Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-20-00226-CV

Abelardo G. **GONZALEZ**, Individually and as Next Friend of M.A.G. and Z.A.G.,
Appellant

v.

Alberto J. **GONZALEZ**, Sergio R. Gonzalez, Rosalinda Gonzalez, and Diana Gonzalez,
Appellees

From the 341st Judicial District Court, Webb County, Texas
Trial Court No. 2018CVH001007D3
Honorable Karen H. Pozza, Judge Presiding[1]

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Patricia O. Alvarez, Justice
Luz Elena D. Chapa, Justice
Lori I. Valenzuela, Justice

Delivered and Filed: December 29, 2021

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

This dispute arises out of property jointly owned by appellant Abelardo G. Gonzalez and his brothers. Abelardo, proceeding pro se, sued two of his brothers and their wives (collectively referred to as "defendants"), asserting multiple causes of action. The trial court granted the defendants' no-evidence motion for summary judgment and rendered a take-nothing judgment on all of Abelardo's claims. Abelardo filed this appeal, arguing his motion to recuse the trial judge

[1] The Honorable Karen H. Pozza, Senior District Judge, rendered the judgment in this case. At the time judgment was rendered, Judge Pozza was the presiding judge of the 407th Judicial District Court of Bexar County, Texas, sitting as the 341st Judicial District Court of Webb County, Texas by assignment.

should not have been denied without a hearing, the trial court should not have considered or granted the defendants' motion to strike their deemed admissions, and the trial court erred in granting the summary judgment. In addition, Abelardo argues the trial court's judgment was not final and we should dismiss the appeal.

We conclude we have jurisdiction over the appeal because the judgment disposed of all parties and claims. We further conclude the trial court did not err by denying the motion to recuse without a hearing and did not abuse its discretion in striking the deemed admissions. We reverse the summary judgment in part and remand Abelardo's individual claims (1) against Alberto Gonzalez for breach of contract, (2) against the defendants for damages caused by the interference with property rights, damage to personal property, and interference with contract; and (3) against the defendants under the Uniform Declaratory Judgment Act. We affirm the trial court's judgment on all other claims.

I. Background

Abelardo and his brothers—Hipolito, Sergio, and Alberto—acquired several parcels of property from their grandfather by a gift deed that reserved a life estate in favor of the grantor. The grantor has since died. The record reflects the property has not been partitioned and is owned by the brothers jointly as co-tenants. Abelardo's second amended petition alleges the brothers informally divided the property and had verbal agreements that each would maintain the property designated as his and pay his share of the property taxes.

Abelardo asserts "his" property is the land on which he built a home and maintains a large back yard. The house and part of the back yard are on two tracts. The petition alleges the yard extends onto a third tract, referred to as "the .59 acres." The yard is accessed via an entrance cut from the road (the "south entrance") that he kept gated. The petition states Abelardo and his wife have possessed, used, controlled, maintained, and improved his property, including the south

entrance since 1992. It alleges they conducted business on the property, including renting the yard out for parties and running a limousine service. Abelardo alleges they use the south entrance to access the yard, where they store the limousines.

According to Abelardo, his brother Alberto was to build his home on another part of the .59 acres. The petition alleges Alberto failed to pay his share of the taxes and their mother agreed to pay them on the condition Alberto would repay her before he began building. Abelardo contends she paid the taxes and later assigned the debt to Abelardo. Abelardo also alleges he agreed to maintain Alberto's property for a monthly fee that would be due in a lump sum when Alberto decided to use the property. Abelardo alleges he maintained the .59 acres for over twenty years.

The brothers' mother died in January 2017. Abelardo alleges that in October 2017, Alberto expressed an intent to begin building on the .59 acres; however, Alberto refused to pay Abelardo for maintaining the property or to repay the debt he owed for past taxes. Abelardo further alleged that in October 2017, Alberto and Sergio, with their wives and other unknown parties, replaced the gate to the south entrance with a fence and padlocked it, denying Abelardo's family access to the back yard through the south entrance. He also alleges they attempted to move a limousine the family business kept on the .59 acres, and in the process damaged it so that it could not be used for generating income.[2]

Abelardo filed this suit in May 2018, alleging claims for breach of contract, interference with property rights, damage to personal property, interference with contract, reimbursement for improvements made to real property, and intentional infliction of emotional distress. Additionally,

[2] Abelardo is in prison. *See Gonzalez v. State*, Nos 04-10-00123-CR, 04-10-00124-CR, & 04-10-00124-CR, 2011 WL 3849393 (Tex. App.—San Antonio Aug. 31, 2011, pet. ref'd) (mem. op., not designated for publication) (affirming convictions of three counts of aggravated robbery and three counts of engaging in organized criminal activity, and thirty-year sentence on each count). He presented summary judgment evidence that his wife continued the business after he went to prison and that she uses the south entrance daily when it is not padlocked.

he sought a declaration of property boundaries and a declaration that the defendants have abandoned any claim to the property Abelardo and his family have possessed, controlled, and used. Finally, he sought an injunction precluding the defendants from denying Abelardo and his family access to his property through the south entrance. Abelardo purported to bring the breach of contract claim regarding the payment of property taxes both on behalf of the estate of his deceased mother and on his own behalf as her assignee. In an amended petition, Abelardo pleaded he was also asserting all the claims on behalf of his two minor children, M.A.G. and Z.A.G.

