**Reversed and Remanded and Opinion Filed February 12, 2026**

**In The**
**Court of Appeals**
**Fifth District of Texas at Dallas**

**No. 05-24-01503-CV**

**VICTOR BURNETT, Appellant**
**V.**
**JORGE ARMANDO AGUILAR LOZANO AND SHASTA TRANSPORTATION LLC, Appellees**

**On Appeal from the 193rd Judicial District Court**
**Dallas County, Texas**
**Trial Court Cause No. DC-22-06508**

# MEMORANDUM OPINION

Before Justices Garcia, Jackson, and Lee
Opinion by Justice Garcia

In this negligence case arising out of a traffic accident in which Victor Burnett claims to have suffered injury, the trial court granted Jorge Armando Aguilar Lozano ("Lozano") and Shasta Transportation's ("Shasta") summary judgment motion asserting there was no evidence of a breached duty. In a single issue with multiple subparts, Burnett argues the trial court erred in granting the no-evidence motion because the motion lacked specificity, was not set for hearing, and because he provided sufficient evidence to defeat the motion.

We conclude that while neither the specificity of the motion nor the manner of submission are problematic, the trial court erred in granting the no-evidence summary judgment because the unobjected to summary judgment evidence was sufficient to raise a fact issue about whether Lozano and Shasta breached a duty of care. We therefore reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

## I. BACKGROUND

Burnett, appearing pro se, filed an original petition alleging that on or about June 25, 2020, he was operating a motor vehicle on 33900 block of Interstate Highway 20, LBJ Freeway Road located in Dallas County, Texas when Lozano's vehicle collided with Burnett's vehicle. Burnett alleged that Lozano was acting in the course and scope of his employment with Shasta at the time of the accident.

Burnett's petition alleged that Lozano failed to adequately control his speed and distance, failed to maintain a proper lookout, failed to adequately yield right of way, failed to maintain adequate separation of vehicles and traffic, failed to maintain a single lane of traffic, and failed to brake or otherwise control the speed of his vehicle, which proximately caused the collision, Burnett's property damages, and his personal injuries. Burnett requested $100,000.00 in damages.

The parties engaged in some discovery and the case was set for trial. The trial setting was continued twice. Ultimately, the case was set for trial on November 19, 2024.

On October 21, 2024, Lozano and Shasta filed a no evidence motion for summary judgment arguing there was no evidence that they breached a legal duty to Burnett. On October 28, 2024, a notice of hearing was filed and served, stating that the motion would be considered by submission on November 18, 2024.

Burnett had retained counsel by this time. Burnett timely responded to the no-evidence summary judgment motion and submitted Burnett's affidavit, an unauthenticated accident report, unauthenticated medical records, and documents concerning Burnett's motion to compel discovery. There were no objections to Burnett's summary judgment evidence. The trial court granted the no-evidence motion on the day of submission. This appeal followed.[1]

## II. ANALYSIS

### A. Standard of Review and Applicable Law

We review a trial court's order granting summary judgment de novo; in doing so, we indulge every reasonable inference in favor of the nonmovant, resolve any doubts in favor of the nonmovant, and take as true all evidence favorable to the nonmovant. *Flores v. Oncor Elec. Delivery Co., LLC*, 697 S.W.3d 465, 475 (Tex. App.—Dallas 2024, no pet.). A party may move for summary judgment that there is no evidence of one or more essential elements of the claim on which the non-movant

[1] The notice of appeal was filed on December 23, 2024, thirty-five days after the order granting summary judgment was entered. But we granted Burnett's motion requesting an extension of time to file his notice of appeal and deemed the December 23 notice timely filed for jurisdictional purposes.

would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. TEX. R. CIV. P. 166a(i). "When a motion is presented under rule 166a(i) asserting there is no evidence of one or more essential elements of the nonmovant's claims upon which the nonmovant would have had the burden of proof at trial, the burden is on the nonmovant to present enough evidence raising a genuine fact issue entitling the nonmovant to trial." *Bill Jackson Assocs., Inc. v. Century Furniture Indus., Inc*., No. 05-00-01424-CV, 2001 WL 1427905, at *3 (Tex. App.—Dallas Nov. 15, 2001, no pet.) (mem. op., not designated for publication). A genuine issue of material fact exists if the nonmovant produces more than a scintilla of probative evidence regarding the challenged element. *Lujan v. Navistar, Inc*., 555 S.W.3d 79, 84 (Tex. 2018).

