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DEWHIRST & DOLVEN LLC
Attorneys at Law

ROCKY MOUNTAIN
LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas

IN BRIEF

COLORADO

- Dewhirst & Dolven attorneys Trevor Cofer and Robin Lamborn obtained a very defense-friendly jury verdict in a construction defect case. Plaintiffs were homeowners who sued several Defendants, alleging recovery for house settlement, defective construction of a balcony, and improper grading and drainage. Dewhirst & Dolven represented the general contractor, Province, Inc. Plaintiffs presented a repair cost of $1.12 million. After a jury verdict, the Court entered judgment against Province for $51,900.

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UTAH

- In a personal injury case stemming from an auto accident, Defendants served written discovery requests on Plaintiff. Separately, Defendants sent Plaintiff a letter requesting that she sign authorizations for Defendants to obtain medical and employment records. The Court ruled that the letter was not a formal request under the Utah Rules of Civil Procedure and that there were procedures for Defendants to obtain out-of-state records.

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WYOMING

- Plaintiff brought claims for negligence and vicarious liability against an employer for personal injuries sustained in a vehicular accident. In reversing the district court's grant of summary judgment in favor of the employer, the Wyoming Supreme Court adopted Restatement (Second) of Torts, § 317. As such, the Court held that an employer has a duty to exercise reasonable care toward third parties in supervising "servants" while on the employer's premises or using the employer's chattel, even if the servant is not acting in the course and scope of employment.

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NEW MEXICO

- An insurance company contested compensatory and punitive damages awarded by a jury to Plaintiffs in a bad faith case, arguing that its denial of coverage under a racing exclusion did not meet the threshold of bad faith. The Supreme Court stated that an insurer acts in bad faith when it denies a first party claim for reasons that are frivolous or unfounded. In ruling that the award was supported by evidence, the Court noted the insureds' expert, who opined that the insurance company did not consider the rights of its insureds.

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COLORADO

DEWHIRST & DOLVEN OBTAINS FAVORABLE JURY VERDICT IN CONSTRUCTION DEFECT TRIAL

Larimer County: Dewhirst & Dolven attorneys Trevor Cofer and Robin Lambourn obtained a very defense-friendly verdict of $51,900 on behalf of a general contractor at the conclusion of a six day jury trial in Larimer County District Court in Fort Collins, Colorado. Charles F. Brega and Matthew Rork of Fairfield & Woods, P.C., represented the Plaintiffs/homeowners, Robert and Yvonne Lauro. Plaintiffs initially sued Bison Ridge, LLC, and Shear Engineering Corp., in addition to Dewhirst & Dolven's client, Province, Inc. Plaintiffs alleged settlement of two to three inches of their slab-on-grade underlying their finished walkout basement level and their garage slab. Plaintiffs also alleged defective construction of a balcony and improper grading and drainage. Plaintiffs' home is located in the Bison Ridge subdivision in Windsor, Colorado. Bison Ridge was the developer who placed some fill on the lot during the development phase. Shear Engineering was the structural engineer for the home. Dewhirst & Dolven's client was the general contractor for the construction of Plaintiffs' home.

Plaintiffs settled with Bison Ridge and Shear Engineering before trial, leaving the general contractor as the only remaining defendant at trial. At trial, Plaintiffs' experts alleged that Province's subcontractor failed to adequately compact the fill that it placed beneath Plaintiffs' home. Plaintiffs' experts also contended that Province should have obtained a lot-specific soils report. Plaintiffs presented a cost of repair of $1.12 million, calling for replacement of the slab with a structural floor, and also requested significant damages for relocation, inconvenience, aggravation, loss of use, and loss of enjoyment.

Province contended that Shear Engineering was fully aware of the amount of fill placed and, as the structural engineer, had the sole responsibility to design a structural floor rather than a slab-on-grade and to request any additional soils investigations necessary for the structural design. Province further argued that Bison Ridge placed much of the fill underlying Plaintiffs' home during over-lot grading, and that Bison

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NEW MEXICO

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Ridge's fill placement probably caused some of the settlement. Province also presented evidence that Plaintiffs contributed to the settlement and breached their contract with Province by changing the grading around their home and planting irrigated, non-xeric landscaping adjacent to the foundation. Finally, Province's experts opined that compaction grouting below the home's slabs was the more reasonable repair and presented a cost of repair of $122,000.

