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Route to: _____ _____ _____ _____
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Dorsaneo, Texas Litigation Guide

Publication 719

Release 122

September 2016

HIGHLIGHTS

- **Counterclaims.** Following from a recent Texas Supreme Court case [In re J.B. Hunt Transport, Inc., 2016 Tex. LEXIS 414 (Tex. 2016)] resolving a dilemma inherent in Civil Procedure Rule 97(a) as to counterclaims, parts of Ch. 71, *Cross-Claim and Counterclaim*, have been extensively revised. Discussion of *J.B. Hunt* has also been added to the mandamus discussion in Ch. 152, *Original Proceedings*.
- **Joinder.** Much of Ch. 80, *Joinder*, has been revised to update the discussion of cross-actions and third-party actions.

whether the plaintiff is so well known in that community that the general public automatically associates the plaintiff with the official position (see §§ 333.10[3][a], 333.42[2]).

Economic Loss Rule. *MEMC Pasadena, Inc. v. Riddle Power, LLC*, 472 S.W.3d 379 (Tex. App.—Houston [14th Dist.] 2015, pet. filed) held that the economic loss rule barred the recovery of negligence damages when the only loss alleged by the plaintiff was the failure to perform a contract (see § 290.04[1]).

Burden of Proof. *Williams v. Parker*, 472 S.W.3d 467 (Tex. App.—Waco 2015, no pet.) held that when a violation of law that would support negligence per se is proved, the burden to show that the violation was excused is on the violator (see § 290.30[2], [3]).

Malpractice

Informed Consent. *Benge v. Williams*, 472 S.W.3d 684 (Tex. App.—Houston [1st Dist.] 2014, pet. filed) held that: (1) whether there negligence in obtaining in-

Personal Injury

Defamation of Public Official. *Greer v. Abraham*, 59 Tex. Sup. Ct. J. 645, 2016 Tex. LEXIS 317 (Tex. Apr. 15, 2016) held that whether a public official is required to show actual malice because defamatory statements relate to that status is determined by whether they were disseminated within the plaintiff's community, and

formed consent is a distinct legal question from whether there was negligence in the surgery or treatment itself, so separate jury questions are required on the two theories; and (2) when it was undisputed that the primary surgeon made all required disclosures, all negligence duties were discharged, and the patient cannot assert a “secret surgeon” claim that informed consent required disclosure that a resident would not only assist, but perform a substantial portion of the surgery (see § 321.05[2], [3]).

Qualification as Health Care Provider. *Diagnostic Research Grp. v. Vora*, 473 S.W.3d 861 (Tex. App.—San Antonio 2015, no pet.) held that a facility that conducted a study of an experimental drug provided no evidence that it was licensed or certified to provide health care, or that it was an affiliate of a physician, so it had not shown it was a “health care provider,” and the claim was not a health care liability claim (see § 321.02[2][a], [3][a]).

Unrecoverable Damages. *Pressil v. Gibson*, 477 S.W.3d 402 (Tex. App.—Houston [14th Dist.] 2015, pet. filed) held that if the damages sought by a plaintiff in the underlying suit were simply not recoverable as a matter of law, any subsequent malpractice claim is also not viable (see § 322.02[1][d]).

Certificate of Merit Requirement. *Frazier v. GNRC Realty, LLC*, 476 S.W.3d 70 (Tex. App.—Corpus Christi 2014, pet. denied) held that if a design professional defendant concedes the alleged design error, that concession shows that the plaintiff’s claims have merit and waives the certificate of merit requirement of Tex. Civ. Prac. & Rem. Code § 150.001 (see § 322.04[2][d]).

Employment

Job Performance. *Shannon v. Mem’l*

Drive Presbyterian Church, 476 S.W.3d 612 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) held that a former employer was not entitled to summary judgment on its defense under Texas Labor Code Chapter 103 because it did not conclusively establish that the statements about why the former employee left on unfavorable terms related to “job performance” under the Act (see § 333.20[2][b]).

