

PUBLICATION UPDATE

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Dorsaneo, Texas Litigation Guide

Publication 719

Release 149

May 2023

HIGHLIGHTS

Amended Texas Rules of Civil Procedure.

- **Ch. 271, Mechanic’s and Materialmen’s Liens has been completely rewritten and updated.**

This release updates Texas Litigation Guide with recent legislation as well as Texas Supreme Court and court of appeals decisions and federal cases. Many of the significant developments in this release are summarized below.

ATTORNEYS

Lawyer Specialization. The Texas Supreme Court has amended the Texas Plan for Recognition and Regulation of Specialization in the Law to include insurance law as a specialty and to set out specific requirements for specialization in this

area; this change is noted in Ch. 3, *Professional Responsibility*, § 3.03[2][c].

PRETRIAL, TRIAL, AND APPELLATE PRACTICE

Justice Courts—New Civil Procedure Rules and Electronic Appearances. This release includes new Tex. R. Civ. P. 500.10, which clarifies procedures for appearances at justice court proceedings by electronic means, and revisions to Tex. R. Civ. P. 505.1 regarding the form of justice court judgments. See Ch. 46, *Justice Court Proceedings*, §§ 46.02[3], 46.19[5].

Discovery—Scope. In *In re Kurray Am., Inc.*, 656 S.W.3d 137, 142 (Tex. 2022), the Texas Supreme Court granted mandamus and directed the trial court to vacate its orders requiring a party to produce cell-phone data that was not consid-

ered relevant. See Ch. 90, *Discovery: Scope and Limitations*, § 90.02[3][a].

Discovery—Mental Examinations. In *In re Auburn Creek Ltd. P’ship*, 655 S.W.3d 837, 2022 Tex. LEXIS 1076, at *6–*7 (Tex. 2022), The Texas Supreme Court discussed the procedures to request an order compelling a mental examination under Civil Rule 204. See Ch. 93, *Requests to Produce; Subpoenas*, § 93.40.

Judges—Disqualification and Recusal. In *State v. Volkswagen Aktiengesellschaft*, ___ S.W. 3d ___, 2022 Tex. LEXIS 1020, at *25–*26 (Tex. 2022), the Texas Supreme Court considered Tex. Gov’t Code § 22.005(b), which allows the Governor to commission justices to replace Supreme Court justices who have recused themselves or been disqualified, and found that it withstood constitutional challenge. See Ch. 110A, *Disqualification of Judge or Counsel*, § 110A.03[3].

Sanctions and Appeal of Sanctions. In *State ex rel. Durden v. Shahan*, 658 S.W.3d 300, 2022 Tex. LEXIS 1180, at *6–*7 (Tex. 2022), the Texas Supreme Court applied the bona fide attempt to invoke jurisdiction doctrine in a case in which an attorney sought to appeal sanctions against the attorney personally, but in which the attorney was not named in the notice of appeal. See Ch. 14, *Sanctions for Improper Pleading*, § 14.03[9]; Ch. 147, *Perfecting and Docketing the Appeal*, § 147.02[4][b][iii].

Appeals—Oral Argument Proce-

dural Rules. The Texas Supreme Court has amended Tex. R. App. P. 39.7, governing oral argument in an appeal, to clarify that a party’s failure to request oral argument on the front cover of the brief does not waive the right to argue; If the court sets the case for oral argument, then all parties that filed a brief are entitled to participate in the oral argument. See Ch. 150, *Appellate Proceedings in Court of Appeals*, § 150.04[2].

Appeals—Scope of Opinion. In *In re Brown*, 653 S.W.3d 721, 722 (Tex. 2022), the Texas Supreme Court held that, when granting relief in an original proceeding, the court must issue an opinion addressing every issue raised and necessary to final disposition of the appeal, and granted mandamus to direct the court of appeals to vacate its order. See Ch. 152, *Original Proceedings in Court of Appeals and Supreme Court*, § 152.05[2].

ADMINISTRATIVE LAW

Agency Rule-Making Procedures. In *Tex. Tel. Ass’n v. PUC of Tex.*, 653 S.W.3d 227, 264–267 (Tex. App.—Austin 2022, no pet. h.), the court of appeals held that an agency’s decision and contract amendment were “rules” and therefore invalid because they were not promulgated in accordance with the Texas Administrative Procedure Act. See Ch. 421, *Administrative Rules*, § 421.05[1].

