

PUBLICATION UPDATE

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Dorsaneo, Texas Litigation Guide

Publication 719 Release 125

June 2017

HIGHLIGHTS

- **Agency Interpretation of Statute.** In *Southwest Royalties, Inc. v. Hegar*, 500 S.W.3d 400, 405 (Tex. 2016), the Texas Supreme Court held that courts may take an agency’s construction of a statute into consideration when interpreting statutes, but deferring to an agency’s construction is appropriate only when the statutory language is ambiguous. See Ch. 4, *Statutory Construction*, § 4.04[2][c].
- **Objective Determination of Scope of Employment.** This update includes a discussion of *Laverie v. Wetherbe*, ___ S.W.3d ___, 2016 Tex. LEXIS 1091, *9 (Tex. 2016) in which the Texas Supreme Court held that an employee’s subjective intent is not a component of a scope-of-employment analysis. See Ch. 12, *Pleading the Parties*, § 12.03[6].
- **Sanctions for Improper Pleading.** Included in this update is a discussion of *Akinwamide v. Transp. Ins. Co.*, 499 S.W.3d 511, 528–529 (Tex. App.—Houston [1st Dist.] 2016, pet. denied), which addresses many sanctions issues, including the court of appeals’ holding that a pro se party may be sanctioned pursuant to Civil Practice and Remedies Code Chapter 10. See Ch. 14, *Sanctions for Improper Pleading*, § 14.03[2].
- **Determining “Prevailing Party.”** In *Palavan v. McCulley*, 498 S.W.3d 134, 143 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.), the court of appeals held that obtaining specific performance of a contract can make the party a prevailing party for purposes of recovering attorney’s fees. See Ch. 22, *Attorney’s Fees*, § 22.20[1][a].
- **Evidence Needed For Lodestar Analysis.** This update discusses *Universal MRI & Diagnostics, Inc. v. Medical Lien Mgmt.*, 497 S.W.3d 653, 664–665 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.), in which the court of appeals held that an attorney’s affidavit that failed to identify the time spent on specific tasks and who performed the tasks was deemed inadequate under a lodestar calculation. See Ch. 22, *Attorney’s Fees*, § 22.41.
- **Service of Citation in Tax Delin-**

quency Suits. In *Mandel v. Lewisville Indep. Sch. Dist.*, 499 S.W.3d 65, 75 (Tex. App.—Fort Worth 2016, pet. filed), the court of appeals held that T.R.C.P. 117a prevailed over any conflict provision in T.R.C.P. 21a regarding service of amended and intervention pleadings. See Ch. 31, *Service on Residents*, § 31.101[1][a].

- **Purposeful Availment.** Included in this update is *ERC Midstream LLC v. Am. Midstream Partners, LP*, 497 S.W.3d 99, 111 (Tex. App.—Houston [14th Dist.] 2016, no pet. h.), in which the court of appeals held that a single meeting in Texas may establish that the defendant purposely availed itself of the privilege of conducting business in Texas when the defendant voluntarily came to Texas, purposefully met with a party in an attempt to acquire business, and made representations that form a substantial portion of the operative facts of the litigation. See Ch. 32, *Personal Jurisdiction and Service on Nonresidents*, § 32.04[2][b][i].
- **Forum non Conveniens.** *Pablo Rion y Asociados, S.A. de C.V. v. Dauajare*, 495 S.W.3d 494, 498 (Tex. App.—Houston [14th Dist.] 2016, no pet.), discussing the use of return-jurisdiction provisions in forum non conveniens dismissals, has been added to Ch. 61, *Venue* (see § 61.30[1]).
- **Discovery—Privileges.** In *In re Andrew Silver*, 500 S.W.3d 644, 646–647 (Tex. App.—Dallas 2016, orig. proceeding), the Dallas Court of appeals discussed the patent-agent privilege adopted by the Federal Circuit, which would protect communications between a non-lawyer patent agent and client made in the course of a patent application, but concluded it had no authority to adopt a patent-agent privilege for Texas (see Ch. 90, *Discovery: Scope and Limitations*, § 90.06[2][c], [3][a]).
- **Discovery—Physical or Mental Examination.** Ch. 93, *Requests*

for Production; Subpoenas, has been updated with discussion of *In re Advanced Powder Solutions, Inc.*, 496 S.W.3d 838, 852 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) and *In re Offshore Marine Contrs., Inc.*, 496 S.W.3d 796, 803 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding), two cases applying the requirement that a party seeking a physical or mental examination of an opponent demonstrate that the same information cannot be obtained by less intrusive means (see § 93.40).

