Opinion filed August 27, 2026

In The

Eleventh Court of Appeals

No. 11-23-00253-CV

MICHAEL SURRENTO, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BRIANNA SURRENTO, DECEASED, Appellant

V.

CACTUS GROWERS, INC.; JAMES AND DOROTHY DOSS FOUNDATION, INC.; JEFFREY D. CARLISLE; AND JACKIE WARREN, Appellees

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On Appeal from the 106th District Court
Gaines County, Texas
Trial Court Cause No. 22-03-18850

M E M O R A N D U M   O P I N I O N

This appeal arises out of a tragic accident that resulted in the death of Brianna Surrento after her vehicle collided with a cow that was on the highway. Following the accident, Appellant, Michael Surrento, who is Brianna's father, brought suit against Appellees, Cactus Growers, Inc.; James and Dorothy Doss Foundation, Inc. (the Doss Foundation); Jeffrey D. Carlisle; and Jackie Warren, asserting claims for gross negligence and for statutory liability under Section 143.102 of the Texas Agriculture Code. TEX. AGRIC. CODE ANN. § 143.102 (West 2025). The trial court granted the combined no-evidence and traditional motions for summary judgment filed by each Appellee. Michael appealed. We affirm.

Background Facts

The accident occurred near the Doss Ranch. The Doss Ranch is owned by the Doss Foundation. At the time of the accident, and for several years prior to the incident, the property had been leased by the Doss Foundation to Warren. Warren had, in turn, entered into a grazing agreement with Carlisle, who used the property to manage a herd of approximately 250 cattle pursuant to a Cow/Calf Cooperator/Producer Agreement with Cactus Growers, the owner of the herd (the producer agreement).

The Doss Ranch was divided into three large pastures. Two of those pastures lie next to each other, divided by County Road 135 running north to south between them. An interior fence to the east of County Road 135, further divided the two pastures. The pasture on the western side of County Road 135 is referred to as the "West Pasture" and the pasture on the eastern side is referred to as the "East Pasture." U.S. Highway 180 runs from east to west along the southern border of each pasture. There were two cattle guards near the pastures, both of which were maintained by Gaines County. The first was located at the intersection of Highway 180 and County Road 135. The second was located on the north side of the pastures.

In an affidavit that is part of the summary judgment record, Carlisle stated that the Cactus Growers herd was kept in the West Pasture, where, as a result of recent work that had been performed by Carlisle, "the perimeter fence on the west, north and south sides were brand new fence consisting of five-strand barbed wire fence with steel pipe corners with intermittent reinforcement." The east fence of the West Pasture, which was a part of the division between the two pastures, was constructed in the same manner and, according to Carlisle, "was tight, in good condition and would turn cattle."

Michael's criticisms are focused on the fencing in the East Pasture, where, according to Carlisle, no cattle were kept.

At some point between 4:00 p.m. and 6:00 p.m. on the day of the accident, Sergeant Lenard Reimer with the Gaines County Sheriff's Office was dispatched to a location near where the accident occurred, where he found a cow outside the fence. The cow had a yellow and green ear tag. Sergeant Reimer testified that he called Carlisle and inquired about the cow. Carlisle responded that his cows have blue and yellow tags, but that "there may be a few with green tags." Sergeant Reimer then, with his patrol unit, herded the cow eastbound toward "the AT&T tower" near the middle of the East Pasture. He then opened the gate, let the cow in, and secured the gate.

After receiving the call from Sergeant Reimer, Carlisle and Dennis Knelsen, who is one of Carlisle's ranch hands, inspected the property and the perimeter fences. However, they found no cattle outside the fence, no open gates, and no breaches in the fence. Carlisle stated that, after that point, he had no knowledge of any livestock out on Highway 180, nor did he have any reason to believe that any cattle within his care were roaming on the highway.

At 8:19 p.m., Gaines County dispatch received another call indicating that two cows had been spotted on the highway "just west of [County Road] 135." Both cows were black. The dispatcher then called Knelsen and informed him about the new report. The accident involving Brianna occurred shortly thereafter.

Brianna was a graduate student at the University of the Southwest in Hobbs, New Mexico. At the time of the accident, Brianna was traveling eastbound on Highway 180 through Gaines County while driving from Hobbs to her home in Mississippi.

The cow that was involved in the accident was black. Carlisle stated that he was "unable to identify" the cow that was involved in the accident. However, Texas Department of Public Safety Trooper Melissa Flanigan testified that Carlisle was at the scene of the accident, and that Carlisle told her that the cow was owned by Cactus Growers and was part of a herd that Carlisle was "watching after" or "taking care of" on behalf of Cactus Growers.

Analysis

Michael challenges the trial court's judgment in four issues. As set out below, the bulk of his issues are directed at the summary judgment orders.

I. *Summary Judgment - Procedural Issues*

A. *Did the Trial Court Err in Excluding Michael's Expert Reports from the Summary Judgment Record?*

As a part of his first issue, Michael contends that the trial court erred in striking two expert reports that he offered as part of his summary judgment evidence.[1] The first was a report prepared by Brandon Ogden, whom Michael retained as an expert on the containment of livestock. The second consisted of a series of screenshots taken from a PowerPoint presentation that was prepared by Steve Irwin, Michael's accident reconstructionist. The Irwin materials addressed the reconstruction of the collision itself.