On April 9, 2020, the trial court granted the defendants' no evidence motion for summary judgment and rendered a take-nothing judgment. On appeal, Abelardo contends the judgment is not final because it did not dispose of all parties and argues the court erred in granting summary judgment. In addition, Abelardo argues the trial court erred by denying his motion to recuse the trial judge without holding a hearing and the court erred in considering and granting the defendants' motion to strike their deemed admissions. The defendants waived filing an appellees' brief.[3]

II. Jurisdiction

We first address Abelardo's contention the trial court did not render a final judgment. An order rendered without a conventional trial on the merits is not presumed to be final. *In re Burlington Coat Factory Warehouse of McAllen, Inc.*, 167 S.W.3d 827, 829 (Tex. 2005) (orig. proceeding). Such an order may be final if it either contains language that unequivocally expresses an intent to finally dispose of the case or if the order "actually disposes of all parties and all claims."

[3] In his reply brief, Abelardo asserts that by waiving their right to file a brief, the defendants have conceded the validity of all his issues. Appellees are not required to file a brief and do not concede the validity of appellant's points of error by waiving a brief; appellant still bears the burden of establishing reversible error. *Richardson-Eagle, Inc. v. William M. Mercer, Inc.*, 213 S.W.3d 469, 478 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *see Spencer v. Gilbert*, No. 03-09-00207-CV, 2010 WL 3064346, at *2 (Tex. App.—Austin Aug. 4, 2010, pet. dism'd w.o.j.) (mem. op.) (stating appellee's failure to file a brief "does not lead to concession of error through some sort of appellate default judgment").

Id. at 829-30. "Because the law does not require that a final judgment be in any particular form, whether a judicial decree is a final judgment must be determined from its language and the record in the case." *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). Abelardo contends the judgment is not final because it did not unequivocally state that it disposed of all claims and parties, and it did not actually dispose of the claims he asserted on behalf of his children M.A.G. and Z.A.G. or the claims asserted against Jane and John Doe. We disagree.

The defendants' motion for summary judgment sought judgment on all claims asserted in the second amended petition, including those brought by Abelardo in his representative capacity. The trial court's judgment, titled "final judgment," granted the motion for summary judgment and decreed that Abelardo "take nothing on all claims and causes of action asserted against defendants." Judgment was rendered on all of Abelardo's claims, both those brought individually and those he purported to bring in a representative capacity for the estate of his mother and as next friend of his minor children. Additionally, the judgment was rendered on all causes of action against "defendants," which would include Jane and John Doe if they were parties in the case. However, Jane and John Doe were not parties defendant when the judgment was rendered. Although Abelardo listed them in the style, they were never served with process and they were not listed in the parties section of the live petition. *See Youngstown Sheet & Tube Co. v. Penn*, 363 S.W.2d 230, 232 (Tex. 1962); *Green v. Vidlak*, 76 S.W.3d 117, 119-20 (Tex. App.—Amarillo 2002, no pet.).

We conclude the judgment disposed of all claims and parties and was final for purposes of appeal.

III. Denial of Recusal Motion

Abelardo contends the trial court abused its discretion "when it denied [his] motion to recuse trial court Judge Pozza without a hearing." We conclude the motion to recuse did not

comply with Texas Rule of Civil Procedure 18a and the trial court therefore did not err in summarily denying it.

A. Background

The events leading to the motion to recuse began in April 2019, when the judge presiding over the case and the Regional Presiding Judge voluntarily recused themselves after Abelardo filed a motion to recuse them. The Chief Justice of the Texas Supreme Court assigned the Honorable Karen H. Pozza, then the presiding judge of the 407th Civil District Court of Bexar County, to preside over all further proceedings in the case.

Judge Pozza held a hearing on October 15, 2019, at which she considered and later ruled on numerous pending motions. Then, in November, she issued a scheduling order and sent a letter to the parties giving notice that all pretrial matters and pending motions would be heard March 6, 2020, and a jury trial would be held March 16, 2020. Abelardo filed various motions in November and December 2019, and on December 8, he mailed an objection to the March 6 hearing date, demanding an earlier hearing to address his pending motions. In February, the defendants filed a motion to continue the pretrial hearing and the trial, asserting one of the defense attorneys would be on vacation March 6 through March 25, 2020.

On February 11, 2020, the trial court reset the pretrial hearing to March 5 and sent the parties notice of the resetting. The notice identified thirteen matters, including the defendants' motion for continuance, their motion to strike deemed admissions, and many of Abelardo's motions, to be considered at the hearing. In a motion signed February 13, Abelardo objected to the defendants' motion for continuance and requested to appear in person at the rescheduled March 5 hearing.

Abelardo appeared at the March 5 pretrial hearing by telephone. The trial court first considered the motion to continue the trial date. The court then heard arguments on the defendants'

motion to strike their deemed admissions. After defense counsel presented his argument, Abelardo objected to the court proceeding with further motions, objected to the order in which the court was considering the motions, and repeatedly interrupted the judge. The court eventually determined Abelardo's repeated demands and interruptions made it impossible to proceed, and the court recessed the hearing. Later the same day, the court signed orders granting the motion to strike the deemed admissions, granting the motion for continuance, and resetting the jury trial to June 15, 2020.

Soon after the March 5 hearing, Abelardo filed his motion to recuse Judge Pozza for bias and lack of impartiality. Senior District Judge John D. Gabriel was assigned to consider and rule on the motion. Judge Gabriel summarily denied the motion to recuse on April 1, 2020, stating the motion did not comply with the requirements of Rule 18a of the Texas Rules of Civil Procedure.

