Spring 2019

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • Colorado • Texas

IN BRIEF

UTAH

- Dewhirst & Dolven Attorneys Kyle Shoop and Rick Haderlie successfully obtained judgment in favor of their client, insurer PLM, in a coverage and bad faith lawsuit. Plaintiff sued PLM seeking coverage, and the court held that coverage was precluded under the policy and underlying complaint at issue

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COLORADO

- The Colorado Court of Appeals held: "as a matter of first impression in Colorado, when an insurer notifies an insured that it is cancelling an automobile insurance policy and specifies the reason for the cancellation, the validity of the cancellation turns on the accuracy of the information underlying the cancellation."

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WYOMING

- In a home sale dispute, the plaintiffs-buyers alleged that the defendant-sellers did not comply with the sales contract because the functioning water well was not installed. The Wyoming Supreme Court interpreted the sales contract to find that defendants did not breach the contract.

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TEXAS

- The issue before the Texas Court of Appeals was whether a UIM claim against an insurer should have been severed at trial from the bad faith claims against the insurer. The Court held that severance should have occurred due to prejudicial evidence.

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UTAH

DEWHIRST & DOLVEN OBTAINS JUDGMENT IN FAVOR OF INSURER IN BAD FAITH COVERAGE ACTION

Salt Lake County: Plaintiff National Woods Products (National) filed suit against Defendant Pennsylvania Lumbermen's Mutual Insurance Company (PLM), seeking coverage of an underlying lawsuit filed by its ex-employee Calvin Balthazor. National also asserted claims of insurance bad faith against PLM. Dewhirst & Dolven Attorneys Rick Haderlie and Kyle Shoop were retained to defend PLM.

The lawsuit arose when Balthazor's employment with National was terminated. He filed a lawsuit against National seeking recovery of back-pay for vacation and overtime, as well as wrongful termination damages. Interspersed throughout Balthazor's lawsuit were statements that he was told to use his personal health insurance instead of workers' compensation insurance for injuries he sustained on the job.

National sought coverage under the Employee Benefits Liability Coverage Endorsement of its policy with PLM. National argued that the Endorsement provided coverage because Balthazor's complaint alleged "negligent administration of its employee benefit program," as was covered under the Endorsement. National argued that "employee benefit program" was defined to include workers' compensation. Thus, deficiencies alleged by Balthazor as to workers' compensation advice given by National were sufficient to provide coverage under the Endorsement.

On behalf of PLM, Dewhirst & Dolven filed a motion for judgment on the pleadings, arguing that the face of Balthazor's complaint plainly fell outside the scope of coverage under the Endorsement. At the court hearing, attorney Kyle Shoop argued that Balthazor's complaint did not actually allege any deficiencies in workers' compensation advice rendered by National. Rather, the action sought back-pay unassociated with workers' compensation damages. It also sought wrongful termination damages instead of workers' compensation recovery. He further argued that Utah authority precluded the scope of the underlying complaint from being expanded to include allegations not contained within its plain language. Mr. Shoop thus argued that Plaintiff's position required inferences not contained within the underlying policy.

The third district court agreed with Mr. Shoop, and found that PLM did not have any defense or indemnification obligations under the policy because Balthazor's complaint was not covered

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under the Endorsement. As such, PLM's motion for judgment on the pleadings was granted.

National Wood Products, Inc. v. Pennsylvania Lumbermens Mutual Insurance Company, Case No. 170908006 (Court ruling issued March 26, 2019).

UTAH SUPREME COURT AFFIRMS REDUCTION OF JUDGMENT DUE TO PLAINTIFF'S TIER DESIGNATION FOR THE LAWSUIT

Utah Supreme Court: In 2011, Utah adopted several amendments to the rules of civil procedure with the intention of addressing the costs of litigation. This included adopting three tiers for civil cases: (1) actions claiming $50,000 or less; (2) actions claiming more than $50,000 to less than $300,000; and (3) actions claiming $300,000 or more in damages. Each tier provides proportional caps on discovery, such as the permitted amount of deposition hours, days for discovery, and amount of written discovery requests. As stated by the Utah Supreme Court, this case concerned the plaintiff's "impermissible weaponization of this process."