Appellees objected to the expert reports on the ground that they had not been produced in discovery and that Michael had not complied with the applicable discovery rules for designating experts. The trial court granted these objections.

We review a trial court's decision to exclude or admit summary judgment evidence for an abuse of discretion. *Starwood Mgmt., LLC v. Swaim*, 530 S.W.3d 673, 678 (Tex. 2017). A trial court abuses its discretion only when it acts without

[1]We address the remainder of Michael's complaints regarding the exclusion of summary judgment evidence after we consider the merits of his claims.

reference to any guiding rules and principles. *U-Haul Int'l, Inc. v. Waldrip*, 380 S.W.3d 118, 132 (Tex. 2012). We must uphold the trial court's evidentiary ruling if there is any legitimate basis for it. *Owens–Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998).

The Texas Rules of Civil Procedure require a party to disclose information regarding its testifying experts. TEX. R. CIV. P. 195.5(a). When the responding party retains the expert, the party must disclose information that includes multiple components, including two that are relevant in this case. First, the party must disclose the expert's report, if ordered to do so by the trial court. TEX. R. CIV. P. 195.5(b). Second, the party must also disclose "all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony." *Id.* R. 195.5(a)(4)(A).

Here, the Agreed Discovery Control Plan identified April 21, 2023 as the deadline for Michael to produce "the information required by Tex. R. Civ. P. Rule 195.5." The same discovery control plan also required Michael to produce "reports containing the experts' opinions and [the] basis for same" on or before April 21.

Michael concedes that the Ogden expert report was served approximately one week after this deadline. Likewise, Michael does not contest that the Irwin PowerPoint presentation, together with the materials provided to and generated by Ogden and Irwin, were not produced until Michael relied upon them in his responses to the motions for summary judgment.

When evidence is not timely disclosed, its exclusion is mandatory unless the party seeking to introduce it shows (1) good cause for the failure to timely make, amend, or supplement the discovery response, or (2) that the failure will not unfairly surprise or prejudice the other parties. TEX. R. CIV. P. 193.6(a); *see also Lopez v.*

La Madeleine of Tex., Inc., 200 S.W.3d 854, 860 (Tex. App.—Dallas 2006, no pet.). The evidentiary exclusion imposed by Rule 193.6 also applies to summary judgment proceedings. *Fort Brown Villas III Condo. Ass'n, Inc. v. Gillenwater*, 285 S.W.3d 879, 882 (Tex. 2009). The burden to establish good cause or the absence of unfair surprise rests on the party who seeks to introduce the evidence. TEX. R. CIV. P. 193.6(b).

The purpose of Rule 193.6 is not merely to "prevent trial by ambush," but also to "give the opposing party the opportunity to prepare rebuttal expert testimony." *Am. Honda Motor Co., Inc. v. SFI 59 LP*, 726 S.W.3d 915, 931–32 (Tex. App.—Houston [14th Dist.] 2025, no pet.). A party's failure to produce supporting documents that were reviewed or relied on by an expert can therefore be just as prejudicial as a failure to provide the expert's opinions and/or report. *See RDJRLW, Inc. v. Miller*, No. 02-16-00132-CV, 2017 WL 2590568, at *8 (Tex. App.—Fort Worth June 15, 2017, no pet.) (mem. op.) ("Failure to respond fully to a request for an expert's mental impressions and opinions and the documents, tangible things, reports, models, or data compilations provided to, reviewed by, or prepared by or for the expert in anticipation of his testimony is considered a complete failure to respond, triggering rule 193.6's automatic exclusion.").

The record contains no indication that Michael made any effort to demonstrate to the trial court that he had good cause for (1) the late disclosure of Ogden's report and/or (2) his failure to disclose the remaining materials relied on or generated by the experts. TEX. R. CIV. P. 193.6(a), (b). Likewise, there is no indication in the record that Michael filed a motion or other pleading seeking to excuse the late or non-disclosure of such materials based on a lack of surprise or prejudice. *Id.*

On appeal, Michael argues that a mere one-week delay between serving an expert designation and the report of one of his experts (presumably, the Ogden report) is not grounds to exclude the report. However, such an argument only goes to whether Appellees were unfairly *surprised*. It says nothing about whether they were unfairly *prejudiced*, for example, as a result of their inability to prepare a rebuttal based on a full disclosure of the basis for Ogden's opinion. *See Am. Honda*, 726 S.W.3d at 931–32.

The trial court was required to exclude any materials that were never disclosed pursuant to the trial court's order. *See* TEX. R. CIV. P. 193.6(a). Furthermore, although the Ogden report was disclosed several days after the deadline for Michael's expert disclosures, the trial court could have reasonably concluded that Michael's failure to provide the supporting materials for Ogden's report was prejudicial to Appellees. Accordingly, the trial court did not abuse its discretion in sustaining the objections to the Ogden expert report, as well as the remaining materials that were generated or relied on by Ogden and Irwin. *See Miller*, 2017 WL 2590568, at *8.