B. Law

Rule 18a of the Texas Rules of Civil Procedure sets forth the requirements for a motion to recuse and the procedure to be followed when a motion to recuse is filed. *See* TEX. R. CIV. P. 18a. The judge to whom a motion to recuse is referred may summarily deny the motion without an oral hearing if the motion does not comply with the requirements of the rule. *Id.* R. 18a(g)(3). We review an order denying a motion to recuse for abuse of discretion. *Id.* R. 18a(j)(1)(A).

Rule 18a requires the motion be verified and to assert one or more of the grounds for recusal listed in Rule 18b(b). *Id.* R. 18a(a)(1)-(2), (b). In support of the grounds, the motion must "state with detail and particularity facts that:" "are within the affiant's personal knowledge, except that facts may be stated on information and belief if the basis for that belief is specifically stated;" "would be admissible in evidence;" and "if proven, would be sufficient to justify recusal." *Id.* R. 18a(a)(4).

A motion to recuse must not be based solely on the judge's rulings in the case. *Id.* R. 18a(a)(3). Judicial rulings will almost never constitute a valid basis for a bias or partiality motion. *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 240 (Tex. 2001) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)). A judge's rulings during a case do not rise to the level of bias or impartiality unless they "indicate a high degree of favoritism or antagonism that renders fair judgment impossible." *Parker v. Cain*, No. 07-17-00211-CV, 2018 WL 4997784, at *2 (Tex. App.—Amarillo Oct. 15, 2018, no pet.) (mem. op.). "The need for recusal is triggered only when a judge displays an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a reasonable member of the public to question the objective nature of the judge's rulings." *Ex parte Ellis*, 275 S.W.3d 109, 117 (Tex. App.—Austin 2008, no pet.) (internal quotation marks omitted).

Nor will actions taken to control a judge's docket or courtroom ordinarily be a valid basis for a motion to recuse for bias or lack of impartiality. A "trial court is vested with broad discretion to manage and control its docket in order to promote the orderly and efficient administration of justice." *Taylor v. State*, 255 S.W.3d 399, 402 (Tex. App.—Texarkana 2008, pet. ref'd). The court has "inherent power to control the disposition of cases 'with economy of time and effort for itself, for counsel, and for litigants.'" *Dow Chem.*, 46 S.W.3d at 240 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). The "court may properly intervene to maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of time." *Id.* at 240-41.

Further, a judge's remarks "that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* at 240 (quoting *Liteky*, 510 U.S. at 540). "Nor do 'expressions of impatience, dissatisfaction, annoyance, and even anger . . . . A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune.'" *Id.* (alteration in original) (quoting *Liteky*, 510 U.S. at 555–56).

C. Discussion-Sufficiency of Recusal Motion

Abelardo's motion alleged two grounds for Judge Pozza's recusal: that she has a personal bias or prejudice concerning the subject matter or a party and that her impartiality might reasonably be questioned. *See* TEX. R. CIV. P. 18b(b)(1), (2). Abelardo asserted the source of the judge's bias against him was her "improper communication with" the previously recused trial court judge in the case and with defense counsel. However, Abelardo did not allege any facts regarding the nature or substance of the alleged communications or to support that such communications occurred. Abelardo alleged the following particular facts to justify the claim of bias and lack of impartiality:

1. The judge's November 2019 scheduling order set a hearing for March 6, 2020, to hear all remaining motions; she did not set an earlier hearing for motions Abelardo had labeled "expedited" and did not set an earlier hearing after Abelardo filed an objection and demand for an earlier hearing.

2. At the October 15, 2019 hearing, the judge denied Abelardo's motion to admonish the defendants for "obstructing and impeding the administration of justice" and would not question the defendants about Abelardo's allegations.[4]

3. The judge moved the date of the pretrial hearing from March 6 to March 5 after the defendants filed their motion for continuance. This was done "for the sole convenience of defendant's attorney" and was done without giving timely notice and without identifying the court in which the hearing would be held.[5]

4. At the March 5, 2020 hearing, the judge did not call out the names of the witnesses Abelardo had subpoenaed to appear when he demanded it be done.

5. At the March 5, 2020 hearing, the judge granted the defendant's motion for continuance.

6. At the March 5, 2020 hearing, the court refused to consider the motions in the order Abelardo had requested, did not conduct the hearing in the manner Abelardo desired, and

[4] The record of the October 15 hearing reflects the trial court gave Abelardo the opportunity to present evidence on his motion and asked him on several occasions if he had anything further to present. Abelardo did not call any witnesses or ask to examine the defendants.

[5] Defense counsel sought a continuance until after March 25; the trial court rescheduled the pretrial hearing to one day earlier, *before* counsel was to leave on his vacation. The court gave the parties notice of the new hearing date by letter dated February 11, which the record reflects Abelardo received on or before February 14. The location of the hearing was not changed.

> recessed the hearing without considering or ruling on all of Abelardo's motions. In addition, the judge used a "rude voice" and was disrespectful.

All the specific facts alleged in the motion concerned the trial judge's rulings on motions and its discretionary decisions about how to manage its docket and control its courtroom. None of the facts alleged reflect a "deep-seated favoritism or antagonism" or an attitude "so resistant to fair and dispassionate inquiry as to cause a reasonable member of the public to question the objective nature of the judge's rulings." *See Parker*, 2018 WL 4997784, at *3; *Ellis*, 275 S.W.3d at 117. The trial court's actions leading up to and including the March 5 hearing were all within its inherent power to control its docket and courtroom; and neither those actions nor the court's rulings on the parties' motions are sufficient to justify recusal. Because the motion did not plead with particularity facts, which if proven, would be sufficient to justify recusal, the motion did not comply with the requirements of Rule 18a. *See* TEX. R. CIV. P. 18a(a)(4), (g)(3). Therefore, the recusal judge did not err by summarily denying the motion. *See id.* R. 18a(j)(1)(A).

