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Dorsaneo, Texas Litigation Guide

Publication 719 Release 132 March 2019

HIGHLIGHTS

Summary Judgment

- The Texas Supreme Court held that a court's ruling on a summary judgment motion itself does not necessarily imply any particular ruling on objections to summary judgment evidence; this decision resolved a split of authority and overruled several cases, under Appellate Rule 33.1(a)(2)(A). See Ch. 101, *Summary Judgment*.

Enforcement of Judgments

- The Texas Supreme Court discussed the finality of turnover orders for purposes of appeal, concluding that a turnover order is usually considered final when it functions as a mandatory injunction. See Ch. 132, *Enforcement of Judgments*.

Insurance

- If the insured demands mediation of the valuation issue after the suit was filed rather than appraisal, the dispute is ongoing and the parties are not at an impasse [In re Allstate Vehicle & Prop. Ins. Co., 542 S.W.3d 815, 820 (Tex. App.—Beaumont 2018, orig. proceeding)]. If the insured has filed suit, the insurer can invoke the right to appraisal by motion, and it need not present the issue by counterclaim or in a responsive pleading [In re Allstate Vehicle & Prop. Ins. Co., 542 S.W.3d 815, 821 (Tex. App.—Beaumont 2018, orig. proceeding)]. See Ch. 343, *Property Insurance*.

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

Pretrial, Trial, and Appellate Practice

Statutory Construction. In *Tex. Workforce Comm'n v. Wichita Cty.*, 548 S.W.3d 489, 492 (Tex. 2018), the Texas Supreme Court reviewed the principles of statutory construction in the context of the Texas Unemployment Compensation Act. See Ch. 4, *Statutory Construction*, § 4.03.

Court, Not Arbitrator, Decides Class Arbitration Availability Issue. This release includes *Robinson v. Home Owners Mgmt. Enters.*, 549 S.W.3d 226, 240 (Tex. App.—Fort Worth 2018, pet. filed), in which the court of appeals held that when a bilateral arbitration agreement said nothing about delegating the question of class-arbitration availability to an arbitrator, the court retained its presumed role as the adjudicator of this gateway issue. See Ch. 44, *Arbitration*, § 44.02[2].

Declaratory Relief Claim Not Legal Action for Texas Citizens Participation Act. In *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 302–303 (Tex. App.—Austin 2018, pet. filed), the court of appeals held that with respect to a challenge under the Texas Citizens Participation Act, a claim for declaratory relief is not a "legal action," but is instead a remedy. See Ch. 45, *Declaratory Relief*, § 45.01.

Government Immunity Not Waived in Declaratory Relief Action. In *Schmitz v. Denton Cty. Cowboy Church*, 550 S.W.3d 342, 354 (Tex. App.—Fort Worth 2018, pet. denied), the court of appeals held that government immunity was not waived when the plaintiff sought a declaration challenging the government entity's actions that were allegedly contrary to its ordinances. See Ch. 45, *Declaratory Relief*, § 45.05[3].

Forum Non Conveniens. In *In re Mahindra, USA Inc.*, 549 S.W.3d 541, 544–548 (Tex. 2018), the Texas Supreme Court discussed the Texas forum non conveniens statute and its exception from dismissal for Texas residents, concluding that a party was a "plaintiff" and entitled to rely on the exception with respect to the party's individual claims but not with respect to claims brought as representative of a nonresident decedent. See Ch. 61, *Venue*, § 61.30.

Interpleader. In *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 850 (Tex. 2018), the Texas Supreme Court applied the Texas interpleader rule, concluding that the stakeholder was not a disinterested party and therefore was not entitled to attorney's fees. See Ch. 81, *Interpleader*, §§ 81.01, 81.07[1].

Electronic Discovery. In *In re Shipman*, 540 S.W.3d 562, 566–567 (Tex. 2018), the Texas Supreme Court discussed the procedures for electronic discovery set out in *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 317 (Tex. 2009), concluding as in *Weekley* that requiring a party to produce his computer for inspection was unduly intrusive. See Ch. 99, *Electronic Discovery*, § 99.20[2].