The jury found in Province's favor on the breach of contract and breach of implied warranty of habitability claims brought by Plaintiffs. On Plaintiffs' negligence claim, the jury found Shear Engineering 40% responsible, Plaintiffs 15% responsible, Bison Ridge 15% responsible, and Province 30% responsible. The jury awarded a cost of repair of $150,000, approximately the amount suggested by Province's experts. The jury also awarded $23,000 for relocation costs, inconvenience, aggravation, loss of use, and loss of enjoyment. Multiplying the total damages awarded by Province's percentage of fault, the Court entered a judgment of $51,900 on December 11, 2012. Given that Province prevailed on the breach of contract claim, Dewhirst & Dolven anticipates seeking recovery of all attorney fees and costs on behalf of Province based upon a fee-shifting provision in the contract.

Lauro v. Province Inc., No. 2010CV801.

COURT OF APPEALS HOLDS ROOFER CAN BRING FIRST PARTY CLAIM AGAINST INSURANCE COMPANY ON BEHALF OF AN INSURED

Colorado Court of Appeals: Plaintiff Kyle W. Larson Enterprises, Inc. (roofer) appealed only a portion of the trial court's summary judgment in favor of Defendant Allstate Ins. Co. The judgment against the roofer on its claim under CRS § 10-3-1116 was reversed and the case was remanded for further proceedings on that claim.

The roofer contracted with the owners of four homes insured by Allstate to repair their roofs. The contracts provided that the repair costs would be paid from insurance proceeds and granted the roofer full authority to communicate with Allstate regarding all aspects of the insurance claims. The roofer met with Allstate adjustors to discuss the four homes and to determine the amount of each claim. The roofer began repairing each home after receiving approval from Allstate for the claims. It was later determined, however, that additional repairs were necessary to comply with applicable building codes and to maintain certain manufacturers' warranties. The roofer made the repairs and invoiced Allstate for them. Allstate paid the claim amounts that were agreed to during the original adjustment, but refused to pay for the additional repairs. Pursuant to CRS §§ 10-3-1115 and 1116, the roofer filed suit as a first-party claimant against Allstate for unreasonable delay and denial of benefits. The trial court ruled that the roofer was not a first-party claimant entitled to seek relief under the statutes, and granted Allstate's summary judgment motion.

On appeal, the roofer contended that the trial court erred in granting summary judgment for Allstate because the roofer is a first-party claimant. The Court ruled that a repair vendor who brings a claim against an insurer on behalf of its insured qualifies as a first-party claimant under § 10-3-1115 and is entitled to sue the insurer under § 1116. This includes vendors such as the roofer, which are authorized to assert, and do assert, claims on behalf of insureds.

Kyle L. Larson Enterprises, Inc. v. Allstate Ins. Co., 2012 COA 160 (Colorado Court of Appeals, decided September 27, 2012, not yet released for publication in the permanent law reports).

UIM EXCLUSION UPHELD AS TO PASSENGER IN SINGLE CAR ACCIDENT CASE

Colorado Court of Appeals: In this underinsured motorist coverage action, Plaintiff Jacox appealed the district court's order granting a motion filed by Defendant American Family Mutual Ins. Co. which determined that Jacox was not legally entitled to UIM benefits.

Jacox was a passenger in Winferd Loper's vehicle when Loper fell asleep at the wheel, resulting in a one-car accident in which Jacox suffered injuries. Jacox filed a civil action against Loper and ultimately settled her suit against him, collecting the liability policy limit for bodily injuries. She also sought UIM coverage under Loper's American Family policy. The request was denied and Jacox sued. The district court granted American Family's motion to dismiss, ruling that Jacox was not entitled to UIM benefits under Loper's policy.