BUSINESS AND COMMERCIAL LAW

General Partner’s Liability. This release includes *Konogeris v. Pinacle Health Facilities GP I, LLC*,

657 S.W.3d 421, 2022 Tex. App. LEXIS 6121, *15 (Tex. App.—El Paso 2022, no pet. h.), in which the court of appeals held that because a general partner’s liability is derivative, a general partner is not liable if the limited partner cannot be held liable. See Ch. 182, *Limited Partnership*, § 182.05[5][a].

Whistleblower Report of Violation of Law. In *City of Fort Worth v. Pridgen*, 653 S.W.3d 176, 182 (Tex. 2022), the Texas Supreme Court held that to “report” under the Whistleblower Act, an employee must convey facts geared toward exposing, corroborating, or otherwise providing information pertinent to identifying or investigating governmental illegality, rather than providing unsupported opinions or legal conclusions. See Ch. 203A, *Employment Litigation*, § 203A.70[2].

Pleadings Regarding Conditions Precedent. In *Rise Above Steel Co., LLC v. Liberty Mut. Ins. Co.*, 656 S.W.3d 577, 2022 Tex. App. LEXIS 8183, *12 (Tex. App.—El Paso 2022, no pet. h.), the court of appeals held that a defendant cannot generally deny that the plaintiff has not proved all conditions precedent, but must specifically deny which conditions precedent have not been met. See Ch. 210A, *Contracts*, § 210A.100[1][c].

Standing to Sue Under Uniform Fraudulent Transfer Act. Included in this release is *LMP Austin English Aire, LLC v. Lafayette English Apts., LP*, 654 S.W.3d 265, 279 (Tex. App.—Austin 2022, pet. filed), in which the court of appeals held that

because equity holders were not statutory “creditors” under Tex. Bus. & Com. Code § 24.002(4), they lacked standing to bring UFTA claims. See Ch. 241, *Fraudulent Transfers*, § 241.02[2][d].

PERSONAL INJURY LITIGATION

Automobiles; Vicarious Liability of Employer. An employee’s personal trip to buy food and water does not fall within the special mission exception even if the employee brought the items to the worksite and voluntarily shared them with coworkers [*Cameron Int’l Corp. v. Martinez*, 66 Tex. Sup. Ct. J. 183, 2022 Tex. LEXIS 1177, at *4–*9 (Tex. 2022) (per curiam)]. See Ch. 302, *Liability of Owners and Others*, §§ 302.01[2][d].

False Imprisonment; Tim Cole Act. That a claimant may not “bring” an action against a government unit or employee after receiving compensation also applies to the continuation of any previously brought action, so if such an action is pending when compensation is received, the claimant cannot maintain the action [*Brown v. City of Hous.*, 66 Tex. Sup. Ct. J. 285, 2023 Tex. LEXIS 115, at *2 (Tex. 2023)]. See Ch. 331, *False Imprisonment*, § 331.08[3].

Tort Claims Act; Available Damages. The damage caps of the Act are not an affirmative defense; instead, they are a substantive limitation of the legislature’s waiver of immunity from suit, so a trial court lacks jurisdiction to render a judgment for an amount exceeding the applicable cap

[*Gulf Coast Ctr. v. Curry*, 66 Tex. Sup. Ct. J. 168, 2022 Tex. LEXIS 1181, at *8–*11 (Tex. 2022)]. See Ch. 293, *Claims Against Governmental Entities*, § 293.11[1][a].

Tort Claims Act; Premises Defect. The use of painted stripes and buttons instead of concrete barriers to separate opposing lanes of traffic at a roadway construction site is not a premises defect as a matter of law [*Salinas v. Tex. DOT*, 66 Tex. Sup. Ct. J. 306, 2023 Tex. LEXIS 128, at *14–*18 (Tex. 2023)]. See Ch. 293, *Claims Against Governmental Entities*, § 293.10[5][g].

