Spring 2017

DEWHIRST & DOLVEN LLC Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • Colorado • New Mexico • Texas

IN BRIEF

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- The Utah Supreme Court held that a strict liability standard applies to motor vehicle accident cases involving the sudden incapacity of a driver. This standard overrides the common-law sudden incapacity defense.

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COLORADO

- In an accident involving a tractor, the Colorado Court of Appeals held that the tractor is a covered motor vehicle in an underinsured motorist policy, based upon the definition of "motor vehicle."

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WYOMING

- The Wyoming Supreme Court enforced the "natural accumulation rule" in a case involving a student slipping on ice on a school premises. The rule was enforced to find that the school was not liable for conditions resulting from the natural accumulation of ice due to weather conditions.

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NEW MEXICO

- The New Mexico Supreme Court held that a New Mexico resident injured by a Texas state-employed surgeon cannot sue that surgeon in a New Mexico lawsuit, when Texas sovereign immunity laws would require that the lawsuit be dismissed.

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TEXAS

- In interpreting a statute requiring a certificate of merit to accompany a lawsuit against a construction professional, the Texas Supreme Court held that the requirement for an affiant to have knowledge of the construction area is not satisfied just by the affiant having an active license and practice in that area of construction.

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UTAH

STRICT LIABILITY STANDARD STATUTORILY IMPOSED IN CASE INVOLVING SUDDEN INCAPACITY OF A MOTOR VEHICLE DRIVER

Utah Supreme Court: This case came before the Utah Supreme Court via certification from the United States District Court for the District of Utah. "The questions presented concern the proper interpretation of U.C.A. § 31A-22-303, which requires motor vehicle liability insurance policies to 'cover damages or injury resulting from a covered driver of a motor vehicle' who suddenly and unforeseeably becomes incapacitated." The Supreme Court interpreted the provision under § 303 to impose strict liability of an insured driver, and to limit the driver's liability to the coverage of the applicable insurance policy.

The case arose from a bus accident that happened when bus driver Debra Jarvis experienced a sudden and unforeseeable loss of consciousness while driving the bus back from a high school band competition. Her loss of consciousness caused the bus to leave the roadway, hit a ravine, and roll over. Several passengers were injured in the accident. Those injured passengers each filed separate lawsuits. During those lawsuits, motions were filed seeking to hold the bus company's insurer, Lancer Insurance Co., strictly liable for the passengers' injuries. The district court denied those motions, holding that § 303(1) instead preserved the "sudden incapacity" defense, under which Jarvis would not be liable for her sudden loss of consciousness and the injured parties could recover only upon a showing of fault.

Subsequent to the district court's ruling, Lancer Insurance filed an action against the insured bus company, Lake Shore Motor Coach Lines, seeking to confirm that ruling. However, the Utah Supreme Court found that the enactment of § 303 overrides the common-law "sudden incapacity" defense. Though § 303 does not specifically refer to a strict liability standard for cases involving sudden incapacity, the Court nevertheless ruled that strict liability was implicit in the requirement for insurance coverage under § 303 in such cases. Thus, the Court held that § 303 imposes "strict liability on a driver (and by extension, the driver's insurer)" in cases involving sudden incapacity of the driver. The Court also ruled that, in such cases, the insured driver's liability is limited under § 303 to the amount of insurance coverage available under the driver's liability policy.

Lancer Insurance Co. v. Lake Shore Motor Coach Lines, Inc., 2017 UT 8 (Utah Supreme Court, decided February 15, 2017, not yet released for publication in the permanent law reports).

IN THIS ISSUE

Forum Selection Clause Held Enforceable in Construction Contract

Utah Court of Appeals: Plaintiff Rocky Mountain Builders Supply (RMBS), a roofing contractor located in Utah, brought an action for breach of contract against Defendant Steve Marks. RMBS alleged that Marks failed to pay for the installation of new roofs on two gazebos. Those gazebos were located on Marks's property in Montana. The contract between the parties included a forum selection clause designating Utah as the forum for resolution of any disputes between the parties under that contract.