On appeal, Jacox argued she was entitled to UIM benefits pursuant to the amended UIM statute, CRS § 10-4-609. Loper's policy contained a UIM exclusion applicable to vehicles "insured under the liability coverage of this policy." Jacox contended that the 2008 amendments to the UIM statute overruled the Supreme Court's ruling in *Terranova v. State Farm Mut. Ins. Co.,* 800 P.2d 55, 59 (Colo. 1990), which held that the identical exclusion does not violate public policy. The Court of Appeals found that the amendments did not invalidate *Terranova* and, therefore, the UIM exclusion was valid.

Jacox also argued that the UIM exclusion in Loper's policy was inconsistent with the "limits of liability" policy provision, because the provision provided that bodily injury liability payments would be offset against the UIM coverage. The Court disagreed that they were inconsistent because, per the exclusion, there was no UIM coverage and therefore there was no limit of liability for a non-existent UIM coverage. The order of dismissal was affirmed.

Jacox v. American Family Mut. Ins. Co., 2012 COA 170 (Colorado Court of Appeals, decided October 11, 2012, not yet released for publication in the permanent law reports).

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DEFENSE VERDICT IN MOTOR VEHICLE ACCIDENT WHERE DEFENDANT WAS TEXTING

Jefferson County: Plaintiff Reale alleged that she was injured when Defendant Jones rear-ended her vehicle. Defendant admitted that she was texting while driving, but claimed that Plaintiff's injuries were caused by two subsequent auto accidents. Plaintiff's alleged injuries were carpal tunnel syndrome with radiculopathy and facet syndrome. Plaintiff underwent carpal tunnel release surgery.

Plaintiff's final demand before trial was $45,000, and Defendant offered a $5,000 statutory offer of settlement prior to trial. The jury returned a verdict for Defendant.

Reale v. Jones, Case No. 11-CV-874.

UTAH

UTAH SUPREME COURT HOLDS THAT DISTRICT COURT COULD NOT COMPEL PLAINTIFF TO SIGN RECORDS AUTHORIZATIONS

Utah Supreme Court: Sabrina Rahofy sued Lynn Steadman and Steadman Land & Livestock (Defendants) for injuries sustained in an automobile accident. After serving Plaintiff written discovery requests, Defendants also mailed Rahofy a separate letter asking for her authorization to permit the release of her medical and employment records for the last twenty years, including those with out-of-state third parties. She declined. The district court granted a motion to compel Rahofy to sign the authorizations.

Upon interlocutory appeal, the court of appeals reversed and remanded the district court's order on the following bases: (1) Defendants did not properly request the documents according to the procedural requirements of Utah R. Civ. P. 34; and (2) records in the possession of out-of-state third parties could be obtained using subpoenas.

The Utah Supreme Court first ruled that Defendants' letter was not a properly served request for production under Rule 34, and thus Rahofy had no obligation to sign the requested authorizations. Because of this procedural deficiency, Plaintiff's refusal to sign the authorizations was not a failure to respond that was subject to discovery sanctions. As such, the Supreme Court held that the district could not compel Rahofy to sign the authorizations. Lastly, the Court noted that if documents are located in another state, then Defendants may subpoena them according to the rules of that state. As such, the court of appeals' decision was affirmed.

Rahofy v. Steadman et al., 2012 UT 70 (Utah Supreme Court, decided October 5, 2012, not yet released for publication in the permanent law reports).

DEFENSE SUMMARY JUDGMENT REVERSED IN UNIVERSITY DANCE TEAM PERSONAL INJURY CASE

Utah Court of Appeals: Plaintiff Cope was a member of the Utah Valley University dance team who was injured when she fell while practicing a lift with another team member. Cope's instructor was supervising the team's rehearsal at the time and had been working with each couple on the lift. The instructor noticed that Plaintiff and her partner were performing the lift incorrectly by lifting Plaintiff over Partner's right shoulder instead of left. The instructor warned the couple that they either do the lift correctly or the lift would be cut from the routine. When the couple practiced it over Partner's left shoulder, Partner lost his footing and Plaintiff fell, suffering an injury when she hit her head.