- **Spoliation of Evidence.** *In re Advanced Powder Solutions, Inc.*, 496 S.W.3d 838, 853, 858 (Tex. App.—Houston [1st Dist.] 2016, orig. proceeding) discusses the limitations on the use of a spoliation instruction, or on other sanctions such as striking pleadings based on the same conduct, when the sanctions amount to “death penalty” sanctions (see Ch. 98, *Discovery Sanctions*, §§ 98.04[6], 98.05[3][b][i]).
- **Acceptance-of-Benefits Doctrine.** In *Kramer v. Kastleman*, ___ S.W.3d ___, 60 Tex. Sup. Ct. J. 272, 2017 Tex. LEXIS 110, at *28–30 (Tex. Jan. 27, 2017), the Texas Supreme Court discussed the acceptance-of-benefits doctrine, which prevents litigants from accepting the benefits of a judgment while simultaneously challenging its validity; the Court clarified that this doctrine is equitable in nature and applies only when the benefits are accepted voluntarily and the opposing party is thereby prejudiced (see Ch. 150, *Appellate Proceedings in Court of Appeals*, § 150.01[2][b]).

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

Business and Commercial Litigation

Effect of Copyright Act on Trade Secret Misappropriation Claim. The Fifth Circuit has held in *Globeranger Corp. v. Software AG United States of America, Inc.*, 836 F.3d 477, 484-488 (5th Cir. [Tex.] 2016), that a plaintiff's trade secret misappropriation claim required establishing an additional element than what was required to establish a copyright violation—that the protected information was taken by improper means or breach of a confidential relationship. As a result, the plaintiff's Texas trade secret misappropriation claim was not preempted by the Copyright Act. See Ch. 200B, *Trade Secrets*, § 200B.02[2][b][iii].

Civil Litigation

Associate Judge's Report. A SAPCR modification order signed by associate judge was not final, appealable order because it was never signed by referring court. See Ch. 360A, *Temporary Orders*, § 361A.10[9].

Employment Litigation

Preclusive Effect of Settlement of FLSA claims. In *Richardson v. Wells Fargo Bank, N.A.*, 839 F.3d 442, 449-454 (5th Cir. [Tex.] 2016), the Fifth Circuit held that a court-approved settlement of FLSA claims may preclude employees from filing a subsequent action against the employer on these claims, as long as the settlement satisfied due process requirements. It rejected the employees' contention that FLSA claims released as part of an opt out class action settlement can never be given preclusive effect against absent class members (unless they opt in) because they are not parties, or in privity with a party, with respect to the release of FLSA claims. See Ch. 203, *Employer-Employee Relations*, § 203.22[1][g][iv].

Employer's Waiver of Right to Com-

pel Arbitration. In *El Paso Healthcare System, Ltd. v. Green*, 485 S.W.3d 227, 230, 232-234 (Tex. App.—El Paso 2016, no pet. h.), the El Paso court of appeal held that an employer substantially invoked and judicial process and thereby waived its right to arbitrate by answering an employee's suit for wrongful termination, filing special exceptions, agreeing to joint trial preparation arrangements and an eve-of-trial continuance for the purpose of facilitating a pretrial settlement, and conducting 19 months of merits discovery before moving to arbitrate one hour after receiving from the employee a second motion to compel withheld discovery and with three months to go until trial. See Ch. 203, *Employer-Employee Relations*, § 203.48[11][b].

Transfer as Adverse Employment Action Under Title VII. In *Outley v. Luke & Assocs*, 840 F.3d 212, 217 (5th Cir. [Tex.] 2016), the Fifth Circuit followed the general rule that a purely lateral transfer is not an adverse employment action under Title VII. It held that merely changing the employee's working hours or imposing a higher workload in the new position does not make the transfer an adverse employment action, and the fact that the employee is required to attend training sessions does not make the transfer a demotion. However, the denial of a merit adjustment raise following the transfer may constitute an adverse employment action. See Ch. 203A, *Employment Litigation*, § 203A.17[3][d].