The lawsuit stemmed from Plaintiff Pilot suing Defendant Hill for damages that allegedly resulted from a car accident. Pilot filed the action as a Tier 2 case, designating damages as being less than $300,000. At trial, Pilot presented evidence of damages in excess of $300,000. At a pre-trial conference, the judged asked attorneys for both sides what happens if the jury returns a verdict of $300,000 or more. Defendant Hill's attorney stated that the verdict would get reduced. Plaintiff Pilot's attorney stated that the situation would be dealt with after trial.

The jury awarded damages in the amount of $640,989. Pilot then filed a motion to amend his complaint so as to plead it as Tier 3 and not be bound by the Tier 2 cap on damages. The district court denied the motion and reduced the verdict to the Tier 2 limit of $299,999.99. Pilot appealed.

The Utah Supreme Court held that Pilot could not amend his complaint to plead the Tier 3 designation post-trial. Allowing amendment would undermine the purpose of discovery limitations established by the tier-system. "The tier structure established by Rule 26 of the Utah Rules of Civil Procedure exists so that parties may understand the stakes underlying a civil litigation and plan their strategies and expenditures accordingly."

Pilot v. Hill, 2019 UT 10 (Utah Supreme Court, decided March 1, 2019, not yet released for publication in the permanent law reports).

TESTIMONY OF TREATING PROVIDERS AS TO PERMANENT IMPAIRMENT IS SUFFICIENT FOR THE LAWSUIT PRE-REQUISITES OF U.C.A. § 31A-22-309

Utah Court of Appeals: This case concerned whether Plaintiff Pinney could pursue a lawsuit for personal injuries arising from a car accident, despite not seeking any economic damages. During litigation, Plaintiff produced about $11,000 in medical bills. At trial, Plaintiff stipulated to not seek an award of economic damages, but instead chose to focus on non-economic damages associated with her herniated disc. She argued that it was permanent, based upon the testimony of her treating chiropractor.

At the close of Plaintiff's case-in-chief, Defendant moved for judgment as a matter of law. Defendant argued that Plaintiff failed to satisfy the threshold requirements of U.C.A. § 31A-22-309(1)(a). That section requires Plaintiff to have sustained one of the following before a lawsuit can be brought for personal injuries stemming from a car accident: death, dismemberment, permanent disability or permanent impairment "based upon objective findings," permanent disfigurement, or medical expenses in excess of $3,000. Defendant argued that Plaintiff did not establish any of these pre-requisites because Plaintiff did not seek any economic damages/medical bills. Defendant also argued that there was no "objective findings" as to Plaintiff sustaining a permanent injury because her treating chiropractor was not objective.

The district court denied Defendant's motion. The jury then returned a verdict of $300,000. Defendant appealed.

On appeal, the Utah Court of Appeals held that an "objective finding" for purposes of a permanent impairment under § 309 may include testimony from the plaintiff's treating provider. "An objective finding of permanent disability or permanent impairment need not be established by a witness other than a current or past treating physician. To be considered objective, a finding need only be demonstrated through evidence other than the plaintiff's own subjective testimony." In addition, Plaintiff's decision to not pursue economic damages did not preclude the lawsuit, as § 309 required satisfaction of at least one of those pre-requisites. Because of the testimony from her treating provider, Plaintiff could thus satisfy the requirement for permanent impairment. As such, the district court's ruling was affirmed.

Pinney v. Carrera, 2019 UT App. 12 (Utah Court of Appeals, decided January 10, 2019, not yet released for publication in the permanent law reports).

AWARD FOR HOLE-IN-ONE CONTEST AT CHARITY GOLF TOUNAMENT IS RULED TO BE A QUESTION FOR THE JURY RATHER THAN SUMMARY JUDGMENT

Utah Court of Appeals: At issue in this case was whether the Plaintiff could be awarded a new car for hitting a hole-in-one at a charity golf tournament. Plaintiff Wayment was a professional golfer at that time he hit the hole-in-one.

