the trial court's December 10, 2010 order should be reversed and remanded."

In his brief, Eleow Hunt argues that the trial court's granting summary judgment on Scott's DTPA claim was proper because Scott failed to present any evidence that Hunt had any connection with any alleged consumer transaction involving Scott, the evidence conclusively defeated Scott's DTPA claim, and the claim was barred by the statute of limitations. Eleow further argues that Scott cannot obtain a reversal here based on arguments or evidence that was never presented to the trial court in response to Eleow's motion for summary judgment.

A. Applicable Law

Section 17.50(c) of the DTPA provides that a trial court may award attorneys' fees to a prevailing DTPA defendant:

> On a finding by the court that an action under this section was groundless in fact or law or brought in bad faith, or brought for the

> purpose of harassment, the court shall award to the defendant reasonable and necessary attorneys' fees and court costs.

TEX. BUS. & COM. CODE ANN. § 17.50(c) (Vernon 2011). Under Section 17.50(c), "groundless" means a claim having no basis in law or fact, and not warranted by any good faith argument for the extension, modification, or reversal of existing law. *Donwerth v. Preston II Chrysler–Dodge, Inc.*, 775 S.W.2d 634, 637 (Tex. 1989). The standard for determining whether a suit is groundless is "whether the totality of the tendered evidence demonstrates an arguable basis in fact and law for the consumer's claim." *Splettstosser v. Myer*, 779 S.W.2d 806, 808 (Tex. 1989). To prove "bad faith," the defendant must show the claim is motivated by a malicious or discriminatory purpose. *Central Tex. Hardware, Inc. v. First City, Texas–Bryan, N.A.*, 810 S.W.2d 234, 237 (Tex. App.—Houston [14th Dist.] 1991, writ denied). Whether a suit is groundless or brought in bad faith is a question of law for the trial court. *Donwerth*, 775 S.W.2d at 637.

B. Analysis

Because Scott did not respond to Eleow Hunt's motion for summary judgment on her DTPA claim, and because she does not seek reversal of that order here, our review is limited to whether the trial court correctly determined that Scott's DTPA claim was groundless or brought in bad faith as required to support the summary judgment granting attorneys' fees to Eleow Hunt. We hold that Scott

has not established that the trial court erred by finding the claim was groundless or brought in bad faith. *Id*. at 637 n.3.

As Eleow notes in his brief here, Scott added her DTPA claim shortly before the summary-judgment hearing on her other claims, and has never addressed his assertion that her claim was clearly barred by the statute of limitations. Eleow also emphasizes that, in Scott's brief here, she does not actually cite any evidence in the record in support of the elements of her DTPA claim. Rather, she ignores Smith's agreement to pay Eleow Hunt $100,000 (in part to settle counter-claims filed by Eleow Hunt alleging that Smith's DTPA claim was groundless, made in bad faith, and intended to harass), and instead she cites a default judgment she obtained against Welch for DTPA violations while Welch was incarcerated. Neither Scott's arguments, nor the evidence she cites, establishes that the trial court erred by finding that she brought her DTPA claims in bad faith.

We overrule Scott's third issue.

SUMMARY JUDGMENT ON THEFT LIABILITY ACT ATTORNEYS' FEES

On April 14, 2010, Eleow Hunt moved for partial summary judgment, seeking attorneys' fees for successfully defending against Scott's Theft Liability Act claim. Scott did not respond to this motion, and the trial court signed an order awarding Eleow $100,000 in attorneys' fees on May 31, 2010. On June 30, 2010, and again on November 29, 2010, Scott filed letters with the trial court arguing that

she did not receive notice of Eleow's motion for partial summary judgment, and asking that the court reconsider its ruling because her Theft Liability Act claims had been dismissed before the trial court granted summary judgment on them, rendering attorneys' fees on that claim inappropriate. On December 10, 2010—the same day that the trial court granted Eleow's motion to sever and for final judgment—the court considered Scott's letters, construed them as "requests for reconsideration or for new trial," and denied them both.