B. *Appellees' Remaining Objections to Michael's Summary Judgment Evidence*

In addition to the Ogden and Irwin reports, Appellees also objected to several other exhibits that Michael offered in support of his responses to the motions for summary judgment. Those exhibits included the depositions of Carlisle, Warren, David Knight (who is the Doss Foundation's Trustee and Treasurer), Sergeant Reimer, and Deputies Colby Scott and Victor Montes with the Gaines County Sheriff's Office, all of which were taken pursuant to Rule 202 of the Texas Rules of Civil Procedure. TEX. R. CIV. P. 202. They also included the lease agreement between the Doss Foundation and Warren, as well as a crash investigation report that was generated by the Texas Department of Public Safety.

In his first issue, Michael complains, for various reasons, that the trial court erred in excluding these additional exhibits. As discussed below, we have taken these additional exhibits into consideration in conducting our de novo review of the trial court's orders, and we have concluded that, even when they are considered as a part of the summary judgment evidence, they fail to raise a genuine issue of material fact. Accordingly, because they would not have changed the result of the trial court's rulings, any error in striking such exhibits was harmless. *See Hogg v. Lynch, Chappell & Alsup, P.C.*, 553 S.W.3d 55, 72 (Tex. App.—El Paso 2018, no pet.) ("We find that these materials were either properly excluded under the sanctions order, or else that their inclusion in the summary judgment decision would not have created a genuine issue of material fact, rendering their exclusion harmless.").

We overrule Michael's first issue.

C. *Did the Trial Court Allow Adequate Time for Discovery Before Ruling on Cactus Growers' Motion for Summary Judgment?*

Michael's second issue presents two questions. First, he contends that the trial court granted summary judgment as to Cactus Growers before allowing adequate time for discovery. Second, he contends that summary judgment was improper on the merits of his claims under Chapter 143 of the Texas Agriculture Code. We address the discovery question first.

Michael argues that summary judgment was premature because he had not yet conducted discovery on whether Cactus Growers "knowingly permit[ted]" the cow involved to roam at large. Courts must provide an "adequate time for discovery" before ruling on a no-evidence summary judgment motion. *Raoger Corp. v. Myers*, 711 S.W.3d 206, 215–16 (Tex. 2025) (citing TEX. R. CIV. P. 166a(i)).

We review a trial court's decision of whether to grant a party additional time for discovery before summary judgment is considered by the trial court for an abuse of discretion. *See Tenneco Inc. v. Enter. Prods. Co.*, 925 S.W.2d 640, 647 (Tex. 1996). "A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 161 (Tex. 2004) (citing *BMC Software*

Belgium, N.V. v. Marchand, 83 S.W.3d 789, 800 (Tex. 2002)). In deciding whether the trial court abused its discretion, we consider factors such as how long the case had been on file before the hearing, the materiality of the discovery sought, and whether the party seeking the continuance exercised due diligence in obtaining the discovery. *Raoger Corp.*, 711 S.W.3d at 215–16.

When a nonmovant contends it has not had adequate opportunity for discovery before a summary judgment hearing, it must either file an affidavit explaining the need for additional discovery or file a verified motion for continuance. *Cooper v. Circle Ten Council Boy Scouts of Am.*, 254 S.W.3d 689, 696 (Tex. App.—Dallas 2008, no pet.) (citing *Tenneco*, 925 S.W.2d at 647); *see* TEX. R. CIV. P. 166a(g), 251, 252. "The affidavit must describe the evidence sought, explain its materiality, and set forth facts showing the due diligence used to obtain the evidence prior to the hearing." *Cooper*, 254 S.W.3d at 696 (citing *MKC Energy Invs., Inc. v. Sheldon*, 182 S.W.3d 372, 379 (Tex. App.—Beaumont 2005, no pet.)).

We conclude that the trial court did not abuse its discretion when it denied Michael's request to postpone the summary judgment submission date.

First, Michael failed to file a verified motion for continuance or affidavit seeking discovery relating to Cactus Growers' liability, as required by *Tenneco*. 925 S.W.2d at 647. The record indicates that Michael filed a Verified Motion for Continuance on July 28, 2023, seeking a "brief continuance of the submission of all Defendants' motions for summary judgment" and to compel production of the fencing for inspection and testing. However, that motion sought a continuance arising out of ongoing efforts to conduct discovery relating to the fencing at issue. It was not concerned with discovery relating to Cactus Growers' actions in "knowingly permit[ting]" a cow to roam at large. Additionally, the trial court granted the continuance, and the date for submission of the motions for summary judgment was reset in accordance with Michael's request. Furthermore, although

Michael complained in his summary judgment response that he had not yet deposed Cactus Growers' corporate representative, the response was not verified, and no related affidavit was attached to the motion. Under such circumstances, the trial court did not abuse its discretion when it denied Michael's request to further postpone the submission of the motions for summary judgment. *See id.*