IV. The March 5, 2020 Hearing and Striking the Deemed Admissions

In two issues, Abelardo contends the trial court erred by proceeding with the March 5, 2020 hearing and erred in granting the defendants' motion to strike deemed admissions after the hearing.

A. The Hearing

Abelardo contends he received insufficient notice of the hearing, the hearing should have stopped after the trial court granted the motion for continuance, and the court should not have considered the motion to strike without his witnesses. We disagree. The pretrial hearing was originally set for March 6; however, in response to the defendants' motion to continue both the pretrial hearing and the trial to after March 25, the court reset the pretrial hearing by moving it ahead one day. In pleadings Abelardo signed February 13, twenty-one days prior to the hearing,

he acknowledged receipt of the trial court's notice of the rescheduled hearing.[6] *See* TEX. R. CIV. P. 21(b) (requiring three days' notice). At the hearing, the trial court initially considered and granted the defendants' motion to continue the trial date. Abelardo asserts the trial court abused its discretion in considering any further motions because after the court granted the defendants' motion for continuance, "the whole case should of stopped." He cites no authority for this proposition. Granting a continuance of the trial date had no effect on the trial court's ability to consider motions that had been properly set for hearing on March 5.

Finally, Abelardo asserts the court should not have gone forward with the motion to strike because the witness he had subpoenaed for March 6 to prove personal service of the request for admissions was unable to appear on March 5. However, Abelardo was not harmed by the absence of the witness because the defendants acknowledged the request for admissions had been hand-delivered to counsel's office and that the defendants' responses were filed late.

B. Striking Deemed Admissions

On February 6, 2020, Abelardo filed a sworn pleading, stating the attached first request for admissions to the defendants Alberto and Sergio had been hand-delivered to defense counsel's office on December 20, 2019. The request for admissions contained a certificate of service by hand-delivery; however, neither the request nor the certificate of service were dated. Abelardo's February pleading attached a separate signed copy of an acknowledgement of receipt, dated December 20. Abelardo asserted he had not received a response to the request for admissions and they were therefore deemed admitted. *See* TEX. R. CIV. P. 198.2.

On February 10, Alberto and Sergio filed responses to the request for admissions and a motion to strike the deemed admissions. The motion, supported by counsel's affidavit, stated

[6] In his reply brief, Abelardo states he received only two days' notice of the March 5 hearing. The assertion is belied by the record.

counsel was unaware of the request for admissions until he saw Abelardo's February 6 filing on the trial court's online docket sheet. Defense counsel stated he eventually located the undated request for admission in his office, and that upon learning about the request, he immediately consulted his clients and prepared and served responses. The motion to strike asked the deemed admissions be withdrawn because the defendants' failure to timely respond was not intentional, but due to accident or mistake and because Abelardo would not be prejudiced.

The court considered the defendants' request to withdraw the deemed admissions at the March 5 hearing. Defense counsel acknowledged the request for admissions had been delivered to his office and that the defendants' responses were filed late. However, he asserted he was not made aware of the request for admissions when it was delivered and did not become aware of it until he saw it on the court's docket sheet. The defendants' responses and the motion to strike were filed promptly thereafter. Abelardo asserted that his brother Hipolito hand-delivered the request for admissions, obtained a signature acknowledging receipt, and left a carbon copy of the acknowledgement at counsel's office. He asserted the defendants intentionally neglected the request for admissions, citing his contention that appellees had yet to comply with another order compelling discovery. Abelardo asserted he would be prejudiced by an order allowing the deemed admissions to be withdrawn because, in reliance on the admissions, he had told two of his witnesses they could relocate beyond the court's subpoena power. However, the record does not reflect who these witnesses are or the subject matter of their potential testimony.

The trial court has broad discretion to allow a party to withdraw deemed admissions if (1) the party shows good cause for the withdrawal and (2) the court finds the party relying on the deemed admissions will not be unduly prejudiced and presentation of the merits of the action will be subserved by permitting the party to withdraw the admissions. TEX. R. CIV. P. 198.3; *Wheeler v. Green*, 157 S.W.3d 439, 443 (Tex. 2005) (per curiam). "A party can establish good cause by

showing that its failure to answer was accidental or the result of a mistake, rather than intentional or the result of conscious indifference." *Stelly v. Papania*, 927 S.W.2d 620, 622 (Tex. 1996) (per curiam). When the deemed admissions act as merits-preclusive sanctions, good cause will exist to allow withdrawal unless the court finds the failure to respond was the result of bad faith or callous disregard. *Wheeler*, 157 S.W.3d at 443; *see Fifty-One Thousand One Hundred & Twenty-Four Dollars in US Currency v. State*, No. 04-18-00428-CV, 2019 WL 1779928, at *4 (Tex. App.—San Antonio April 24, 2019, no pet.) (mem. op.). Whether there is "[u]ndue prejudice depends on whether withdrawing an admission or filing a late response will delay trial or significantly hamper the opposing party's ability to prepare for it." *Wheeler*, 157 S.W.3d at 443. We may "set aside the trial court's ruling only if, after reviewing the entire record, it is clear that the trial court abused its discretion." *Stelly*, 927 S.W.2d at 622.

