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DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas

IN BRIEF

UTAH

In a construction defect case concerning a retaining wall between two properties, Plaintiffs sought recovery of attorneys fees after the parties reached a settlement of the underlying repair claim. In holding that Plaintiffs were not entitled to attorneys fees, the Utah Court of Appeals interpreted the REPCs to only permit attorneys fees for litigation "to enforce" the REPCs. Because the REPCs did not contain any express or implied warranties for retaining walls on limited common areas, Plaintiffs could thus not recover attorneys fees.

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COLORADO

Dewhirst & Dolven attorney Lars Bergstrom prevailed in obtaining summary judgment in a snow removal slip and fall case for client Martinson Snow Removal. Plaintiff sought recovery for alleged injuries sustained when she tripped and fell on some ice in a Home Depot parking lot. The Court agreed that Martinson was not a landlord under the Colorado's Premises Liability Act, C.R.S. § 13-21-115, and ruled that Martinson was not contractually responsible for inspecting the property in the absence of a snow fall.

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WYOMING

In an insurance coverage dispute, the U.S. District Court, D. Wyoming ruled that a company's insurer had a duty to defend a person identified in the complaint as potentially being an employee of the company. The Court ruled that a duty to defend is invoked by any claim alleged in the complaint that is potentially covered under the policy.

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NEW MEXICO

The issue before the New Mexico Supreme Court was whether the primary or secondary UIM insurer, if either, should be given the statutory offset for the tortfeasor's liability coverage. After discussion of an applicable hypothetical, the Court stated: "The short answer to the certified question is that neither the primary nor the secondary insurers are directly awarded the offset because … the offset is applied before any UIM insurer is required to pay UIM benefits."

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TEXAS

The issue before the Texas Supreme Court was whether the implied warranty for good and workmanlike repair of tangible goods or property can be disclaimed or superseded. The Court held that the implied warranty is a "gap filler" warranty, and thus the parties' express warranty superseded any implied warranty.

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UTAH

UTAH COURT OF APPEALS DENIES RECOVERY OF ATTORNEYS FEES IN CONSTRUCTION DEFECT CASE

Utah Court of Appeals: Two homeowners in a subdivision sued the general contractor who constructed their residences, Defendant S&S Construction, after a rock retaining wall in a limited common area between their lots collapsed in 2005. After several years of litigation, the parties entered into a settlement agreement under which the homeowners dismissed their complaint in return for S&S's contribution toward the cost of removing and replacing the retaining wall. However, the parties were unable to reach an agreement as to whether the homeowners were entitled to recover their attorneys fees under the real estate purchase agreements ("REPC") they entered into with S&S.

The homeowners filed a motion for attorney fees and costs, which was ultimately granted by the district court. Upon an award being entered in the homeowners' favor of $141,575, S&S appealed. On appeal, S&S argued that granting the motion for attorneys fee was in error because the REPC was misinterpreted, in addition to the court incorrectly considering extrinsic facts and expert opinions outside of the four corners of the REPC. The REPC only permitted recovery of attorneys fees arising from litigation "to enforce this [REPC]." S&S argued that the REPC's language unambiguously did not provide any warranties for the retaining wall installed on the limited common area at the subdivision, thus recovery of attorneys fees was not permitted under the REPC. The homeowners argued that the retaining wall is fundamental to the structure of the lots, and thus their litigation was to enforce warranties under the REPC.

The Court of Appeals noted that the REPC differentiated between the terms "lot" and "residence." It also noted that if the REPC's warranty was intended to cover structural elements of the lots, as well as residences, it would have stated as such. Accordingly, the REPC express warranty did not cover the retaining wall. The Court of Appeals stated: "As a matter of law, the REPCs contain neither an express nor an implied warranty covering the retaining wall." Thus, because the REPCs only

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permitted recovery of attorneys fees for litigation which enforces the REPC, and no warranties pertaining to the retaining walls were contained in the REPC, the Court of Appeals reversed the district court's grant of attorneys fees.

