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Dorsaneo, Texas Litigation Guide

Publication 719 Release 133 June 2019

HIGHLIGHTS

Arbitration Under FAA

- In *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), the term "contracts of employment" in the FAA refers not only to contracts between employers and employees, but also to contracts with independent contractors. See Ch. 44.

Specific Performance

- The Texas Supreme Court has ruled that a person who purchases property with actual or constructive notice of a right of first refusal may be compelled to convey title to the holder of that right. See Ch. 51.

Parental Rights Termination

- The Texas Supreme Court held that when a parent states in a mediated settlement agreement that termination of parental rights is in the child's best interest, that statement can satisfy the requirement that a court's best interest finding be supported by clear and convincing evidence. See Ch. 381.

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

Depositions Before Suit. In *Glassdoor, Inc. v. Andra Grp.*, L.P., 62 Tex. Sup. Ct. J. 380, ___ S.W.3d ___, 2019 Tex. LEXIS 51, at *8 (Jan. 25, 2019), the Texas Supreme Court addressed a Civil Rule 202 proceeding, dismissing it as moot because the statute of limitation had run on the petitioner's potential claims. See Ch. 10, *Depositions Before Suit*, § 10.02.

Attorney's Fees. In *Palfreyman v. Gaconnet*, 561 S.W.3d 258, 260–262 (Tex. App.—Houston [14th Dist.] 2018, no pet. h.), the Fourteenth Court of Appeals interpreted the statute that allows recovery of attorney's fees in cases involving injury to livestock—it doesn't apply to pet dogs. See Ch. 22, *Attorney's Fees*, § 22.20[2][b].

Under FAA Employer Could Not Compel Arbitration of Dispute. In *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), the term "contracts of employment" in the FAA refers not only to contracts between employers and employees, but also to contracts with independent contractors. See Ch. 44, *Arbitration*, § 44.02[1][c].

Governmental Immunity in Declaratory Relief Action. This release includes *Luttrell v. El Paso Cty.*, 555 S.W.3d 812, 828 (Tex. App.—El Paso 2018, no pet. h.), in which the court of appeal held that declaratory relief is not available to permit a party to bring an action to challenge the actions that a governmental entity took under a statute; instead, the validity of the statute itself must be challenged for governmental immunity to be waived. See Ch. 45, *Declaratory Relief*, § 45.04[1].

Trial Court Should Decline Jurisdiction Over Action Seeking Declaration of Potential Defendant's Non-Liability in Tort Action. In *In re Houston Specialty Ins. Co.*, ___ S.W.3d ___, 2019 Tex. LEXIS 50, **4–8 (Tex. Jan. 25, 2019), the Texas Supreme Court held that it was improper for a potential tort defendant to seek a declaratory judgment of nonliability because the action deprived the plaintiff of the traditional right to choose the time and place of the tort action. See Ch. 45, *Declaratory Relief*, § 45.03.

Specific Performance. In *Carl M. Archer Trust No. Three v. Tregellas*, ___ S.W.3d ___, 2018 Tex. LEXIS 1153, at *8 (Nov. 16, 2018), the Texas Supreme Court ruled that a person who purchases property with actual or constructive notice of a right of first refusal may be compelled to convey title to the holder of that right. See Ch. 51, *Specific Performance*, § 51.04[3][a].

Statutes of Limitation. In *Glassdoor, Inc. v. Andra Grp.*, L.P., 62 Tex. Sup. Ct. J. 380, ___ S.W.3d ___, 2019 Tex. LEXIS 51, at **7–8 (Jan. 25, 2019), the Texas Supreme Court reaffirmed that claims for business disparagement are governed by the two-year statute, unlike defamation claims which have a one-year period. See Ch. 72, *Limitation of Actions*, §§ 72.02[1][a], [d], 72.03[1][b].

Discovery Rule. In *Carl M. Archer Trust No. Three v. Tregellas*, ___ S.W.3d ___, 2018 Tex. LEXIS 1153, at *11 (Nov. 16, 2018), the court ruled that a grantor's conveyance of property in breach of a right of first refusal is "inherently undiscoverable" so that the discovery rule applies in such cases. See Ch. 72, *Limitation of Actions*, § 72.03[3][c].