The district court dismissed RMBS's action, finding that the forum selection clause in Utah was unenforceable. This was because Marks was a private citizen rather than a business entity, the contract was for work on a private dwelling instead of a commercial property, and because the amount at issue was relatively small. The district court thus found that enforcing the Utah forum selection clause would be unreasonable for such circumstances.

On appeal, the Court of Appeals held that the forum selection clause was enforceable. It determined that factors examined by the district court "are not of the type that would cause the enforcement of a forum selection clause to be adjudged unfair or unjust." The Court of Appeals found a "rational nexus" between the clause and the parties because RMBS was a Utah corporation with its principle place of business in Utah.

Rocky Mountain Builders Supply, Inc. v. Marks, 2017 UT App 41 (Utah Court of Appeals, decided March 2, 2017, not yet released for publication in the permanent law reports).

Uninsured Motorist Claim Involving Road Debris Requires Clear and Convincing Evidence of the Uninsured Vehicle's Existence

Utah Court of Appeals: Plaintiff Nani Nau brought an uninsured motorist (UM) action against his UM insurer, Defendant Safeco Insurance Company of Illinois, to recover for injuries sustained in a single-vehicle accident. That accident occurred when his tire ruptured on the highway. He lost control of his vehicle and crashed into the median. Plaintiff asserted that the tire ruptured because he ran over debris in the road that looked like a piece of concrete, rubber, or carpet. The wife was a passenger and had not seen the debris because she was not looking at the road. However, his wife heard her husband exclaim "oh" before feeling the car run over something just before the accident.

Plaintiff Nau filed a UM claim under the theory that an unidentified, uninsured motorist was the cause of the debris on the highway, and thus the cause of the accident. When Safeco denied the claim, Plaintiff sued. The district court granted a motion for summary judgment filed by Safeco, on the basis that evidence was speculative as to whether there was debris in the road and whether it was left by an uninsured motor vehicle. Plaintiff appealed, arguing that there was a question of fact as to those issues based upon the accounts of Plaintiff and his wife.

The Utah Court of Appeals held that "to prove that such a vehicle caused an accident, the claimant must show the existence of the uninsured motor vehicle by clear and convincing evidence consisting of more than the covered person's testimony." As this was not done, Plaintiff's theory of liability rested solely upon speculation. As such, the Utah Court of Appeals affirmed the district court's ruling in favor of Safeco.

Nau v. Safeco Insurance Co. of Illinois, 2017 UT App 44 (Utah Court of Appeals, decided March 9, 2017, not yet released for publication in the permanent law reports).

Enacted Utah Legislation

The following bills have recently been signed into law by Governor Herbert:

H.B. 157: This bill amends provisions related to condominium and community associations ("HOA") under U.C.A. 57-8a-226. It also enacts U.C.A. § 57-8-58 and U.C.A. § 57-8a-228. Modifications include enacting requirements that an HOA must comply with before bringing legal action against a declarant, management committee, board of directors, employee, or an independent contractor related to a period of declarant or administrative control of the HOA. These requirements to bringing an action include the lawsuit being approved by a certain percentage of owners at a meeting attended by at least 51% of owners. Modifications also include the HOA establishing a trust for the litigation and providing owners with certain notifications. The requirements do not apply to actions for less than $75,000.

House Bill 157 (signed into law by Governor Herbert on March 23, 2017).

H.B. 170: This bill modifies provisions regarding small claims courts in Utah, under U.C.A. § 78A-8-102. The bill raises the jurisdictional limit of small claims court cases from the prior $10,000 limit, to now being $11,000 (including attorneys' fees but exclusive of court costs and interests). Modifications under the bill also include that a separate claim for bodily injuries related to a motor vehicle accident may be brought despite a small claims court action for recovery of property damage having already been brought against the same defendant.

House Bill 170 (signed into law by Governor Herbert on March 17, 2017).

S.B. 225: This bill clarifies provisions related to post-judgment interest rates for a final judgment less than $10,000. Under the bill, a judgment under $10,000 in an action regarding the purchase of goods and services shall bear post-judgment interest at a rate of 10% plus the federal post-judgment interest rate.

Senate Bill 225 (signed into law by Governor Herbert on March 24, 2017).