Tort Claims Act; Special Defect. A small gap between the surface of a road and the track for a light rail system that ran along that road was not a special defect as a matter of law because it was a permanent condition of the road [*Kownslar v. City of Hous.*, 654 S.W.3d 472, 477–478 (Tex. App.—Houston [14th Dist.] 2022, pet. filed)]. See Ch. 293, *Claims Against Governmental Entities*, § 293.10[5][g].

Tort Claims Act; Municipal Liability. A teenager who was sexually assaulted while volunteering at a city’s animal shelter could not sue the city because it was performing the governmental function of animal control under Tex. Civ. Prac. & Rem. Code Ann. § 101.0215(a)(33) when it engaged in the allegedly negligent conduct in its maintenance and supervision of the shelter [*Doe v. City of Fort Worth*, 646 S.W.3d 889, 899–900 (Tex. App.—Fort Worth 2022, no pet.)]. See Ch. 293, *Claims*

Against Governmental Entities, § 293.01[3][c].

Tort Claims Act; Scope of Employment. When a vehicle involved in an accident is owned by the government unit and the driver is an employee of the unit, a presumption arises that the driver was acting within the scope of his employment when the accident occurred, and the unit bears the burden to rebut the presumption [*City of Hous. v. Arelano*, 654 S.W.3d 483, 486–487 (Tex. App.—Houston [14th Dist.] 2022, pet. filed)]. See Ch. 293, *Claims Against Governmental Entities*, § 293.10[3][c].

Citizens Participation Act; Applicability. In an action arising from the defendants’ refusal to grant easement rights, the TCPA was inapplicable because the plaintiff’s suit was in response to the *conduct* of the defendants, not in response to any *statements* they may have made while engaging in that conduct [*ML Dev, Ltd. P’ship v. Ross Dress for Less, Inc.*, 649 S.W.3d 623, 628–629 (Tex. App.—Houston [1st Dist.] 2022, pet. denied)]. See Ch. 333, *Libel and Slander*, § 333.42[3][c].

Citizens Participation Act; Ruling on Motion. When a trial court announces an oral ruling from the bench on a TCPA motion, but never issues a formal order reflecting that result, the oral ruling is ineffective, the motion is denied by operation of law, and the movant can appeal [*Simmons v. Taylor*, 651 S.W.3d 499, 503 (Tex. App.—Houston [14th Dist.] 2022, no pet.)]. See Ch. 333, *Libel*

and Slander, § 333.42[5].

Citizens Participation Act; Identity of Movant. A defendant who files a TCPA motion may not proceed completely anonymously; instead, the movant may proceed under a pseudonym, but must reveal his or her identity to the court and the parties [*Allison Publ'ns, LLC v. Doe*, 654 S.W.3d 210, 215–218 (Tex. App.—Fort Worth 2022, pet. filed)]. See Ch. 333, *Libel and Slander*, § 333.42[4][a].

Medical Malpractice; Authorization for Release of Medical Records. Any alleged omissions in the authorization form required by statute must “seriously or significantly hinder” the provider’s ability to investigate the claims and possibly resolve them before the form can be deemed fatally defective [*Maypole v. Acadian Ambulance Serv.*, 647 S.W.3d 533, 544–551 (Tex. App.—Dallas 2022, pet. filed)]. See Ch. 321, *Medical Malpractice*, §§ 321.12[5][a], 321.14[2][a], 321.101[1].

Professional Malpractice; Certificate of Merit. When a third-party petition was initially filed but then nonsuited, the current version of Tex. Civ. Prac. & Rem. Code § 150.002 applied to its later reassertion, so a certificate of merit was required to accompany the second filing of the third-party petition [*Thompson Hancock Witte & Assocs. v. Stanley Spurling & Hamilton, Inc.*, 650 S.W.3d 741, 746–748 (Tex. App.—Houston [14th Dist.] 2022, no pet.)]. See Ch. 322, *Professional Malprac-*

tice, § 322.04[2][d].

INSURANCE LITIGATION

Liability Insurance; Duty to Defend. If extrinsic evidence is offered to either refute or trigger the duty to defend, but no party objects by raising the eight-corners rule, the issue is waived and the trial court does not err in considering the evidence [*Donias v. Old Am. Cty. Mut. Fire Ins. Co.*, 649 S.W.3d 789, 793 (Tex. App.—El Paso 2022, no pet.)]. See Ch. 341, *Liability Insurance*, § 341.04[3][b].