**B. Does the motion fail for lack of specificity?**

Burnett argues the no-evidence summary judgment motion fails for lack of specificity. According to Burnett, "there are no specific elements in the movant's request." We disagree.

Rule 166a(i) requires the movant in a no-evidence summary judgment motion to specifically state which elements of the non-movant's claims lack supporting evidence. TEX. R. CIV. P. 166a(i). The comment to the rule states that the motion "must be specific in challenging the evidentiary support for an element of a claim or defense," and the rule "does not authorize conclusory motions or general no-

evidence challenges to an opponent's case." *See Jose Fuentes Co. v. Alfaro*, 418 S.W.3d 280, 283 (Tex. App.—Dallas 2013, pet. denied) (en banc).

A no-evidence motion that only generally challenges the sufficiency of the non-movant's case and fails to state the specific elements that the movant contends lack supporting evidence is fundamentally defective and cannot support summary judgment as a matter of law. *See Roehrs v. FSI Holdings, Inc*., 246 S.W.3d 796, 805 (Tex. App.—Dallas 2008, 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. *Alfaro*, 418 S.W.3d at 283. But the law will not operate to penalize a party for making a direct, uncomplicated assertion in its no-evidence summary judgment motion. *Visionary Indus. Insulation, Inc.* v. TTHREI, LLC, No. 05-23-00539-CV, 2024 WL 5232681, at *2 (Tex. App.—Dallas Dec. 27, 2024, no pet.) (mem. op.).

To establish a negligence cause of action, a plaintiff must establish "a duty, a breach of that duty, and damages proximately caused by the breach." *Kroger Co. v. Elwood*, 197 S.W.3d 793, 794 (Tex. 2006) (per curiam); *see also Western Invs., Inc. v. Urena*, 162 S.W.3d 547, 550 (Tex. 2005). Whether a legal duty exists is a question of law. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401, 404 (Tex. 2009).

Here, the no-evidence motion recites the elements of negligence. The breach of duty element appears in bold. Then, the motion clearly states, "[t]he plaintiff has

presented nothing more than an unsupported argument that Defendants breached a legal duty to plaintiff." In a subsequent paragraph, the motion states "Plaintiff has presented no evidence supporting its allegation that Defendants breached a legal duty to plaintiff." This is sufficiently specific to challenge the breach of duty element of negligence. This aspect of Burnett's argument is resolved against him.

**C. Submission of the Motion**

Burnett also complains that the trial court never set a hearing date or gave notice of the hearing in violation of TEX. R. CIV. P. 166(c), which requires twenty-one days' notice of hearing on the motion. This argument lacks merit.

A hearing on a motion for summary judgment need not be an oral hearing. *Martin v. Martin, Martin & Richards, Inc*., 989 S.W.2d 357, 359 (Tex. 1998); *BP Auto. LP v. RML Waxahachie Dodge*, LLC, 517 S.W.3d 186, 210–11 (Tex. App.—Texarkana 2017, no pet.). The court may also choose to take up the motion by submission. *Martin*, 989 S.W.2d at 359. The date of submission has the same meaning as the day of hearing under Texas Rule of Civil Procedure 166a(c). *See id*. at 359. The decision to take up a motion by submission, however, does not alleviate the requirement for notice of submission prior to consideration of the motion. As is the case with a notice of an oral hearing, notice of the submission of a motion for summary judgment is required, so that the due date for the response can be fixed. *Id*. Thus, when a motion is taken up by submission, notice of a date certain on which the motion will be submitted is required under Rule 166a(c). *BP Auto*, 517 S.W.3d

at 211; *Ready v. Alpha Bldg. Corp*., 467 S.W.3d 580, 584–85 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

