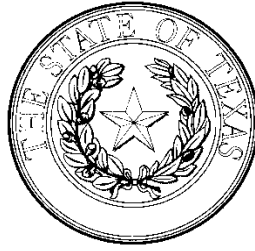


Opinion issued March 29, 2022



In The  
**Court of Appeals**  
For The  
**First District of Texas**

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NO. 01-21-00469-CV

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**WOODY’S ACCESS, LLC D/B/A UNITED ACCESS, Appellant**  
**V.**

**HARRIS COUNTY TAX ASSESSOR-COLLECTOR, Appellee**

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**On Appeal from the 164th District Court**  
**Harris County, Texas**  
**Trial Court Case No. 2020-13726**

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**MEMORANDUM OPINION**

Appellant, Woody’s Access, LLC, doing business as United Access (“Woody”), challenges the trial court’s summary judgment in favor of appellee, Harris County Tax Assessor-Collector (the “County”), in the County’s suit to collect statutory penalties against Woody for failing to timely file certain business-inventory

tax statements.<sup>1</sup> In eight issues, Woody contends that the trial court erred in granting summary judgment for the County, awarding it penalties, interest, and attorney's fees, and denying Woody's motion for new trial.

We reverse and remand.

### **Background**

In its petition, the County alleged that Woody is a "motor vehicle dealer" and that, from April 2018 to December 2019, Woody failed to timely file monthly "Dealer's Motor Vehicle Inventory Tax Statements," as required by Texas Tax Code section 23.122. The County sought statutory penalties, interest, and attorney's fees.

Woody filed an answer, generally denying the allegations.

The County filed a motion for summary judgment, arguing that it was entitled to judgment as a matter of law on its claim for statutory penalties, interest, and attorney's fees because there were no genuine issues of material fact. It asserted that its evidence established that Woody failed to timely file "Dealer's Motor Vehicle Inventory Tax Statements," as required by Tax Code section 23.122.

To its motion, the County attached the affidavits of its records custodian, Trajuana Phillips, and of its counsel in support of attorney's fees. Phillips testified regarding 109 pages of attached "certified copies of the Dealer's Motor Vehicle Inventory Tax Statement(s) from the records from the Harris County Tax Assessor-

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<sup>1</sup> See TEX. TAX CODE § 23.122(e), (f).

Collector.” Phillips testified that each of the statements, which Woody filed between March 2018 and February 2021, established that it was filed “after the 10th day of the month.” Phillips testified that the “penalty for the late filing of these documents as require by statute is \$231,500.00.”

The County also attached a Notice of Submission, stating that its summary-judgment motion was set for June 7, 2021, “without the necessity of an oral hearing unless one [was] requested by [Woody],” and a Certificate of Service, stating that, on May 12, 2021, the motion and notice were sent to Woody’s counsel.

Woody did not file a summary-judgment response.

On June 15, 2021, the trial court signed an order granting summary judgment for the County, in which the trial court found that the County presented evidence conclusively establishing that Woody “failed to timely file and/or failed to file its Dealer’s Motor Vehicle Inventory Tax Statements.” It awarded the County \$231,500.00 in penalties, \$14,746.23 in interest, \$1,007.40 in attorney’s fees for trial, and attorney’s fees contingent on appeal.

Woody filed a motion for new trial, asserting that it was entitled to a new trial because its failure to file a summary-judgment response was not intentional. Rather, based on an administrative error in its attorney’s office, it was “unaware of the setting for submission of the Motion for Summary Judgment.” Woody further asserted that it is a “heavy equipment dealer,” and not a “motor vehicle dealer,” as

these terms are defined in the Tax Code, and that the County sued for penalties under an inapplicable statute.

In its response, the County argued that Woody was not entitled to a new trial because Woody had notice of the summary-judgment motion and sufficient time to respond. And, Woody admitted that it failed to respond. The County did not dispute that Woody is a heavy equipment dealer. It asserted that, although it alleged in its lawsuit that Woody is a motor vehicle dealer, it filed its suit under “Tax Code, section 23.121 et. seq.,” and these sections “set forth filing and tax payment requirements for automobile dealers, vessel and outboard motor dealers, heavy equipment dealers and retail manufactured housing dealers” and “have identical reporting requirements except for the due date for the monthly filings.” Further, it is undisputed that Woody’s “inventory tax reports from April 2018 through July 2020” were “late, regardless of which special inventory tax statute is viewed.”

The trial court denied Woody’s motion for new trial.