Second, we conclude that, in any event, Michael failed to exercise "due diligence" in obtaining the requested discovery. *See Raoger Corp.*, 711 S.W.3d at 216 (quoting *Joe*, 145 S.W.3d at 161). Michael delayed in seeking the deposition of Cactus Growers until almost seventeen months after his original petition was filed, and only fifteen days before the discovery deadline that had been established by the trial court. *See* TEX. R. CIV. P. 199.2(a) ("An oral deposition may be taken outside the discovery period only by agreement of the parties or with leave of court."). Such delay reflects a failure to exercise adequate diligence. *See Raoger Corp.*, 711 S.W.3d at 216 (explaining a trial court could have appropriately found a plaintiff did not exercise "due diligence" in obtaining discovery where the plaintiff had 561 days between joining the defendant and the defendant moving for no-evidence summary judgment to depose the defendant's employee and the plaintiff did not attempt to set an earlier date for the deposition when the no-evidence motion hearing was set). Accordingly, the trial court did not err in denying Michael's request for further postponement of the submission.

To the extent that Michael's second issue contends that the trial court granted summary judgment as to Cactus Growers before allowing adequate time for discovery, we overrule it.

II. *Summary Judgment - Merits*

The remainder of Michael's second issue concerns the trial court's summary judgment orders. We review the trial court's grant of summary judgment de novo.

Lujan v. Navistar, Inc., 555 S.W.3d 79, 84 (Tex. 2018) (citing *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003)).

After an adequate time for discovery, a party may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. TEX. R. CIV. P. 166a(i).[2] We review a no-evidence motion for summary judgment under the same legal sufficiency standard as a directed verdict. *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). Under this standard, the nonmovant has the burden to produce more than a scintilla of evidence to support each challenged element of its claims. *Id.* Evidence is no more than a scintilla if it is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)). In reviewing a no-evidence summary judgment, we consider the evidence in the light most favorable to the nonmovant and disregard all contrary evidence and inferences. *Id.*

A party moving for traditional summary judgment bears the burden of proving that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 257 (Tex. 2017). To be entitled to a traditional summary judgment, a defendant must conclusively negate at least one essential element of the cause of action being asserted or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). "Evidence is conclusive only if reasonable people could not differ in their

[2]We note that the Texas Supreme Court has recently revised Rule 166a. Although the "rewrite is not intended to substantively change the law," it has resulted in a renumbering of the provisions of the rule. *See* Final Approval of Amendments to Rule 166a of the Texas Rules of Civil Procedure, Misc. Docket No. 26-9012 (Tex. Feb. 27, 2026). The amendments to this rule only apply to motions for summary judgment filed on or after March 1, 2026. Because the motions for summary judgment in this case were filed prior to that date, we refer to the rule in effect at the time the motions were filed. *See id.*

conclusions." *City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). If the movant initially establishes a right to summary judgment on the issues expressly presented in the motion, then the burden shifts to the nonmovant to present to the trial court any issues or evidence that would preclude summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678–79 (Tex. 1979). In reviewing a traditional summary judgment, we also consider the evidence in the light most favorable to the nonmovant, and we indulge every reasonable inference in the nonmovant's favor, resolving any doubts against the movant. *City of Keller*, 168 S.W.3d at 824.

When the trial court's order does not specify the grounds for its summary judgment, we will affirm the summary judgment if any of the theories are meritorious. *Knott*, 128 S.W.3d at 216. Additionally, when a party moves for summary judgment on both traditional and no-evidence grounds, we first review the no-evidence summary judgment. *See Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39, 45 (Tex. 2017). "However, this rule is not absolute." *Neurodiagnostic Tex., L.L.C. v. Pierce*, 506 S.W.3d 153, 163 (Tex. App.—Tyler 2016, no pet.).

A. *Did the Trial Court Err When it Granted Appellees' Motions for Summary Judgment on Michael's Claims Under Section 143.102?*

In Texas, there is no common-law duty requiring livestock owners to prevent their animals from running at large. *Gibbs v. Jackson*, 990 S.W.2d 745, 747–48, 747 n.2 (Tex. 1999); *see Pruski v. Garcia*, 594 S.W.3d 322, 323 (Tex. 2020) ("From the time of the Republic of Texas, the default rule in this state has been that livestock owners may allow their animals to run at large."); *Mullins v. McWhirter*, 724 S.W.3d 571, 579 (Tex. App.—Eastland 2025, pet. denied); *Arraby Props., LLC v. Brown*, 695 S.W.3d 532, 540–41 (Tex. App.—Houston [1st Dist.] 2023, pet. denied). However, the Texas legislature has created two duties that arise under statute, which limit livestock owners' ability to allow their stock to roam at large. Both duties are set out in Chapter 143 of the Texas Agriculture Code.

Section 143.074 applies in counties that have enacted stock laws. It provides that "a person may not permit any animal of the class mentioned in the [stock law] proclamation to run at large in the county." AGRIC. § 143.074.