Automobile Insurance; Coverage. When a person is using a gas can to add fuel to a vehicle that has run out, a fact issue is presented on whether the person was “upon” the vehicle and therefore “occupying” at the time of the accident [*Hill v. Allstate Fire & Cas. Ins. Co.*, 652 S.W.3d 516, 520–522 (Tex. App.—Houston [1st Dist.] 2022, no pet.)]. See Ch. 342, *Uninsured Motorist Coverage*, § 342.02[4].

FAMILY LAW

Termination of Parental Rights. The Texas Supreme Court has held that when a court of appeals determines that there was factually insufficient evidence to support termination under Family Code Section 161.001(b)(1)(D) or (E), but legally and factually sufficient evidence to support termination on a non-endangerment ground, the proper remedy is to affirm the trial court’s termination under that other ground and strike the (D) and (E) findings [In Interest of M.P., 639 S.W.3d 700, 703–704 (Tex. 2022)]. See Ch. 381,

Termination of Parental Rights, § 381.22[4][e].

PROBATE LITIGATION

Default In Probate. If an applicant knows he or she should probate the will and there is evidence supporting this knowledge, they may be found to be in default [*Marshall v. Estate of Freeman*, No. 03-20-00449-CV, 2022 (Tex. App.—Austin Apr. 29, 2022, no pet. h.) (where evidence was provided the applicant had been advised by an attorney to probate and only offered the will over forty years later once an heir initiated a competing application for determination for heirship)]; See also *Matter of Estate of Masters*, No. 08-20-00156-CV, 2022 WL 2827022 (Tex. App.—El Paso July 20, 2022, no pet. h.) (where applicant offered will six years after death and had been advised by an attorney probate was needed)]. See Ch. 392, *Admitting Wills to Probate*, § 392.13[2].

Signed Will. A will may still be held to be validly executed even when a testator fails to sign the signature page of a will, if the attesting witnesses provide testimony that the testator initialed each substantive page in front of them [*Jones v. Jones*, 649 S.W.3d 577 (Tex. App.—Houston [1st Dist.] 2022, no pet. h.)]. See Ch. 392, *Admitting Wills to Probate*, § 392.18[3][c].

REAL ESTATE LITIGATION

Construction Contracts; Arbitration. When a family unit resides in a home and sues for factually intertwined construction-defect

claims concerning that home, the signature of one spouse on an arbitration agreement binds the other spouse and their minor children because the family members accept direct benefits under the signatory spouse's agreement, so they may be compelled to arbitrate through direct-benefits estoppel [*Taylor Morrison of Tex., Inc. v. Ha*, 66 Tex. Sup. Ct. J. 275, 2023 Tex. LEXIS 60, at *4–*9 (Tex. 2023) (per curiam)]. See Ch. 270, *Improvement Contracts*, § 270.12[5]; Ch. 271, *Mechanic's and Materialmen's Liens*, § 271.02[1].

Construction Contracts; Venue. An action alleging construction defects that primarily seeks compensation based on physical damage or injury to a house is an action “for recovery of damages to real property,” so Tex. Civ. Prac. & Rem. Code § 15.011 mandating venue in the county where the property is located applies, and mandamus is available to enforce the statute [*In re Custom Home Builders of Cent. Tex. Inc.*, 647 S.W.3d 419, 426–428 (Tex. App.—San Antonio 2021, orig. proceeding)]. See Ch. 270, *Improvement Contracts*, § 270.120[1].

Deeds; Interest Conveyed. A deed conveying “all of my right, title and interest in and to” certain property is most naturally understood to mean any present interest of the grantor, so it does not include any expectancy interest in the property that the grantor may later acquire [*Jordan v. Parker*, 66 Tex. Sup. Ct. J. 174, 2022 Tex. LEXIS 1176, at *10–*15 (Tex. 2022)]. See Ch. 254,

Deeds and Conveyances, Tax Suits, § 260.04[2][b].
§ 254.05[1].