### **Summary Judgment**

In its first and second issues, Woody argues that the trial court erred in granting summary judgment because the County failed to meet its initial burden to conclusively prove all the elements of its claim. In its fifth issue, Woody asserts that the trial court erred in entering a judgment for the County “on grounds that were not pled.”

### *Standard of Review*

We review a trial court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In our review, we take as true all evidence favorable to the non-movant, and we indulge every reasonable inference and resolve any doubts in the non-movant's favor. *Id.* If a trial court grants summary judgment without specifying the grounds, we will uphold its judgment if any of the theories advanced in the motion is meritorious. *Beverick v. Koch Power, Inc.*, 186 S.W.3d 145, 148 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

In a traditional motion for summary judgment, the movant has the burden to establish that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A plaintiff moving for summary judgment on its own claim, as here, must conclusively prove all essential elements of its cause of action. *Rhône-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). A plaintiff seeking a summary judgment awarding damages on its claim must conclusively establish its damages. *McRay v. Dow Golub Remels & Beverly, LLP*, 554 S.W.3d 702, 705 (Tex. App.—Houston [1st Dist.] 2018, no pet.). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005).

Only after the movant meets its burden does the burden shift to the non-movant to present evidence raising a genuine issue of material fact precluding summary judgment. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995); *see also McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 342 (Tex. 1993) (“[S]ummary judgments must stand or fall on their own merits, and the non-movant’s failure to except or respond cannot supply by default the . . . summary judgment proof necessary to establish the movant’s right.”). Evidence raises a genuine issue if reasonable people 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). A non-movant who fails to present a response is limited on appeal to arguing the legal sufficiency of the grounds presented by the movant. *McConnell*, 858 S.W.2d at 343.

### ***Summary-Judgment Grounds***

As a threshold matter, Woody asserts that the trial court erred in granting summary judgment for the County on “grounds that were not pled.” Woody seems to complain that the trial court erred in rendering a summary judgment against it as a heavy equipment dealer, despite that the County alleged that Woody owes penalties as a motor vehicle dealer.

A trial court cannot grant a summary judgment on grounds that were not presented. *Nall v. Plunkett*, 404 S.W.3d 552, 555 (Tex. 2013). “Granting a summary

judgment on a claim not addressed in the summary judgment motion . . . is, as a general rule, reversible error.” *G&H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011).

The record shows that the County asserted in its petition that Woody is a “motor vehicle dealer” and that Woody failed to “timely file the Dealer’s Motor Vehicle Inventory Tax Statements monthly as required by law.” In its summary-judgment motion, the County also asserted that Woody failed to timely submit its “Dealer’s Motor Vehicle Inventory Tax Statements.” The trial court’s judgment reflects that it is based on its finding that Woody “did not timely file and/or failed to file the required Dealer’s Motor Vehicle Inventory Tax Statements.” Thus, the trial court’s judgment is in accordance with the pleadings. *See Nall*, 404 S.W.3d at 555. Whether the County was entitled to such judgment is a different question.

### ***Summary-Judgment Merits***

Woody asserts that the County failed to meet its initial burden to conclusively prove all the elements of its claim. *See* TEX. R. CIV. P. 166a(c); *Siegler*, 899 S.W.2d at 197.

In its summary-judgment motion, the County argued that it was “entitled to final summary judgment as a matter of law as [Woody] did not timely file and failed to file its Dealer’s Motor Vehicle Inventory Tax Statements with the Harris County Tax Office.” The County asserted that Woody “failed to comply with the

requirements of Chapter 23 of the [Tax Code] as outlined herein,” quoting portions of Tax Code section 23.122.

Section 23.122(e), provides:

The comptroller shall promulgate a form entitled Dealer’s Motor Vehicle inventory Tax Statement. Each month, a dealer shall complete the form. . . .

TEX. TAX CODE § 23.122(e).

Section 23.122(f) provides the deadline for filing the Dealer’s Motor Vehicle Inventory Tax Statement:

On or before the 10th day of each month a dealer shall file with the collector the statement covering the sale of each motor vehicle sold by the dealer in the prior month. . . .

*Id.* § 23.122(f).

Section 23.122(n) provides penalties for failing to timely file:

In addition to other penalties provided by law, a dealer who fails to file or fails to timely file a *statement as required by this section* shall forfeit a penalty. A tax lien attaches to the dealer’s business personal property to secure payment of the penalty. . . . A penalty forfeited under this subsection is \$500 for each month or part of a month in which a statement is not filed or timely filed after it is due.

*Id.* § 23.122(n) (emphasis added). Section 23.122(a) provides that the term “Dealer’s motor vehicle inventory” has the meaning given it in Section 23.121 of this code.” *Id.* § 23.122(a)(4).