After reviewing the entire record, we conclude the trial court acted within its discretion in granting the motion to strike the deemed admissions. The court reasonably could have found the failure to timely respond was the result of counsel being unaware of the request and was not intentional or due to conscious indifference. The court also acted within its discretion to conclude that granting the motion would not result in undue prejudice. The defendants fully responded to the request as soon as they became aware of it. The responses, which admitted almost half of the fifty-one requests, were served on Abelardo in February, and the trial court's order striking the deemed admissions was rendered March 5, four weeks before the April 2 deadline to respond to the defendants' pending motion for summary judgment. In the event Abelardo needed to secure additional affidavits or other evidence to support his response to the motion for summary judgment, he had sufficient opportunity to do so. We therefore overrule Abelardo's issue and hold the trial court did not abuse its discretion in considering and granting the defendants' motion to strike deemed admissions.

V. Timeliness of Third Response to the Motion for Summary Judgment and Consideration of Second Set of Admissions

The defendants' no-evidence motion for summary judgment was set for submission on April 9, 2020, and the trial court granted the motion and rendered judgment that day. Abelardo had previously filed a response and objections to the motion, a correction to the response, and an amendment to the response (which incorporated the two previous responses). Abelardo also filed a third response to the motion for summary judgment, which asked the court to consider the defendants' deemed responses to his *second* request for admissions. The third response was file-stamped by the district clerk on April 14, 2020. In his sixth issue, Abelardo argues the trial court erred by failing to consider the second set of deemed admissions when ruling on the motion for summary judgment.

To defeat a no-evidence motion for summary judgment under Rule 166a(i), a party is required to "point out evidence that raises a fact issue on the challenged elements" of his causes of action in a timely filed response. *See* TEX. R. CIV. P. 166a(i) cmt. (1997). The response to the motion may point to discovery material, so long as the material is "filed and served on all parties together with a statement of intent to use the specified discovery as summary judgment proofs . . . at least seven days before the hearing if such proofs are to be used to oppose the summary judgment." TEX. R. CIV. P. 166a(d).

Abelardo filed the second set of deemed admissions with the trial court clerk in February. However, neither that filing or any other pleading filed before the April 14 third response to the motion for summary judgment included a statement of intent to use the second set of deemed admissions as summary judgment proof. None of Abelardo's responses to the motion for summary judgment prior to the April 14 pleading referred to or "pointed to" the second set of admissions in any way. The issue therefore becomes whether the third response was timely.

The deadline to submit summary judgment evidence in response to the motion was April 2, seven days before the motion was set for submission. TEX. R. CIV. P. 166a(c), (d). Abelardo's third response was not file-stamped by the clerk of the court until April 14, 2021, twelve days after the due date and five days after the court ruled on the motion for summary judgment. A pleading from a pro se party who is in custody is deemed timely filed so long as it is delivered to prison officials for mailing on or before its due date. *Ramos v. Richardson*, 228 S.W.3d 671, 673 (Tex. 2007) (per curiam). The inmate has the burden to provide proof of the date the pleading was given to prison authorities for mailing. *Id.*

The cover letter accompanying the third response was dated April 1, 2020. In addition, the response and the certificate stating opposing counsel was being served with the response are both signed by Abelardo and dated April 1. However, neither the cover letter nor the response or its certificate of service contains a statement of when the pleading was deposited with prison authorities for mailing, and the record does not contain an envelope with a legible postmark. The date on the letter and the date Abelardo signed the pleading and certificate are not any evidence of when he delivered the pleading to prison authorities for mailing. *Compare Smith v. Smith*, No. 14-20-00807-CV, 2021 WL 3925155, at *1 (Tex. App.—Houston [14th Dist.] Sept. 2, 2021, no pet.) (per curiam) (mem. op.) (holding date notice of appeal was signed is not evidence of when it was delivered to prison officials for mailing) *and Simms v. Gonzales*, No. 07-17-00066-CV, 2018 WL 3735835, at *2–3 (Tex. App.—Amarillo Aug. 6, 2018, no pet.) (mem. op.) (holding date of letter is not evidence of when appellant gave letter to prison authorities for mailing), *with Ramos*, 228 S.W.3d at 673 (holding that filing letter accompanying notice of appeal and certificate of service, both of which stated notice of appeal was placed in "outgoing prison mailbox" on date before it was due was sufficient to meet inmate's burden).

In his brief, Abelardo argues the third response was timely under the mailbox rule in the Texas Rules of Civil Procedure. However, the third response was not timely filed under the mailbox rule because it was not received by the district court clerk within ten days of the April 2 filing deadline. *See* TEX. R. CIV. P. 5. Because there is no proof the third response to the motion for summary judgment was mailed or deposited with prison authorities for mailing on or before the due date, the trial court did not err in failing to consider the third response or the second set of admissions referred to therein.

VI. No-Evidence Summary Judgment

Abelardo next complains the trial court erred in rendering judgment on each of the claims in his live pleading.[7]

A. Standard of Review

We review a summary judgment *de novo*. *Provident Life & Acc. Ins. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). When, as in this case, the trial court does not specify the grounds on which it granted summary judgment, we will affirm the judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious. *Id*. at 216.