Summary Judgment—Preservation of Error. In *Seim v. Allstate Tex. Lloyds*, 551 S.W.3d 161, 164–166 (Tex. 2018), The Texas Supreme Court held that a court's ruling on a summary judgment motion itself does not necessarily imply any particular ruling on objections to summary judgment evidence; this decision resolved a split of authority and overruled *Frazier v. Yu*, 987 S.W.2d 607 (Tex. App.—Fort Worth 1999, pet. denied), and other cases construing Appellate Rule 33.1(a)(2)(A) to mean a trial court implicitly rules on objections in summary-judgment proceedings by ruling on the merits of the summary-judgment motion. See Ch. 101, *Summary*

Judgment, § 101.10[2][a]; Ch. 145, *Overview of the Appellate Process*, § 145.03[2][a].

Presentation of Proof. In *Gunn v. McCoy*, 554 S.W.3d 645, 672 (Tex. 2018), the Texas Supreme Court addressed the use of affidavits under Tex. Civ. Prac. & Rem. Code § 18.001 as evidence of the reasonableness and necessity of past medical expenses, ruling that this section does not require that affidavits be made by a records custodian for a medical provider; affidavits from subrogation agents for the health insurance carriers were legally sufficient evidence of the reasonableness and necessity of the medical fees. See Ch. 120A, *Presentation of Proof,* § 120A.111.

Enforcement of Judgments. In *Alexander Dubose Jefferson & Townsend LLP v. Chevron Phillips Chem. Co., L.P.*, 540 S.W.3d 577, 583 (Tex. 2018), the Texas Supreme Court discussed the finality of turnover orders for purposes of appeal, concluding that a turnover order is usually considered final when it functions as a mandatory injunction; the Court also discussed the applicability of turnover orders to third parties, admitting that its conflicting opinions have caused confusion in this area, but finding it unnecessary to resolve the question in the present case. See Ch. 132, *Enforcement of Judgments*, § 132.05[3][b], [9][b].

Petition for Review. In *Fort Worth Transp. Auth. v. Rodriguez*, 547 S.W.3d 830, 849 (Tex. 2018), the Texas Supreme Court indicated that, while issues not presented in the petition for review are waived, the Court will liberally construe issues presented to avoid waiver and obtain just, fair, and equitable adjudication of the rights of the litigants. See Ch. 151, *Appellate Proceedings in Supreme Court*, § 151.04[1][e].

Business and Commerce

Breach of Contract. The Texas Supreme Court has held that the immunity inquiry focuses on a municipality's conduct at the time it entered the contract at issue, not when it allegedly breached, to determine whether immunity applies to a breach-of-contract claim against a municipality. *See* Ch. 210A, *Action for Breach of Contract Against Local Government Entity*, § 210A[4][a][iv].

Texas Debt Collection Practices Act. The court of appeals in *Green v. Port of Call Homeowners Association* held that homeowners' association assessment fees do not "arise from a transaction" to constitute a "consumer debt." *See* Ch. 242, *Unfair Collection Practices*, § 242.03[2][b].

Texas Deceptive Trade Practices Act. In *Park v. Suk Baldwin Properties, LLC*, the court of appeals held a counterclaim for attorney's fees pursuant to section 17.50(c) of the DTPA is based on or in response to an underlying DTPA claim and, therefore, falls within the reach of the Texas Citizens Participation Act. *See* Ch. 220, *DTPA Defenses*, § 220.06[2][d][i].

Family Law

Enforcement of Agreed Spousal Support. The Texas Supreme Court has held that an agreed order to pay alimony could not be enforced by wage withholding because the agreement provided for spousal support and not spousal maintenance under Family Code Chapter 8 [Dalton v. Dalton, 551 S.W.3d 126, 133–135 (Tex. 2018)]. See Ch. 362, *Divorce*, § 362.21[8][c].

Modification of Agreed Spousal Support. The provisions in Family Code Chapter 8 pertaining to modification of spousal maintenance do not apply to agreed spousal maintenance when the amount or duration of agreed maintenance exceeds that allowed by Chapter 8 [Waldrop v. Waldrop,

552 S.W.3d 396, 402–406 (Tex. App.—Fort Worth 2018, no pet. h.)]. See Ch. 362, *Divorce*, § 362.30[5].

Conservatorship. A parent's immigration status should not be used as a basis for denying joint managing conservatorship absent evidence that the immigration status has a material, adverse effect on that party's ability to parent [Turrubiartes v. Olvera, 539 S.W.3d 524, 529–531 (Tex. App.—Houston [1st Dist.] 2018, pet. denied)]. See Ch. 371, *Conservatorship*, § 371.05[3][b].