Utah Court of Appeals: Nolin et al. v. S&S Construction, Inc., 2013 UT App 94 (Utah Court of Appeals, decided April 18, 2013, not yet released for publication in the permanent law reports).

UTAH LEGISLATURE PASSES BILL MODIFYING UM/UIM REJECTION REQUIREMENTS

On April 1, 2013, Governor Herbert signed Senate Bill 236 into law, which modifies the prior statutory language of the uninsured and underinsured motorist ("UM/UIM") coverage statutes, U.C.A. §§ 31A-22-305 and 305.3. SB 236 changes the requirements of the acknowledge form for a named insured to sign to reject the statutory minimum of UM/UIM coverage, or to purchase coverage in an amount less than the statutory minimum.

Per SB 236, the acknowledgement form need only state that UM coverage provides benefits or protection to the insured and other covered persons for bodily injury resulting from an accident caused by the fault of another party where the other party has no liability insurance (or in the case of UIM coverage – where the other party has insufficient liability insurance). In addition, the acknowledgement form is to disclose the premiums required to purchase the UM/UIM coverage. Any selection or rejection of UM/UIM coverage for policies written on or after January 1, 2001, continues for that issuer of the liability coverage until the insured requests, in writing, a change of the UM/UIM coverage from that liability insurer.

SB 236 also amends the UM/UIM statutes to identify the Utah Rules of Civil Procedure to apply in arbitration when a claim by a named insured or covered person is arbitrated against the UM/UIM motorist carrier.

Senate Bill 236 (Signed into law by Governor Herbert on April 1, 2013).

DEFENSE SUMMARY JUDGMENT IN OPEN AND OBVIOUS TRIP AND FALL CASE

Salt Lake County: Plaintiff Nathan Seal was a visitor at his parents' house. While leaving the home at the end of their visit, Nathan turned to talk to his mother, stepped backward, and tripped over an 18 inch high flower pot at the top of the steps. Nathan fell down the steps, suffering a broken left wrist which required surgery. He filed suit alleging that the flower pot was placed in a dangerous location.

The defense moved for summary judgment, arguing that the flower pot was an open and obvious hazard and that the Defendant did not have duty to warn Nathan of the alleged hazard. The Court granted the motion, finding as a fact that Nathan admitted seeing the flower pot upon entering the home when the sun was still shining. Furthermore, the Court was influenced by the fact that Nathan had frequently visited the home during the summer, and that the pot had occupied the same position on the steps for the entire summer.

Seal v. Deal, Case No. 100426464.

DEFENSE VERDICT IN PARKING LOT MOTOR VEHICLE ACCIDENT CASE

Salt Lake County: Plaintiff Hurd was backing from a parking stall at a Draper, Utah business. Defendant Pease was also backing from a nearby business when his vehicle collided with Plaintiff's vehicle. Plaintiff alleged soft tissue injuries to her neck and back. The case was arbitrated with an undisclosed amount being awarded in Plaintiff's favor. The defense demanded a trial *de novo*. Upon deliberation for one hour, the jury at the trial *de novo* awarded Plaintiff no damages.

Hurd v. Pease, Case No. 110917538.

Colorado

DEWHIRST & DOLVEN WINS SUMMARY JUDGMENT IN SNOW REMOVAL SLIP AND FALL CASE

Denver County, Colorado: Dewhirst & Dolven attorney Lars Bergstrom won summary judgment in a snow removal slip and fall lawsuit. Plaintiff claimed she slipped and fell in the parking lot of a Home Depot store on December 27, 2009. Snow had fallen on December 23-24, 2009 followed by trace amounts of snow on December 25-26, 2009. Dewhirst & Dolven client Martinson Snow Removal, Inc., pursuant to its service agreement with CBRE, Inc., the property management company, serviced the property in conjunction with the snowfall. Martinson rendered substantial service in response to the December 23-24 snowfall and concluded its work on December 26, 2009. Martinson was not working on the property at the time of the incident. Neither CBRE nor Home Depot contacted Martinson for additional service.