In a no-evidence motion for summary judgment filed under Texas Rule of Civil Procedure 166a(i), the movant challenges the evidentiary support for a specific element of a claim or defense after an adequate time for discovery. TEX. R. CIV. P. 166a(i). The motion must "provide the

[7] Although Abelardo's brief includes a global issue challenging the summary judgment, he does not present any argument challenging the judgment on the breach of contract claim he purported to bring on behalf of his mother's estate or the claim for intentional infliction of emotional distress. The motion for summary judgment asserted Abelardo could present no evidence he is authorized to act as the legal representative of his mother's estate or that he had standing to sue in that capacity. Abelardo did not respond to that ground of the motion in the trial court and does not address it in his brief. The motion also asserted there was no evidence of any extreme and outrageous conduct to support a cause of action for intentional infliction of emotional distress. *See Hoffman-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004) (holding conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community"). Abelardo has not presented any argument on appeal challenging the summary judgment on the intentional infliction of emotional distress claim. We conclude he has waived appellate review of the validity of the summary judgment on these claims. *See Ontiveros v. Flores*, 218 S.W.3d 70, 71 (Tex. 2007).

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) (internal quotation marks omitted).

The burden then shifts to the respondent to produce summary judgment evidence that raises a genuine issue of material fact on the challenged element. TEX. R. CIV. P. 166a(i); *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 601 (Tex. 2004). The respondent is not required to marshal its proof but must specifically point out evidence that raises a fact issue on each of the challenged elements. TEX. R. CIV. P. 166a(i) cmt. (1997); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 207 (Tex. 2002). Both direct and circumstantial evidence may be used to establish a material fact. *Ford Motor Co.*, 135 S.W.3d at 601. "A genuine issue of material fact exists if more than a scintilla of evidence establishing the existence of the challenged element is produced." *Id.* at 600.

In our review, we examine the evidence in the light most favorable to the respondent, "crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not." *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). We will reverse a no evidence summary judgment if the respondent pointed out more than a scintilla of probative evidence to raise a genuine issue of material fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003). "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. More than a scintilla of evidence exists when the evidence rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Id.* (internal quotation marks and citation omitted).

B. The Summary Judgment Evidence

In reviewing Abelardo's challenge to the summary judgment, we will consider the following evidence: Abelardo's affidavit, his brother Hipolito's affidavit, an affidavit executed by

their mother, Margarita V. Gonzalez, in 2013, and Sergio and Alberto's responses to the first request for admissions.

In the trial court, Abelardo additionally asked the trial court to consider the second set of deemed admissions. However, as discussed above, Abelardo did not point to the second set of admissions as summary judgment evidence until he filed his untimely third response to the motion for summary judgment. Therefore, they were not properly before the court and we do not consider them. Abelardo's responses to the motion for summary judgment also requested the court consider Alberto's testimony at a previous hearing in the case. However, no copy of the reporter's record of that hearing was filed in the trial court. Because the material was not before the trial court when it ruled on the motion for summary judgment, we do not consider it. *See Munoz v. Gulf Oil Co.*, 693 S.W.2d 372, 373 (Tex. 1984) (per curiam) (declining to consider hearing transcript on review of summary judgment because record did not establish that trial court considered transcript at time it ruled on motion). Finally, Abelardo improperly sought to rely on his sworn petition as summary judgment evidence. *See Americana Motel, Inc. v. Johnson*, 610 S.W.2d 143, 143 (Tex. 1980) (per curiam) ("[s]worn pleadings are not summary judgment evidence in Texas").

C. Discussion

1. *Statute of Limitations*

The defendants' motion sought summary judgment on Abelardo's breach of contract and tort claims on the ground the claims are barred by the statute of limitations. Abelardo argues this was error.

The statute of limitations is an affirmative defense on which the defendants would have the burden of proof at trial. TEX. R. CIV. P. 94; *Nowak v. DAS Inv. Corp.*, 110 S.W.3d 677, 680 (Tex. App.—Houston [14th Dist.] 2003, no pet.). A no-evidence motion for summary judgment may only be addressed to a claim or defense for which the non-movant would have the burden of proof

at trial. TEX. R. CIV. P. 166a(i); *Killam Ranch Properties, Ltd. v. Webb Cty.*, 376 S.W.3d 146, 157–58 (Tex. App.—San Antonio 2012, pet. denied). The defendants' no-evidence motion for summary judgment on their statute of limitations affirmative defense was not authorized by the rules and thus was improper. *See id.*; *Selz v. Friendly Chevrolet, Ltd.*, 152 S.W.3d 833, 838 (Tex. App.—Dallas 2005, no pet.). However, Abelardo did not challenge the legal sufficiency of this ground for the motion, either in his response to the motion or in his briefing on appeal, and we may not reverse the judgment on unassigned error. *See Allright, Inc. v. Pearson*, 735 S.W.2d 240, 240 (Tex. 1987) (per curiam) ("It is error for a court of appeals to consider unassigned points of error."); *Selz*, 152 S.W.3d at 838 (court of appeals could not reverse on ground no-evidence motion for summary judgment was legally insufficient when appellant did not raise the issue on appeal).

Instead, Abelardo argues the judgment cannot be affirmed on the basis of the statute of limitations because his summary judgment evidence establishes he filed suit before the statute of limitations expired. Abelardo asserts his breach of contract claims accrued when payment under the contracts was due but not made. He contends a lump-sum payment was due in October 2017 under the terms of each agreement. Abelardo contends the conduct that is the basis of his tort claims also occurred in October 2017, when his family was denied access to the south entrance and his limousine was damaged. Abelardo's contentions regarding the terms of the agreements, the date payment was due, the failure to pay, and when the allegedly tortious conduct occurred are all supported by his summary judgment affidavits. The statements in the affidavits constitute some evidence the breach of contract and tort claims accrued less than two years before March 2018, when Abelardo filed his suit. The judgment is therefore not supported by statute of limitations grounds in the defendants' motion.