Colorado

Colorado Court of Appeals Determines a Tractor is a Covered Motor Vehicle in an Underinsured Motorist Policy

Colorado Court of Appeals: Insured Neill Smith brought an action against automobile insurer, Defendant State Farm, alleging breach of contract and bad faith arising from insurer's denial of underinsured (UIM) coverage. The UIM claim stemmed from injuries Plaintiff Smith sustained when he was "skewered" by hay spears attached to a farm tractor. The district court dismissed Plaintiff's action after concluding that the tractor was not a covered motor vehicle under the State Farm insurance policy.

On appeal, the issue before the Colorado Court of Appeals was: "whether State Farm's UIM provision provides coverage to Mr. Smith for bodily injuries sustained in an automobile accident with a farm tractor." The policy did not define the term "motor vehicle." The Court thus examined the plain and ordinary meaning of a motor vehicle. It determined the definition of motor vehicle to be: "an automobile vehicle not operated on rails; especially one with rubber tires for use on highways." Under this definition, the Court determined that a tractor was a motor vehicle.

Though State Farm argued that a tractor's primary use is off-road rather than on a highway, the Court dismissed this argument. Rather, it found that the definition of motor vehicle does not require it to be primarily used on a highway. As such, the Court determined that the tractor was a covered motor vehicle under the policy, and reversed the dismissal of Plaintiff's action.

Smith v. State Farm Mutual Automobile Insurance Co., 2017 COA 6 (Colorado Court of Appeals, decided January 12, 2017, not yet released for publication in the permanent law reports).

Precipitation That Falls and Flows Into Window Well is Surface Water Under a Homeowner's Insurance Policy Exclusion

Colorado Court of Appeals: Plaintiff Michael Martinez was an insured of Defendant American Mutual Insurance Company. In this homeowner's insurance coverage case, Plaintiff appeals the district court's entry of summary judgment in favor of Defendant.

Plaintiff owned a home in Erie, Colorado with a finished basement and windows below the ground. Those windows were surrounded by window wells. When a severe thunderstorm occurred, some heavy hail and rain collected at the base of his window wells. The hail prevented the accumulating rainwater from percolating into the ground. The rainwater thus overflowed into the basement windows, causing substantial damage to the home and personal property.

Plaintiff filed a claim with Defendant American Family. After an investigation, Defendant concluded that damage to the home was caused by either "flooding" or "surface water," and was thus expressly excluded from coverage under the policy. Plaintiff's claim was thus denied.

Plaintiff filed suit against Defendant, seeking a declaratory judgment on the coverage issue, arguing that the rain and hail was not surface water or flooding. This was because the rainwater never touched the ground, as it instead moved from on top of the accumulated hail into the windows. It also touched the house's roof before migrating into the window well. Plaintiff further argued that if it was surface water, then it nevertheless lost that character when it entered the window wells.

The Colorado Court of Appeals first found that the roof of a house is "a mere continuation of the earth's surface." Thus, the rainwater hitting the roof did not change the character of the water as something other than surface water. The Court next determined that the accumulated hail also qualified as surface water because it was precipitation. Thus, it determined that "all of the precipitation that fell into Martinez's window wells – rain and hail – was surface water." The grant of summary judgment in favor of Defendant was therefore affirmed.

Martinez v. American Family Mutual Ins. Co., 2017 COA 15 (Colorado Court of Appeal, decided February 9, 2017, not yet released for publication in the permanent law reports).

Defense Verdict in Underinsured Motorist Policy Bad Faith Case

U.S. Dist. Ct., D. Colorado: Plaintiff Sharolyn Leeper alleged that she was injured in a motor vehicle accident. She was a passenger in a truck that was stopped when it was rear-ended. The at-fault driver's insurance carrier settled with Plaintiff Leeper for $50,000 (policy limits). Plaintiff then sought underinsured motorist (UIM) benefits from her insurance carrier, Defendant Allstate Insurance. She alleged that her damages exceeded the $50,000 amount. Allstate disputed the severity of the accident and asserted that Plaintiff had been fully compensated by the $50,000 settlement.