Plaintiff arrived at the store in the late afternoon of December 27, 2009. She walked into the store and shopped for several items. As she walked into the store, she claimed to have noticed that several areas of the parking lot were wet. She also claimed that snow was piled at several locations at the back of the property. As she exited the store and walked to her vehicle, she claimed she fell on "black ice." Although she claimed the ice on which she slipped was invisible, she also claimed that it arose because the snow piles at the back of the lot were melting and refreezing.

Co-Defendants Home Depot and CBRE reached settlements with Plaintiff. Plaintiff's sole claim against all Defendants fell under Colorado's Premises Liability Act, C.R.S. § 13-21-115 ("PLA"). Plaintiff argued that Defendants were statutory landowners and were responsible for the condition of the real property. Dewhirst & Dolven attorney Lars Bergstrom argued that Defendant

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Martinson was not a landowner within the meaning of the PLA. Martinson was only obliged to render service when it snowed or when there was freezing rain. Martinson had met this obligation and rendered significant service in fulfillment of its contract with regard to the snowfalls of December 23-24 and December 25-26. It had not snowed and Martinson had not been at the property for almost 30 hours when the incident occurred. Mr. Bergstrom argued application of Land-Wells v. Rain Way Sprinkler & Landscape, LLC, 187 P.3d 1152, 1154 (Colo. App. 2008) which held that a sprinkler installation company was a landlord when it was present on the property installing a sprinkler system, but it was not a landlord in control of the property when, months later, a problem arose with the system creating an icy condition.

Mr. Bergstrom also argued there was nothing which would have given notice to Martinson that additional service was needed or requested. It was December and temperatures had not gone above freezing between the snowfalls and the date of the incident. Further, Martinson's records indicated that most of the snow had not been piled; rather, the snow had been removed from the property. There was no expectation that any pile of snow (Plaintiff could not identify any precise location) would melt and then refreeze. Plaintiff testified that she never saw the ice and could not identify the precise shape or size of the slippery patch on which she claimed to have fallen. The property manager, CBRE, had not requested additional service.

The court agreed that Martinson was not a landlord and ruled that "[n]othing in the contract makes Martinson responsible for inspecting the property in the absence of a snow fall to see if new ice has formed in a pedestrian area by whatever means." As such, Martinson's motion for summary judgment was granted.

Larsen v. Martinson Snow Removal, Inc. et al., Case No. 11CV8588.

SETTLEMENT OF CLAIM WITHIN BODILY INJURY (BI) LIABILITY LIMITS DOES NOT EQUATE TO DAMAGES AT OR ABOVE BI POLICY LIMITS ENTITLING INSURED TO UIM BENEFITS.

Colorado Court of Appeals: Plaintiffs Philip and Roberta Jordan appealed the district court's summary judgment in favor of Defendant Safeco Ins. Co. of America, Inc. on their claim that Safeco unreasonably denied them underinsured motorist (UIM) benefits.

In 2009, the Jordans were involved in an automobile accident with J.F., a minor driver. The Jordans were injured and sued J.F. J.F.'s automobile insurance policy covered damages for injury to others up to $100,000 per person or $300,000 per accident. The Jordans settled for $60,000 and $38,500, respectively.

The Jordans then sought UIM benefits under their policy with Safeco, asserting that the policy covered all damages unpaid under the settlements, up to the policy limit. Safeco maintained that their UIM coverage would be triggered only if either of them had damages exceeding the $100,000 limit of J.F.'s policy.

The Jordans sued Safeco, asserting claims for (1) common law bad faith breach of an insurance contract; (2) unreasonable delay and denial of payment of a claim in violation of CRS §§ 10-3-1115 and 1116; and (3) deceptive trade practice in violation of the Colorado Consumer Protection Act (CCPA). The Jordans moved for summary judgment under their unreasonable delay claims, and Safeco moved for summary judgment on the same claims and the bad faith claim. The parties stipulated that neither could prove damages in excess of $100,000, and the court granted the Jordans' motion to dismiss their own CCPA claim.

The court granted Safeco's motion for summary judgment. On appeal, the Jordans challenged only the grant of summary judgment in favor of Safeco under §§ 1115 and 1116 and conceded that no material facts were disputed.