2. *Breach of contract – property taxes*

Abelardo sued Alberto and Sergio for breaching an agreement to repay sums their mother had paid in property taxes to avoid foreclosure on the .59 acres. The no-evidence motion for summary judgment asserted Abelardo could produce no evidence of any offer, acceptance, consideration, or meeting of the minds to support the breach of contract claim.

Abelardo argues a June 2013 affidavit prepared by his mother, Margarita V. Gonzalez, together with his and Hipolito's affidavits were sufficient to require denial of the motion for summary judgment. The affidavits state that it was agreed among the brothers and their grandfather, who gave them the property, that in consideration for the deed, each brother would pay the property taxes for the part of the property they would eventually build on. The affidavits state Alberto was to build on the .59 acres; Alberto did not pay the taxes on the property; and Margarita paid the taxes on the .59 acres with Alberto's agreement that he would repay her before he made use of the property. Margarita's affidavit additionally assigned to Abelardo the right to recover the debt from Alberto in the event it was not paid before she died. According to Abelardo and Hipolito, Alberto first stated an intent to begin building on the property in October 2017, after their mother died. Hipolito's affidavit states he asked Alberto when he would repay the debt he owed as a result of his mother paying the property taxes, and Alberto responded, "I ready to pay her, but she not here." Abelardo states he made demand on Alberto for the amount due, but it was not paid.

This evidence is sufficient to raise a fact issue as to each element of Abelardo's individual breach of contract claim against Alberto, and it was error to grant summary judgment on this claim. However, there is no summary judgment evidence that Sergio entered into any agreement to repay any property taxes paid on his behalf, and the court did not err in granting summary judgment on this breach of contract claim against Sergio.

3. *Breach of contract — property maintenance*

Abelardo next complains of the court's summary judgment on his claim against Sergio and Alberto for breach of a contract to pay him to maintain the .59 acres. The defendants moved for summary judgment on the grounds there is no evidence of an offer, acceptance, meeting of the minds, or consideration. Abelardo's summary judgment affidavit recites one of the conditions for his grandfather gifting the property was that each of the brothers agree to maintain his portion of the property. He states Alberto failed to maintain his property, which was overgrown with heavy brush, and the City was threatening to fine them. According to Abelardo, he offered to maintain the .59 acres for Alberto for a monthly fee that would be due in a lump sum when Alberto decided to begin maintaining or using the property, and Alberto accepted the offer. Abelardo states he thereafter maintained or arranged for others to maintain the property, and Hipolito's affidavit states Alberto did nothing to maintain the .59 acres before October 2017. Finally, Abelardo asserts the debt became due in October 2017, when Alberto stated his intent to build on the property.

Abelardo presented some evidence Alberto agreed to maintain his share of the property in consideration for the gift deed and some evidence that Abelardo offered and Alberto agreed that Abelardo would perform Alberto's maintenance duties on the .59 acres in consideration for payment. The evidence is sufficient to raise a fact issue as to offer, acceptance, "meeting of the minds," and consideration with respect to an oral contract with Alberto. However, no evidence was presented as to any agreement between Abelardo and Sergio. The trial court therefore erred in granting summary judgment on this cause of action in favor of Alberto but did not err in granting judgment in favor of Sergio.

4. *Interference with property rights, intentional damage to property and interference with contract*

In his next group of claims, Abelardo alleged the defendants interfered with his property rights and with his family's business by installing a new fence and padlock on the south entrance, blocking his family's access to his back yard and the .59 acres, and by intentionally damaging one of his limousines, which was being stored on the .59 acres. He alleged the defendants' actions caused him to lose a contract. In addition to seeking an injunction, Abelardo sought damages for the cost to repair the limousine and lost business income. The defendants moved for summary judgment on these causes of action on the grounds that there is (1) no evidence Abelardo, who is in prison, was personally denied access to the property; (2) no evidence Abelardo's wife was denied access to her house; (3) no evidence "[m]ovants were [] in any type of contract to use [Abelardo's] limo business;" and (4) no evidence the limousine business was in existence at all.

The summary judgment evidence establishes Abelardo is a co-tenant of the property on which the south entrance lies and of the .59 acres. In their responses to Abelardo's first request for admissions, Alberto and Sergio admitted Abelardo and his wife ran a limousine service from their home and back yard, they used the south entrance to enter and exit the property with their limousines, and they stored their limousines under a metal awning Abelardo built on the .59 acres. They also admitted that in October 2017, they and their wives closed the south entrance to the property by replacing the gate with a fence, which was chained and padlocked.

Abelardo and Hipolito's affidavits state Abelardo and his wife ran the limousine business from his back yard, including part of the .59 acres. They state the only means to access the back yard with the limousines is through the south entrance and the limousines are stored on the .59 acres. Abelardo's affidavit states that after he went to prison, his wife continued operating the limousine business. However, she later decided she would be unable to continue doing so and

Abelardo states he began looking for someone to operate the business. According to Abelardo, in August 2017, he entered into a written lease agreement with someone to operate a limousine service out of his back yard using one of his vehicles. Pursuant to the agreement, Abelardo would provide a working limousine and a place from which to run the business and store the vehicle, and Abelardo would receive lease payments. Abelardo states he intended to use his Hummer limousine, which was stored under the awning on the .59 acres and allow the lessee to run the service from his back yard. According to Abelardo, he lost the lease when the defendants intentionally damaged the Hummer limousine and closed access to the entrance the lessee was going to use.

