Fall 2014

DEWHIRST & DOLVEN LLC Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas

IN BRIEF

WYOMING

- Dewhirst & Dolven attorneys George Parker and Robin Lambourn obtained a defense verdict against product liability claims involving an off-road motorcycle accident, and also prevailed on a counterclaim for attorneys fees at the conclusion of a jury trial in federal district court in Cheyenne, Wyoming.

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UTAH

- In a case where Dewhirst & Dolven attorney Rick Haderlie successfully obtained Plaintiff's voluntary dismissal with prejudice based upon the passive-retailer doctrine, the Court of Appeals reversed the grant of summary judgment against co-defendant Fulmer Helmets under the same doctrine. Plaintiff sustained injuries in an ATV accident when his helmet cracked open. The Court of Appeals held that issues of fact existed as to whether Fulmer Helmets was a "passive" retailer.

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COLORADO

- In a civil case involving a rear-end accident where the Defendant plead guilty of DUI, the Court of Appeals ruled that the DUI guilty plea had no preclusive effect in the subsequent civil case. The Court also ruled that evidence of the Plaintiff's failure to file income tax returns for several years was probative of the witness's character for truthfulness. Such impeachment evidence is thus admissible under C.R.E. 608(b).

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NEW MEXICO

- The issue in this case was: "Whether a party to a home warranty contract can enforce an arbitration provision contained in that warranty against a non-party who nevertheless seeks to invoke its benefits." The Court of Appeals held: "a non-party who directly seeks the benefits of a warranty agreement is equitably estopped from refusing to comply with a reasonable arbitration provision contained in the same agreement."

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TEXAS

- This appeal concerned alleged defects in a commercial construction project. The issue was "whether cross-claimants and third-party plaintiffs seeking contribution and indemnity in suits against licensed or registered professionals are obligated to comply with the certificate of merit requirement prescribed by Chapter 150 of the civil practice and remedies code." The Court of Appeals held that the statutory requirement did not apply to a third-party plaintiff or cross-claimant in this circumstance.

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WYOMING

DEWHIRST & DOLVEN WINS DEFENSE VERDICT AND PREVAILS ON A COUNTERCLAIM IN A PRODUCTS LIABILITY JURY TRIAL

U.S. Dist. Court, Dist. of Wyoming: Dewhirst & Dolven attorneys George Parker and Robin Lambourn obtained a defense verdict against product liability claims involving an off-road motorcycle accident, and also prevailed on a counterclaim, at the conclusion of a jury trial in federal district court in Cheyenne, Wyoming.

Dewhirst & Dolven represented Defendant/Counterclaimant Big Horn Power Sports, LLC ("Big Horn"), located in Sheridan, Wyoming. Plaintiff, Karl F. Kretzschmar, claimed negligence and breach of Uniform Commercial Code ("UCC") implied warranties against Big Horn. Big Horn sold Plaintiff an off-road motorcycle and installed numerous aftermarket parts on Plaintiff's motorcycle. While riding his motorcycle in Berthoud, Colorado for the first time after taking delivery, Plaintiff wrecked the motorcycle, resulting in injuries that led to a several-week hospital stay. Plaintiff and his expert witness, Darren Murphy, alleged Big Horn did not properly assemble and install an aftermarket rear shock absorber, which they claimed caused the accident.

Plaintiff alleged numerous short term injuries, including broken ribs, internal bleeding, a closed head injury, and several lacerated organs, as well as permanent cognitive deficiencies and memory loss resulting from the accident. At trial, Plaintiff requested $650,000 in damages from the jury for past and future medical expenses, pain and suffering, mental anguish, inconvenience, physical disfigurement, and impairment of quality of life.