Governmental Entity Claims

No Immunity for Proprietary Functions. *Wasson Interests, Ltd. v. City of Jacksonville*, 59 Tex. Sup. Ct. J. 524 (Tex. 2016) held that the distinctions between a city’s “proprietary” and “governmental” functions applies to contract claims, so a city does not have immunity from suit on a contract entered into in the exercise of any proprietary function (see § 270.01[5][b], § 293.01[3]).

Public Utility Is Propriety Function. *Wheelabrator Air Pollution Control v. City of San Antonio*, 59 Tex. Sup. Ct. J. 662, 2016 Tex. LEXIS 318 (Tex. Apr. 15, 2016), which held that a city’s operation of its own public utility was a proprietary function, so the city did not have governmental immunity (see § 270.01[5][b], § 293.01[3]).

Discretion by Governmental Official. *Houston Belt & Terminal Ry. Co. v. City of Houston*, 59 Tex. Sup. Ct. J. 512 (Tex. 2016) held that an *ultra vires* claim is available despite some limited discretion by a governmental official, provided the claimant alleges that the official exceeded the bounds of that authority or the conduct conflicts with the law itself (see § 293.01[2]).

Scope of Employment. *Fink v. Anderson*, 477 S.W.3d 460 (Tex. App.—Houston [1st Dist.] 2015, no pet.) which held that the mere fact that the claimant alleges an

intentional tort by a governmental employee does not establish that the employee's conduct was outside the scope of employment for purposes of the election of remedies provision of the Tort Claims Act (see §§ 293.10[3][c], 293.16[3][a]).

Attorney's Fees under TCPA. *Sullivan v. Abraham*, 59 Tex. Sup. Ct. J. 652, 2016 Tex. LEXIS 315 (Tex. Apr. 15, 2016) held that when a trial court awards attorney's fees under Tex. Civ. Prac. & Rem. Code § 27.009(a) incident to a dismissal under the Texas Citizens Participation Act, the only requirement for recovery is that the award be "reasonable," and the court may not reduce a reasonable fee award based on principles of justice and equity (see § 333.42[2]).

Discovery in TCPA Cases. *Whisenhunt v. Lippincott*, 474 S.W.3d 30 (Tex. App.—Texarkana 2015, no pet.) held that when a party opposing a motion for dismissal under the Texas Citizens Participation Act seeks discovery on the issue raised by the motion, it must do so before the hearing date on the motion (see § 333.42[2]).

Premises Defect. *City of San Antonio v. Peralta*, 476 S.W.3d 653 (Tex. App.—San Antonio 2015, no pet.) held that: (1) a person who is cycling in a recreational area falls within the recreational use statute even if the person is commuting to work at the time of the injury; but (2) allegations that the defendant knew that a drain cover plate was missing, and knew of the extreme risk posed to pedestrians and cyclists by its absence, yet failed to replace it before the accident were sufficient to state a premises defect claim based on gross negligence (see § 293.10[5][g]).

Insurance

Instrumentalities Claim. Ch. 340, *Workers' Compensation*, has been revised to include *Kroger Co. v. Milanes*, 474

S.W.3d 321 (Tex. App.—Houston [14th Dist.] 2015, no pet.), which held that because an employee injured while operating a band saw alleged failure to properly train and provide necessary safety equipment, an instrumentalities claim against the nonsubscriber employer based on general negligence was available (see § 340.40[4][b]).

Appraisal Provision. Ch. 343, *Property Insurance*, has been revised to include *In re OOIDA Risk Retention Grp., Inc.*, 475 S.W.3d 905 (Tex. App.—Fort Worth 2015, orig. proceeding), which held that when a negotiating impasse has been reached and the parties are required to invoke an appraisal provision, this may occur after the suit has been filed, provided that the parties continue to negotiate after filing (see § 343.07[1]).