Sovereign Immunity Under ADEA. The Fifth Circuit held in *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. [Tex.] 2016), that a court properly dismisses an employee's claim under the Age Discrimination in Employment Act (ADEA) against the University of Texas because it is a state university, and neither Congress nor Texas has waived Texas's

sovereign immunity from ADEA claims. See Ch. 203A, *Employment Litigation*, § 203A.35[3][b].

No Prima Facie Case of Sex Discrimination Under TCHRA. In *Texas Dept. of Aging & Disability Services v. Loya*, 491 S.W.3d 920, 925–926 (Tex. App.—El Paso 2016, no pet. h.), the El Paso court of appeal held that an employee, who was an administrative assistant, could not prove a prima facie case of sex discrimination because she was replaced by another female employee, there were no male comparators as the only other administrative assistants were females and thus she could neither allege nor produce any evidence that she was treated less favorably than similarly situated male employees, and there was no other evidence that she was terminated because of her gender. See Ch. 203A, *Employment Litigation*, § 203A.55[1].

Family Law

Informal Marriage. It is an open question whether a third party can ever prove that two cohabitants are informally married if they both swear that they do not have an agreement to be married. See Ch. 362, *Divorce*, § 362.01[2][b][i].

Property Division. A party seeking reimbursement for capital improvements must show (1) the fair market value of the property in its improved condition on the date of dissolution and (2) the fair market value that the property would have had on the date of dissolution had the improvements not been made. See Ch. 363, *Division of Property*, § 363.55[4].

Standing. Agreeing with several other courts of appeals, the Houston Fourteenth Court of Appeals has held that to establish standing based on six months of “actual care, custody, and control” of a child, a party must show that he or she had actual, rather than legal, control. See Ch. 370,

SAPCR Procedures, § 370.02[1][d][iii].

Termination of Parental Rights. The fact that a parent signs an affidavit of relinquishment as part of a plea agreement does not constitute evidence that the parent signed the affidavit under duress. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.102[1][d].

UCCJEA. Under the UCCJEA, temporary emergency jurisdiction is reserved for extraordinary circumstances. See Ch. 374, *Interstate SAPCR Issues*, § 374.03[1][f].

Insurance Litigation

Employee Injury. *Durham v. Children’s Med. Ctr. of Dallas*, 488 S.W.3d 485 (Tex. App.—Dallas 2016, pet. filed) held that: (1) the statute tolling limitations on minors’ claims until their 14th birthday, Tex. Civ. Prac. & Rem. Code § 74.251(a), applies only when the minor was under the age of 12, so when patient was exactly that age at time of treatment, the statute was inapplicable and the claim was time-barred unless some other tolling rule applied; and (2) statutory claims for wrongful death and survival were not protected by the Open Courts provision, so they were barred because the patient was a 12-year old minor at the time of treatment, and died more than two years after the last treatment. See Ch. 321, *Medical Malpractice* § 321.12[1].

Personal Injury

Statute of Limitations. *Pinkus v. Hartford Cas. Ins. Co.*, 487 S.W.3d 616 (Tex. App.—Dallas 2015, pet. denied) held that when an employee is injured during travel, but cannot establish that the trip met the “origination” and “furtherance” elements, the trip was outside the course and scope of employment and no analysis of the “coming and going” rule, the “dual purpose” rule or their exceptions is required. See Ch. 340, *Workers’ Compensation* § 340.04[3][b].

Claims against Governmental Entities. *Univ. of Tex. M.D. Anderson Cancer Ctr. v. Jones*, 485 S.W.3d 145 (Tex. App.—Houston [14th Dist.] 2016, pet. filed) held that because pharmaceutical drugs are tangible personal property, a government health care provider that prescribes and dispenses a drug to a patient has engaged in a “use” of the property, even if the drug is taken personally by the patient and is not administered by any government medical professional. See Ch. 293, *Claims Against Governmental Entities* § 293.10[5][c].

Defamation. *Levatino v. Apple Tree Café Touring, Inc.*, 486 S.W.3d 724 (Tex. App.—Dallas 2016, pet. denied) held that although communications in or relating to judicial proceedings are within the right to petition under the Texas Citizens Participation Act (TCPA), Tex. Civ. Prac. & Rem. Code § 27.001(4)(A)(i), the judicial action must be one pending at the time of the communication at issue, and statements relating to a mere potential or contemplated action are not covered. See Ch. 333, *Defamation* § 333.42[1].