Discovery. In *In re N. Cypress Med. Ctr. Operating Co.*, 559 S.W.3d 128, 142 (Tex. 2018), the Texas Supreme Court held that in an action challenging the reasonableness of hospital charges to an uninsured patient, information regarding the hospital's reimbursement rates from private insurers and government payers was relevant and subject to discovery. See Ch. 90, *Discovery: Scope and Limitations*, § 90.02[3][a].

Dismissal of Baseless Claims. In *In re Hous. Specialty Ins. Co.*, 62 Tex. Sup. Ct. J. 386, ___ S.W.3d ___, 2019 Tex. LEXIS 50, at **8–9 (Jan. 25, 2019), the Texas Supreme Court granted mandamus to review the denial of a Rule 91a motion to dismiss a declaratory judgment action, indicating that mandamus will generally be available to review such denials. See Ch. 103, *Dismissal*, § 122.04[3].

Evidence. In JBS Carriers, Inc. v. Washington, 62 Tex. Sup. Ct. J. 270, 564 S.W.3d 830, 2018 Tex. LEXIS 1313, at *11 (2018), the Texas Supreme Court provided guidance on determining whether otherwise relevant evidence may be excluded because of the danger of "unfair prejudice." See Ch.

120A, *Presentation of Proof*, § 120A.13[1].

Jury Charge. In *Benge v. Williams*, 548 S.W.3d 466, 474–476 (Tex. 2018), the Texas Supreme Court concluded that when a broadform question allows a finding of liability based on evidence that cannot support recovery, a presumption-of-harm rule must be applied as in *Crown Life Ins. Co. v. Casteel*. See Ch. 122, *Jury Charge*, § 122.04[4][c].

Business and Commerce

Fraud in Inducement of Contract. Sophisticated parties represented by counsel in an arms-length business transaction may waive by a limitations-of-liability clause recovery of punitive damages for fraudulent conduct, the Texas Supreme Court in *Bombardier Aerospace Corporation v. SPEP Aircraft Holdings*, LLC, 2019 Tex. LEXIS 101, **32–42 (Tex. 2019). *See* Ch. 210A, *Contracts*, § 210A.04[3][c][v].

Breach of Implied Warranty. The Texas Supreme Court resolved an inter-appellate court split, holding an action based on the implied warranty of workmanlike repair is actionable under the DTPA and common law. *See* Ch. 221, *Warranties*, § 221.01[2][b][i].

Family Law

Termination of Parental Rights. When a parent states in a mediated settlement agreement that termination of parental rights is in the child's best interest, that statement can satisfy the requirement that a court's best interest finding be supported by clear and convincing evidence [In Interest of A.C., 560 S.W.3d 624, 632–635 (Tex. 2018)]. See Ch. 381, *Termination of Parent-Child Relationship*, § 381.03[2][c][i].

Personal Injury Litigation

Libel and Slander Damages. The Texas Supreme Court reversed a dismissal under the TCPA because the claimant offered clear and specific evidence of each element of its breach of contract claim, holding that this standard requires only evidence that *some* damages were caused by the breach, not evidence of the specific *amount* of damages [*S&S Emergency Training Sols., Inc. v. Elliott*, 62 Tex. Sup. Ct. J. 289 (2018)]. See Ch. 333, *Libel and Slander* § 333.42[2][e].

Statute of Limitations. To trigger the running of the 60-day period for a defendant to move to dismiss under the TCPA, a voluntary appearance must be a formal one, i.e., by filing an answer or a waiver of service, and informal contacts with the plaintiff or court are insufficient [*Grant v. Pivot Tech. Sols., Inc.*, 556 S.W.3d 865 (Tex. App.—Austin 2018, pet. filed)]. See Ch. 333, *Libel and Slander* § 333.42[2][a].