Termination of Parental Rights. Deportation, standing alone, does not constitute an endangering course of conduct, but it may be relevant to the issue of endangerment if it exposes the child to instability [In Interest of R.A.G., 545 S.W.3d 645, 651–652 (Tex. App.—El Paso 2017, no pet.)]. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.02[2][b][ii][I].

Minor as Parent. A parent's status as a minor does not preclude termination under Family Code Section 161.001(b)(1)(O) [In Interest of L.A.M., 545 S.W.3d 579, 583–584 (Tex. App.—El Paso 2016, no pet.)]. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.02[2][b][xii].

Personal Injury Litigation

Affidavits. Submitting an uncontroverted Section 18.001 affidavit therefore does not conclusively establish that the claimant is entitled to a jury award of the amount claimed [Bullard v. Lynde, 292 S.W.3d 142, 144–146 (Tex. App.—Dallas 2009, no pet.) or to any jury award at all [Rumzek v. Lucchesi, 543 S.W.3d 327, 340–342 (Tex. App.—El Paso 2017, pet. denied)]. See Ch. 20, *Damages in Tort*, § 20.02[l][a].

Scope of Employment Admission. If both a government unit and one of its employees are named as defendants, and the unit successfully moves for dismissal of the employee under the election of remedies provision of the Tort Claims Act [*see* Tex. Civ. Prac. & Rem. Code § 101.106(e)], that is a binding judicial admission that the employee acted in the scope of employment, so the court should not permit the unit to later contest its liability based on that issue [Ramos v. City of Laredo, 547 S.W.3d 651, 655–656 (Tex. App.—San Antonio 2018, no pet.)]. See Ch. 293, *Claims Against Governmental Entities*, § 293.10[3][c].

Insurance Litigation

Seat Belts. Whether the failure to wear a seat belt caused or contributed to the claimant's injury may be the subject of expert testimony, but it is not required when the issues are within the jury's understanding [Nabors Well Servs. v. Romero, 456 S.W.3d 553, 563 (Tex. 2015) (expert testimony may or may not be necessary); Sanchez v. Balderama, 546 S.W.3d 230, 235–236 (Tex. App.—El Paso 2017, no pet.)]. See Ch. 300, *Operator's Liability*, § 300.03[3].

Amended Report. If initial reports are filed and the defendant objects within the required 21 days [*see* § 321.15[5]], a later stipulation to an extension of time to permit new or amended reports is not a concession that the original reports were sufficient and does not waive the defendant's right to object to the later reports [Humble Surgical Hosp., LLC v. Davis, 542 S.W.3d 12, 19–21 (Tex. App.—Houston [14th Dist.] 2017, pet. filed)]. See Ch. 321, *Medical Malpractice*, § 321.15[6][a].

Negligence Standard. If a mother is initially admitted to an obstetrical unit without prior evaluation or treatment in a hospital ER, and a need for emergency care later arises, the willful and wanton negligence standard of care is inapplicable [Glenn v. Leal, 546 S.W.3d 807, 811–814 (Tex. App.—Houston [1st Dist.] 2018, pet.

filed)]. See Ch. 321, *Medical Malpractice*, § 321.18[1][b].

Statute of Limitions. One court of appeals has held that when the underlying litigation was a criminal prosecution, the *Peeler* and *Hughes* rules act in conjunction with each other, so the *Hughes* rule tolls limitations until the conviction has been set aside, regardless of whether that occurs on direct appeal from the conviction, or in later collateral review proceedings [Skelton v. Gray, 547 S.W.3d 272, 277–279 (Tex. App.—Houston [14th Dist.] 2018, pet. filed)]. See Ch. 322, *Professional Malpractice*, § 322.02[1][f].

Exclusive Remedy. If a general contractor merely secures a contractual commitment from all of its subcontractors that they will provide coverage for their employees, that agreement by itself does not "provide" coverage to the subcontractor's employees, and the general contractor is not entitled to the protections of the exclusive remedy provision [Halferty v. Flextronics Am., LLC, 545 S.W.3d 708, 711–714 (Tex. App.—Corpus Christi 2018, pet. filed)]. See Ch. 340, *Workers' Compensation*, § 340.03[6][d].