TCPA Motion. *Inwood Forest Cmty. Improvement Ass’n v. Arce*, 485 S.W.3d 65 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) held that when a presiding judge expresses an intent to grant a TCPA motion at the conclusion of hearing, but no such order is ever entered, the motion is denied by operation of law 30 days after the hearing, and a subsequent order of the judge purporting to grant the motion has no effect. See Ch. 333, *Defamation* § 333.42[2][d].

Products Liability. Ch. 320, *Products Liability*, has been revised to address recent cases from the Texas courts of appeals, including *Lopez v. Huron*, 490 S.W.3d 517 (Tex. App.—San Antonio 2016, no pet.), which held that the statutory definition of

“products liability action” in Civil Practices and Remedies Code Chapter 82 incorporates the economic loss doctrine for distinguishing tort and contract claims, so that when the only claimed loss is damage to the product itself, the claim sounds in contract only and does not constitute a “products liability action” or implicate statutory indemnity. See § 291.05[2][c]; § 320.10[2][a].

Probate Litigation

Adoption by Estoppel. In *Dampier v. Yearnd*, 493 S.W.3d 118, 123-125 (Tex. App.—Houston [1st Dist.] 2016, no pet. h.), the First District court of appeal declined to extend the doctrine of adoption by estoppel to the adoption of one adult by another. It followed the general rule limiting the doctrine to the adoption of a child. See Ch. 391, *Descent and Distribution*, § 391.02[2][b].

Attestation of Will. The witnesses’ knowledge of the contents of the will is unnecessary to establish the narrow issue of proper attestation and, by extension, proper execution. As a result, the El Paso Court of Appeals in *Estate of Kam*, 484 S.W.3d 642, 650–651 (Tex. App.—El Paso 2016, no pet. h.), rejected a contestant’s assertion that even if the court were to accept the testimony of the subscribing witnesses, the proponent of the will could not establish that the will was properly attested as a matter of law because none of the witnesses could describe the will’s contents. See Ch. 392, *Admitting Wills to Probate*, § 392.18[3][d][i].

Real Property

Option Contract. Ch. 280, *Adjoining Landowners* and Ch. 252, *Real Estate Sales Contracts* have been revised to include *N. Shore Energy v. Harkins*, 60 Tex. Sup. Ct. J. 48, 2016 Tex. LEXIS 964 (Tex. 2016) (per curiam), which held that when an

option contract permitted an oil and gas producer to execute a mineral lease over certain acreage, but the producer never that exercised option, it had no interest in the land and could not maintain a trespass claim against a rival producer. See § 280.02[1]; § 252.01[2].

Deed. *Savering v. City of Mansfield*, 491

S.W.3d 433 (Tex. App.—Fort Worth 2016, no pet.) held that a deed is void if the grantee is a nonexistent entity, even if the parties are both aware that the entity does not exist and contemplate its future creation. See Ch. 254, *Deeds and Conveyances* § 254.03[3].

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<input type="checkbox"/>	261-65 thru 261-66.1	261-65 thru 261-66.1
<input type="checkbox"/>	261-107 thru 261-110.1	261-107 thru 261-110.1

VOLUME 18

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	270-23	270-23 thru 270-24.1
<input type="checkbox"/>	280-34.1 thru 280-34.3	280-34.1 thru 280-34.3
<input type="checkbox"/>	281-19 thru 281-23	281-19 thru 281-24.1
<input type="checkbox"/>	281-47	281-47 thru 281-48.1
<input type="checkbox"/>	282-88.1 thru 282-94.1	282-89 thru 282-94.1
<input type="checkbox"/>	282-110.1 thru 282-110.5	282-110.1 thru 282-110.5
<input type="checkbox"/>	283-11 thru 283-12.1	283-11 thru 283-12.1
<input type="checkbox"/>	283-31 thru 283-32.1	283-31 thru 283-32.1
<input type="checkbox"/>	283-57 thru 283-59	283-57 thru 283-60.1
<input type="checkbox"/>	285-46.16(1) thru 285-46.21	285-46.17 thru 285-46.25