Big Horn denied all of Plaintiff's allegations. Big Horn and its expert witness, Mark Kittel, P.E., opined no evidence existed that Big Horn improperly assembled the rear shock absorber because a third-party mechanic had apparently disassembled and reassembled the rear shock absorber after the accident. Thus, the evidence on Big Horn's assembly was destroyed. Moreover, Mr. Kittel's

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reconstruction of the accident caused him to conclude the crash resulted from Plaintiff's inexperience and over-application of the brakes while entering a turn, rather than from a defective rear shock absorber. Big Horn also presented evidence that Plaintiff took numerous pain medications on the day of the accident which may have impaired his ability to safely operate a motorcycle. Big Horn further disputed Plaintiff's assertion that the accident caused his alleged permanent cognitive deficiencies and memory loss. Big Horn argued Plaintiff's memory loss was a progressive side effect of medications taken by Plaintiff for years before the accident.

Big Horn's counterclaim asserted breach of the sales contract with Plaintiff. In that sales contract, Plaintiff disclaimed negligence and breach of implied warranty claims and agreed not to file suit against Big Horn alleging those claims. Plaintiff argued the sales contract was unconscionable and signed by Plaintiff under duress.

Before the claims went to the jury, the District Court entered directed verdict against Plaintiff's breach of UCC implied warranty claims, leaving only Plaintiff's negligence claim and Big Horn's breach of contract counterclaim for the jury's consideration.

The jury returned a verdict in Big Horn's favor on both Plaintiff's negligence claim and Big Horn's breach of contract counterclaim. The jury found Plaintiff 80% contributorily negligent for the accident, thus barring him from recovering on his negligence claim. The jury also decided Plaintiff breached the sales contract by filing the lawsuit against Big Horn, finding the sales contract was not unconscionable.

The District Court entered judgment in Big Horn's favor. The District Court will decide the amount of attorney fees and costs Big Horn will recover from Plaintiff as damages on its counterclaim at a future post trial hearing.

Kretzschmar v. Big Horn Power Sports, LLC, No. 13-CV-87F, United States District Court for the District of Wyoming, Cheyenne Division.

SUPREME COURT AFFIRMS COST OF REPAIR AS MEASURE OF DAMAGES IN RESIDENTIAL CONSTRUCTION DEFECT CASE

Supreme Court of Wyoming: Plaintiffs contracted to purchase a newly constructed home from Defendants. Due to the house having numerous structural and cosmetic flaws, Plaintiffs sued Defendants for breach of contract and breach of the implied warranty of habitability. After a bench trial, the district court awarded Plaintiffs judgment in the amount of $319,302 based on the cost of repairs.

On appeal, Defendants challenged: (1) the damage award, arguing that the cost of repair measure of damages was incorrect and that the correct measure of damages should have been the change in fair market value between the home as contracted and as actually constructed; (2) the district court's reliance on Plaintiff's expert's testimony as to future damages; and (3) the district court's finding that expansive soils were the cause of Plaintiff's damages.

As to the first issue, at trial Defendants presented evidence of its own cost of repair rather than evidence of the change in the residence's fair market value. The Wyoming Supreme Court thus held: "the lesser of the two measures of damages – cost of repair or diminution in value – should generally be awarded for breach of contract and breach of warranty. However, when the defendant has failed to present diminution of value evidence, cost of repair damages can be awarded even when they may be disproportionate."

As to the second issue, the Court held: "Damages for breach of contract may include recovery for incidental or consequential loss caused by the breach, as long as such damages are a foreseeable result of the breach." With the exception of two areas of future damages that the Court found unforeseeable, the Court upheld Plaintiff's expert's testimony as to future damages to the residence.

The Court also affirmed the district court's finding that expansive soils were the cause of the damages to Plaintiff's residence. In support, the Court cited to pre- and post-construction engineering reports given to Defendants identifying the problem of expansive soils.

Andrews v. Legacy Builders, LLC et al., 2014 WY 103 (Wyoming Supreme Court, decided August 15, 2014, not yet released for publication in the permanent law reports).