At her deposition, Plaintiff testified that she had never worked with Partner before the day of the injury. However, UVU provided the trial court with a video taken prior to the day of the accident showing the couple practicing the lift together. According to Plaintiff's expert, executing the lift over the left shoulder, after having practiced it over the right shoulder, was as difficult as practicing a new lift. As such, it was industry standard for spotters to be used when practicing new lifts to decrease the risk of injury. The instructor believed, however, that no spotters were needed because the couple had been practicing the same lift over the opposite shoulder.

After discovery, UVU filed a motion for summary judgment arguing that there was not a special relationship with Plaintiff that gave rise to a duty of care on the part of UVU. The trial court denied the motion. Upon UVU renewing its motion, the trial court revised its earlier decision based upon the video showing the couple having previously practiced the lift. The court then determined that Plaintiff had accepted the risk of continuing to attempt the lift rather than have it cut from the routine. Accordingly, the trial court concluded that no special relationship arose and thus UVU thus did not owe Plaintiff a duty of care.

Plaintiff appealed on two bases: (1) that the trial court abused its discretion by reconsidering its original denial of UVU's motion for summary judgment; and (2) that a special relationship existed between her and UVU.

As to Plaintiff's first basis of appeal, the Court of Appeals ruled that Rule 54(b) allows the court to change its position with respect to any order or decision before a final judgment has been rendered in the case. Though UVU presented its motion to reconsider under Rule 60, the Court stated that the substance of the motion, rather than the caption, is dispositive in determining the character of the motion. Thus, the trial court was procedurally correct in revising its prior order.

As to Plaintiff's second argument, the Court of Appeals adopted the following rule: "a special relationship is created when (1) a directive is given to a student (2) by a teacher or coach (3) within the scope of the academic enterprise. The Court determined that the facts of this case, specifically that the instructor had directed Plaintiff to perform the lift correctly, satisfied the adopted rule. As such, a special relationship existed and the trial court's grant of summary judgment was reversed.

Cope v. Utah Valley State College, 2012 UT App 319 (Utah Court of Appeals, decided November 8, 2012, not yet released for publication in the permanent law reports).

PARTIAL DEFENSE SUMMARY JUDGMENT AWARDED IN TRIP AND FALL CASE INVOLVING OPEN AND OBVIOUS DEFENSE

Salt Lake County: Plaintiff was a resident of the Waterbury condominiums in Salt Lake County. Plaintiff was cleaning up after her dog while on a walk inside the condominium grounds. She tripped and fell on uneven ground caused by the roots and stump of a tree that had been removed. She alleged that Defendants Waterbury Homeowner's Association and Superior property Management were negligent in failing to remove the hazard.

Both Defendants moved for summary-judgment. Superior claimed that its liability was limited by contract. Superior and Waterbury also argued that the hazard was open and obvious under the Court of Appeals' *Lyman v. Soloman* decision, 258 P.3d 647 (Utah Ct. App. 2011). Plaintiff acknowledged that she was aware of the hazard and usually attempted to avoid the uneven ground. However, she alleged that she was compelled to walk there at the time of the accident to clean up after her dog. She also claimed that the danger was obscured due to long grass. Plaintiff relied upon the Supreme Court's *Hale v. Beckstead decision,* 116 P.3d 263 (Utah 2005).

The Court granted summary judgment to Superior on the basis that its only possible exposure was for failure to mow the long grass, and the accident had occurred early in the year before the lawn mowing contract kicked in. The Court denied summary judgment as to Waterbury, ruling "it remains unclear whether it was impossible for the plaintiff to protect herself under these circumstances, much like the plaintiff in *Beckstead*."

Hill v. Waterbury Homeowner's Association, Inc. et al., Case No. 100920934.

Wyoming

DEFENDANT WHOSE VEHICLE WAS STOLEN HELD NOT TO HAVE A DUTY TO INJURED PLAINTIFF IN LATER AUTOMOBILE ACCIDENT

Wyoming Supreme Court: Defendant Holbrook left her car unattended with the motor running in her private driveway while she briefly returned home to retrieve her pocketbook. In the interim, Colbey Emms stole Holbrook's vehicle. Emms later got into a high speed chase with the police, which ended when the car he stole collided with a vehicle driven by Plaintiff Lucero and her two children.

