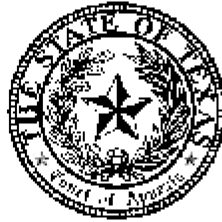
**Affirmed and Opinion filed September 7, 2000.**




**In The**

# Fourteenth Court of Appeals

____________

**NO. 14-99-00493-CV**

____________

**WENDELL M. ROBERSON, Appellant**

**V.**

**UNIVERSITY OF TEXAS MEDICAL BRANCH AT GALVESTON AND THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE – INSTITUTIONAL DIVISION, Appellees**

---

**On Appeal from the 212th District Court**
**Galveston County, Texas**
**Trial Court Cause No. 93CV0084**

---

## O P I N I O N

Appellant, Wendell M. Roberson, an inmate, appeals *pro se* and *in forma pauperis* from the trial court's decision to grant separate motions for summary judgment filed by the University of Texas Medical Branch at Galveston ("UTMB") and the Texas Department of Criminal Justice—Institutional Division ("TDCJ-ID"), defendants below and appellees herein. We affirm.

### I. Background and Procedural History

Roberson is a state inmate currently in the custody of TDCJ-ID. In January of 1993, Roberson filed suit against UTMB, TDCJ-ID, and other "John Doe" defendants, alleging claims of negligence, medical malpractice, and "patient dumping," as well as violations of his civil rights. Roberson's amended petition references claims under the Texas Medical Liability Insurance Improvement Act, the Texas Tort Claims Act, the Texas Penal Code, various constitutional provisions, the federal Emergency Medical Treatment and Active Labor Act, and the federal civil rights statute, 42 U.S.C. § 1983.

Roberson's claims against UTMB stem from surgery performed on his left thumb in 1990. Roberson alleged that, following the surgery, he experienced "mental and physical trauma, distress or convulsions" as a result of the "improper administration of anesthetics or medical care." Roberson also complained that the surgery "failed to correct or repair his injured thumb," and that it had become "further deformed, disfigured, and otherwise stiffen[ed]" as a result of UTMB's negligence. In addition, Roberson claimed that UTMB "abandoned the health and medical care" efforts that were scheduled for February of 1991, without providing him with "reasonable notice [or] explanation." Roberson maintained further that UTMB "failed or refused" to promptly provide him with copies of his medical records.

With regard to his claims against TDCJ-ID, Roberson complained that his civil rights were violated when he was "repeatedly forced" to endure transport to UTMB for treatment "while his injured hand was in a sling" and his "free hand" further handcuffed to other inmates. Roberson alleged that TDCJ-ID refused to provide him with "legcuffs" instead of the handcuffs, despite the fact that "legcuffs were used on other inmates with similar injur[ies] and infirmities." Roberson stated further that, during these transports, TDCJ-ID employees denied the inmates "drinking water." He also alleged that TDCJ-ID "repeatedly assigned and forced" him to work jobs requiring the use of his injured left thumb "in direct violation of his written medical classifications and restrictions." Roberson insisted therefore that he was injured by TDCJ-ID's "wrongful or negligent use or condition of tangible personal property" and "improper administration of [TDCJ-ID] policies, customs, practices or procedures."

In 1995, UTMB filed a motion for summary judgment, arguing that all of Roberson's allegations failed as a matter of law because he failed to provide timely notice of his claims, as required by the Texas

Tort Claims Act. On January 29, 1996, the trial court granted UTMB's motion and entered an interlocutory judgment.

TDCJ-ID was not served with Roberson's suit until 1996. Subsequently, TDCJ-ID filed a motion for summary judgment arguing that all of Roberson's claims against it failed as a matter of law. Roberson responded by filing his own motion for summary judgment which included new allegations against TDCJ-ID, including claims that TDCJ-ID employees had engaged in a conspiracy to alter his medical records, malicious prosecution, retaliation, and "misuse of authority" in violation of the Texas Tort Claims Act. TDCJ-ID amended its summary judgment motion to address the new allegations and, on April 9, 1999, the trial court granted TDCJ-ID's motion.