Utah

SUMMARY JUDGMENT UNDER THE PASSIVE RETAILER DOCTRINE REVERSED IN ATV HELMET CASE

Utah Court of Appeals: Eight-year-old Conway Cook crashed an ATV while wearing a protective helmet. Instead of protecting him, the helmet cracked and injured his face. Conway's mother sued various defendants on his behalf, including Defendant Fulmer Helmets and White Knuckle Motor Sports. Fulmer Helmets distributed the helmet throughout the American market, and White Knuckle sold the helmet to Conway's father. Dewhirst & Dolven attorney Rick Haderlie represented White Knuckle and successfully obtained Plaintiff's stipulation for a voluntary dismissal with prejudice of claims under the "passive retailer" doctrine.

Plaintiff asserted claims for strict liability for defective design, negligence, and failure to warn against Fulmer. Fulmer moved for summary judgment under the passive retailer doctrine, arguing that as a passive retailer it could not be held liable for defects in the helmet. The district court agreed and dismissed all claims against Fulmer.

Regarding the passive retailer doctrine, the Court of Appeals noted: "The passive retailer doctrine creates an exception to strict liability under the Product Liability Act for 'passive retailers' – sellers who do not

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participate in the design, manufacture, engineering, testing, or assembly of a product…. Under this doctrine, a passive retailer is not subject to a strict liability claim … where the manufacturer is a named party to the action … [and] when undisputed facts establish that no fact finder could, under principles of comparative fault, apportion fault to that codefendant."

On appeal, Plaintiff argued that Fulmer did not qualify as a passive retailer because Fulmer "is not passive in the design, manufacturing, and testing of the helmets bearing its name." Fulmer responded that it qualified as a passive retailer because it "does not design or manufacture helmets."

The Court found that evidence supported Fulmer participating in the manufacture, design, and testing of the helmets bearing its name. This included Fulmer making design recommendations to manufacturer KYL, examining KYL's quality-control procedures, and testing the helmets itself. The Court also noted that Fulmer holds itself out to the public as the manufacturer of the helmets. The Court emphasized that "one who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer." Thus, the Court reversed the judgment of dismissal and remanded for further proceedings.

McQuivey v. Fulmer Helmets, Inc., 2014 UT App 177 (Utah Court of Appeals, decided July 31, 2014, not yet released for publication in the permanent law reports).

ISSUE OF SUFFICIENCY OF TEMPORARY TRAFFIC CONTROL ON CONSTRUCTION PROJECT RULED TO REQUIRE EXPERT OPINION

Utah Court of Appeals: This lawsuit involved a car accident that occurred when Scott and Brenda McDowell ran off the end of a paved section of road that was under construction. They had entered the road from a parking lot. There was no barrier or sign preventing access to the road from the parking lot, nor any immediately preceding the road's drop-off. Plaintiff United Fire, the McDowells' insurer, paid for the McDowells' medical bills and vehicle damage. As the McDowells' subrogee, Plaintiff then sued Staker, claiming it negligently maintained the construction zone.

Following the close of fact discovery, Staker filed a motion for summary judgment on the basis that United Fire, which had not designated an expert, could not establish the standard of care or a breach of the standard without expert testimony. The district court agreed and granted Staker's motion for summary judgment.

On appeal, Plaintiff challenged the district court's determination that an expert was required to establish the standard of care for temporary traffic control and the breach of that standard. Plaintiff argued that this issue was within the knowledge of the average juror, as its claims were not based upon deficiencies in the traffic control signage, but instead "on a complete lack of signs or devices to warn or guide the McDowells away from danger." Thus, if the jury believed Plaintiff's version of events, namely the total absence of warning signs, then it is within the knowledge of the average juror that Staker should have placed at least some warning about the dangerous condition that it created.

The Court noted, however, that if the jury believes Staker's position, then the issue becomes the adequacy of the warning. The Court thus held: "The average person has little understanding of the standard of care for temporary traffic control in a major construction project and therefore expert testimony must usually be presented to establish the standard of care for warning travelers of danger. However, if the jury believes United Fire's evidence that there was a complete lack of signage warning the McDowells of the dangerous road conditions or of devices guiding them away from such danger, the jury may well find for United Fire even in the absence of expert testimony." The grant of summary judgment was thus reversed.