Plaintiff filed suit against Allstate for bad faith, alleging that it breached the insurance contract by refusing to pay UIM benefits. She also sought punitive damages. Plaintiff was 32-years old at the time of the accident. She had pre-existing conditions and alleged aggravation of Complex Regional Pain Syndrome and chronic low-back pain, as well as new trauma to multiple areas. Prior to the accident, she had sustained on-the-job injuries and was permanently disabled.

Plaintiff's initial demand was $1 million, reduced to $500,000 before trial. During jury deliberations, she demanded $1.5 million. Defendant's final offer before trial was $275,000. During trial, the Court directed verdict

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in favor of Defendant on Plaintiff's claim for punitive damages. As to the remaining claims, the jury returned a verdict in favor of Defendant.

Leeper v. Allstate Fire and Casualty Insurance Co., Case No. 13-CV-3460.

Wyoming

NATURAL ACCUMULATION RULE APPLIES IN SLIP AND FALL ICE CASE

Wyoming Supreme Court: A minor (RB) and his friends were returning to their classroom after P.E. class when they spotted a patch of ice on the sidewalk. They began running, sliding, and playing on it. RB took his second turn to slide, lost his balance, and fell on the ice. This resulted in a broken tooth, fractured nose, and face laceration. RB sued the school district to recover for his injuries, alleging that the school district was negligent in failing to remove the ice that had accumulated on the sidewalk. The school district had previously applied some ice melt on the patch of ice.

The school district filed a motion for summary judgment, which the district court granted under the "natural accumulation rule." This rule provides that, in a premises liability action, a property owner "is not considered negligent for allowing the natural accumulation of ice due to weather conditions where he has not created the condition…. There is thus no liability where the danger is obvious or is as well known to the plaintiff as the property owner." However, the natural accumulation rule ceases to apply when "the accumulation of ice or snow is not a natural accumulation, but rather an artificial condition created by the defendant." Under this law, the district court determined that the ice was natural and obvious.

On appeal, RB argued that there was an issue of fact as to whether the ice was a natural accumulation, due to the school district applying ice melt on the ice. RB also argued that the jury could find the school district negligent for applying an insufficient amount of ice melt.

The Wyoming Supreme Court ruled that there was no evidence establishing that the ice melt made the condition of the ice more dangerous than it would have been without the ice melt. In addition, policy considerations were important, since the venue is a region with frequent snowstorms. Applying ice melt should thus be promoted. Moreover, there was no dispute that the danger was obvious, as that's why RB and his friends chose to play on the ice. As such, the school district had no duty with regard to the ice. The Court thus affirmed the grant of the school district's motion.

RB v. Big Horn County School District No. 3, 2017 WY 13, 388 P.3d 542 (Wyoming Supreme Court, decided February 7, 2017).

DEFENSE VERDICT IN CASE INVOLVING FALL AT CONSTRUCTION SITE

U.S. Dist. Ct., D. Wyoming: Plaintiff Adalberto Gonzalez, a 38-year old construction worker, reportedly suffered multiple injuries after falling about 18 feet onto a cement surface. He had been working on the underside of a highway bridge removing plywood forms used for cement repair. His alleged injuries included a traumatic brain injury with loss of consciousness, residual personality changes, and multiple fractures to several areas of his body.

Plaintiff claimed that his supervisors, Defendants Jessie Whiteley and Kent Bratberg, directed him to remove the concrete forms from the bridge by using a system known as the "two-plank" or "leapfrog" method. This method involved placing one plank on a girder, sitting on it, moving the second plank to the next girder, sitting on the second plank, and then continuing on until reaching the concrete form to be removed. Plaintiff said that while using this method, a plank broke and he fell face-first to the concrete surface below.

Plaintiff claimed that Defendants were negligent for instructing him to use the method and failing to ensure that fall-protection systems were provided. Defendants denied telling Plaintiff to use the two-plank method, denied that they knew Plaintiff would be working at a height above six feet without a safety harness, and claimed that Plaintiff failed to use provided fall protection. Upon trial to a jury, the jury returned a verdict in favor of Defendants.