Roberson filed a timely notice of his intent to appeal the final judgment entered by the trial court, and he raises the following two issues: (1) whether the trial court erred by granting summary judgment in favor of UTMB and TDCJ-ID; and (2) whether the trial court abused its discretion by overruling his requests for a continuance. Each issue is discussed separately in turn.

## II. Standard of Review: Summary Judgment

Here, both UTMB and TDCJ-ID filed their motions for summary judgment under Rule 166a(c) of the Texas Rules of Civil Procedure. The traditional standard for reviewing motions filed under this rule "is whether the successful movant at the trial level carried its burden of showing that there is no genuine issue of material fact and that judgment should be granted as a matter of law." *KPMG Peat Marwick v. Harrison County Housing Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). Under that standard, this Court must take as true all evidence favorable to the nonmovant and must make all reasonable inferences in the nonmovant's favor as well. *See id.*

When a defendant moves for summary judgment on an affirmative defense, it must conclusively prove all the essential elements of its defense as a matter of law, leaving no issues of material fact. *See Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 494 (Tex. 1991); *Montgomery v. Kennedy*, 669 S.W.2d 309, 310-11 (Tex.1984). Where, as here, the trial court does not specify the grounds for its granting of a movant's motion for summary judgment, we may affirm the judgment if any of

the grounds advanced within the motion are meritorious. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996); *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex.1993).

TDCJ-ID also moved for summary judgment, in the alternative, under the "no-evidence" standard established by Rule 166a(i) of the Texas Rules of Civil Procedure. After adequate time for discovery and without presenting summary judgment proof, a party is permitted by Rule 166a(i) to move for summary judgment on the ground that no evidence supports one or more essential specified elements of an adverse party's claim or defense on which the adverse party would have the burden of proof at trial. *See* TEX. R. CIV. P. 166a(i). If the adverse party is unable to produce summary judgment proof raising a genuine issue of material fact on the challenged elements, the trial court must grant the motion. *See id.*

On review of a "no evidence" summary judgment, the appellate court reviews the proof in the light most favorable to the nonmovants and disregards all evidence and inferences to the contrary. *See Blan v. Ali*, 7 S.W.3d 741, 747 (Tex. App.—Houston [14 th Dist.] 1999, no pet.). We sustain a no evidence summary judgment if: (1) there is a complete absence of proof on a vital fact; (2) the court is barred by rules of law or evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the proof conclusively establishes the opposite of a vital fact. *See id.* Less than a scintilla of evidence exists when the proof is so weak as to do no more than create a mere surmise or suspicion of a fact. *See Isbell v. Ryan*, 983 S.W.2d 335, 338 (Tex. App.—Houston [14 th Dist.] 1998, no pet). More than a scintilla of evidence exists when the proof rises to a level that would enable reasonable and fair-minded people to differ in their conclusions. *See id.*

## III. Claims Against UTMB

In his amended petition, Roberson claimed that UTMB committed medical malpractice and was negligent in treating him following surgery performed on his left thumb in 1990, and because his thumb remains "deformed." Roberson complained further that he did not receive additional treatment scheduled for February of 1991, and that UTMB instead "abandoned" him as a patient without providing any

"reasonable notice [or] explanation." Roberson alleged that UTMB's unexplained failure to treat him in February 1991 violated the federal Emergency Medical Treatment and Active Labor Act ("EMTALA"), which prohibits "patient dumping." *See* 42 U.S.C. § 1395dd (1996). Roberson maintained further that UTMB wrongfully refused to provide him with copies of his medical records when he requested them, in violation of the Texas Medical Liability and Insurance Improvement Act. In its motion for summary judgment, UTMB argued that all of Roberson's claims against it failed as a matter of law under the doctrine of governmental immunity because he did not provide timely written notice of his claims as required by the Texas Tort Claims Act.