United Fire Group v. Staker and Parson Cos., 2014 UT App 170, 332 P.3d 394 (Utah Court of Appeals, decided July 25, 2014).

UTAH MODIFIES PREJUDGMENT INTEREST LAW

Under U.C.A. § 78B-5-824, a plaintiff may claim interest on special damages actually incurred, in lawsuits brought to recover damages for personal injuries. For lawsuits classified as tier 1 under the Utah Rules of Civil Procedure, a plaintiff may only recover prejudgment interest if the plaintiff tenders a written settlement demand and the amount of the demand does not exceed 1-1/3 of the amount of the judgment eventually awarded at trial. Tier 2 and 3 cases are not subject to these requirements to claim prejudgment interest.

Rather than using a flat 7.5% interest rate, the statute now provides:

> (a) Any prejudgment interest shall be computed as simple interest. For first special damages incurred during the year of the occurrence of the act giving rise to the cause of action, any prejudgment interest shall be computed as simple interest accruing from the date on which the first date special damages were actually incurred.
>
> (b) For special damages incurred in successive years, prejudgment interest shall be calculated from January 1 of each year special damages were incurred. The court shall calculate prejudgment interest using a per annum rate, which is two percentage points above the prime rate, as published by the Board of Governors of the Federal Reserve System on the first business day in January of the calendar year in which the judgment is entered. The prejudgment interest rate applied to all cases may not be lower than 5% or higher than 10%.

U.C.A. § 78B-5-824(5). These changes only apply to a cause of action arising on or after July 1, 2014.

U.C.A. 78B-5-824 amended by Senate Bill 69 (Signed into law by Governor Herbert on March 31, 2014).

$19,436 JURY VERDICT IN MOTOR VEHICLE ACCIDENT CASE ALLEGING TRAUMATIC BRAIN INJURY

Salt Lake County: Plaintiff Natalie Hansen alleged that an eastbound vehicle, in which she was a passenger, crossed at least one lane of traffic in an attempt to enter a convenience store parking lot. In doing so, the vehicle was struck by another eastbound vehicle. Defendant Chloe Snethen was the driver of the vehicle in which Plaintiff Hansen was a passenger. Plaintiff sued Defendant Snethen for negligence, claiming that she sustained a traumatic brain injury as a result of the accident.

Defendant admitted her negligence caused the accident, but denied the injuries alleged by Plaintiff. The matter went to jury trial, which awarded Plaintiff past medical expenses of $8,876 and pain and suffering of $10,560. Plaintiff's total award was thus $19,436.

Hansen v. Snethen, Case No. 2012-09-05484, 2014 WL 1256095.

Colorado

EVIDENCE OF FAILING TO FILE TAX RETURNS ADMISSIBLE TO IMPEACH WITNESS'S CREDIBILITY UNDER CRE 608

Colorado Court of Appeals: Defendant Peter Beihoffer's car rear-ended Plaintiff Michael Leaf's taxicab on an icy road. Beihoffer ultimately pleaded guilty to a misdemeanor charge of driving under the influence of drugs (DUI). Leaf sued Beihoffer for negligence, and the court entered judgment in Beihoffer's favor.

On appeal, Leaf contended that the district court committed reversible error by allowing impeachment evidence that he had failed to file income tax returns for several years. Leaf argued that the evidence was not probative of his truthfulness and was unfairly prejudicial. The Court of Appeals recognized that this was an issue of first impression and ruled that evidence of a witness's failure to file income tax returns for several years is probative of the witness's character for truthfulness. Such evidence is therefore admissible under Colorado Rule of Evidence 608(b) to impeach the witness's credibility. Thus, the district court did not err in admitting such evidence.