Medical Malpractice Standard of Proof. The statute requiring proof of willful and wanton negligence when the claims arose from emergency care in a hospital obstetrical unit [Tex. Civ. Prac. & Rem. Code § 74.153], applies to *all* such emergency care, regardless of whether it was provided immediately following evaluation or treatment in the hospital's ER [*Tex. Health Presbyterian Hosp. of Denton v. D.A.*, 62 Tex. Sup. Ct. J. 280 (2018)]. See Ch. 321, *Medical Malpractice*, § 321.18[1][b].

Negligence. A claim that a hospital was negligent in allowing a nurse who had been exposed to the Ebola virus to leave the hospital and spread contamination stated a safety-related health care liability claim; and (2) the fact that the contaminated property was owned by a corporation did not change the analysis because a corporation is a "person" and therefore a "claimant" for purposes of the statute [*Tex. Health*

Res. v. Coming Attractions Bridal & Formal, Inc., 552 S.W.3d 335 (Tex. App.—Dallas 2018, pet. filed)]. See Ch. 321, *Medical Malpractice*, §§ 321.02[2][f], 321.02[8].

Negligence and Training. When an employee truck driver struck a pedestrian, the jury's finding of negligent training could not be supported because there was no evidence that any lack of training as to visibility from the truck cab was the proximate cause of the pedestrian's injuries, or that additional training would have prevented the incident [*JBS Carriers, Inc. v. Washington*, 62 Tex. Sup. Ct. J. 270 (Tex. 2018)]. See Ch. 290, *Negligence*, § 290.32[1][b].

Causation. A certificate of merit need not address the causation element of a negligence claim, or link the alleged breach of duty to the claimant's injury [*Jaster-Quintanilla & Assocs. v. Prouty*, 549 S.W.3d 183 (Tex. App.—Austin 2018, no pet.)]. See Ch. 322, *Professional Malpractice*, § 322.04[2][d].

Attorney Immunity. When all attorney conduct involved acts taken and communications made to facilitate the rendition of legal services to a client in a bankruptcy proceeding, attorney immunity barred all claims alleged by a non-client [*Sheller v. Corral Tran Singh, LLP*, 551 S.W.3d 357 (Tex. App.—Houston [14th Dist.] 2018, pet. denied)]. See Ch. 322, *Professional Malpractice*, § 322.02[1][f].

Joint and Several Liability. The common law rule that when the actions of two or more wrongdoers produce an indivisible injury, all of the wrongdoers are jointly and severally liable survives the adoption of the proportionate responsibility statutes [*Lakes of Rosehill Homeowners Ass'n v. Jones*, 552 S.W.3d 414 (Tex. App.—Houston [14th Dist.] 2018, no pet.)]. See Ch. 291, *Proportionate Responsibility; Contribution and Indemnity*, § 291.03[4][b].

Governmental Immunity. In determining whether governmental immunity applies to a contract claim against a city, the inquiry is whether the city was engaged in a governmental or proprietary function when it *entered* the contract, not when it allegedly *breached* it [*Owens v. City of Tyler*, 62 Tex. Sup. Ct. J. 294 (Tex. 2018) (per curiam)]. See Ch. 293, *Claims Against Governmental Entities*, § 293.01[3].

Insurance Litigation

Exclusive Remedy. Whether an employee's personal injury claim against the employer is barred by the exclusive remedy provision is not within the division's exclusive jurisdiction; and denial of the claim by the employer's carrier does not bar the employer from asserting the exclusive remedy defense [*Berry Contracting, L.P. v. Mann*, 549 S.W.3d 314 (Tex. App.—Corpus Christi 2018, no pet.)]. See Ch. 340, *Workers' Compensation*, §§ 340.01[2], 340.30[3].

Tort Liability Immunity. When both the owner and operator of the other vehicle are immune from tort liability, the insured is not "legally entitled to recover" from either, so UM/UIM coverage is likewise unavailable [*Loncar v. Progressive Cty. Mut. Ins. Co.*, 553 S.W.3d 586 (Tex. App.—Dallas 2018, no pet.)]. See Ch. 342, *Uninsured Motorist Coverage*, § 342.02[4][b].