It is well established that governmental units such as UTMB are immune from suit and not liable for the torts of its agents or officers unless there is a constitutional or statutory waiver of that immunity. *See Mount Pleasant Indep. Sch. Dist. v. Lindburg*, 766 S.W.2d 208, 211 (Tex. 1989); *University of Texas Medical Branch at Galveston v. Greenhouse*, 889 S.W.2d 427, 429 (Tex. App.—Houston [1st Dist.] 1994, writ denied). The Texas Tort Claims Act waives immunity to suit only to the extent that a governmental unit may be found liable under that Act. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a) (Vernon 1997); *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 813-14 (Tex.), *cert. denied*, 510 U.S. 820 (1993). All of Roberson's claims against UTMB are subject to the limitations imposed by the Texas Tort Claims Act. *See University of Texas Medical Branch at Galveston v. York*, 871 S.W.2d 175, 176 (Tex. 1994) (negligence); *Huffine v. Tomball Hosp. Auth.*, 979 S.W.2d 795, 800 (Tex. App.—Houston [14th Dist.]1998, no pet.) (EMTALA claims); *Greenhouse*, 889 S.W.2d at 428 (medical malpractice).

As a prerequisite to suit and to liability, the Texas Tort Claims Act provides that a governmental unit is entitled to receive notice of a claim "not later than six months after the day that the incident giving rise to the claim occurred." TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (Vernon 1997). The notice must reasonably describe:

(1) the damage or injury claimed;
(2) the time and place of the incident; and
(3) the incident.

*Id.* The purpose of the notice requirement is to ensure a prompt reporting of claims to enable the governmental unit to investigate the merits of a claim while the facts are fresh and conditions remain substantially the same. *See City of Houston v. Torres*, 621 S.W.2d 588, 591 (Tex.1981).

Roberson concedes that he did not give UTMB written notice of his claims within six months after the day the incidents he complains of occurred. Roberson argues, however, that UTMB had "actual notice" of his claims because his post-surgical difficulties are reflected in UTMB's own medical records. He contends, therefore, that his claims are not barred for failure to give timely notice.

It is true that the Texas Tort Claims Act's notice requirement does not apply if the governmental unit has actual notice that the claimant has received some injury. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(c). However, actual notice is only accomplished when the governmental unit has knowledge of the injury, its alleged or possible fault producing or contributing to the injury, and the identity of the person injured. *See Putthoff v. Ancrum*, 934 S.W.2d 164, 173 (Tex. App.—Fort Worth 1996, writ denied). Mere notice that an incident has occurred is not enough to establish actual notice for purposes of the Texas Tort Claims Act. *See id.*

In this case, the only proof of actual notice that Roberson points to is information contained in his medical records showing that he had difficulties after the surgery and that, following this procedure, his thumb remained injured. The Texas Supreme Court has held that information contained in a hospital's own medical records is not sufficient, as a matter of law, to adequately convey its possible culpability for a patient's injuries and, therefore, is not actual notice of a claim under the Texas Tort Claims Act. *See Cathey v. Booth*, 900 S.W.2d 339, 340 (Tex. 1995) (per curiam). More is required than notes contained in hospital records to raise a fact issue on notice for purposes of the Texas Tort Claims Act. *See Reynosa v. Bexar County Hosp. Dist.*, 943 S.W.2d 74, 77-78 (Tex. App.—San Antonio 1997, writ denied); *see also Dinh v. Harris County Hosp. Dist.*, 896 S.W.2d 248 (Tex. App.—Houston [1st Dist.] 1995, writ dism'd w.o.j.) (holding that an expert's testimony, in addition to hospital records, was sufficient to raise a fact issue on whether the hospital had actual notice). Because Roberson relied only on the information found in his medical records, he failed to raise a genuine issue of material fact on whether

UTMB had actual notice of his claims, as required under the Texas Tort Claims Act. *See Cathey*, 900 S.W.2d at 341-42; *Reynosa*, 943 S.W.2d at 77-78. Therefore, the trial court's decision to grant summary judgment on Roberson's claims against UTMB was correct under Rule 166a(c) of the Texas Rules of Civil Procedure.

## IV. Claims Against TDCJ-ID

Roberson alleged that TDCJ-ID's conduct violated his constitutional and civil rights under 42 U.S.C. § 1983, and that TDCJ-ID's actions further violated portions of the Texas Penal Code and the Texas Medical Liability and Insurance Improvement Act. In addition, Roberson complained that negligence by TDCJ-ID employees violated the Texas Tort Claims Act. TDCJ-ID moved for summary judgment arguing that all of Roberson's claims failed as a matter of law. Each of the claims raised against TDCJ-ID by Roberson are addressed separately below.