Defendants Schneider Automotive Group and Nate Wade Subaru helped sponsor the charity golf tournament. They put on a hole-in-one contest at the eighth hole, where the new car was parked. Neither the rule sheet nor a sign at the hole stated that the car, or any other prize, would be awarded for hitting a hole-in-one. Plaintiff Wayment hit the hole-in-one without disclosing that he was a professional golfer, which Defendants learned several days later. The tournament organizer did not expect professional golfers to complete for tournament prizes, though that was never communicated to participants. When the insurance policy was found to require the hole-in-one be made only by an amateur, Defendants refused to deliver the car. Plaintiff sued for breach of contract.

During litigation, both parties disclosed experts who opined as to the expectations of both parties during the tournament. Plaintiff then moved for

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summary judgment. He argued that it was uncontested that Defendants agreed to award the contest winner based upon the terms a reasonable contestant would have understood existed. The district court granted the motion, finding that Defendants did not manifest an intent to limit the contest to amateur golfers.

On appeal, the Utah Court of Appeals disagreed. It found that if there was a contract in existence, it would have been implied based upon the facts and conduct of the parties. "The existence of an implied-in-fact contract is a question of fact which turns on the objective manifestations of the parties' intent and is primarily a jury question." The Court found that reasonable minds could have differed on the meanings of the parties' objective manifestations and conduct. As such, summary judgment was not appropriate, and it is for a jury to determine the outcome. The grant of summary judgment in Plaintiff Wayment's favor was thus reversed.

Wayment v. Schneider Automotive Group LLC et al., 2019 UT App. 19 (Utah Court of Appeals, decided January 31, 2019, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN MOTOR VEHICLE PRODUCT LIABILITY LAWSUIT

Salt Lake County: Plaintiff Andrew Blank reportedly suffered injuries while riding as a passenger in a Mercedes-Benz automobile. The car was purchased at a store owned by Defendant Ken Garff Mercedes Benz. Both the store and the automobile manufacturer were sued. The accident happened when Plaintiff's car was rear-ended at 130 mph on the highway by an intoxicated driver. Plaintiff's spouse was driving the vehicle, and also sustained injuries. She also thus asserted claims in the action.

Plaintiffs alleged that the passenger seat broke, the headrests popped up, the seatbelts did not prevent injuries, and the front airbag did not deploy during the collision. They alleged strict liability claims that the vehicle was defective and unreasonably dangerous, all stemming from design defects.

Plaintiff Andrew asserted the following injuries: traumatic brain injury, cognitive damage, crushed and fractured vertebrae, broken ribs, lung damage, and emotional distress. Plaintiff's spouse alleged to have sustained brain damage, as well as a loss of consortium due to her husband's injuries.

The jurors found that there was not a design defect in the front passenger seat system. As such, damages were not awarded.

Blank v. Garff Enterprises Inc. et al., Case No. 2011-09-07788.

Colorado

COLORADO COURT OF APPEALS HOLDS THAT AN AUTOMOBILE INSURANCE POLICY IS NOT DEEMED CANCELLED IN MOTORCYCLE ACCIDENT CASE

Colorado Court of Appeals: This insurance dispute arises from Plaintiff Brown's motorcycle accident and the purported cancellation of his motorcycle insurance policy by Defendant American Standard Insurance Company of Wisconsin.

Brown sued American for benefits under the policy stemming from a motorcycle accident. He had allegedly sustained serious injuries in the accident. Because the other driver was either uninsured or underinsured, Brown made a claim under his own policy for UM/UIM benefits.

During the litigation, the district court granted American's motion for summary judgment, concluding that there was no coverage in effect at the time of the accident. American had previously given written notice to Brown of cancellation on the ground that Brown did not have a valid driver's license. But Brown contested that fact, and offered admissible evidence that he had a valid driver's license at the time of the cancellation, as well as on the date of the accident.

On appeal, the Colorado Court of Appeals concluded: "as a matter of first impression in Colorado, when an insurer notifies an insured that it is cancelling an automobile insurance policy and specifies the reason for the cancellation, the validity of the cancellation turns on the accuracy of the information underlying the cancellation." Accordingly, the Court held: "under these circumstances, a policy cancellation based on inaccurate information is no cancellation at all." Summary judgment in favor of American was therefore reversed.