Leaf also contended that the district court erred by not giving preclusive effect to Beihoffer's DUI guilty plea and by excluding evidence of the plea which was offered for impeachment. However, the Court of Appeals held that evidence of Beihoffer's DUI guilty plea had no preclusive effect in this subsequent civil case. The Court also found that the district court did not err in excluding evidence of the guilty plea for impeachment, because there was sufficient cumulative evidence presented to the jury on this undisputed issue. The judgment was affirmed.

Leaf v. Beihoffer, 2014 COA 117 (Colorado Court of Appeals, decided September 11, 2014, not yet released for publication in the permanent law reports).

SUBSTANTIAL COMPLIANCE WITH HOSPITAL LIEN STATUTE RULED SUFFICIENT

Colorado Court of Appeals: Plaintiff Wainscott was injured in an auto accident caused by third parties (tortfeasors). He received treatment at St. Anthony Central Hospital, which is managed and operated by Centura Health Corporation. To secure payment of these medical expenses, Centura asserted a statutory hospital lien against any settlement or judgment that Wainscott might receive as a result of the accident. However, Centura did not identify in its lien filing the tortfeasors responsible for Wainscott's injuries, and did not serve a copy of the notice on them. Centura did identify and serve the tortfeasor's insurer and Wainscott.

The issue in this case was "whether substantial compliance may be sufficient to satisfy the filing and notice provisions of Colorado's hospital lien statute." The trial court ruled that Centura's failure to strictly comply with the hospital lien statute rendered its own lien unenforceable. On appeal, Centura argued that it substantially complied with the hospital lien statute and that substantial compliance is thus sufficient.

The Court of Appeals found that, because minor filing and notice deficiencies should not invalidate an otherwise valid hospital lien, substantial compliance may be sufficient to satisfy the filing and notice provisions of Colorado's hospital lien statute. A lienholder substantially complies with the statute when it satisfies the statute's purposes through timely actual notice of the lien to those against whom the lienholder attempts to enforce the lien. As Centura identified and served the tortfeasors' insurer and Wainscott, Centura substantially complied with the hospital lien statute. Thus, the Court of Appeals held that the trial court erred in finding the lien unenforceable.

On cross-appeal, Wainscott contended that the district court erroneously dismissed his Colorado Consumer Protection Act (CCPA) and fraudulent concealment claims under C.R.C.P. 12(b)(5), for failure to state a claim on which relief can be granted. The basis of Wainscott's CCPA claim was alleged injury resulting from Centura's failure to bill Medicare. However, during the period of time in question, Centura was required to refrain from billing Medicare and to instead seek payment from the tortfeasors' liability insurer. The Court held that Centura's failure to advise Wainscott that it was obeying the law did not constitute a deceptive or unfair trade practice. Further, Centura did not have a duty to disclose to Wainscott that it planned to pursue payment from the tortfeasors or their insurer. Accordingly, the district court's dismissal of the CCPA and fraudulent concealment claims was upheld.

In light of the reversal as to the validity of Centura's hospital lien, the

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case was remanded to determine whether the amount of Centura's asserted lien represents "reasonable and necessary charges" under CRS § 38-27-101.

Wainscott v. Centura Health Corp., 2014 COA 105 (Colorado Court of Appeals, decided August 14, 2014, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN UNDERINSURED MOTORIST CASE INVOLVING CLAIM OF MILD TRAUMATIC BRAIN INJURY

El Paso County: Plaintiff Teresa DeVoy alleged she was injured in a T-bone collision at an intersection. She alleged sustaining a mild traumatic brain injury and said that she was unable to work as a result of her injuries. She settled with the driver of the vehicle that hit her for $25,000. She then sought a total of $1,075,000 from Defendant American Family Insurance, representing $75,000 in available underinsured motorist benefits and $1 million under an umbrella policy. American Family argued that Plaintiff sustained minor injuries as a result of the collision, and alleged that Plaintiff had been fully compensated for her injuries and damages.

Plaintiff also alleged that Defendant had delayed in paying benefits, which Defendant denied.

Plaintiff's final demand before trial was $1.2 million. Defendant's final offer before trial was $50,000. Upon a jury trial, the jury returned a verdict for the defendant.