The Court of Appeals concluded that Safeco's denial of coverage was permissible under the clear language of the policy, as well as the unambiguous terms of CRS § 10-4-609. The policy language unambiguously provides that payment of UIM benefits are only for damages above the tortfeasor's insurance policy liability limit. Here, the damages did not exceed those limits.

The Jordans also argued that under § 609, an insured's good faith settlement with a tortfeasor necessarily exhausts the tortfeasor's liability limits. That section requires that UIM coverage "shall be in addition to any legal liability coverage and shall cover the difference, if any, between the amount of the limits of any legal liability coverage and the amount of the damages sustained." The Court ruled that the trigger for UIM benefits is damages in excess of the tortfeasor's limits of legal liability coverage. Thus, the judgment was affirmed.

Jordan v. Safeco Ins. Co. of America, 2013 COA 47 (March 28, 2013).

DEFENSE VERDICT IN NEW YEAR'S EVE TRIP AND FALL CASE

Jefferson County: Plaintiff Lawrence Castor alleged injuries including spinal fracture, and fractures of his tibia and fibula after he tripped and fell on his walk home after a New Year's Eve party. Plaintiff tripped on an uneven portion of a snow and ice-covered sidewalk in front of a tri-plex owned by Defendants Steve and Marlene Ellis.

Plaintiff claimed that the sidewalk was badly deteriorated because cars had driven over it for many years to access parking, and alleged that the homeowners were negligent because they were aware of the sidewalk's dangerous condition. Plaintiff also alleged that the City of Sheridan knew or should have known that the deteriorated sidewalk constituted a dangerous condition.

Before trial, the court ruled that the City waived its sovereign immunity and breached its duty regarding the dangerous condition of the sidewalk. Plaintiff sought punitive damages from the homeowners, but the Court directed a verdict in favor of the homeowner Defendants on the punitive damages claim.

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Defendants did not dispute that Plaintiff was injured, but disputed liability for the injuries on the basis that Plaintiff was comparatively at fault because he had walked the same route on the way to the party. Plaintiff's past medical expenses were $60,000, and Plaintiff's final demand before trial was $300,000. The City provided a statutory offer of $50,000 and the homeowner Defendants did not provide a final offer before trial. The jury returned a verdict in Defendants' favor, ruling that although Plaintiff was injured and Defendants were negligent, Defendants were not the proximate cause.

Castor v. Ellis et al., Case No. 12-CV-404.

COLORADO LEGISLATURE PASSES BILL INCREASING AMOUNT OF RECOVERY UNDER GOVERNMENT IMMUNITY ACT

On April 19, 2013, Governor Hickenlooper signed Senate Bill 12-023 into law, which increases the amount of recovery permitted under the Colorado Government Immunity Act, C.R.S § 24-10-114. Under SB 13-023, the maximum amount recoverable for any injury to one person in any single occurrence is increased from $150,000 to $350,000. The maximum amount recoverable for any injury to two or more persons in any single occurrence is increased from $600,000 to $900,000, "except that, in such instance, no person may recover in excess of $300,000."

Senate Bill 13-026 (signed into law by Governor Hickenlooper on April 19, 2013).

WYOMING

DUTY TO DEFEND RULED TO EXIST IN INSURANCE COVERAGE DISPUTE

U.S. District Court, D. Wyoming: Shawn Wimberly sued Windsor Energy Group and Wes McKenney after suffering an injury in an explosion at a Wyoming gas well. McKenney and his insurer, Century Surety, alleged that Federal Ins. Co., which insured Windsor, was obligated to defend McKenney since the Wimberly complaint alleged McKenney was Windsor's employee. Federal claimed that it had no duty to defend because the complaint was ambiguous, alleging McKenney was an "employee … or subcontractor" and because McKenney testified under oath that he was an independent contractor. Both sides moved for summary judgment.