Brown v. American Standard Insurance Company of Wisconsin, 2019 COA 11 (Colorado Court of Appeals, decided January 24, 2019, not yet released for publication in the permanent law reports).

TAXI COMPANY DEEMED NOT LIABLE FOR ITS PASSENGER ASSAULTING A NON-PASSENGER

Colorado Court of Appeals: Plaintiff Jose Garcia sued Defendant Colorado Cab Company, after a passenger in one of Defendant's taxis assaulted him on the street. The events began late one night when taxi driver Ali Yusuf picked up Curt Glinton and Glinton's friend. The passengers were intoxicated and did not give Yusuf a destination address, instead telling him when to turn. When Glinton told Yusuf to stop, Yusuf told the passengers about the taxi fee. Glinton then grabbed and punched Yusuf from behind.

Around the same time, Plaintiff Jose Garcia had called for a taxicab. When he saw Yusuf's taxi drive by, he thought it might be for him. When Garcia heard Yusuf and Glinton arguing, he approached the taxicab to see what was going on. When Garcia told Glinton to leave Yusuf alone, Glinton got out of the cab and attacked Garcia. Glinton then jumped behind the steering wheel of the taxi, ran Garcia over, and dragged Garcia down the street.

Garcia's injuries were allegedly extensive, including a shattered ear drum, a traumatic brain injury, fractured eye socket, three broken ribs, torn anterior cruciate ligament, other torn ligaments, and other injuries resulting in back and hip pain. He sued Defendant Colorado Cab. As to Colorado Cab, he alleged that the company's negligent failure to take safety measures caused his injuries. Colorado Cab moved for summary judgment, arguing that it did not owe Garcia a duty of care. The district court denied the motion. Colorado Cab then appealed the decision.

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Since the claims concerned Colorado Cab's failure to take safety measures, the case concerns nonfeasance – the defendant's failure to prevent harm, as opposed to actively creating harm. In such cases, a duty exists only if there is a special relationship between the plaintiff and the defendant. Such special relationships include common carrier/passenger relationships. The Colorado Court of Appeals found that there was no such relationship, since Garcia was not a passenger in the taxicab.

Despite the requirement for a special relationship, there could still be liability under the rescuer doctrine. Under that doctrine, liability can be established if Garcia was Yusuf's rescuer. The Colorado Court of Appeals determined that Garcia was not Yusuf's rescuer. This was because there was no evidence that Garcia had physically sought to intervene in the argument, such as to get between the two men. As such, the Court of Appeals found that Colorado Cab could not be liable.

Garcia v. Colorado Cab Company LLC, 2019 COA 3 (Colorado Court of Appeals, decided January 10, 2019, not yet released for publication in the permanent law reports).

$7 MILLION VERDICT AGAINST UNITED STATES FOR BIKING ACCIDENT AFFIRMED

U.S. Court of Appeals, 10th Cir: Plaintiff James Nelson was involved in a bicycle accident while riding on an asphalt path on land owned by the United States Air Force Academy ("USAFA"). He struck a sinkhole, lost control of his bicycle, and was flung into the asphalt path. He allegedly sustained severe injuries as a result. USAFA considered public users of the path to be trespassers. Yet, despite knowing the public used the path, it did not take any affirmative steps to preclude the public. Indeed, a sign was nearby stating that it was a bicycle path, though that sign was not installed by the USAFA. Another smaller sign prohibited entry onto the USAFA property.

A biologist for the USAFA was responsible for the area. He had observed the sinkhole, but did not take any steps to warn of, fill in, or cordon off the sinkhole. Upon a bench trial, Plaintiff was awarded $7 million for his injuries. USAFA had argued that the Colorado Recreational Use Statute ("CRUS") had shielded it from liability, but the district court disagreed. The issue on appeal before the 10th Circuit Court of Appeals was whether the CRUS applied to bar Plaintiff's claims.

The CRUS was adopted to encourage land owners to make land available for recreational purposes. To do so, it limits landowner liability toward persons entering the land for recreational purposes. However, an exception to CRUS exists for the landowner's willful or malicious failure to guard or warn against a known dangerous condition likely to cause harm.