By contrast, Section 143.102 applies throughout the state and provides that a "person who owns or has responsibility for the control of" certain livestock animals, including cattle, "may not knowingly permit the animal to traverse or roam at large, unattended, on the right-of-way of a highway." *Id.* § 143.102. For purposes of Chapter 143, "highway" means a U.S. or state highway. *Id.* § 143.101. Where an accident involving a livestock animal occurs on such a highway, Section 143.102 provides the exclusive standard for liability. *Pruski*, 594 S.W.3d at 324. There is no dispute that Section 143.102 sets out the standard applicable to this case. *See Mullins*, 724 S.W.3d at 580 (addressing a motor vehicle-livestock accident that occurred on U.S. Highway 84).

The Texas Supreme Court most recently addressed liability under Section 143.102 in *Pruski*. 594 S.W.3d at 324; *see Mullins*, 724 S.W.3d at 579. The court determined that Section 143.102 is violated only "if the livestock owner permits the animal to traverse or roam at large, unattended, on the right-of-way of a highway and does so with the knowing mental state traditionally applied in criminal law." *Pruski*, 594 S.W.3d at 327. The term "permit" usually "connotes awareness or assent, as opposed to mere oversight or negligence." *Id.* To "permit" an animal to "roam or run at large" means more than temporary escape. *Id.* "Instead, it refers to animals allowed as a matter of course to graze and move about freely in an unconfined area." *Id.* As to "knowingly," the court in *Pruski* cited to the statutory definition of the term found in the Penal Code:

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Id. at 326–27 (quoting TEX. PENAL CODE ANN. § 6.03(b) (West 2021)).

The Fourth Court of Appeals explained in its analysis in *Garcia* that it is not enough when a person "should have known" but "does not actually know" their livestock have been permitted to roam at large on a highway's right-of-way. *Garcia v. Pruski*, 563 S.W.3d 333, 343–44 (Tex. App.—San Antonio 2018), *rev'd in part on other grounds*, 594 S.W.3d 322 (Tex. 2020).[3] As we noted in *Mullins*, the supreme court in *Pruski* did not overrule the intermediate court's analysis of Section 143.102 in *Garcia*. 724 S.W.3d at 580.

Subsequently, the First Court of Appeals in *Arraby Props., LLC v. Brown* has noted that "Section 143.102 does not impose a duty to prevent all escapes of fenced animals." 695 S.W.3d at 546. "The mere fact an animal escapes and makes its way onto a highway does not support a finding of culpability." *Id.* at 546–47 (citing *Beck v. Sheppard*, 566 S.W.2d 569, 572–73 (Tex. 1978)). The court in *Arraby Properties* also cited the Fourth Court of Appeals' opinion in *Garcia*, 563 S.W.3d at 344, for the proposition that "mere knowledge that a cow may escape from pastured land is insufficient to establish the 'knowingly' element under the statute." *Arraby Props.*, 695 S.W.3d at 547. In that regard, the Fourth Court of Appeals held in *Garcia* that Section 143.102 is not violated if a person who is responsible for controlling livestock merely "should have known—but does not actually know" that his livestock "was permitted to traverse or roam at large, unattended, on a highway's

[3]As we noted in *Mullins*, the facts from *Pruski* are more developed in the Fourth Court of Appeals' opinion. *Mullins*, 724 S.W.3d at 579. We refer to the Texas Supreme Court's opinion as "*Pruski*," and we refer to the opinion of the Fourth Court of Appeals as "*Garcia*."

right-of-way." *Garcia*, 563 S.W.3d at 343; *see Arraby Props.*, 695 S.W.3d at 547 (citing *Garcia*).

In *Mullins*, we summarized the applicable law as follows:

> *Pruski* instructs us that Section 143.102 is violated only "if the livestock owner permits the animal to traverse or roam at large, unattended, on the right-of-way of a highway and does so with the knowing mental state traditionally applied in criminal law." 594 S.W.3d at 327. The statute's inclusion of the word "permit" means that it is not violated by "mere oversight or negligence." *Id.* As noted in *Arraby Properties* and *Garcia*, the statute is not violated if the livestock owner merely "should have known—but does not actually know" that his livestock are roaming along the right-of-way of a state highway. *Arraby Properties*, 695 S.W.3d at 547; *see Garcia*, 563 S.W.3d at 343. Further, to roam or run at large means "more than temporary escape," but rather "it refers to animals allowed *as a matter of course*" to roam along the right-of-way of a state highway. *Pruski*, 594 S.W.3d at 327 (emphasis added).

Mullins, 724 S.W.3d at 582.