Federal claimed that the ambiguities in the complaint required consideration of extrinsic evidence, specifically McKenney's testimony that he was an independent contractor, to resolve the issue of its duty to defend. The District Court disagreed, noting that Wyoming courts have ruled that a duty to defend is invoked by any claim alleged in the complaint that is potentially covered under the policy. Since the complaint alleged that McKenney might be a Windsor employee, and Federal's policy covered Windsor's employees, Federal thus owed a duty to defend, with any ambiguity to be resolved against the insurer. However, the Court did not find that Federal's refusal to defend was in bad faith, ruling that there was a reasonable or fairly debatable question on the substantive state law to be applied. The Court finally adjudged Federal liable for $101,196.92, representing one-half of the attorneys fees paid by Century Surety to defend McKenney in the action.

McKenney et al. v. Federal Ins. Co., Case No. 12 CV 131.

$2.3 MILLION VERDICT IN MULTI-VEHICLE ACCIDENT CASE

U.S. District Court, D. Wyoming: Plaintiffs Dennis Cahalan (the driver), Dianna (Dennis's wife), and their three children were involved in a multi-vehicle accident on eastbound I-80 near Evanston, Wyoming. Snow was blowing and roads were icy. Daniel Nadeau, operating a May Trucking semi-truck, drove in the treacherous conditions until he determined that he could not travel any further and elected to chain his truck's wheels. Other truckers were doing the same, making it difficult for Mr. Nadeau to find a place to pull off to the side of the road. Mr. Nadeau was either stopped or was travelling at a very slow speed in the travel lanes just beyond the crest of a hill. Plaintiffs' vehicle crested the hill to find the May semi-truck and was impacted shortly thereafter by a Let's Go Trucking semi-truck, driven by Let's Go Trucking's employee Sergey Soklalv.

Plaintiffs' injuries included fractures, dental injuries, and neuropsychological injuries, with resulting surgeries. The case was tried to a jury, which returned an award of $2,310,506 total for Plaintiffs. The award was apportioned 5% to Dennis Cahalan, 40% to May Trucking/Nadeau, and 55% to Let's Go Trucking/Soklalv.

Cahalan v. May Trucking Co. et al., Case No. 11 CV 214.

NEW MEXICO

NEW MEXICO SUPREME COURT PROVIDES PROCEDURE FOR DETERMINING OFFSET BETWEEN PRIMARY AND SECONDARY UIM INSURERS

New Mexico Supreme Court: On certification from the New Mexico Court of Appeals, the issue before the Supreme Court was whether the primary or secondary underinsured (UIM) insurer, if either, should be given the statutory offset for the tortfeasor's liability coverage.

In it decision, the Supreme Court addressed the following hypothetical: A was a passenger in a vehicle driven by B, which was struck by a vehicle negligently driven by C. A sustains $500,000 in damages. C has liability coverage of $100,000. B has $100,000 in UIM coverage with XYZ insurance company. Because A was a passenger in the vehicle insured by XYZ, A is a class II insured under the XYZ policy, and XYZ is the primary insurer because it insured the vehicle involved in the collision, which was the vehicle closest to the risk. A also has UIM coverage under three other policies totaling $175,000 because A is a named insured in each policy. Because these policies did not insure the vehicle involved in the collision, the insurers who issued these policies

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are considered secondary insurers. Thus, A has $100,000 in primary UIM coverage, plus $175,000 in secondary UIM coverage, for a total of $275,000 in UIM coverage.

The question before the Supreme Court in light of the hypothetical was whether XYZ or the secondary insurers should receive an offset for the $100,000 of liability coverage available from C, the tortfeasor.

The Court analyzed two prior decisions, and determined that neither of them addressed which insurer, if any, was to be given the offset for the tortfeasor's liability coverage. The Court then held that once the limits of the insured's UIM recovery are identified, the primary insurer must pay up to its policy limits before secondary UIM insurers are required to pay in proportion to their respective policy limits. To identify the limits of the insured's UIM recovery, such recovery is limited to the lesser of the insured's total damages or the insured's total stacked UIM coverage, minus the tortfeasor's liability coverage.