Property and Real Estate Litigation

Implied Roadway Easement. *Staley Family P'ship v. Stiles*, 59 Tex. Sup. J. 322 (Tex. 2016) held that merely demonstrating that a property was landlocked at the time of severance is insufficient to obtain an implied roadway easement; instead, the claimant must also show that the easement is necessary to access a public roadway (see § 281.03[4]).

Right of Access. *Union Pac. R.R. Co. v. Seber*, 477 S.W.3d 424 (Tex. App.—Houston [14th Dist.] 2015, no pet.) held that a claim of a right of access to a railroad's right of way was one for a roadway, so the claimant was limited to seeking an easement by necessity, not from prior use (see § 281.03[3], [4]).

Project Influence Rule. *Caffe Ribs, Inc. v. State*, 59 Tex. Sup. J. 499 (Tex. 2016) held that: (1) the "project influence rule" bars consideration of the effect of any change in market value that results from the government manifesting a definite purpose to take property as part of a governmental

project; and (2) when the rule applies, it should be enforced not by evidentiary exclusion, but instead by permitting all admissible evidence of market value, with appropriate instructions to the jury to eliminate the distorting effect of the project (see §§ 261.31, 261.32[4][b]).

Inverse Condemnation. *Sloan Creek II, L.L.C. v. N. Tex. Tollway Auth.*, 472 S.W.3d 906 (Tex. App.—Dallas 2015, pet. filed) held that: (1) because governmental knowledge is required to support an inverse condemnation claim, merely demonstrating that the government’s conduct was the cause in fact of the property damage is insufficient; and (2) when there is no flooding that exceeds the capacity of a watercourse, the owner is not entitled to compensation for a governmental entity’s use of that watercourse to transport water across the property for a public purpose (see § 261.21[2]).

Statute of Limitations for Tax Sale. Ch. 260, *Real Property Tax Suits*, has been revised to include *Am. Homeowner Pres. Fund, LP v. Pirkle*, 475 S.W.3d 507 (Tex. App.—Fort Worth 2015, pet. filed), which held that the assignee of a security interest in foreclosed property cannot challenge a tax sale unless suit is filed within one year after the tax deed was recorded (see § 260.03[7]).

Petition for Eviction. *Norvelle v. PNC Mortg.*, 472 S.W.3d 444 (Tex. App.—Fort Worth 2015, no pet.) held that: (1) although the justice court rules require that a petition for eviction must be “sworn to by the plaintiff” [Tex. R. Civ. P. 510.3(a)], an attorney or other authorized agent may fulfill the requirement, and it is not neces-

sary for the plaintiff-landlord to personally swear to the petition; and (2) the failure to comply is merely a pleading defect, and does not affect either a justice court’s or a county court’s jurisdiction over an eviction action (see §§ 282.41[4], 282.121[1]).

Obligation to Pay Rent During Appeal. *In re Lippian*, 477 S.W.3d 880 (Tex. App.—Houston [14th Dist.] 2015, orig. proceeding) held that when a tenant originally appeals by filing a pauper’s affidavit, but then also subsequently files an appeal bond, the original method of perfecting the appeal stands, and the tenant remains subject to the requirement to pay rent during the appeal (see § 282.41[6]).

Oil and Gas Leases

Costs. *Chesapeake Exploration, L.L.C. v. Hyder*, 59 Tex. Sup. Ct. J. 290 (Tex. 2016) held that the parties to an oil and gas lease may agree that a royalty interest is free of all costs, including those for post-production (see § 283.03[8][a]).

Responsibilities after Repudiation of Lease. *Rippy Interests, LLC v. Nash*, 475 S.W.3d 353 (Tex. App.—Waco 2014, pet. denied) held that the lessor’s repudiation by unqualified notice that the lease has been forfeited or terminated excuses any requirement that the lessee produce minerals or conduct operations to continue the lease (see § 283.03[7]).

Family Law

Name Change. Ch. 380, *Paternity*, now contains a discussion of the “good cause” and “best interest” requirements for changing a child’s surname in a suit to adjudicate parentage (see Ch. 380, *Paternity*, § 380.05A).