We concluded in *Mullins* that, to support a finding of liability, there must be evidence a livestock owner had knowledge such that he or she was "reasonably certain" a cow could escape and roam at large. *Id.* at 583. In *Mullins*, we identified two evidentiary routes by which a plaintiff seeking to prove that a livestock owner knowingly permitted an animal to roam at large on a highway may proceed. *Id.*

Under the direct-evidence route, the plaintiff offers proof that the owner had actual knowledge that the specific animal involved in the collision had escaped and was on the highway, but the owner takes no or insufficient action to retrieve it. *Id.* As we recognized in *Mullins*, the most probative indication of a livestock owner's knowledge of escaped cattle would be awareness that the particular livestock involved in a collision had escaped. *Id.*

Under the circumstantial-evidence route, the plaintiff seeks to establish the owner's knowledge through a combination of two categories of evidence:

(1) evidence that the fencing used to contain the animals was inadequate, and (2) evidence that the fenced animals had an established history of escaping. *Id.*; s*ee Weaver v. Brink*, 613 S.W.2d 581, 583 (Tex. App.—Waco 1981, writ ref'd n.r.e.) (concluding that a pattern of multiple escapes, the owner's knowledge of the fencing deficiency that caused them, and actual notice of the most recent escape together established that the owner knowingly permitted his cattle to roam at large). Both showings are required. Evidence that a fence was inadequate, standing alone, does not establish that an owner was reasonably certain his cattle would escape. *Mullins*, 724 S.W.3d at 585 (Despite evidence that the fence was insufficient, there was no evidence in the form of recent escapes.).

Under either route, the evidence must show more than a temporary escape. To "permit" an animal to roam or run at large refers to animals "allowed as a matter of course to graze and move about freely in an unconfined area," and not to animals that have momentarily escaped. *Pruski*, 594 S.W.3d at 327. Accordingly, even direct evidence that an owner knew an animal had escaped does not, standing alone, establish liability. The evidence must further show that the owner permitted the animal to remain at large as a matter of course, rather than acting to retrieve it. *See id.*

1. *Carlisle*

Carlisle filed a no-evidence motion for summary judgment, asserting that "[t]here is no evidence that Carlisle knowingly permitted a cow to traverse or roam at large, unattended, on the right-of-way of US Highway 180."

Michael argues that Carlisle had responsibility for the control of the cow involved in the accident and knowingly permitted the cow to roam freely. In support of these assertions, he relies on a theory of circumstantial liability. That is, he asserts that a combination of inadequate fencing and a history of escapes provide some evidence that Carlisle knew that cattle were roaming freely on the highway.[4] *See Mullins*, 724 S.W.3d at 585.

We conclude that Michael failed to produce evidence that the fencing used to contain the herd was inadequate. The summary judgment record established that Carlisle kept the Cactus Growers herd in the West Pasture. Michael does not contend that the fencing in the West Pasture was inadequate. Instead, his criticisms are directed solely at the fencing in the East Pasture, where, according to Carlisle, no cattle were kept.

Furthermore, Michael's evidence that the East Pasture's fencing was inadequate consisted primarily of the expert report prepared by Ogden. As we have already explained, that evidence was inadmissible and was therefore properly excluded from the summary judgment record. *See* TEX. R. CIV. P. 166a(f); *Petty v. Citibank (S. Dakota) N.A.*, 218 S.W.3d 242, 245 (Tex. App.—Eastland 2007, no pet.) (Evidence offered in support of or in opposition to a summary judgment motion must be in admissible form to constitute competent summary judgment evidence.).

Recognizing Carlisle's sworn statement that the herd was kept in the West Pasture, Michael attempts to place the cattle in the East Pasture through the deposition testimony of Sergeant Reimer. Sergeant Reimer testified that, on the day of the accident, "there was probably about five [cows] kind of running on the inside of the fence while this other cow was running on the outside, maybe something like that." That testimony cannot bear the weight Michael places on it. Sergeant Reimer prefaced his estimate by stating that he had "no idea" how many cattle were present, and that he could not say whether he "even saw them" that day. He then expressly disclaimed any certainty, testifying, "I can't . . . be sure."

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[4]Michael does not contend, for example, that the alerts that were provided to Knelsen regarding escaped cattle on the day of the accident are evidence that Carlisle permitted the specific animal involved in this incident to roam freely on the highway.

Testimony of this character is too speculative to serve as evidence that any other cows were present, much less that Carlisle kept the herd in the East Pasture. Evidence that does "no more than create a mere surmise or suspicion" of a vital fact is no more than a scintilla and, in legal effect, is no evidence. *Kindred*, 650 S.W.2d at 63.

Furthermore, even if it was admissible, Sergeant Reimer's testimony would at most support an inference that a small number of cattle had crossed from the West Pasture, where the herd was kept, into the adjacent East Pasture. It does not support an inference that Carlisle knowingly allowed cattle—much less the specific cow involved— to roam in the East Pasture, as Michael maintains.

Michael's circumstantial theory also fails because there is no evidence that the herd in question had an established history of escaping. The circumstantial route requires proof of a pattern of recent, recurring escapes. *See Mullins*, 724 S.W.3d at 584–85; *Weaver*, 613 S.W.2d at 583 (liability supported where the owner's cattle had escaped five to six times per year over a fifteen-year period and four times in the months before the accident).

To be sure, there was some evidence that loose cattle were reported near the property close in time to the accident. Sergeant Reimer testified that he contacted Carlisle earlier that day about a loose cow, and dispatch received a subsequent report of additional cattle on the highway. But the record demonstrates that, after Sergeant Reimer's call, Carlisle and Knelsen inspected the property and the perimeter fences and found no cattle outside the fence, no open gates, and no breaches in the fencing.