Here, Scott argues that the trial court's May 31, 2010 order awarding attorneys' fees under the Theft Liability Act should be reversed, because it was based on the June 15, 2007 summary judgment order. According to Scott, her Theft Liability Act claims had been abandoned before the June 15, 2007 summary judgment order, such that summary judgment on that claim would not have been proper, thereby rendering an attorneys' fee award based upon that previous order improper.

In response, Eleow argues that, because Scott did not respond to his motion for summary judgment on his claim for attorneys' fees under the Theft Liability Act, to prevail she must satisfy the *Craddock* elements, i.e., (1) her failure to respond to the motion was a due to a mistake or accident rather than conscious indifference, (2) she has a meritorious defense, and (3) a new trial would not cause undue delay or otherwise injure Eleow Hunt. Because she did not prove her

entitlement to a new trial under these factors, Eleow argues that we should affirm the trial court's summary judgment on attorneys' fees under the Theft Liability Act.

A. Applicable Law

The Theft Liability Act provides that "[e]ach person who prevails in a suit under this chapter shall be awarded court costs and reasonable and necessary attorney's fees." TEX. CIV. PRAC. & REM. CODE ANN. § 134.005(b) (Vernon 2011).

The supreme court has held that a default judgment should be set aside when the defendant establishes that (1) the failure to answer was not intentional or the result of conscious indifference, but the result of an accident or mistake, (2) the motion for new trial sets up a meritorious defense, and (3) granting the motion will occasion no undue delay or otherwise injure the plaintiff. *Craddock v. Sunshine Bus Lines, Inc.*, 133 S.W.2d 124, 126 (Tex. 1939). This Court has held that *Craddock* does not apply to an appeal from a traditional summary judgment. *Rabe v. Guar. Nat'l Ins. Co*, 787 S.W.2d 575, 579 (Tex. App.—Houston [1st Dist.] 1990, writ denied).

"In civil causes generally, filing an amended petition that does not include a cause of action effectively nonsuits or voluntarily dismisses the omitted claims as of the time the pleading is filed." *FKM P'ship, Ltd. v. Bd. of Regents of Univ. of Houston Sys.*, 255 S.W.3d 619, 632 (Tex. 2008). "No hearing is necessary to

effect the nonsuit. Even if the nonsuit applies to the entire case, the nonsuit or voluntary dismissal is effective when notice is filed or announced in open court." *Id*.; *see also Univ. of Tex. Med. Branch at Galveston v. Estate of Blackmon*, 195 S.W.3d 98, 100 (Tex. 2006). Amended pleadings and their contents take the place of prior pleadings. TEX. R. CIV. P. 65. So, except in limited circumstances not presented here, "causes of action not contained in amended pleadings are effectively dismissed at the time the amended pleading is filed." *FKM P'ship, Ltd*, 255 S.W.3d at 633.

If the movant's motion for traditional summary judgment and evidence facially establish its right to judgment as a matter of law, the burden shifts to the nonmovant to raise a genuine issue of material fact sufficient to defeat summary judgment. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). The nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes each element of its cause of action as a matter of law. *Rhone–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222–23 (Tex. 1999). The trial court may not grant summary judgment by default because the nonmovant did not respond to the summary judgment motion when the movant's summary judgment proof is legally insufficient. *Id.* at 223. On appeal, the nonmovant need not have responded to the motion to contend the movant's

summary judgment proof is insufficient as a matter of law to support summary judgment. *Id*.

B. Analysis

On April 16, 2007, Eleow moved for summary judgment on several of Scott's claims, including liability under the Theft Liability Act. On May 25, 2007, Scott filed her third amended petition, which abandoned her Theft Liability Act claim. On June 15, 2007, after the Theft Liability Act claims had been dropped, the trial court granted Eleow's April 2007 motion for summary judgment without specifying the claims or grounds.

On April 15, 2010, Eleow filed a motion for summary judgment seeking $100,000 in attorneys' fees for defending against Scott's Theft Liability Act claim. As a basis for that claim, he argued that because the trial court had granted summary judgment in his favor for "theft under the Theft Liability Act", he is a "prevailing party" such that "the Court must enter summary judgment against Scott[] in favor of [Eleow] Hunt, awarding him reasonable and necessary attorney's fees." On May 31, 2010, the trial court granted Eleow's motion.