Real Estate Litigation

State Official Error. Although the Texas Supreme Court has since clarified that an ultra vires action is not available when the plaintiff alleges only that a state official made an error in judgment as to a matter within the official's authority [Hall v. McRaven, 508 S.W.3d 232, 241–243 (Tex. 2017); *see* Ch. 293, *Claims Against Governmental Entities*], that rule does not apply in the context of a trespass to try title action because whether the state owns property is governed exclusively by the state constitution and statutes, so any alleged error by the state official in claiming ownership is necessarily outside the official's authority [Bush v. Lone Oak Club, LLC, 546 S.W.3d 766, 772–775 (Tex. App.—Houston [1st Dist.] 2018, pet. filed)]. See Ch. 251, *Tresspass to Try Title*, § 251.04[4][b].

Failure to Allege Licensing. Failure to allege licensing is not a jurisdictional defect, so it may be cured by amended pleadings [Zarate v. Rodriguez, 542 S.W.3d 26, 35–37 (Tex. App.—Houston [14th Dist.] 2017, pet. denied)]. See Ch. 253, *Agents and Brokers*, § 253.21[2][a].

Statute of Limitation Waiver. A guarantor may waive the two-year statute of limitations for a deficiency judgment. Such a waiver does not violate public policy by making the deficiency judgment perpetually enforceable because the generally applicable four-year statute of limitations for actions on a debt applies when the more specific two-year period has been waived [Godoy v. Wells Fargo Bank, N.A., 542 S.W.3d 50, 54–55 (Tex. App.—Houston [14th Dist.] 2017, pet. filed)]. See Ch. 255, *Real Property Security Interests*, § 255.03[6][b].

Property Taxes and Boundary Move. Under the Local Government Code, one county may sue another to establish the boundary line between them [Tex. Local Gov't Code § 72.009(a)]. Though any relocation of the boundary under this statute does not permit one county to retroactively recover property taxes that were erroneously imposed by its neighbor, it does resolve which county has the authority to tax the disputed area in the future [*see, e.g.*, In re Occidental Chem. Corp., 62 Tex. Sup. Ct. J. 42, ___ S.W.3d ___, 2018 Tex. LEXIS 1011, at *6–*7 (2018)]. See Ch. 260, *Real Property Tax Suits*, § 260.02[1][a].

Multiple Landlords and Lawsuits. If there are multiple landlords because the

leased premises are owned by two or more co-owners, any one of them may provide the required notices to vacate and file a subsequent eviction suit, because an absentee owner is not an indispensable party to a forcible detainer action brought by a co-owner [Jimenez v. McGeary, 542 S.W.3d 810, 812–813 (Tex. App.—Fort Worth 2018, pet. denied)]. See Ch. 282, *Landlord and Tenant*, § 282.41[2].

Affirmative Defenses. The doctrines of abandonment, waiver, and estoppel are affirmative defenses available when a restriction is sought to be enforced against a particular owner. The owner therefore should not attempt to recharacterize the argument as a counterclaim for a declaratory judgment on one or more of these defenses. If, however, the owner seeks additional relief beyond merely defeating enforcement of the restriction, that relief may be sought by counterclaim [Garden Oaks Maint. Org. v. Chang, 542 S.W.3d 117, 123–124 (Tex. App.—Houston [14th Dist.] 2017, no pet.); Indian Beach Prop. Owners' Ass'n v. Linden, 222 S.W.3d 682, 700 (Tex. App.—Houston [1st Dist.] 2007)]. See Ch. 285, *Restrictions*, § 285.04[2][c].

Estates and Probate

Will Provisions. A provision in a will stating that no real property is to be sold or mortgaged, but rather kept in the family, will likely be construed that the grant created a life estate in the devisees with a remainder interest [Gutierrez v. Stewart Title Co., 550 S.W.3d 304, 318 (Tex. App.—Houston [14th Dist.] 2018, no pet h.); Knopf v. Gray, 545 S.W.3d 542, 545–546 (Tex. 2018) (citing Richardson v. McCloskey, 276 S.W. 680, 685 (Tex. 1925)]. See Ch. 394, *Will Construction*, § 394.05[1][a].

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