In the present case, a notice of hearing was filed and served on October 28, 2024. The notice advised that the motion for summary judgment would be heard by submission on November 18, 2024. This satisfies the notice requirement of Rule 166(c). Burnett does not dispute that he received the notice, and the record reflects that he timely responded to the motion nine days before the submission date. This aspect of Burnett's motion is resolved against him.

**D. The Summary Judgment Evidence**

In response to the summary judgment motion, Burnett filed an affidavit, an unauthenticated police report, unauthenticated medical records, and documents concerning Burnett's motion to compel discovery. Lozano and Shasta insist the evidence did not raise a fact issue concerning the breach of duty element of Burnett's negligence claim.

But there were no objections to Burnett's summary judgment evidence in the court below. Therefore, we must determine the extent to which we can consider the evidence, even if it might otherwise be considered deficient.

It is well-established that deficiencies in form cannot be considered when there was no objection in the trial court. *See Gonzalez v. VATR Const., LLC*, 418 S.W.3d 777, 783 (Tex. App.—Dallas 2013, no pet.). Conversely, substantive deficiencies pertain to the sufficiency of the evidence and can therefore be

challenged and considered for the first time on appeal. *See Thompson v. Curtis*, 127 S.W.3d 446, 450 (Tex. App.—Dallas 2004, no pet.). Here, of the evidence submitted, only the affidavit and the accident report are relevant to whether there was a breach of duty. We begin with the affidavit.

Lozano and Shasta argue that Burnett's affidavit offers only " a statement of opinion that . . . Lozano was driving at an unsafe speed." Accordingly, they contend that Burnett's statement is nothing more than "mere speculation." Objections to the testimony of an interested witness or the absence of personal knowledge are defects in form. *See Hartsfield v. Hartsfield Cabinet*, 05-21-00896-CV, 2022 WL 4103097, at *3 (Tex. App.—Dallas Sept. 8, 2022, no pet.) (mem. op.). "Objections to the form of summary judgment evidence are preserved for review only if such objections are made and ruled on by the trial court." *Id.*

On the other hand, defects in the substance of the evidence do not require a written ruling, and such objections may be raised for the first time on appeal. *Hartsfield*, 2022 WL 4103097, at *3; *Thompson*, 127 S.W.3d at 450. Substantive defects are those that leave the evidence legally insufficient and include affidavits which are nothing more than legal or factual conclusions. *Stewart v. Sanmina Texas L.P.*, 156 S.W.3d 198, 207 (Tex. App.—Dallas 2005, no pet); *Hou–Tex, Inc. v. Landmark Graphics*, 26 S.W.3d 103, 112 (Tex. App.—Houston [14th Dist.] 2000, no pet.).

By rule, affidavits opposing summary judgment must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." TEX. R. CIV. P. 166a(f); *see also Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 122 (Tex. 1996) (per curiam); *CA Partners v. Spears*, 274 S.W.3d 51, 63 (Tex. App.—Houston [14th Dist.] 2008, pet. denied). Generally, a statement of subjective belief, which is not supported by other summary-judgment proof, is insufficient. *Ryland Grp*., 924 S.W.2d at 122. This is because an affidavit stated in terms of the affiant's "understanding" of the "circumstances" constitutes mere speculation and has no probative force. *See Frank's Int'l, Inc. v. Smith Int'l, Inc.,* 249 S.W.3d 557, 566 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

A "conclusory" statement is defined as "[e]xpressing a factual inference without stating the underlying facts on which the inference is based." *See Arkoma Basin Expl. Co. v. FMF Assocs*. *1990-A, Ltd.*, 249 S.W.3d 380, 389 n.32 (Tex. 2008); *see also Bastida v. Aznaran*, 444 S.W.3d 98, 105 (Tex. App.—Dallas 2014, no pet.) (statements are conclusory if they fail to provide underlying facts to support their conclusions). Conclusory affidavits are not sufficient to raise fact issues because they are not credible or susceptible to being readily controverted. *Ryland Grp.*, 924 S.W.2d at 122.