The Court of Appeals first determined that USAFA knew of the condition, due to its responsible biologist being aware of it. It also determined that USAFA willfully failed to guard against the condition because it was aware that the path was used for recreational purposes. As such, the exception to CRUS applied, resulting in USAFA not being shielded from liability. Entry of the verdict in Plaintiff's favor was therefore affirmed.

Nelson v. United States, 915 F.3d 1243 (United State Court of Appeals, 10th Cir., decided February 12, 2019).

DEFENSE VERDICT IN COMMERCIAL MOTOR VEHICLE CASE SEEKING IN EXCESS OF $1 MILLION

Adams County: Defendant James Fedje was driving his commercial vehicle when the rear duel wheels came off the truck. Plaintiff claimed he was injured when his vehicle collided with one of those fallen tires. Plaintiff had been driving at about 75 mph on the highway when the impact occurred.

Plaintiff claimed that Defendant Fedje was within the course and scope of his employment with Defendant Mountain Man Wielding and Fabrication at the time of the impact. Mountain Man disputed that. In addition, Fedje had taken his rig welder truck to be serviced at Four To Go, ten days before the impact. Plaintiff had sued Four To Go in a separate lawsuit and settled that case before trial. Defendants argued that Four To Go was solely responsible for the impact due to its negligent work on the vehicle.

Plaintiff alleged that he sustained the following injuries: a torn rotator cuff that required surgical repair, and a two-level cervical fusion. He claimed economic damages of $1.1 million for past and future medical expenses and wage losses. Plaintiff's final demand before trial was about $700,000 to $800,000, with Defendants having offered $100,000.

Upon trial to a jury, a verdict was rendered in Defendants' favor. The jury found that Plaintiff was injured, but determined that any negligence by Defendants was not the cause of the Plaintiffs' claimed damages.

Cypher v. Fedje et al., Case No. 17 CV 149.

PROPOSED LEGISLATION WOULD RAISE THE LIMITATIONS ON DAMAGES

S.B. 19-109: The present status of this bill is that it has been passed by the legislature but not yet signed by the governor into law. If signed into law, this bill would raise the caps on damages for claims of non-economic loss or injury, wrongful death, and unlawfully serving alcohol. The bill adjusts those damage limitations for inflation on January 1, 2020, and each January 1 every two years thereafter.

Wyoming

DEFENSE JUDGMENT AFFIRMED IN HOMEBUYER BREACH OF CONTRACT CASE STEMMING FROM WATER WELL ISSUES

Wyoming Supreme Court: This lawsuit concerned Plaintiffs Dustin and Lonnie Schell ("buyers") alleging breach of contract against Defendants Dustin and Lance Scallon ("sellers"), who sold them residential property. The purchase contract for the property required: "Seller to complete a fully functional water well prior to closing." Buyers brought suit, alleging that the sellers failed to comply with that requirement.

Prior to listing their property, the sellers had obtained water by hauling it from a cistern on the property, but they understood that potential buyers may not be able to obtain financing to purchase a property that lacked its own water supply. Sellers thus drilled a water well, and listed the property for sale about a month after entering into a contract with a contractor to drill the well. The well contractor finished the well and installed a pump a couple weeks before closing on the purchase occurred. Sellers used the well prior to

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closing and did not have any issue with it.

Buyers did not inspect the well prior to closing, other than obtaining a water sample that passed their lender's required test. Around the time of closing, sellers requested that the contractor install a deeper, more powerful pump, as no charge to buyers, to help the well function better during drought conditions. Buyers agreed, and the new pump was installed after closing.

Buyers then began experiencing problems with the well over the next several months, including discolored water, algae, and silt issues. Eventually the well stopped working, and buyers had to drill a new one.

Upon a trial to the bench, the district court entered judgment in favor of the seller-defendants. The court determined that the plaintiff-buyers did not meet their burden of proof, and concluded that sellers had completed a fully functional well prior to closing.

Plaintiff-buyers appealed. They argued that a "full functioning" well meant a well that produces a suitable quantity and quality of water for domestic use for the reasonable life of the well. Defendants argued that the clause should be read in conjunction with the "as is" clause and the clause allowing the buyers to inspect the property prior to closing.