Gonzalez v. Bratberg; Whiteley, 2016 WL 7987913 (United State District Court, District of Wyoming).

New Mexico

NEW MEXICO EXTENDS COMITY TO TEXAS IMMUNITY LAW IN MEDICAL MALPRACTICE CASE

New Mexico Supreme Court: The issue before the New Mexico Supreme Court in this case was: "Can a New Mexico resident who has been injured by the negligence of a state-employed Texas surgeon name that surgeon as a defendant in a New Mexico lawsuit, when Texas sovereign immunity laws would require that the lawsuit be dismissed?" The Court recognized that answering this issue implicated principles of interstate comity between New Mexico and Texas.

The accident occurred when Plaintiff Kimberly Montano, a New Mexico resident, sought bariatric surgery for her obesity. At that time, Defendant Eldo Frezza, M.D. was the only doctor from whom Montano could receive the surgery and still be covered by her insurer. Montano believed she needed the surgery and that she could not afford it without medical insurance coverage. Dr. Frezza was employed as a bariatric surgeon at Texas Tech Hospital. He was acting within the course of his employment with that hospital when he provided care to Montano.

After the surgery, Montano experienced constant pain. Upon returning to Dr. Frezza several times, she was advised that everything was okay. Six years later, she was informed by another doctor that Dr. Frezza's procedure left a tangled network of sutures in her gastric pouch and down the jejunal limb. She was informed that this was the source of her pain. She thus filed a medical malpractice claim in New Mexico against Dr. Frezza. Dr. Frezza moved to dismiss the claim, on the basis that Texas law prohibits lawsuits against individual government employees. Thus, the Supreme Court was faced with the above issue.

Comity is a doctrine under which a sovereign state (New Mexico) chooses to recognize and apply the law of another sovereign state (Texas). The New Mexico Supreme Court determined that comity should be extended unless doing so would undermine and be "sufficiently offensive" to New Mexico's own

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public policy. In this case, it determined that extending comity to Texas immunity laws would be consistent with New Mexico's public policy. Specifically, the Court did not want to promote forum shopping by plaintiffs to allow suits in New Mexico when they could not have brought them in Texas. As such, Montano's suit was dismissed.

Montano v. Frezza, M.D. et al., Docket No. S-1-SC-35214 (New Mexico Supreme Court, slip opinion, decided March 13, 2017, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN GROCERY STORE PREMISES LIABILITY CASE ARISING FROM ASSAULT

Bernalillo County: Plaintiff Samuel Montoya, an adult male, reportedly suffered a knee laceration, tibial/fibial plateau fracture treated with multiple surgeries, and vertebrae fractures as he rode his bicycle to a grocery store operated by Defendant Albertsons. As he approached the store, multiple non-party assailants in a vehicle reportedly targeted Mr. Montoya. They chased him, knocked him off his bicycle, and robbed him.

Plaintiff Montoya sued Defendant Albertsons, claiming Defendant was negligent for failing to provide adequate security for its customers; failing to have an adequate number of security guards and cameras; negligently hiring, training, and supervising its employees; and failing to develop a security plan or perform an assessment of the neighborhood. Defendant Albertsons denied liability and argued that the criminal actions of the non-party assailants caused Plaintiff's alleged injuries and damages. Upon trial to a jury, Defendant was found not negligent.

Montoya v. Albertsons, L.L.C., Case No. D-202-CV-2013-09368.

Texas

TEXAS SUPREME COURT INTERPRETS STATUTE REQUIRING CERTIFICATE OF MERIT IN ACTIONS AGAINST CONSTRUCTION PROFESSIONALS

Texas Supreme Court: Under Texas law, a sworn "certificate of merit" must accompany a plaintiff's complaint in a lawsuit against architects, engineers, surveyors, and landscape architects. The certificate of merit must be from a similarly licensed professional who meets certain qualifications and attests to the merit of the claims in the plaintiff's complaint. If a plaintiff fails to file a certificate of merit, then the complaint must be dismissed.