Furthermore, there is no evidence that Carlisle knew that the loose cows were a part of the Cactus Growers herd. Isolated reports of loose cattle on a single afternoon, especially when they are followed by an inspection that revealed no breach, do not establish the recurring pattern of escapes that is required to raise a fact issue on liability based on circumstantial evidence. *See Beck*, 566 S.W.2d at 573; *Mullins*, 724 S.W.3d at 584–85; *Arraby Props.*, 695 S.W.3d at 546–47.

There is no evidence that Carlisle knowingly permitted a cow within his control to roam at large. Accordingly, the trial court did not err in granting Carlisle's no-evidence motion for summary judgment.

Furthermore, because we have concluded that the trial court did not err in granting Carlisle's no-evidence motion, we need not and do not consider the trial court's ruling on Carlisle's traditional motion for summary judgment. *See* TEX. R. APP. P. 47.1.

2. *Cactus Growers*

Cactus Growers likewise sought a summary judgment, in part, based on the argument that there is "[n]o evidence that [Cactus Growers] knowingly permitted a cow to traverse or roam at large on a highway."

Michael alleged that Cactus Growers was liable under Section 143.102 as the owner of the cow involved. In response, Cactus Growers argued that, even if it was the owner of the cow involved, it did not have responsibility for the control of the cow because responsibility for the care of the cattle was delegated to Carlisle.

We decline to answer the question of whether an owner of livestock who delegates responsibility for the control of the animal continues to be subject to liability under Section 143.102. *See id.* We also decline to address whether Cactus Growers retained any responsibility for control of the animal here, because we conclude that, in any case, there was no evidence Cactus Growers knowingly permitted the cow to roam at large. *See id.*

Michael's circumstantial theory fails against Cactus Growers for the same reasons it fails against Carlisle. As explained above, there is no evidence that the fencing containing the herd was inadequate, and no evidence of a recent, recurring pattern of escapes. Michael identified no evidence that Cactus Growers knew of any inadequacy in the fencing, or of any prior escapes, such that it was "reasonably certain" a cow would escape. *See Mullins*, 724 S.W.3d at 584. Nor did he identify any evidence that Cactus Growers authorized Carlisle or anyone else to permit the cattle to run at large. *See* AGRIC. § 143.102; *Garcia*, 563 S.W.3d at 343.

Because Michael failed to raise a genuine issue of fact, the trial court properly granted Cactus Growers' no-evidence motion for summary judgment.

Furthermore, because we have concluded that the trial court properly granted a no-evidence motion for summary judgment as to Michael's claims against Cactus Growers, we need not and do not consider the trial court's ruling on Cactus Growers' traditional motion for summary judgment. *See* TEX. R. APP. P. 47.1.

3. *Warren and the Doss Foundation*

Warren moved for a summary judgment on the grounds that (1) there was "no evidence that Warren owned or had responsibility for the cow involved in the collision," and (2) there was no evidence that Warren "knowingly permitted the cows to traverse or roam at large onto the highway." Similarly, the Doss Foundation moved for a summary judgment on the grounds that (1) there was "no evidence that [the Doss Foundation] owned or had responsibility for the cow involved in the collision," and (2) there was no evidence that the Doss Foundation "knowingly permitted the cows to traverse or roam at large onto the highway."

Section 143.102 provides that "[a] person who owns or has responsibility for the control of a horse, mule, donkey, cow, bull, steer, hog, sheep, or goat may not knowingly permit the animal to traverse or roam at large, unattended, on the right-of-way of a highway." AGRIC. § 143.102. The plain language of the statute makes clear that the statute applies only to parties who own or have responsibility for the control of a *livestock animal*, rather than those who merely own or have control of the *property* where a livestock animal resides. *Id.*; *see also Arraby Props.*, 695 S.W.3d at 544 ("Section 143.102 does not place the risk upon the *owner* of the land on which livestock is pastured. A landowner is liable under Section 143.102 only if it owns the animal or has responsibility for control of the animal."); *Billelo v. SLC McKinney Partners, L.P.*, 336 S.W.3d 852, 854 (Tex. App.—Dallas 2011, no pet.) ("By this statute, the legislature clearly limited the duty to restrain livestock to its owner or those who have responsibility for its control."); *Levesque v. Wilkens*, 57 S.W.3d 499, 505 (Tex. App.—Houston [14th Dist.] 2001, no pet.) (holding that Section 143.102 "places the risk upon the *owner* of the livestock, not the owner of the land," rejecting the argument that the landowners had a common law duty to ensure that their lessees prevented the landowner's livestock from roaming at large on public highways).

Accordingly, because the summary judgment evidence demonstrates that Cactus Growers was the owner of the herd at issue, the question on summary judgment is whether Warren or the Doss Foundation had any *responsibility* for the control of the cow that was involved in the accident. AGRIC. § 143.102.