Lucero filed suit on behalf of herself and two children against Holbrook, alleging that Holbrook breached a duty to them of due care by leaving her car unattended with the keys in the ignition. The district court granted Holbrook's motion for summary judgment on the basis that no duty was owed to Plaintiffs under common law or by statute, and that Holbrook's leaving her keys in her car with the motor running was not the proximate cause of the accident.

On appeal, Plaintiffs argued that Wyo. Stat. Ann. § 31-5-509, which provides certain requirements before leaving a motor vehicle unattended, created a duty that Defendants breached. The Court, however, found that the statute does not apply to vehicles parked in private driveways and therefore did not provide a basis for a duty between the parties. Upon weighing factors under Wyoming common law as to whether a duty exists, the Court ruled that the facts of the case were such that Defendant did not owe Plaintiffs a duty of care to protect them from the harm that occurred. Indeed, imposing a duty under the circumstances would substantially burden Defendant and Wyoming residents in general.

As to proximate cause, the Court disagreed with Plaintiffs' assertion that Defendant "essentially delivered the vehicle to a drug-impaired thief." The court found that the Defendant's actions were not the proximate cause of Plaintiffs' injuries because the harm suffered was not a foreseeable consequence of Defendant's conduct. The district court's grant of summary judgment was thus affirmed.

Lucero et al. v. Holbrook, 2012 WY 152, 288 P.3d 152 (November 30, 2012).

EMPLOYER HELD TO HAVE DUTY TO THIRD PARTY DESPITE TORTFEASOR NOT ACTING WITHIN COURSE AND SCOPE OF EMPLOYMENT

Wyoming Supreme Court: Plaintiff Shafer was injured when his tractor-trailer collided with a pickup owned by Defendant TNT Well Service, and driven by Melvin Clyde. Mr. Shafer and his wife brought suit against TNT asserting recovery under theories of negligence and vicarious liability. The district court granted summary judgment to TNT on all claims after determining that there was no genuine issue as to whether Clyde's employment with TNT had been terminated prior to the collision. The Shafers appealed the decision.

Though the Court examined issues pertaining to factual disputations as to whether Clyde's employment had terminated prior to the accident, the crux of the Court's decision addressed whether to adopt a duty of care as set forth by Restatement (Second) of Torts, § 317. Under § 317, in pertinent part, a duty is imposed upon an employer to exercise reasonable care for the benefit of third parties in supervising "servants" while on the employer's premises or using the employer's chattel. As such, the Court ruled that an employer may nonetheless be held directly liable for failing to exercise reasonable care when a "servant" is acting outside the scope of his employment, in those circumstances where § 317 is satisfied. Based upon the Court's imposition of this duty, as well as other genuine issues of material fact existing as to the termination of Clyde's employment with TNT, the Supreme Court reversed the district court's grant of summary judgment.

Shafer et al. v. TNT Well Service, Inc., 2012 WY 126, 285 P.3d 958 (September 26, 2012).

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MEDICAL MALPRACTICE SUIT DISMISSED UNDER STATUTE OF LIMITATIONS IN CAT BITE CASE

U.S. District Court, Dist. of Wyoming: Plaintiff was treated with a PICC line at Wyoming Medical Center onJune 11, 2008 for an infected finger from a cat bite. On June 29, 2008, Plaintiff presented to WMC's emergency room, where she was diagnosed with deep vein thrombosis. Plaintiff continued to experience symptoms and finally sought treatment from a Colorado vascular surgeon on August 7, 2010. Plaintiff filed a notice of claim against WMC on July 2, 2010, in which she alleged negligent placement of the PICC line. The medical review panel with WMC dismissed the claim, after which Plaintiff filed suit.

WMC moved for dismissal, arguing that the statute of limitations had expired. WMC argued that Plaintiff's cause of action accrued on June 29, 2008 when she first sought treatment for deep vein thrombosis. Plaintiff argued that the "continuous treatment doctrine" governed her case and that she only learned of WMC's negligence when she saw the vascular surgeon on August 7, 2010. The Court rejected the continuous treatment argument, noting that it is based upon a physician-patient relationship in which the patient continuously treats with a single doctor and may not be advised of the negligence while under the doctor's continuing treatment. The Court noted that Plaintiff's complaint alleged she was informed of the deep vein thrombosis on June 29, 2008 and that the diagnosis was a "direct result" of the PICC lien placement. The Court thus ruled that the complaint must be dismissed as beyond the statute of limitations.