Real Estate Sales Contracts; Validity. Texas Property Code Section 5.043 requiring the reformation of an interest that violates the rule against perpetuities does not apply to an unreasonable restraint on alienation, so the trial court properly voided the deed's option to repurchase that lasted for more than 100 years [*Tiner v. Johnson*, 647 S.W.3d 103, 111 (Tex. App.—Tyler 2022, pet. filed)]. See Ch. 252, *Real Estate Sales Contracts*, § 252.01[2][d]; Ch. 254, *Deeds and Conveyances*, § 254.04[8][b].

Real Property Taxes; Notice to Taxpayer. A mistake in the name or address of an owner in any notice that must be provided to the taxpayer by the taxing unit does not undermine the validity of the notice [*Desert NDT, LLC v. Ector Cty. Appraisal Dist.*, 654 S.W.3d 302, 307–308 (Tex. App.—Eastland 2022, no pet.)]. See Ch. 260, *Real Property*

Condemnation; Inverse. Allegations that one or more employees of a government unit fraudulently induced a property owner to convey property to the unit without a formal condemnation proceeding state a tort claim only, and do not allege a taking or support an inverse condemnation claim [*City of Webster v. Hunnicutt*, 650 S.W.3d 792, 798–800 (Tex. App.—Houston [14th Dist.] 2022, pet. filed)]. See Ch. 261, *Condemnation*, § 261.20[1].

Condemnation; Owner's Right to Repurchase. Property Code Section 21.101 waives the condemning authority's sovereign or governmental immunity in a former owner's suit to enforce the repurchase rights created by the statute [*State v. LBJ/Brookhaven Inv'rs, L.P.*, 650 S.W.3d 922, 930–933 (Tex. App.—Dallas 2022, no pet.)]. See Ch. 261, *Condemnation*, § 261.15[1].

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Publication 719 Release 149

May 2023

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<input type="checkbox"/>	321-104.23 thru 321-104.24(1)	321-104.23 thru 321-104.24(2)(a)
<input type="checkbox"/>	321-134.1 thru 321-134.7	321-134.1 thru 321-134.7

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<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	322-38.15 thru 322-38.19	322-38.15 thru 322-38.19
<input type="checkbox"/>	322-54.6(1) thru 322-54.8(1)	322-54.7 thru 322-54.8(1)
<input type="checkbox"/>	322-54.17.	322-54.17 thru 322-54.18(1)
<input type="checkbox"/>	323-7 thru 323-8.1	323-7 thru 323-8.1
<input type="checkbox"/>	331-35	331-35 thru 331-36.1
<input type="checkbox"/>	333-97 thru 333-108.19	333-97 thru 333-108.20(5)

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<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	341-34.3 thru 341-34.9	341-34.3 thru 341-34.9
<input type="checkbox"/>	341-85	341-85 thru 341-86.1
<input type="checkbox"/>	341-107 thru 341-108.1	341-105 thru 341-107
<input type="checkbox"/>	342-23	342-23 thru 342-24.1
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<input type="checkbox"/>	Title page.	Title page
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<input type="checkbox"/>	371-4.1 thru 371-5	371-5 thru 371-6.1
<input type="checkbox"/>	371-81 thru 371-84.1	371-81 thru 371-84.1
<input type="checkbox"/>	371A-45 thru 371A-48.5	371A-45 thru 371A-48.5

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<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	374-9 thru 374-11	374-9 thru 374-12.1
<input type="checkbox"/>	381-5 thru 381-6.1	381-5 thru 381-6.1
<input type="checkbox"/>	381-105 thru 381-110.3	381-105 thru 381-110.3
<input type="checkbox"/>	381-121 thru 381-128.5	381-121 thru 381-128.5

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<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	392-37	392-37 thru 392-38.1
<input type="checkbox"/>	392-53	392-53 thru 392-54.1
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<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	421-12.1 thru 421-14.1	421-13 thru 421-14.1
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<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	I-59 thru I-60.1	I-59 thru I-60.1
<input type="checkbox"/>	I-199 thru I-201	I-199 thru I-202.1
<input type="checkbox"/>	I-589	I-589 thru I-590.1
<input type="checkbox"/>	I-823	I-823 thru I-824.1
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