Michael contends that Warren and the Doss Foundation assumed responsibility for the cattle through the agreements between the parties. However, there is no language in either agreement by which Warren or the Doss Foundation assume responsibility for the control of the cattle grazing on the property. At best, Michael can only show that Warren "maintained control of the fencing" through an arrangement to prorate the cost of fence repairs against the rent, but control of the fencing is not control of the cattle. Likewise, although the Grazing Partnership entitled Warren to a portion of the calf crop, there is no evidence that Warren thereby assumed responsibility for the care or control of the cattle. Furthermore, it appears the Farm Lease Agreement terminated in 2007, and it is not clear that it governs the parties' relationship in 2019 and 2020.

Finally, even if we were to conclude that Warren and/or the Doss Foundation had somehow accepted responsibility for the control of the cattle, we would also conclude that neither Warren nor the Doss Foundation "knowingly permit[ted]" the cow involved to roam at large. AGRIC. § 143.102; *cf. Rose v. Ben C. Hebert Heirs*, 305 S.W.3d 874, 881 (Tex. App.—Beaumont 2010, no pet.) ("In summary, there is no summary judgment evidence to raise any inference that the Landowners 'permitted' the bull's escape as prohibited by the Legislature in section 143.074 of the Texas Agriculture Code."). There is no evidence that Warren or the Doss Foundation caused the cow at issue to roam at large, or that either party authorized anyone to allow the cow to roam at large. There is also no evidence that Warren or the Doss Foundation knew the cow had escaped into the East Pasture, much less onto the adjoining highway to the south. Likewise, there is no evidence that Warren or the Doss Foundation knew of recent escapes or knew the fence was so inadequate that it was reasonably certain a cow would escape. *See Mullins*, 724 S.W.3d at 584.

In short, there is no evidence that Warren or the Doss Foundation "actually kn[e]w" a cow was roaming at large on the highway, nor is there evidence that they knew of inadequacies in the fence such that it was "reasonably certain" a cow would escape the property. *Mullins*, 724 S.W.3d at 582, 584; *Garcia*, 563 S.W.3d at 343. As a result, the trial court did not err in granting Warren's and the Doss Foundation's no-evidence motions for summary judgment.

Because we have concluded that the trial court properly granted Warren's and the Doss Foundation's no-evidence motions for summary judgment, we need not and do not consider the trial court's rulings on their traditional motions for summary judgment. *See* TEX. R. APP. P. 47.1.

4. *Conclusion*

Because a no-evidence summary judgment was proper as to each Appellee, we overrule Michael's second issue.

B. *Did the Trial Court Err in Granting Summary Judgment on Michael's Claims for Gross Negligence?*

In Michael's third issue, he contends the trial court erred by granting summary judgment on his gross negligence claims. Michael asserts that if there is evidence raising a genuine issue of material fact as to his Section 143.102 claims, then that same evidence would support his claims for exemplary damages for gross negligence. Because we have concluded that there is no more than a scintilla of evidence to support Michael's Section 143.102 claims, we need not and do not reach the question of whether Appellees in this matter are subject to liability for gross negligence arising out of the statutory standard set out in Section 143.102. *See id*.

We overrule Michael's third issue.

III. *Did the Trial Court Err in Striking Michael's Fifth Amended Petition?*

In his fourth issue, Michael contends that the trial court erred in striking his fifth amended petition. We do not reach the question of whether the trial court erred in striking the petition because we conclude any error by the trial court was harmless.

Ordinarily, if a plaintiff amends his pleadings after a defendant has moved for summary judgment, the defendant must file an amended motion for summary judgment in order to prevail on the entirety of the plaintiff's case. *Blancett v. Lagniappe Ventures, Inc.*, 177 S.W.3d 584, 592 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (citing *Smith v. Atl. Richfield Co.*, 927 S.W.2d 85, 88 (Tex. App.—Houston [1st Dist.] 1996, writ denied)). However, where an "amended petition merely reiterates the same essential elements in another fashion, and the motion for summary judgment adequately covers these new variations," then summary judgment can be proper. *Lampasas v. Spring Ctr., Inc.*, 988 S.W.2d 428, 437 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *see also Fraud-Tech, Inc. v. Choicepoint, Inc.*, 102 S.W.3d 366, 387 n.75 (Tex. App.—Fort Worth 2003, pet. denied). Similarly, summary judgment may be proper when a ground asserted in the motion for summary judgment conclusively negates an element common to both the newly and previously asserted claims. *Rotating Servs. Indus., Inc. v. Harris*, 245 S.W.3d 476, 487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (citing *Blancett*, 177 S.W.3d at 592).

Here, Michael's fifth amended petition only omitted claims alleged in his fourth amended petition. Michael concedes that "the sole changes were omitted claims." As a result, we conclude each motion for summary judgment was sufficiently broad to respond to any differences between Michael's fourth and fifth amended petitions, and any error by the trial court in striking his fifth amended petition was harmless.

We overrule Michael's fourth issue.

This Court's Ruling

We affirm the judgment of the trial court.

JOHN M. BAILEY
CHIEF JUSTICE

August 27, 2026

Panel consists of: Bailey, C.J.,
Trotter, J., and Williams, J.