Abelardo presented some evidence the defendants interfered with his property rights by closing off vehicle access to property he owns and from which his family business was operated and by damaging one of his limousines. He also presented some evidence the business continued to operate in some form and the defendants' actions interfered with an existing contract. The no-evidence motion for summary judgment did not challenge any other elements of Abelardo's causes of action for interference with property rights, intentional damage to personal property, or interference with contract. The trial court therefore erred by granting summary judgment on those claims.

5. *Reimbursement for nonremovable improvements*

Abelardo next contends the trial court erred in granting summary judgment on his claim to recover from the defendants the cost of non-removable improvements he alleges he made[8] on the .59 acres. The defendants sought summary judgment on the ground Abelardo has no evidence he has suffered damages because the property has not been sold or partitioned and any claim for reimbursement is premature. We agree. There is no evidence the property Abelardo alleges he

[8] Abelardo's affidavit states he added dirt to the property, leveled it, planted trees, put in underground electric lines, built the carport/awning, cut the south entrance, and put up a thirty-foot pole and light.

improved has been conveyed or that a partition has been sought; Abelardo remains a joint owner of the property, including the improved property. Further, there is no evidence the improvements were necessary to preserve the property as well as no evidence Sergio and Alberto consented to improvements. *See I-10 Colony, Inc. v. Chao Kuan Lee*, 393 S.W.3d 467, 477-79 (Tex. App.—Houston [14th Dist.] 2012, pet denied). The trial court did not err in granting summary judgment on this claim.

6. *Claims for declaratory and injunctive relief*

The no-evidence motion for summary judgment did not challenge any element of Abelardo's claims for declaratory and injunctive relief. The motion asserted only that the requested relief "has been previously denied by the Court." The merits of Abelardo's claims under the Texas Uniform Declaratory Judgment Act and for permanent injunctive relief have not been presented to or decided by the trial court. We therefore sustain Abelardo's contention the trial court erred in granting summary judgment on these claims.

7. *Claims on behalf of children*

Finally, Abelardo asserts the trial court erred by granting summary judgment on the claims he asserted on behalf of his minor children. The no-evidence motion for summary judgment stated there were no issues in the case involving the minor children and challenged standing to assert the claims. Abelardo did not specially except to the motion and does not complain on appeal the ground for summary judgment was defective or insufficient to support a no evidence summary judgment. He therefore waived any complaint that the ground was defective or insufficient. *See Roehrs v. FSI Holdings, Inc.*, 246 S.W.3d 796, 805 (Tex. App.—Dallas 2008, pet. denied). Instead, Abelardo argues (1) he has the right to sue as the children's next friend pursuant to section 151.007

of the Texas Family Code[9] and (2) the children have standing to sue because the loss of income to Abelardo resulting from the defendants' torts and breaches of contract deprives them of sufficient income for school supplies and food.

Abelardo did not present any evidence the children were parties to one of the alleged contracts or that they have any justiciable interest in the real or personal property at issue in the case. The wrongs Abelardo asserts defendants committed were allegedly done to him, individually, and to him and his wife as operators of the family business. Even though the children may have suffered economically as a collateral consequence of those wrongs, they would be made whole if Abelardo were to obtain a recovery. We conclude the trial court did not err in granting summary judgment on this ground.[10]

VII. Conclusion

We hold the trial court did not abuse its discretion by denying Abelardo's motion to recuse without a hearing, by striking defendants' deemed admissions, or in the manner it conducted its hearings.

We conclude the trial court's summary judgment was final and appealable. We affirm that judgment in part and reverse it in part. We reverse the summary judgment on the following claims brought by Abelardo, individually, and remand the case to the trial court for further proceedings on these claims: (1) both of Abelardo's breach of contract claims against Alberto Gonzalez; (2)

[9] Whether Abelardo has the right to bring a legal action on behalf of his minor children is an issue of capacity that was not raised by the defendants in the trial court by a verified pleading. *See* TEX. R. CIV. P. 93; *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 849 (Tex. 2005); *see also In re M.A.G.*, No. 04-18-00833-CV, 2020 WL 7633920, at *4 (Tex. App.—San Antonio Dec. 23, 2020, pet. denied) (mem. op.) (affirming 2018 order in suit involving conservatorship and support of Abelardo's minor children and noting that order designated Abelardo's wife as the sole parent with the right to represent children in legal action).

[10] In his reply brief, Abelardo asserts we must reverse and remand the entire case because he timely requested findings of fact and conclusions of law, timely filed a notice of past-due findings, and the trial court did not issue findings and conclusions. We disagree. Findings of fact and conclusions of law are neither necessary nor proper in a summary judgment proceeding and a party is not entitled to them following summary judgment. *IKB Indus. (Nigeria) Ltd. v. Pro-Line Corp.*, 938 S.W.2d 440, 441 (Tex. 1997).

Abelardo's claims against defendants for damages caused by the interference with property rights, intentional damage to personal property, and interference with contract; and (3) Abelardo's claims against defendants under the Uniform Declaratory Judgment Act and for injunctive relief. We affirm the take-nothing summary judgment on all other claims asserted by Abelardo in his second amended original petition, both those brought individually and those brought in a representative capacity.

Luz Elena D. Chapa, Justice