Appraisal Clause. By invocation of an appraisal clause by the insurer, the insurer waived its right to appraisal by conduct; and when an impasse has already been reached, the insurer cannot revive the negotiations by a belated offer that is made strategically to relocate the date of impasse [*In re Allstate Vehicle & Prop. Ins. Co.*, 549 S.W.3d 881 (Tex. App.—Fort Worth

2018, orig. proceeding),]. See Ch. 343, *Property Insurance*, § 343.07[1].

Real Estate Litigation

Claim for Specific Performance. The right holder may seek the remedy of specific performance from a third-party purchaser who had actual or constructive notice; the claim accrues when the property is sold or transferred in violation of the right of first refusal; but because the holder is entitled to presume that the grantor will honor the right of first refusal, the discovery rule applies to defer accrual until the holder knew or should have known of the injury [*Carl M. Archer Tr. No. Three v. Tregellas*, 62 Tex. Sup. Ct. J. ___, 2018 Tex. LEXIS 1153 (Tex. 2018)]. See Ch. 252, *Real Estate Sales Contracts*, § 252.01[2][d].

Writs of Possession. Because the issue of possession of commercial property may not be appealed in an eviction action, the judgment awarding possession likewise cannot be superseded by posting bond, so mandamus is available to force the immediate issuance of a writ of possession [*In re High Pointe Invs., LLC*, 552 S.W.3d 384 (Tex. App.—Waco 2018, orig. proceeding)]. See Ch. 282, *Landlord and Tenant*, § 282.41[6].

Eviction. An eviction suit is unavailable as to a mobile home that has not been converted to real property, and some other procedure to recover possession must be used [*Segoviano v. Guerra*, 557 S.W.3d 610 (Tex. App.—El Paso 2017, pet. denied)]. See Ch. 282, *Landlord and Tenant*, § 282.41[1].

Correction Deed. A correction deed changing the metes and bounds description of the tract was valid under Tex. Prop. Code § 5.029(a)(1)(C) even though it added land to the prior conveyance [*Flores v. Zimprich*, 559 S.W.3d 223 (Tex. App.—El Paso 2018, no pet.)]. See Ch. 254, *Deeds and Conveyances*, § 254.02[4].

Deed of Trust. Because a deed of trust is the instrument that creates a home equity lien, a spouse's signature on the deed of trust is sufficient consent, and the failure to also sign loan the documents or underlying note is inconsequential [*Alexander v. Wilmington Sav. Fund Soc'y*, 555 S.W.3d 297 (Tex. App.—Dallas 2018, no pet.)]. See Ch. 255, *Real Property Security Interests*, § 255.06[5][a].

Oil and Gas Leases

Offset Well. When a lease clause contained express requirements for an offset well, and it was undisputed that those requirements were met, the lessee was entitled to judgment as a matter of law, and the lessee was not required to show that the well was actually preventing drainage to comply with the lease [*Murphy Expl. & Prod. Co.-USA v. Adams*, 62 Tex. Sup. Ct. J. 186 (Tex. 2018)]. See Ch. 283, *Oil and Gas Leases*, § 283.03[12].

Estates

Survivorship. A right of survivorship cannot be created simply by checking a box on a bank or financial institution form next to the phrase "with right of survivorship." The signature card or account contract must contain language substantially similar to the language required by Texas Estates Code Section 113.151(b) [Hare v. Longstreet, 531 S.W.3d 922, 927–928 (Tex. App.—Tyler 2017, no pet.)]. See Ch. 391, *Descent and Distribution*, § 391.04[2][b].

Administrative Law

Exhaustion of Administrative Remedies Required. In *City of Richardson v. Bowman*, 555 S.W.3d 670, 682 (Tex. App.—Dallas 2018, no pet. h.), the court of appeal held that a party must exhaust administrative remedies even if the party

claims that the administrative agency acted outside its authority or failed to perfectly comply with all of the intricacies of the administrative process. See Ch. 423, *Judicial Review of Contested Cases*, § 423.02[3][a].

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