The sections of Burnett's affidavit pertinent to our analysis state:

1. “My name is Victor Burnett. I am over 21 years of age. I have personal knowledge of the facts stated herein, and those facts are true and correct.

. . .

3. Evidence has been presented that Defendant Lozano was operating a commercial motor vehicle on Interstate 1-20 at approximately 8:00 a.m. At the time of such operation, Defendant Lozano was carrying out his activities under the direction of his employer at the time, Defendant Shasta Transportation, LLC., (See Exhibit A, Certified Police Report).

4. Suddenly and without warning, Plaintiff Burnett’s vehicle was struck from the rear by the tractor trailer truck that was driven by Defendant Lozano, and owned by Defendant Shasta Transportation, LLC., (See Exhibit A, Certified Police Report).

5. Defendant Lozano, as an admission against interest, stated that he was unable to slow down and struck the vehicle operated by Plaintiff Burnett. This admission was made in the presence of Plaintiff Burnett.

6. Moreover, Defendant admitted and stated blame of the truck’s brakes and his failure to control the tractor trailer. However, the reported facts clearly establish that there was evidence of Defendant Lorenzo slowing down at the time of impact. A fair inference from that fact is that Defendant Lorenzano was driving at an improper and unsafe speed, as well as, travelling behind Plaintiff Burnett at an unsafe distance, thus prohibiting him from using his brakes at a timely manner, as well as, using safe defensive driving maneuvers in an effort to avoid colliding into the rear of Plaintiff Bumett’s [sic]vehicle.

. . .

10. We would submit that there is evidence of Defendant Lozano’s negligent actions while working within the scope of his employment with Defendant Shasta Transportation, LLC.; that Defendant Lozano negligently operated the tractor trailer and as a consequence, violently collided with the rear of Plaintiff’s vehicle, causing bodily harm to Plaintiff, and property damage to Plaintiff’s vehicle.

. . .

The affidavit contains hearsay. But a hearsay complaint regarding summary-judgment evidence is one as to form and, thus, is not preserved for appeal unless an objection is made and a ruling is obtained from the trial court. *Stone v. Midland Multifamily Equity REIT*, 334 S.W.3d 371, 374 (Tex. App.—Dallas 2011, no pet.); *Dolcefino v. Randolph*, 19 S.W.3d 906, 925 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) *see also KBMT Operating Co., LLC v. Toledo*, 492 S.W.3d 710, 726 (Tex. 2016) (hearsay in affidavit admitted without objection is not without probative value just because it is hearsay). Because there was no objection to the evidence based on hearsay, the affidavit does not fail on this point.

That Burnett's vehicle was struck from behind by the truck driven by Lorenzo, that Lorenzo was unable to slow down, and that Loreno's brakes were not working properly (without Burnett's superlatives and characterizations) was substantiated by the accident report, also submitted as summary judgment evidence. Therefore, we consider this evidence to the extent the accident report is admissible. Otherwise, the remainder of the affidavit contains legal and factual conclusions and subjective belief. Notwithstanding the lack of objection, these conclusions and subjective beliefs are not competent summary judgment evidence sufficient to raise of fact issue on whether a duty was breached. *See Ryland Grp.*, 924 S.W.2d at 122.

