**Reversed and Remanded and Memorandum Opinion filed August 1, 2023**


**In The**

# Fourteenth Court of Appeals

**NO. 14-21-00593-CV**

**IN THE INTEREST OF G.D.P., A CHILD**

**On Appeal from the 309th District Court**
**Harris County, Texas**
**Trial Court Cause No. 2013-03419**

## MEMORANDUM OPINION

This is an appeal from the grant of a no-evidence summary judgment motion in a suit to modify the parent-child relationship. Father challenges the trial court's order granting a no-evidence summary judgment in favor of Mother, alleging that the circumstances of G.D.P. have materially and substantially changed since the mediated settlement agreement in 2018. Taking as true all the evidence favorable to Father, the nonmovant, we hold that the trial court erred in granting a no-evidence summary judgment on Father's claims. We reverse and remand.

### *Background*

Mother and Father are the parents of G.D.P., who was born in 2012. The

parties signed a mediated settlement agreement on August 6, 2018 (the 2018 MSA). On January 25, 2019, the trial court incorporated the terms of the MSA into an agreed order (the 2019 Order), which provided, inter alia: (1) neither parent had the exclusive right to designate the child's primary residence; (2) each parent had the right to establish the primary residence during their respective periods of possession within a 15-mile radius from David Elementary School located in The Woodlands, Texas, except that Mother may establish the child's primary residence during her periods of possession at her North Humble home until she moved from said residence; and (3) the parties "shall follow a week-on-week-off 7 day alternating possession schedule during the regular school term" and a two-week 14-day alternating possession schedule when school was not in session during the summer.

On January 20, 2021, just shy of the two-year anniversary of the 2019 Order, Father moved to modify the 2019 Order, alleging material and substantial changes in circumstances since the 2018 MSA. In his live pleading, Father requested, among other things, that he be appointed as the parent who had the exclusive right to designate the primary residence of the child, as well as the exclusive right to make educational decisions, to make decisions relating to mental health care treatment and evaluation, to make invasive medical decisions, and to receive and disburse child support. Father requested that all other rights be joint and sought to modify Mother's possession and access to provide for a standard possession order without elections. Father also sought the exclusive right to enroll the child in team sport activities, requested that Mother be enjoined from enrolling the child in extracurricular activities that took place during his periods of possession, sought the right of first refusal, and requested that the geographic restriction be expanded to Harris County, Texas and Montgomery County, Texas.

Mother filed a general denial and alleged that Father's suit to modify was

"filed frivolously" or was "designed to harass" her and requested attorney's fees. Mother later filed her no-evidence motion for summary judgment, and Father filed a response. Attached to his response was Father's declaration, which he argued created a fact issue and presented some evidence to support a material and substantial change. On July 20, 2021, after reviewing the evidence and arguments of the parties, the trial court granted Mother's no-evidence summary judgment, which disposed of all claims. On August 19, 2021, Father filed a motion for new trial, which the trial court denied. This appeal followed.

## *Discussion*

In a single issue with three subparts, Father contends that the trial court erred in granting Mother's no-evidence summary judgment because: (1) the motion was legally defective, (2) he presented evidence raising a genuine issue of material fact that there was a material and substantial change in the circumstances of the child, and (3) the trial court disregarded his response to the summary judgment because of a misnomer in the pleading. We address each of the subparts to Father's issues in turn.

### I. Mother's No-Evidence Summary Judgment Was Legally Sufficient

In the first subpart of Father's issue, he contends that Mother's no-evidence summary judgment was legally defective because it did not strictly comply with Rule 166a(i) of the Texas Rules of Civil Procedure. *See* Tex. R. Civ. P. 166a(i).

Rule 166a(i) permits a party to move for "summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial." *Id.*; *PAS, Inc. v. Engel*, 350 S.W.3d 602, 607 (Tex. App.—Houston [14th Dist.] 2011, no pet.) ("A no-evidence motion for summary judgment under Rule 166a(i) is essentially a

motion for a pretrial directed verdict."). The motion must specifically state the elements for which there is no evidence. *See* Tex. R. Civ. P. 166a(i). The burden of producing evidence is entirely on the nonmovant; the movant has no burden to attach any evidence to the motion, and if the nonmovant produces evidence raising a genuine issue of material fact, summary judgment is improper. *Id.* The underlying purpose of the specificity requirement is to provide the opposing party with adequate information for opposing the motion and to define the issues for the purpose of summary judgment. *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 311 (Tex. 2009).

