



**COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH**

NO. 02-15-00298-CV

RAYMAX MANAGEMENT, L.P.

APPELLANT

V.

AMERICAN TOWER
CORPORATION, AMERICAN
TOWER ASSET SUB II, LLC, AND
METROPCS TEXAS, LLC

APPELLEES

FROM THE 153RD DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 153-279896-15

CONCURRING MEMORANDUM OPINION¹

I concur only to clarify the law regarding the harmless error exception as it applies to the granting of summary judgment on grounds not raised in the summary judgment motion itself.

¹See Tex. R. App. P. 47.4.

The general rule is and remains that a trial court errs in granting summary judgment on a ground not expressly included in the summary judgment motion,² and under most circumstances such an error is reversible on appeal. See Tex. R. Civ. P. 166a(c); *G & H Towing Co. v. Magee*, 347 S.W.3d 293, 297 (Tex. 2011); see also *State Farm Lloyds v. Page*, 315 S.W.3d 525, 532 (Tex. 2010) (stating that a “[s]ummary judgment may not be affirmed on appeal on a ground not presented to the trial court in the motion”).

However, in *G & H Towing*, the Texas Supreme Court recognized what it has characterized as a “limited” exception to that rule. *G & H Towing Co.*, 347 S.W.3d at 298. As the majority correctly states, this limited exception applies only when “the omitted cause of action is precluded as a matter of law by other grounds raised in the case.” *Id.* In such cases, error still occurs, but it is deemed harmless error because a reversal would ultimately be “meaningless,” given that the ultimate legally-correct result would be the same. See *Zarzosa v. Flynn*, 266 S.W.3d 614, 621 (Tex. App.—El Paso 2008, no pet.) (holding reversal would be meaningless because questioned recovery precluded as a matter of law). In other words, this limited exception allows the use of hindsight to avoid the ordinary consequences of an otherwise erroneous denial of summary judgment procedural protections, in recognition of the practical effect of

²In determining whether grounds are expressly presented, reliance may not be placed on briefs or summary judgment evidence. *McConnell v. Southside Indep. Sch. Dist.*, 858 S.W.2d 337, 341 (Tex. 1993).

remand—an identical result, but at a higher cost, considering both delay and expense.

Here, because we have held that the statute of limitations barred RayMax's unjust enrichment claim against Metro, the trial court's rendering of summary judgment in favor of ATC and Asset Sub on the identical legal theory and facts, although error, falls within the narrow confines of the harmless error exception and, therefore, does not require reversal.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
JUSTICE

DELIVERED: August 11, 2016