### A. Civil Rights Claims Under 42 U.S.C. § 1983

Roberson lodged claims against TDCJ-ID for violations of his constitutional and civil rights under 42 U.S.C. § 1983, which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1996). It is well settled that Section 1983 applies only to "persons" as that term is used in the statute. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-70, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). It is equally well established that states are not "persons" as that term is used in Section 1983. *See id.* at 71. TDCJ-ID is a division of a state agency. *See* TEX. GOV'T CODE ANN. § 493.002(a)(2) (Vernon 1998). Because TDCJ-ID is part of a state agency, it is also not a person subject to suit under Section 1983. *See Will*, 491 U.S. at 70; *see also Harrison v. Texas Dep't of Criminal Justice–Institutional Div.*, 915 S.W.2d 882, 888 (Tex. App.—Houston [1st Dist.] 1995,

no writ) (noting that "TDCJ-ID is not a proper party under [Section 1983]; only individuals are"). It follows that, because TDCJ-ID cannot be held liable under 42 U.S.C. § 1983, the trial court properly granted summary judgment, under Rule 166a(c), on all of Roberson's claims against it under Section 1983.

## B. Texas Penal Code

Roberson's complaint also alleged that TDCJ-ID was guilty of official misconduct, official oppression, violating the civil rights of a prisoner, and "disorderly conduct" in violation of Sections 39.01, 39.02, 39.021, and 42.01 of the Texas Penal Code, respectively. However, as TDCJ-ID correctly pointed out in its motion for summary judgment, the Texas Penal Code does not create a private right of action for the alleged wrongs of prison officials. *See Aguilar v. Chastain*, 923 S.W.2d 740, 745 (Tex. App.—Tyler 1996, writ denied); *Spellmon v. Sweeney*, 819 S.W.2d 206, 211 (Tex. App.—Waco 1991, no writ). Thus, Roberson's allegations based on the foregoing penal code sections fail as a matter of law and summary judgment was properly granted under Rule 166a(c) on those claims as well.

## C. Medical Malpractice Claims

Roberson also attempted to allege a claim against TDCJ-ID under the Texas Medical Liability and Insurance Improvement Act. TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 2000). That Act governs all suits for liability against a "health care provider," defined as "any person, partnership, professional association, corporation, facility, or institution duly licensed or chartered by the State of Texas to provide health care as a registered nurse, hospital, dentist, podiatrist, pharmacist, or nursing home, or an officer, employee, or agent thereof acting in the course and scope of his employment." *Id.* at § 1.03(a)(3). TDCJ-ID argued, in its motion for summary judgment, that Roberson's claims against it under the Texas Medical Liability and Insurance Improvement Act failed because TDCJ-ID, as a state penitentiary, does not meet the statutory definition of a "health care provider." A review of the record reveals that Roberson did not attempt to rebut TDCJ-ID's contention on this issue. Because Roberson presented no proof to raise a genuine issue of material fact on whether TDCJ-ID meets this statutory

definition of a health care provider, summary judgment was appropriate under Rule 166a(i) on his medical malpractice claim.

### D. Texas Tort Claims Act

Roberson's complaint further alleged that all of his purported injuries were "caused by Defendants' wrongful or negligent use or condition of tangible personal property," making TDCJ-ID liable under the Texas Tort Claims Act. In its motion for summary judgment, TDCJ-ID argued that Roberson's so-called negligence claims were barred by the doctrine of sovereign immunity because Roberson failed to provide timely notice of his claims under the Texas Tort Claims Act. Alternatively, TDCJ-ID maintained that, if timely notice was given, Roberson's allegations were not sufficient to waive the agency's sovereign immunity.