Father suggests that Mother's no-evidence motion is defective and "fatally flawed." Specifically, Father maintains that the motion (1) provides an improper rebuttal argument; (2) relies on extrinsic evidence and assumptions; (3) references claims that were not at issue at the time of the 2018 MSA; and (4) fails to identify a specific element of Father's claim that was challenged. Father contends that Mother uses an "improper approach" and should have filed a traditional motion for summary judgment. For our discussion, we group Father's first three complaints into one analysis because Father's primary concern appears to be that Mother predicates and relies on evidence in her no-evidence motion. We then address Father's remaining complaint regarding the allegedly defective motion.

When a proponent brings a no-evidence motion for summary judgment solely under Texas Rule of Civil Procedure 166a(i) and attaches evidence, "that evidence should not be considered unless it creates a fact question." *Binur v. Jacob*, 135 S.W.3d 646, 651 (Tex. 2004). We do not, however, disregard the proponent's motion. *See id.* The Texas Supreme Court has held that "[w]e disapprove of decisions that hold or imply that, if a party attaches evidence to a motion for summary judgment, any request for summary judgment under Rule 166a(i) will be disregarded." *Id.* Where, as here, a proponent did not attach evidence per se but

relied on extrinsic evidence in their argument, we believe the same holds true. Mother was only required to specifically state the elements for which she contended there was no evidence. Tex. R. Civ. P. 166a(i). Upon doing so, the burden then shifted to Father to produce evidence raising a genuine issue of material fact. *See id.* Because Mother's no-evidence motion specifically challenged the change-in-circumstances requirement, we reject Father's first three complaints.

Next, Father complains that Mother failed to identify a specific element of Father's claims that she challenged. Specific factual theories or allegations within a claim are not elements of the claim and are not required to be asserted. *See In re A.J.L.*, No. 14-16-00834-CV, 2017 WL 4844479, at *3 (Tex. App.—Houston [14th Dist.] Oct. 26, 2017, no pet.) (mem. op.) (citing *Jose Fuentes Co., Inc. v. Alfaro*, 418 S.W.3d 280, 283 (Tex. App.—Dallas 2013, pet. denied) ("A no-evidence motion for summary judgment may be directed at specific factual theories or allegations within a claim or defense *only* if the challenge to the factual allegation is connected to a no-evidence challenge to a specified element of a claim or defense.") (emphasis in original)).

Relevant here, the grounds for modification of an order establishing conservatorship or possession and access require the petitioner to show that (1) modification would be in the best interest of the child; and (2) the circumstances of the child, a conservator, or other party affected by the order have materially and substantially changed since the date the mediated settlement agreement was signed or the date the modification order was rendered. *See* Tex. Fam. Code §§ 156.101(a)(1), 156.401(a–1). Mother's no-evidence motion specifically states:

> The change-in-circumstances requirement is a threshold issue for the trial court and is based on a policy of preventing constant re-litigation with respect to children. [Father's] petition to modify requests changes that are not supported by and [sic] material and substantial change in

> circumstances and are only made to minimize the Mother's time with their son.

Mother specifically challenged the change-in-circumstances requirement; that is all she was required to do. We therefore overrule the first subpart of Father's issue.

## II. The Trial Court Erred in Granting Mother's No-Evidence Summary Judgment Motion

In the second subpart of Father's issue, he argues that the trial court erred in granting no-evidence summary judgment because the record raises a genuine issue of material fact as to whether there was a material and substantial change in the status of the child since the 2018 MSA on which the 2019 Order is based.

We review a summary judgment de novo. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We review the evidence presented in the motion and response in the light most favorable to the party against whom the summary judgment was rendered, crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *Id.*; *Gish*, 286 S.W.3d at 310.

Under Rule 166a(i), a party may move for a no-evidence summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. Tex. R. Civ. P. 166a(i); *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006) (per curiam). To defeat a no-evidence motion, the nonmovant must produce evidence raising a genuine issue of material fact as to the challenged elements. *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017). The nonmovant is "not required to marshal its proof; its response need only point out evidence that raises a fact issue on the challenged elements." Tex. R. Civ. P. 166a(i) cmt—1997. A genuine issue of material fact exists if the evidence rises to a level that would

enable reasonable and fair-minded people to differ in their conclusions. *Parker*, 514 S.W.3d at 220.

To show that a material and substantial change in circumstances has occurred, the movant must show conditions as they existed at the time the prior order was signed and what material and substantial changes have occurred in the intervening period. *In re A.L.E.*, 279 S.W.3d 424, 428–29 (Tex. App.—Houston [14th Dist.] 2009, no pet.). In deciding whether a material and substantial change of circumstances has occurred, a trial court is not confined to rigid or definite guidelines. *Id.* at 428. Instead, the court's determination is fact-specific and must be made according to the circumstances as they arise. *See Zeifman v. Michels*, 212 S.W.3d 582, 593 (Tex. App.—Austin 2006, pet. denied). Material changes may include: the marriage of one of the parties, changes in the home surroundings, mistreatment of the child by a party, or a party's becoming an improper person to exercise custody. *See In re A.L.E.*, 279 S.W.3d at 428–29.