VOLUME 19

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	290-22.1 thru 290-23	290-23 thru 290-24.1
<input type="checkbox"/>	290-98.1 thru 290-107.	290-99 thru 290-110.1
<input type="checkbox"/>	291-38.1 thru 291-40.1	291-39 thru 291-40.2(5)
<input type="checkbox"/>	291-43 thru 291-45	291-43 thru 291-46.1
<input type="checkbox"/>	291-56.1 thru 291-58.3	291-57 thru 291-58.3
<input type="checkbox"/>	293-43 thru 293-48.1	293-43 thru 293-48.3
<input type="checkbox"/>	293-67	293-67 thru 293-68.1
<input type="checkbox"/>	293-90.1 thru 293-90.3	293-90.1 thru 293-90.3
<input type="checkbox"/>	293-106.11 thru 293-109.	293-107 thru 293-110.1
<input type="checkbox"/>	293-136.9 thru 293-136.10(2)(a)	293-136.9 thru 293-136.10(2)(a)
<input type="checkbox"/>	302-25 thru 302-32.7	302-25 thru 302-32.9
<input type="checkbox"/>	310-7 thru 310-10.3	310-7 thru 310-10.3
<input type="checkbox"/>	310-23 thru 310-28.1	310-23 thru 310-28.1
<input type="checkbox"/>	310-37 thru 310-39	310-37 thru 310-40.1

VOLUME 20

Revision

Check As Done	<i>Remove Old <u>Pages Numbered</u></i>	<i>Insert New <u>Pages Numbered</u></i>
<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	321-13	321-13 thru 321-14.1
<input type="checkbox"/>	321-29 thru 321-30.2(1)	321-29 thru 321-30.2(1)
<input type="checkbox"/>	321-81 thru 321-83	321-81 thru 321-84.1
<input type="checkbox"/>	321-97 thru 321-104.18(9)	321-97 thru 321-104.18(13)
<input type="checkbox"/>	321-110.1 thru 321-112.1	321-111 thru 321-112.3
<input type="checkbox"/>	321-130.1 thru 321-132.1	321-131 thru 321-132.5
<input type="checkbox"/>	322-23 thru 322-32.1	322-23 thru 322-32.1
<input type="checkbox"/>	333-11	333-11 thru 333-12.1
<input type="checkbox"/>	333-49 thru 333-51	333-49 thru 333-52.1
<input type="checkbox"/>	333-88.5 thru 333-88.21	333-88.5 thru 333-88.23

VOLUME 21

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	340-21 thru 340-22.1	340-21 thru 340-22.1
<input type="checkbox"/>	340-88.10(1) thru 340-88.17	340-88.11 thru 340-88.21
<input type="checkbox"/>	341-31 thru 341-34.3	341-31 thru 341-34.3
<input type="checkbox"/>	341-64.1 thru 341-64.3	341-64.1 thru 341-64.3
<input type="checkbox"/>	341-77 thru 341-78.1	341-77 thru 341-78.1
<input type="checkbox"/>	341-129 thru 341-130.1	341-129 thru 341-130.1
<input type="checkbox"/>	343-15	343-15 thru 343-16.1
<input type="checkbox"/>	343-27 thru 343-28.9	343-27 thru 343-28.9
<input type="checkbox"/>	345-17 thru 345-23	345-17 thru 345-24.1
<input type="checkbox"/>	345-57	345-57 thru 345-58.1

VOLUME 23

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	381-49 thru 381-64.1	381-49 thru 381-64.3
<input type="checkbox"/>	381-77 thru 381-81	381-77 thru 381-82.1

VOLUME 24

Revision

<input type="checkbox"/>	Title page.	Title page
<input type="checkbox"/>	391-1.	391-1 thru 391-2.1
<input type="checkbox"/>	391-11 thru 391-13	391-11 thru 391-14.1
<input type="checkbox"/>	392-47 thru 392-53	392-47 thru 392-54.1
<input type="checkbox"/>	392-103 thru 392-107	392-103 thru 392-108.1

VOLUME 26

Check As Done	<i><u>Remove Old Pages Numbered</u></i>	<i><u>Insert New Pages Numbered</u></i>
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|--------------------------|------------------------------|--------------------|
| <input type="checkbox"/> | Title page. | Title page |
| <input type="checkbox"/> | I-15 thru I-17. | I-15 thru I-18.1 |
| <input type="checkbox"/> | I-295 thru I-306.1 | I-295 thru I-306.1 |
| <input type="checkbox"/> | I-405 thru I-421. | I-405 thru I-422.1 |
| <input type="checkbox"/> | I-469 thru I-471. | I-469 thru I-472.1 |
| <input type="checkbox"/> | I-521 | I-521 thru I-522.1 |

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