#### *1. Notice of Claims*

As noted above, the Texas Tort Claims Act provides that a governmental unit is entitled to receive notice of a claim "not later than six months after the day that the incident giving rise to the claim occurred." TEX. CIV. PRAC. & REM. CODE ANN. § 101.101(a) (Vernon 1997). TDCJ-ID maintains that it did not receive any notice of Roberson's claims. In response to TDCJ-ID's motion, however, Roberson detailed specific grievances that he had filed with TDCJ-ID regarding the "misuse and discriminatory denial of legcuffs" and the "misuse and discriminatory denial of drinking water" during his transports to UTMB. Roberson alleged further that he filed numerous grievances with TDCJ-ID to complain of "use of his HS-18 medical restrictions of no repetitive use of his deformed left thumb" to "illegally harass and assign prison labor beyond plaintiff's physical capacity." Other TDCJ-ID grievances filed by Roberson purportedly addressed allegations of "misuse of disciplinary punishment for refusing to work in the fields" due to Roberson's medical condition, a nurse's "misuse of authority in confiscating my custom-made hand splint," a doctor's "intentional harassment and retaliation under color of law by misusing his authority to delete [Roberson's] HS-18 medical restrictions for asthma and no repetitive use of deformed hand" and to assign him a cell with a "very foul smelling psychiatric inmate . . ., who is widely known for refusing to shower nor [sic] change clothes for several weeks at a time." Roberson argued that, based on these grievances,

TDCJ-ID had actual notice of his claims and, therefore, the foregoing allegations were not barred for failure to comply with the Texas Tort Claims Act.

At least one Texas court has held that an inmate's allegation that he has filed grievances with TDCJ-ID raises a genuine issue of material fact about whether the agency received actual notice of those claims for purposes of liability under the Texas Tort Claims Act. *See Harrison v. Texas Dep't of Criminal Justice-Institutional Div.*, 915 S.W.2d 882, 890 (Tex. App.—Houston [1st Dist.] 1995, no writ). Because TDCJ-ID did not deny that it received Roberson's grievances, it was therefore not entitled to summary judgment on the foregoing claims on the grounds that it lacked proper notice under the Texas Tort Claims Act. At the same time, it is clear that any other claim lodged by Roberson which was not documented by a written grievance was appropriate for summary judgment for lack of requisite notice.

### *2. Sovereign Immunity*

Because we have found that TDCJ-ID had actual notice of the claims of "misuse" mentioned above, we must therefore determine whether TDCJ-ID, as a governmental entity, is entitled to sovereign immunity from those claims. In its motion for summary judgment, TDCJ-ID argued that Roberson's claims failed because they do not fit within the waiver of sovereign immunity provided by the Texas Tort Claims Act. In that regard, the Texas Tort Claims Act provides that a governmental unit of the state is liable only for the following:

> (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
>
> (A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor-driven equipment; and
>
> (B) the employee would be personally liable to the claimant according to Texas law; and
>
> (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.021 (Vernon 1997). Under this provision, a governmental entity's sovereign immunity is waived for claims arising under the following limited circumstances: (1) use of publicly owned automobiles; (2) premises defects; and (3) injuries arising out of conditions or use of property. *See City of Denton v. Van Page*, 701 S.W.2d 831, 834 (Tex.1986); *Salcedo v. El Paso Hosp. Dist.*, 659 S.W.2d 30, 31 (Tex.1983). Because none of Roberson's allegations concern injuries caused by a premises defect or by the operation or use of a publicly owned vehicle, the issue here is whether Roberson's alleged injuries, if any, were caused by a "condition or use of tangible personal property" such that TDCJ-ID would be liable if they were a private person. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 101.021(2); *Kassen v. Hatley*, 887 S.W.2d 4, 13 (Tex. 1994).