Section 23.121, “Dealer’s Motor Vehicle Inventory,” provides that the term “dealer” means a person who “holds a dealer’s general distinguishing number issued



by the Texas Department of Motor Vehicles under the authority of Chapter 503, Transportation Code [or certain out-of-state dealers].” *Id.* § 23.121. Section 23.121 provides: “The term *does not include*: . . . a dealer who: . . . does not sell motor vehicles described by Section 152.001(3)(A)[.]” *Id.* § 23.121(a)(3)(D)(i) (emphasis added).

Section 152.001(3)(A) describes a “motor vehicle” as:

- (A) a self-propelled vehicle designed to transport persons or property *on a public highway*;
- (B) a trailer and semitrailer, including a van, flatbed, tank, dumpster, dolly, jeep, stinger, auxiliary axle, or converter gear; and
- (C) a house trailer as defined by Chapter 501, Transportation Code.

*Id.* § 152.001(3)(A) (emphasis added).

Here, to be entitled to a summary judgment on its claim for statutory penalties under Tax Code section 23.122(n), the County was required to establish that Woody was a “dealer” required to file “Dealer’s Motor Vehicle Inventory Tax Statements” and that it failed to timely do so. *See id.* § 23.122(a), (e), (f), and (n).

The County’s summary-judgment evidence in support of its claim consisted of Phillips’s business records affidavit and attached monthly tax statements that Woody filed with the County between March 2018 and February 2021. Phillips described these statements as “certified copies of the Dealer’s Motor Vehicle Inventory Tax Statement(s)” and testified that they established that they were filed after the applicable deadlines, that is, that they “were postmarked or file-stamped

after the 10th day of the month following the month of the sale or no sale.” Phillips testified that the “[t]he penalty for the late filing of these documents as required by statute is \$231,500.00.”

The record shows that Phillips did not, in her affidavit, testify that Woody is a “motor vehicle dealer.” *See id.* § 23.121. The certified copies of the County’s records attached to Phillips’s affidavit reflect that they are Woody’s “Dealer’s *Heavy Equipment* Inventory Tax Statements.” (Emphasis added.) The County did not present any evidence that Woody was required to file “Dealer’s Motor Vehicle Inventory Tax Statements.” *See id.* § 23.122. Thus, the County did not establish that Woody was subject to penalties under Tax Code section 23.122(n).

The County does not dispute that Woody is a heavy equipment dealer, and not a motor vehicle dealer. However, it asserts on appeal that “any error in describing Woody as a motor vehicle dealership rather than a heavy equipment dealership would not defeat the [County’s] claim for penalty under chapter 23 of the Tax Code, because the obligation to file timely dealer special inventory tax reports under chapter 23 of the Tax Code are identical regardless of whether the dealer is characterized as an automobile dealership or a heavy equipment dealership.”

The record reflects that the County expressly sought penalties against Woody under Tax Code section 23.122, which governs “motor vehicle dealers.” *See id.* § 23.122. “Heavy equipment dealers” have separate treatment under the Tax Code

with respect to rules and deadlines governing inventory tax statements. *See id.* § 23.1242. Sections 23.122 and 23.1242 are not “identical,” as the County asserts.

More importantly, the County, as the movant in this summary-judgment proceeding, was required to conclusively prove *all essential elements* of its cause of action. *See Rhône–Poulenc*, 997 S.W.2d at 223. Taking as true all evidence favorable to Woody and indulging every reasonable inference and resolving any doubts in its favor, as we must, we conclude that the County’s summary-judgment evidence does not conclusively establish its right to judgment on its claim for penalties under section 23.122 of the Tax Code. *See Dorsett*, 164 S.W.3d at 661; *Siegler*, 899 S.W.2d at 197. Accordingly, we hold that the trial court erred in granting summary judgment for the County on its claim. *See* TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick*, 988 S.W.2d at 748.

We sustain Woody’s first and second issues. We overrule Woody’s fifth issue, discussed as a threshold matter above. Having sustained Woody’s first and second issues, we do not reach its sixth, seventh, and eighth issues, in which it challenges the trial court’s award of damages, interest, and attorney’s fees. Similarly, we do not reach Woody’s third and fourth issues, in which it challenges the trial court’s order denying its motion for new trial.

## **Conclusion**

We reverse the trial court's summary judgment and remand the case to the trial court for further proceedings.

Sherry Radack  
Chief Justice

Panel consists of Chief Justice Radack and Justices Countiss and Farris.