Both the trial court's June 2007 partial summary judgment granting judgment under the Theft Liability Act and the trial court's May 2010 partial summary judgment awarding attorneys' fees to Eleow as the prevailing party on a Theft Liability Act claim became final and appealable upon the trial court's

December 10, 2010 severance and final judgment. Although Scott filed two letters with the trial court requesting that it reconsider its award of attorneys' fees because there was no live Theft Liability Act claim when the court granted summary judgment in Eleow's favor in June 2007 awarding him attorneys' fees, we disagree that she must satisfy the *Craddock* factors to prevail on appeal. *Rabe*, 787 S.W.2d at 579. Scott was not required to respond to Eleow's motion for summary judgment to argue on appeal that Eleow did not meet his burden in the trial court of showing his entitlement to summary judgment as a matter of law. *Rhone-Poulenc, Inc.*, 997 S.W.2d at 222–23.

Scott's challenge to the June 2007 summary judgment is that it was improper to grant summary judgment on a Theft Liability Act claim that was not contained in her live pleadings, i.e., her third amended petition. Eleow does not argue here that Scott's third amended petition was untimely, nor does he argue that petition was not the relevant live pleadings. Rather, he disputes only that the petition actually abandoned the Theft Liability Act claim because it continued to allege "that Welch had committed theft against Smith and that Hunt and the other defendants, assisted, participated encouraged and/or conspired with Welch to commit this alleged conduct."

We disagree with Eleow's argument that the Theft Liability Act claim was not abandoned in the third amended petition. Scott's original petition, under the heading of Causes of Action, states in relevant part:

> Anthony Welch's actions constitute fraud, conversion, and theft under the Theft Liability Act of the Texas Civil Practice and Remedies Code. James Ballard, Eleow Hunt, and Herschell Hunt Davis Taxes [sic] all assisted, participated encouraged and/or conspired with Anthony Welch in committing fraud, conversion, and theft under the Theft Liability Act.

In contrast, the "Causes of Action" section of her third amended petition removes all references to theft and to the Theft Liability Act. The only reference to theft in the third amended petition is one sentence in the "Facts" section, stating "Mr. Anthony Welch committed theft, fraud, conversion, and forgery when he opened a fraudulent bank account in Antowain Smith's name." The references to Eleow in that section allege that Eleow Hunt assisted Welch in covering up fraud by filing fraudulent tax returns and documents. That section further alleges that Eleow breached fiduciary responsibilities and was negligent.

Because we conclude that there was no live Theft Liability Act claim upon which to grant summary judgment, the trial court erred in granting summary judgment on that claim in May 2007. *Pace Concerts, Ltd. v. Resendez*, 72 S.W.3d 700, 702 (Tex. App.—San Antonio 2002, pet. denied) (holding that plaintiff had right to nonsuit claims after defendant filed motion for summary judgment but before decision was rendered); *Taliaferro v. Smith*, 804 S.W.2d 548, 549–50 (Tex.

App.—Houston [14th Dist.] 1991, no writ) (plaintiff may nonsuit after failing to timely respond to motion for summary judgment); *Morriss v. Enron Oil & Gas Co.*, 948 S.W.2d 858, 871 n.12 (Tex, App.—San Antonio 1997, no pet.) (recognizing that it was error for the trial court to grant summary judgment on contract claim unsupported by the live pleadings, but finding "no harm" to the plaintiff in having summary judgment granted on a claim he disavowed).

Because the trial court should not have granted the June 2010 summary judgment on an abandoned Theft Liability Act claim, we hold that summary judgment cannot support the trial court's May 2010 summary judgment awarding attorneys' fees to Eleow Hunt as a prevailing party on a Theft Liability Act claim. Accordingly, we sustain Scott's fourth issue and reverse the May 15, 2010 summary judgment awarding $100,000 in attorney's fees to Eleow Hunt.

CONCLUSION

We reverse the trial court's May 15, 2010 partial summary judgment awarding $100,000 in attorneys' fees to Eleow Hunt and render judgment that he take nothing on that claim. In all other regards, we affirm the trial court's judgment.

Sherry Radack
Chief Justice

Panel consists of Chief Justice Radack and Justices Higley and Brown.