This lawsuit concerns a commercial retail project constructed on land owned by Plaintiff El Pistolon II. El Pistolon hired Defendant Levinson Alcoser Associates as architects to design the project and oversee construction. Disappointed with

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Dewhirst & Dolven is pleased to announce that George Parker has become a Member of the firm.

Mr. Parker's practice involves representing companies in civil litigation, including construction defect claims, general liability defense, employment law defense, cyber liability, and disputes regarding all areas of civil law. Mr. Parker received his law degree from the University of Houston, and his Bachelor of Arts degree from Texas A&M University. He is a former metropolitan area police officer who currently holds an Advanced Peace Officer Certification from the State of Texas as well as a Police Officer's Medal of Valor earned during his active service. Mr. Parker also holds several certificates issued by the U.S. Department of Homeland Security in the field of cyber security, and is admitted to practice law in the state and federal courts of Colorado and Texas, the 5th and 10th Federal Circuit Court of Appeals, as well as a special additional license to practice before the United States Supreme Court.

Dewhirst & Dolven, LLC is pleased to serve our clients throughout the intermountain west and Texas from the following offices: Salt Lake City, Utah • Denver, Colorado • Colorado Springs, Colorado • Grand Junction, Colorado • Casper, Wyoming • Dallas, Texas • and Port Isabel, Texas. Please see our website at DewhirstDolven.com for specific contact information.

Dewhirst & Dolven, LLC has been published in the A.M. Best's Directory of Recommended Insurance Attorneys and is rated an "AV" law firm by Martindale Hubbell. Our attorneys have extensive experience and are committed to providing clients throughout Utah, Wyoming, Colorado, New Mexico and Texas with superior legal representation while remaining sensitive to the economic interests of each case.

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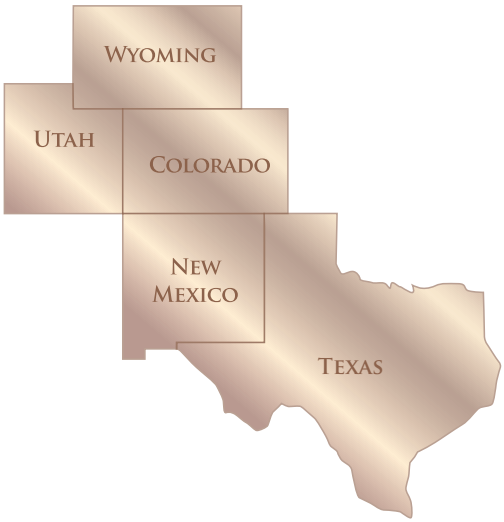

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the architects' services, Plaintiff El Pistolon sued Defendant, claiming breach of contract and negligence in the project's design and development. Gary Payne, a third-party licensed architect, provided Plaintiff with an affidavit stating his professional opinion about Defendant's work. This was filed with Plaintiff's complaint.

Defendant moved to dismiss Plaintiff's complaint, arguing that the affidavit did not meet the requirements for a certificate of merit. The certificate of merit statute provides, among other things, that the affiant should be "knowledgeable in the area of practice," and that the affiant should set forth the professional's negligence as well as the factual basis. Tex. Civ. Prac. & Rem. Code § 150.002. Defendant argued that the affidavit did not satisfy these requirements.

The Texas Supreme Court interpreted the certificate of merit statute. In doing so, it held that an affiant providing the certificate does not have to be actively practicing in the same area of practice as the defendant. Defendant next argued that the affidavit did not set forth the basis for Mr. Payne's knowledge of the area of Defendant's area of practice, as is required under the statute. Plaintiff argued that Mr. Payne's knowledge could be inferred from his licensure and active architecture practice. However, the Texas Supreme Court held that "the statute's knowledge requirement is not synonymous with the expert's licensure or active engagement in the practice; it requires some additional explication or evidence reflecting the expert's familiarity or experience with the practice area at issue in the litigation." Because there was no such evidence in Mr. Payne's affidavit, the Supreme Court deemed the affidavit not to be compliant with the certificate of merit statute. It thus dismissed Plaintiff's complaint.

Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd., 60 Tex. Sup. Ct. J. 464 (Texas Supreme Court, decided February 24, 2017, not yet released for publication in the permanent law reports).