Several of Roberson's claims allege that he was injured by TDCJ-ID's misuse of information found in his HS-18 medical restriction forms or by TDCJ-ID employees misusing their authority. None of these allegations involves a condition or use of tangible personal property as required to make a claim under the Texas Tort Claims Act. *See Kassen*, 887 S.W.2d at 13. The phrase "tangible personal property" has been defined as "something that has a corporeal, concrete, and palpable existence." *University of Texas Medical Branch at Galveston v. York*, 871 S.W.2d 175, 178 (Tex. 1994). The Texas Supreme Court has recognized that information is "intangible" and that, even if recorded in a writing, it is not "tangible property" for purposes of the Texas Tort Claims Act. *See id.* at 178-79. Roberson's claim that TDCJ-ID "misused" information in the records documenting his medical restrictions and that TDCJ-ID employees further "misused" their authority over him involve only intangible, and not tangible personal property, as those terms have been defined under the Texas Tort Claims Act. *See id.* Accordingly, these allegations are not sufficient to invoke a waiver of TDCJ-ID's sovereign immunity under the Texas Tort Claims Act. *See id.*; *see also Kassen*, 887 S.W.2d at 14 (confirming that the state does not waive its sovereign immunity by "using, misusing, or not using information" in a medical record). Therefore, the trial court's decision to grant summary judgment in TDCJ-ID's favor on those claims, under Rule 166a(c), was proper.

Roberson's claims also allege that he was injured by TDCJ-ID's failure to use legcuffs or to provide water. Under the Texas Tort Claims Act, a "use" of tangible property means "to put or bring into action or service; to employ for or apply to a given purpose." *Leleaux v. Hamshire-Fannett Indep.*

*Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992). The Texas Supreme Court has held that the "non-use" of property cannot support a claim under the Texas Tort Claims Act. *See Kassen*, 887 S.W.2d at 14. Roberson's claims that TDCJ-ID failed to use legcuffs or provide water during his transport to UTMB concern only non-use of property and, thus, are likewise insufficient to show a waiver of sovereign immunity. *See id.* Summary judgment on those allegations was therefore appropriate.

As for the rest of Roberson's claims, their real substance is that his injuries, if any, were caused, not by the condition or use of tangible property, but by TDCJ-ID's intentional failure or refusal to accommodate his medical needs. Indeed, his pleadings expressly reference claims of "intentional harassment," conspiracy, and retaliation. These allegations concern intentional conduct on the part of TDCJ-ID employees. However, the Texas Tort Claims Act does not waive a governmental unit's immunity from such complaints. *See University of Texas Medical Branch at Galveston v. Hohman*, 6 S.W.3d 767, 777 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.). Accordingly, these claims fail as a matter of law.

Because none of the allegations Roberson raised at the trial court level fit within the statutory waiver of immunity provided by the Texas Tort Claims Act, he failed raise a genuine issue of material fact on whether he had a valid claim against TDCJ-ID under that statute. *See, e.g., Kassen*, 887 S.W.2d at 14; *Gill v. Texas Dep't of Criminal Justice–Institutional Div.*, 3 S.W.3d 576, 581 (Tex. App.—Houston [1st Dist.] 1999, no pet.). We hold, therefore, that the trial court correctly granted summary judgment in TDCJ-ID's favor pursuant to Rule 166a(c) on all of Roberson's claims under the Texas Tort Claims Act.

## V. Continuance

In his second point of error, Roberson avers that the trial court erred in granting summary judgment in both UTMB and TDCJ-ID's favor because he was not allowed adequate time for discovery. Rule 166a(g) of the Texas Rules of Civil Procedure permits a court to grant a continuance for the purpose of allowing additional discovery when the party opposing summary judgment presents an affidavit asserting "that he cannot for reasons stated present by affidavit facts essential to justify his opposition . . . ." TEX

R. CIV. P. 166a(g). Under this rule, when a party contends that he has not had an adequate opportunity for discovery before a summary judgment hearing, he must file either an affidavit explaining the need for further discovery or a verified motion for continuance. *See Tenneco, Inc. v. Enterprise Prods. Co.*, 925 S.W.2d 640, 647 (Tex.1996). Because UTMB and TDCJ-ID filed their motions for summary judgment separately, we will review each request for a continuance in turn.