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Publication 719 Release 122

September 2016

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Revision

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|--------------------------|----------------------------|--------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 11-15. | 11-15 thru 11-16.1 |
| <input type="checkbox"/> | 12-41 thru 12-47 | 12-41 thru 12-47 |

VOLUME 2

Revision

- | | | |
|--------------------------|-----------------------------------|--------------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 20-31 thru 20-32.1 | 20-31 thru 20-32.1 |
| <input type="checkbox"/> | 20-41 thru 20-44.3 | 20-41 thru 20-44.3 |
| <input type="checkbox"/> | 20-46.15 thru 20-50.2(1). | 20-47 thru 20-50.2(2)(e) |

VOLUME 5

Revision

- | | | |
|--------------------------|---------------------------|-----------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 71-1 thru 71-47 | 71-1 thru 71-47 |
| <input type="checkbox"/> | 80-1 thru 80-53 | 80-1 thru 80-39 |

VOLUME 7

Revision

- | | | |
|--------------------------|--------------------------------|----------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 102-2.1 | 102-2.1 |
| <input type="checkbox"/> | 102-15 thru 102-24.5 | 102-15 thru 102-24.7 |
| <input type="checkbox"/> | 102-51 thru 102-52.3 | 102-51 thru 102-52.3 |
| <input type="checkbox"/> | 102-125 thru 102-143 | 102-125 thru 102-139 |

VOLUME 10

Revision

- | | | |
|--------------------------|--------------------------------|----------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 152-40.7 thru 152-43 | 152-41 thru 152-44.1 |

VOLUME 17

Revision

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	254-15	254-15 thru 254-16.1
<input type="checkbox"/>	260-7 thru 260-9	260-7 thru 260-10.1
<input type="checkbox"/>	260-19 thru 260-20.1	260-19 thru 260-20.1
<input type="checkbox"/>	260-76.1 thru 260-80.1	260-77 thru 260-80.1
<input type="checkbox"/>	261-55 thru 261-58.1	261-55 thru 261-58.1
<input type="checkbox"/>	261-71 thru 261-77	261-71 thru 261-78.1
<input type="checkbox"/>	261-95 thru 261-100.1	261-95 thru 261-100.1
<input type="checkbox"/>	261-141 thru 261-143	261-141 thru 261-143
<input type="checkbox"/>	261-155	261-155 thru 261-156.1

VOLUME 18

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	270-17 thru 270-26.3	270-17 thru 270-26.3
<input type="checkbox"/>	281-21 thru 281-28.1	281-21 thru 281-28.3
<input type="checkbox"/>	282-13 thru 282-15	282-13 thru 282-16.1
<input type="checkbox"/>	282-93	282-93 thru 282-94.1
<input type="checkbox"/>	282-103 thru 282-105	282-103 thru 282-106.1
<input type="checkbox"/>	282-134.1 thru 282-135	282-135 thru 282-136.1
<input type="checkbox"/>	283-9 thru 283-11	283-9 thru 283-12.1
<input type="checkbox"/>	283-40.1 thru 283-40.6(1)	283-40.1 thru 283-40.6(3)

VOLUME 19

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	290-49 thru 290-50.3	290-49 thru 290-50.3
<input type="checkbox"/>	290-79 thru 290-83	290-79 thru 290-84.1
<input type="checkbox"/>	291-66.1 thru 291-66.9	291-66.1 thru 291-66.13
<input type="checkbox"/>	293-18.1 thru 293-20.9	293-19 thru 293-20.11
<input type="checkbox"/>	293-35	293-35 thru 293-36.1
<input type="checkbox"/>	293-43	293-43 thru 293-44.1
<input type="checkbox"/>	293-55	293-55 thru 293-56.1
<input type="checkbox"/>	293-87 thru 293-90.3	293-87 thru 293-90.3
<input type="checkbox"/>	293-126.1 thru 293-126.5	293-126.1 thru 293-126.7
<input type="checkbox"/>	293-136.8(11) thru 293-136.10(1).	293-136.9 thru 293-136.10(9)
<input type="checkbox"/>	293-142.1 thru 293-165	293-143 thru 293-163
<input type="checkbox"/>	310-9 thru 310-10.3	310-9 thru 310-10.3
<input type="checkbox"/>	311-26.1 thru 311-43	311-27 thru 311-43