Here, Mother's motion for no-evidence summary judgment stated that Father "wholly failed to raise a genuine issue of material fact that evidences he was prevented from asserting his assertion of material and substantial change in circumstances not present at the time of the parties' last mediation." The burden then shifted to Father to present evidence raising a genuine issue of material fact. *See Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006).

In response to the summary judgment motion, Father filed a response accompanied by a declaration. In his declaration, Father asserted:

> Since the 2018 Mediated Settlement Agreement, we knew that [G.D.P.] would start elementary school, but we did not anticipate that he would have problems in school. During his kindergarten year, [G.D.P.] struggled academically. At a parent conference towards the end of the year, it was discussed that [G.D.P.] might need to be put in the RTI

> program for the next school year. The RTI program at his school identifies struggling learners and provides interventions to help accelerate their rate of learning. . . . When [G.D.P.] returned to in-person school for the second nine-weeks of second grade, he immediately began to struggle particularly in math. He started getting 40s and 50s on assignments which dropped his math average from a 95 to an 80. . . . [G.D.P.] has had poor grades and was identified for potential placement in the RTI program for struggling students. [G.D.P.] has been very embarrassed by his problems in school, and it shows in his anxiety and sadness about his grades and problems. . . . When [G.D.P.] is with [Mother], he has not completed work sent home by his teacher and a history of poor grades and tardiness. My big concern when [G.D.P.] started struggling in math was that his average was 15 points lower during [Mother]'s weeks compared to my weeks.

Father also declared that:

> But more than school has been affected. As [G.D.P.] has aged, he is more and more involved in team sports as an extracurricular activity. . . . [T]he distance, with the terrible commuting time, is cause a lot of apparent stress and anxiety for [G.D.P.] when he misses his practices and games. . . . Prior to August 2018, [G.D.P.] did not have any siblings. Since August 2018, [G.D.P.] has a sister as well as a brother on the way. . . . I never could have imagined that [G.D.P.] would have such a bond with his sister.

To the extent that Mother contends Father's complaints were anticipated circumstances, we disagree. Since the 2018 MSA, Father presented evidence that: (1) the child's academic performance has decreased; (2) the child has not completed homework while in Mother's care and has a history of tardiness; (3) the child experiences stress and anxiety when he misses practices and games; and (4) the child has bonded with his new siblings.

A no-evidence summary judgment may not be granted if the nonmovant brings forth more than a scintilla of evidence to raise a genuine issue of material fact on the challenged elements. *See Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600

(Tex. 2004). Father satisfied his burden by presenting evidence that the child's academic conditions, extracurricular obligations, and family composition materially and substantially changed since the date of the 2018 MSA. Taking as true all of the evidence favorable to Father, the nonmovant, we conclude that he presented more than a scintilla of evidence regarding the existence of a material and substantial change in circumstances. *Dorsett*, 164 S.W.3d at 661. Consequently, we hold that the trial court erred in granting a no-evidence summary judgment on Father's claims in his petition for modification. *Id.*

We sustain the second subpart of Father's issue.

## III. Misnomer of Pleading Does Not Render it Ineffective

In the remaining subpart of Father's issue, he asserts that an incorrect title on his summary judgment response cannot be the basis of the trial court's order granting Mother's no-evidence summary judgment. "A misnomer occurs when a party misnames itself or another party, but the correct parties are involved." *In re Greater Houston Orthopaedic Specialists, Inc.*, 295 S.W.3d 323, 325 (Tex. 2009) (per curiam) (orig. proceeding). Rule 71 of the Texas Rules of Civil Procedure specifically addresses misnomer of pleadings. Tex. R. Civ. P. 71 (providing that misnomer of a pleading does not render it ineffective, and courts will treat the pleading as if properly named).

Here, Father's response to Mother's no-evidence summary judgment incorrectly identifies another litigant in the caption, but correctly identifies Father in the body of the response. Reviewing the record, there is no evidence (and Father does not cite to any evidence) to support his contention that Mother's summary judgment was granted on this ground. Accordingly, we overrule the third subpart of Father's issue.

## *Conclusion*

For the reasons stated above, and taking as true all the evidence favorable to Father, the nonmovant, we hold that the trial court erred in granting a no-evidence summary judgment on Father's claims because Father presented more than a scintilla of evidence regarding the existence of a material and substantial change in circumstances. We reverse and remand.

/s/ Frances Bourliot
Justice

Panel consists of Chief Justice Christopher and Justices Bourliot and Wilson.