The Wyoming Supreme Court found that, although they were sympathetic to the buyers, the language of the contract clause was unambiguous. It did not further define "fully functional," such as in the way that buyers interpreted it. Thus, the plain meaning of the contract clause was affirmed to find the well needed to be functioning only at the time of closing. The evidence established that the well was completed and able to produce water for the residence at that time. Moreover, the "as is" and "right to inspect" clauses were enforceable. As such, the district court's ruling was affirmed.

Schell v. Scallon, 2019 WY 11. 433 P.3d 879 (Wyoming Supreme Court, decided January 25, 2019).

$316,627 VERDICT FOR PERSONAL INJURIES IN MOTORCYCLE ACCIDENT CASE

U.S. District Court, D. Wyoming: This lawsuit concerned Plaintiff Truman Harrell, a 64-year old veterinarian, alleging multiple injuries from a motorcycle accident. The accident occurred when Defendant Ian Schwartz, a 16-year old, was driving a pickup truck out of a driveway. He intended to take a left turn and ended up hitting the rear of Plaintiff's motorcycle. The impact caused the motorcycle to rotate and slide on the road for 100 feet before coming to a rest. Plaintiff claimed defendant was negligent for not keeping a proper lookout and failing to yield the right-of-way. Defendant denied liability, arguing that Plaintiff's negligence in speeding and failing to pay attention caused the accident.

Defendant also disputed Plaintiff's alleged injuries. Plaintiff alleged the following injuries from the accident: fractures to the right tibia and fibula requiring surgery, two rib fractures, wrist fracture, concussion with post-concussion syndrome, head contusion, and a cervical strain. Plaintiff Truman's wife also asserted a loss of consortium claim.

Upon trial to a jury, the jury allocated 35% fault to Plaintiff and 65% fault to Defendant. The jury awarded $316,627 in damages to Plaintiff Truman, and declined to award any damages for the loss of consortium claim. The court reduced Plaintiff's award to $205,807 based upon the jury's apportionment of fault.

Harrell v. Schwartz, Case No. 2:17CV00165.

Texas

INSURANCE BAD FAITH AND UIM CAUSES OF ACTION SHOULD HAVE BEEN SEVERED AT TRIAL

Texas Court of Appeals: Tina Holland was involved in a motor vehicle collision with a vehicle driven by Nhachi Nguyen. Holland was covered by an automobile insurance policy with American National at the time of the accident. That policy included underinsured motorist (UIM) benefits with a limit of $100,000. Nguyen was insured by Allstate, with bodily injury limits of $30,000.

American granted Holland permission to settle with Allstate after an offer was made. Holland then requested payment in full of her UIM benefits. Holland ended up suing American for breach of contract under the UIM

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CLM

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provision of her policy, and for bad faith based upon violations of the Texas Insurance Code and other insurance principles. American filed a motion to sever the UIM cause of action from the bad faith claims. The district court denied the motion. A jury then found Holland suffered damages totaling $120,000 from the accident, and that American had engaged in bad faith with an additional award of $10,000 for that conduct.

The issue on appeal is whether the bad faith claims should have been severed at trial from the UIM claims. American argued that Holland was allowed to introduce evidence in her bad faith claim that inflated her UIM damages award. Specifically, Holland testified that she was aggravated by American because they did not pay the UIM claim. American argued this was prejudicial testimony because American had no duty to pay the UIM claim until there was a judgment.

The Texas Court of Appeals found that, in the context of insurance cases, a claim for breach of an insurance contract is separate and distinct from bad faith claims. The bad faith claim could therefore have been filed as a separate lawsuit. The Court found that evidence was admitted at trial that should not have been admitted in the bad faith case. Thus, the jury was deemed to have inflated its UIM award based upon that evidence. Severance of the bad faith and UIM claims should therefore have occurred, and the case was remanded for a new trial.

American National County Mutual Insurance Company v. Holland, 2019 WL 1272954 (Texas Court of Appeals, decided March 20, 2019, not yet released for publication in the permanent law reports).