**A. UTMB**

Roberson filed his original petition in January of 1993, and an amended petition in September, 1993. UTMB filed an initial motion for summary judgment in January of 1995, and a second motion for summary judgment in July of 1995, more than two years after Roberson filed his original petition. The record shows that Roberson did not file a motion for a continuance, but that he did allege in a sworn declaration filed in response to UTMB's motion that he needed additional time to "supplement the record with further declarations and attachments, and/or discovery proceeding[s] based only upon the issue of actual notice because Plaintiff cannot presently obtain sworn or certified copies of the above said papers." The trial court did not rule on Roberson's request for a continuance, but granted UTMB's motion for summary judgment in January of 1996. Following the trial court's decision, Roberson filed a motion for a new trial in February of 1996, in which he alleged that a continuance was necessary so that he could obtain a "translation" of the "vague, ambiguous and obscured medical entries" in UTMB's records. The trial court denied Roberson's motion for new trial without explaining the basis for its ruling.

Because the trial court granted UTMB's motion for summary judgment, we presume that it denied Roberson's request for a continuance. A trial court's action in granting or denying a motion for continuance will not be disturbed unless the record discloses a clear abuse of discretion. *See General Motors Corp. v. Gayle*, 951 S.W.2d 469, 476 (Tex. 1997) (orig. proceeding); *see also State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863, 865 (Tex. 1988). As movant, Roberson had the burden of presenting a sufficient record to show error affirmatively establishing the trial court acted in an arbitrary and unreasonable manner. *See Simon v. York Crane & Rigging Co.*, 739 S.W.2d 793, 795 (Tex. 1987).

Here, the record does not show that Roberson initiated any additional discovery between the time UTMB's motion was filed and the time he filed his response. Further, no additional proof was submitted with Roberson's motion for new trial. With regard to Roberson's claim that he needed extra time to obtain a "translation" of the medical terms found in UTMB's medical records, Roberson concedes in his appellate brief that UTMB tendered these records to him in May of 1995, in response to discovery requests. Although he had these records in his possession, Roberson apparently made no effort to obtain such a translation prior to making his response to UTMB's motion for summary judgment or filing his motion for new trial on February 25, 1996. Given the length of time that this case was pending on the trial court's docket, we cannot say the trial judge abused its discretion in refusing to grant Roberson's request for a continuance to respond to UTMB's motion. *See Wood Oil*, 751 S.W.2d at 865 (holding that a litigant's failure to diligently pursue discovery will not authorize the granting of a continuance).

**B. TDCJ-ID**

With respect to Roberson's claims against TDCJ-ID, we note that TDCJ-ID filed its motion for summary judgment in this case in March of 1999, six years after Roberson filed suit and three years after TDCJ-ID was served with process. A careful review of the record shows that Roberson did not request a continuance in response to the motion for summary judgment filed by TDCJ-ID.[1] For a party to preserve error, Rule 33.1(a)(1) of the Texas Rules of Appellate Procedure requires, among other things, that the party present a timely motion to the trial court stating the grounds for the ruling sought with adequate specificity and otherwise complying with the requirements of any applicable procedural rule. *See* TEX. R. APP. P. 33.1(a)(1). Because Roberson failed to present a motion for continuance under Rule 166a(g) in

[1] At the hearing on TDCJ-ID's motion for summary judgment, Roberson reported that "the Galveston County Jail or the [TDCJ-ID] transfer officers have lost all my civil case files." However, Roberson did not ask for a continuance, nor did he hint he wanted time for additional discovery. Instead, he asked to amend his suit to include a cause of action "for the misuse of personal tangible property by [TDCJ-ID] transport officers or Galveston County jail officials for losing all of my civil case files." After the trial court granted summary judgment in TDCJ-ID's favor on all of Roberson's claims, Roberson gave notice of appeal and asked the court for a copy of its case file to replace the one he had lost. There is no allegation in this appeal that Roberson was denied a copy of the record in his case, nor is there any evidence that a continuance was sought on that basis.

response to TDCJ-ID's motion for summary judgment, he failed to preserve that issue for our review. *See id.*

## VI. Conclusion

Based on the foregoing, we hold that the trial court did not err in granting summary judgment in favor of UTMB and TDCJ-ID in this instance. Roberson's first point of error is therefore overruled. Further, for the reasons set out above, Roberson's second point of error regarding whether he was denied a continuance to conduct additional discovery is also overruled. Accordingly, the trial court's judgment in this case is affirmed.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed September 7, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

Do Not Publish — TEX. R. APP. P. 47.3(b).