DeVoy v. American Family Mutual Insurance Co., Case No. 11-CV-5940.

New Mexico

NEW MEXICO COURT OF APPEALS HOLDS ARBITRATION PROVISION IN HOME WARRANTY APPLIES TO NON-PARTY SUBSEQUENT HOME PURCHASERS

New Mexico Court of Appeals: The issue in this case was: "Whether a party to a home warranty contract can enforce an arbitration provision contained in that warranty against a non-party who nevertheless seeks to invoke its benefits."

Plaintiffs Michelle and Jason Damon sued Defendant StrucSure Home Warranty and others for structural defects in their home. StrucSure filed a motion to compel arbitration pursuant to a provision in the home warranty it issued to the builder and original purchasers of the property. The district court denied the motion on the basis that the Plaintiffs were not parties to the StrucSure warranty and, because they did not bargain for or acknowledge the arbitration provision, they could not be bound by it.

On appeal, the Court of Appeals disagreed, holding: "a non-party who directly seeks the benefits of a warranty agreement is equitably estopped from refusing to comply with a reasonable arbitration provision contained in the same agreement." The Court thus reversed the ruling.

Damon v. StrucSure Home Warranty, LLC et al., Docket No. 33,126 (New Mexico Court of Appeals, slip opinion, decided August 19, 2014, not yet released for publication in the permanent law reports).

About Our Firm

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 • Fort Collins, Colorado • 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, 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 solutions through the legal process. Our priority is to establish a reputation in the legal and business community of being exceptional attorneys while maintaining a high level of ethics and integrity. We 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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Texas

STATUTORY CERTIFICATE OF MERIT NOT REQUIRED FOR THIRD-PARTY PLAINTIFFS AND CROSS-CLAIMANTS SEEKING CONTRIBUTION AND INDEMNITY IN CONSTRUCTION CASES

Texas Court of Appeals, Dallas: This appeal concerned alleged defects in a commercial construction project known as One Montgomery Plaza in Fort Worth, Texas. The issue was "whether cross-claimants and third-party plaintiffs seeking contribution and indemnity in suits against licensed or registered professionals are obligated to comply with the certificate of merit requirement prescribed by Chapter 150 of the civil practice and remedies code."

The project's real estate development company, OMP Development, brought the action against the general contractor, ICI Construction. The residential condominium association, 2600 Montgomery, intervened in the lawsuit, seeking to recover damages upon its claims that the project's pool leaked, as well as for other alleged construction deficiencies. ICI then brought third-party claims against the engineering firm (Hydrotech Engineering) and the architect (Swaback Partners). ICI sought contribution in the event that it was found liable to Plaintiffs or Intervenor. ICI attached a certificate of merit to its third-party petition, which offered several reasons why Hydrotech's work caused problems on the project.

The next business day, ICI filed an amended third-party petition, but failed to attach a certificate of merit. Following this amendment, several amend pleadings and cross-claims were filed by several parties, some including certificates of merit, and some not. Hydrotech and Swaback filed motions to dismiss, arguing that claims seeking contribution or indemnification are required to be accompanied with a certificate of merit under section 150.002 of the civil practice and remedies code. The trial court denied their motions.

The Court of Appeals commented that the purpose of the statutory certificate of merit is to ensure that the plaintiff's claims have merit. The statute further provides that failure to file the certificate "shall result in dismissal of the complaint against the defendant." The Court of Appeals was influenced by a recent Texas Supreme Court decision interpreting the certificate of merit statutory requirement, and held that the trial court did not err in denying the motions to dismiss. The statute requires a plaintiff to file the certificate of merit in an action or arbitration proceeding. As such, a third-party plaintiff or cross-claimant was not statutorily required to file the certificate of merit.

Hydrotech Engineering, Inc. et al. v. OMP Development, LLC et al., Case No. 05-13-00713-CV, 2014 WL 3695800 (Texas Court of Appeals, Dallas, decided July 25, 2014, not yet released for publication in the permanent law reports).