VOLUME 20

Check As Done	<i>Remove Old Pages Numbered</i>	<i>Insert New Pages Numbered</i>
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<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	320-72.1 thru 320-72.5	320-72.1 thru 320-72.6(3)
<input type="checkbox"/>	321-15	321-15 thru 321-16.1
<input type="checkbox"/>	321-30.2(1) thru 321-30.6(1)	321-30.3 thru 321-30.6(5)
<input type="checkbox"/>	321-33 thru 321-38.1	321-33 thru 321-38.2(1)
<input type="checkbox"/>	321-89 thru 321-90.1	321-89 thru 321-90.1
<input type="checkbox"/>	321-106.1 thru 321-106.5	321-106.1 thru 321-106.5
<input type="checkbox"/>	322-32.1 thru 322-34.4(1)	322-33 thru 322-34.4(1)
<input type="checkbox"/>	322-54.16(1) thru 322-54.19	322-54.17 thru 322-54.20(1)
<input type="checkbox"/>	332-24.3 thru 332-41	332-25 thru 332-43
<input type="checkbox"/>	333-5.	333-5
<input type="checkbox"/>	333-33 thru 333-38.1	333-33 thru 333-38.1
<input type="checkbox"/>	333-49 thru 333-52.1	333-49 thru 333-52.1
<input type="checkbox"/>	333-61	333-61 thru 333-62.1
<input type="checkbox"/>	333-88.3 thru 333-88.15	333-88.3 thru 333-88.17
<input type="checkbox"/>	334-3.	334-3
<input type="checkbox"/>	334-16.3 thru 334-29	334-17 thru 334-35
<input type="checkbox"/>	335-53 thru 335-79	335-53 thru 335-73
<input type="checkbox"/>	337-13 thru 337-14.1	337-13 thru 337-14.1

VOLUME 21

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	340-88.5 thru 340-88.6(1)	340-88.5 thru 340-88.6(1)
<input type="checkbox"/>	341-20.1	341-20.1
<input type="checkbox"/>	341-46.1 thru 341-47	341-47 thru 341-48.3
<input type="checkbox"/>	343-24.1 thru 343-24.3	343-24.1 thru 343-24.3
<input type="checkbox"/>	350-29 thru 350-38.1	350-29 thru 350-38.1
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<input type="checkbox"/>	351-58.3 thru 351-58.5	351-58.3 thru 351-58.7
<input type="checkbox"/>	351-79	351-79 thru 351-80.1

VOLUME 22

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	362-81 thru 362-85	362-81 thru 362-86.1
<input type="checkbox"/>	371A-51	371A-51 thru 371A-52.1

VOLUME 23

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Revision

- | | | |
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| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | 373-7 thru 373-13. | 373-7 thru 373-13 |
| <input type="checkbox"/> | 373-55 thru 373-57 | 373-55 thru 373-58.3 |
| <input type="checkbox"/> | 380-3 thru 380-6.1 | 380-3 thru 380-6.1 |
| <input type="checkbox"/> | 380-36.5 thru 380-39 | 380-37 thru 380-40.3 |
| <input type="checkbox"/> | 380-67 thru 380-75 | 380-67 thru 380-75 |

VOLUME 25

Revision

- | | | |
|--------------------------|----------------------------|------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | TS-1 thru TS-431 | TS-1 thru TS-445 |

VOLUME 26

Revision

- | | | |
|--------------------------|---------------------------|-----------------|
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