Thus, under the hypothetical, A has available $175,000 in UIM benefits once C's $100,000 in liability coverage has been deducted from the total stackable UIM coverage of $275,000. XYZ therefore pays the first $100,000 in UIM benefits, and the secondary insurers pay the remaining $75,000 in UIM benefits in proportion to their policy limits. The Supreme Court stated: "The short answer to the certified question is that neither the primary nor the secondary insurers are directly awarded the offset because … the offset is applied before any UIM insurer is required to pay UIM benefits."

State Farm Mut. Auto. Ins. Co. v. Safeco Ins. Co. et al., 2013-NMCA-006, 298 P.3d 452.

Texas

TEXAS SUPREME COURT HOLDS EXPRESS WARRANTY CAN SUPERSEDE IMPLIED WARRANTY IN CONSTRUCTION REPAIR CASE

Texas Supreme Court: The issue before the Texas Supreme Court was whether the implied warranty for good and workmanlike repair of tangible goods or property can be disclaimed or superseded.

Plaintiff Gonzales hired a plumber to repair water leaks under her home's foundation and hired Defendant Southwest Olshan Foundation Repair to repair the foundation problems the water leaks had caused. Olshan's foundation repair contract included a lifetime, transferrable warranty on the work requiring Olshan to adjust the foundation due to settling. The contract further provided for Olshan to "perform all the necessary work in connection with this job … in a good and workmanlike manner." The work included cosmetic repairs to the interior of the house.

Subsequently in April 2002, Plaintiff informed Olshan of new cracks appearing on previously repaired walls, and Olshan informed Plaintiff that there were additional plumbing leaks. Olshan excavated tunnels under the home to allow a plumbing company to repair those leaks, and then leveled the foundation. After being told by an Olshan employee that Olshan's foundation repair work was "the worst job I've ever seen," Plaintiff refused to allow Olshan to fill in the excavation tunnels. Several months later, Olshan sent an engineering company to the property to inspect the foundation. Based upon the engineering company's report that the foundation was functioning properly, Olshan advised Plaintiff that it needed to fill in the excavation tunnels.

In the following year, Plaintiff observed more cracking, and hired an engineer which determined that Olshan improperly repaired the foundation. Plaintiff then sued Olshan in June 2006 for breach of express warranty, breach of the implied warranty of good and workmanlike repairs, and violations of the Deceptive Trade Practices Act ("DTPA"). The jury found that Olshan did not breach its express warranty. However, it found that Olshan did breach the implied warranty of good and workmanlike repairs, as well as Olshan violating the DTPA. The trial court entered judgment in favor of Plaintiff for $191,127.

The Court of Appeals reversed,

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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 combined experience of over 300 years and are committed to providing clients throughout Utah, Wyoming, New Mexico, Colorado and Texas with superior legal representation while remaining sensitive to the economic interests of each case.

We strive to understand our clients' business interests to assist them in obtaining business solutions through the legal process. Our attorneys are committed to building professional relationships with open communication, which creates an environment of teamwork directed at achieving successful results for our clients.

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holding that the implied warranty of good and workmanlike repairs is actionable only under the DTPA, and is thus governed by the DTPA's two year statute of limitations. The Court further found that Plaintiff should have discovered Olshan's acts in 2003, when the Olshan employee told Plaintiff that Olshan's work was "the worst job I've ever seen." The Court thus overturned the verdict as to the implied warranty and DTPA claims, and did not address Olshan's remaining argument that the express warranty superseded the implied warranty.

The Supreme Court held that the implied warranty is a "gap filler" warranty that implies terms into a contract that fails to describe how the party or services are to perform. Although the parties cannot disclaim this warranty outright, an express warranty in their contract can fill in gaps covered by the implied warranty and supersede it if the express warranty specifically describes the manner, performance, or quality of the services. Thus the parties' express warranty between Plaintiff and Olshan replaced the implied warranty. Because the jury found that Olshan did not breach the express warranty, Plaintiff was ruled not to prevail on her warranty claims. Plaintiff's only remaining claim was under the DTPA, which the Court ruled remained time-barred.

Gonzales v. Southwest Olshan Foundation Repair Co., LLC, 56 Tex. Sup. Ct. J. 409 (Texas Supreme Court, decided March 29, 2013, not yet released for publication in the permanent law reports).