Radoff-Francis v. Wyoming Medical Center, Case No. 11 CV 31.

NEW MEXICO

BAD FAITH AND PUNITIVE DAMAGES AWARDS UPHELD IN INSURANCE COVERAGE CASE

New Mexico Court of Appeals: This case arises from an automobile collision between a 1986 Porsche 944 Turbo and a police squad car. Officer McElroy was parked in his car pointing his radar gun towards oncoming traffic when he saw two vehicles headed toward him. One of the vehicles, the Porsche, was driven by Defendant Hudson, who lost control and slammed into the squad car. The other car was never identified.

After a police investigation, Hudson was charged with drag racing and reckless driving. Hudson's mother, Co-Defendant Cleveland, was a named insured on the subject American National Property and Casualty Company ("ANPAC") insurance policy. After the accident, Defendants filed a claim with ANPAC. The claim was assigned to an adjuster, Evan Williams, who reviewed the police report and recorded an interview with Hudson. The policy contained language excluding coverage for accidents resulting from the use of the insured car in any race, speed test, or other contest. Williams later obtained a recorded statement from investigating Officer Compton, who stated that Hudson initially denied drag racing but then admitted to it. A signed notarized statement from Hudson was given to Williams stating that he denied drag racing.

Williams presented the evidence before ANPAC's claims committee, who denied the claim on the basis of the racing exclusion. Williams was later informed that Hudson's racing charge had been dismissed. Williams then presented that information to ANPAC's claims committee, who held that the denial of the claim stood based upon the racing exclusion due to Officer Compton's statement that Hudson admitted to racing.

Defendants filed suit against ANPAC, and ANPAC then filed an action seeking a declaratory judgment stating that it had no duty to provide coverage under the language and terms of the policy. Defendants counter-sued for breach of contract and breach of the covenant of good faith and fair dealing. A jury decided that Hudson was not racing and returned a verdict against ANPAC. The jury also found that ANPAC had acted in bad faith and awarded $20,000 in compensation and $50,000 in punitive damages.

On appeal, ANPAC did not contest the judgment against it finding breach of

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ABOUT OUR FIRM

Dewhirst & Dolven congratulates member Trevor Cofer on his recent presentation at the December continuing legal education seminar for the National Business Institute. Mr. Cofer presented on "How to Handle Post-Trial Issues," which included a discussion on judgments, motions after the verdict, and appellate issues.

Dewhirst & Dolven, LLC is pleased to serve our clients throughout the intermountain west and Texas from the following offices:

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contract and requiring it to pay Defendants' insurance claim. Rather, ANPAC sought reversal of the $20,000 and $50,000 awards. ANPAC argued that its motion for directed verdict on the bad faith claim should have been granted because the claim was not supported by substantial evidence and did not meet the threshold of bad faith. ANPAC's position was that because the policy unambiguously excluded coverage for drag racing and because there was conflicting evidence as to whether Hudson was drag racing, there was a reasonable question as to coverage. Thus, ANPAC argued that its decision to deny coverage could not be considered frivolous or unfounded as a matter of law.

The Supreme Court stated that an insurer acts in bad faith when it denies a first party claim for reasons that are frivolous or unfounded. Upon examining the evidence, including an expert opinion that the claim committee only looked at one-sided evidence rather than an even-handed consideration of the rights of the insured, the Court ruled that there was sufficient evidence to have presented the issue of bad faith to the jury. The Court also affirmed the punitive damages award on the basis that ANPAC's opposition to the same was premised on ANPAC's argument that its directed verdict should have been granted as to the bad faith claim. As such, the Court affirmed the jury's damages awards.

ANPAC v. Cleveland et al.,
Docket No. 30,164
(New Mexico Court of Appeals, slip opinion, decided November 21, 2012, not yet released for publication in the permanent law reports).