Next we consider the accident report. Shasta and Lorenzo's only complaint is that the report was not authenticated. An objection to the authentication of summary judgment evidence is an objection to the form rather than the substance of the

evidence. *See Commint Tech. Servs., Inc. v. Quickel*, 314 S.W.3d 646, 651 (Tex. App.—Houston [14th Dist.] 2010, no pet.); *Cantu v. Frye & Assocs., PLLC*, No. 01-12-00868-CV, 2014 WL 2626439, at *7, *10 n.3 (Tex. App.—Houston [1st Dist.] June 12, 2014, no pet.) (mem. op.) (objections to hearsay, improper authentication, lack of foundation, and best evidence rule are defects in form which require ruling from trial court before being reviewed on appeal). Because there was no objection, the accident report was before the trial court and can be considered on appeal. *See Kohler v. Chiquillo*, No, 03-14-00503-CV, 2016 WL 3924430, at *4 (Tex. App. — Austin Jul. 15, 2016, no pet.) (mem. op.).

The report states that an accident occurred on June 25, 2020, involving a freightliner driven by Lozano and owned by Shasta. The report identifies the freightliner as "Vehicle1/2." The freightliner driven by Lozano collided with a white Chrysler driven by Burnett, identified as "Vehicle 3." The Investigator's narrative states:

> All units were traveling east on interstate 20 Lyndon B Johnson Fwy west of Bonnieview road. Unit 1/2 is a tractor and trailer combination. Unit 3 driver stated he was in the left lane and unit 1/2 was moving at a high rate of speed and struck unit 3 on the rear with the front of unit 1/2 combination. Driver of unit 1/2 stated that traffic slowed and he was unable to slow down enough to avoid a collision due to his vehicles brakes not working properly at the time of the crash. Damage to both vehicles indicated driver of unit 1/2 did attempt to slow down. Drivers both refused medical treatment on scene.

Burnett's petition alleged that Lozano failed to adequately control his speed and distance, failed to maintain a proper lookout, failed to adequately yield right of

way, failed to maintain adequate separation of vehicles and traffic, failed to maintain a single lane of traffic, and failed to brake or otherwise control the speed of his vehicle. The petition further alleged that Lozano was operating the vehicle on behalf of Shasta and Shasta knew or should have known that the vehicle was defective or not properly maintained to be safe and operable.

Users of public roads have a duty of ordinary care not to create foreseeable risks of harm to other drivers on the road. *See Hatcher v. Mewbourn*, 457 S.W.2d 151, 152 (Tex. App.—Texarkana 1970, writ ref'd n.r.e.). Generally speaking, drivers have a "duty to exercise the ordinary care a reasonably prudent person would exercise under the same circumstances to avoid a foreseeable risk of harm to others," including a duty to keep a proper lookout. *Ciguero v. Lara*, 455 S.W.3d 744, 748 (Tex. App.—El Paso 2015, no pet.); *see Montes v. Pendergrass*, 61 S.W.3d 505, 509 (Tex. App.—San Antonio 2001, no pet.). "Drivers also have the general duty to keep a proper lookout," and that duty includes a "duty to observe, in a careful and intelligent manner, traffic and the general situation in the vicinity, including speed and proximity of other vehicles, as well as rules of the road and common experience." *Pleasant v. Hernandez*, No. 14-21-00617-CV, 2022 WL 3655176, at *4 (Tex. App.—Houston [14th Dist.] Aug. 25, 2022, no pet.) (mem. op.). Likewise, motor carriers and drivers owe an ordinary standard of care to maintain the vehicles they drive in a safe operating condition. *See Rayner v. Claxton*, 659 S.W.3d 223, 251 (Tex. App.—El Paso 2022, no pet.). Shasta and Lorenzo insist that involvement

in an accident does not equate to negligence. While we generally agree, the summary judgment evidence here suggests that Lorenzo was traveling at a high rate of speed and was unable to slow down enough to avoid a collision because of inoperative brakes. Shasta owned the vehicle Lorenzo was driving. This is sufficient to raise a fact issue about whether Lorenzo and Shasta breached a duty of care. Therefore, the trial court erred in granting the no-evidence summary judgment.

## III. CONCLUSION

We reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

/Dennise Garcia/
DENNISE GARCIA
JUSTICE