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DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • Colorado • Texas

IN BRIEF

UTAH

- The Utah Supreme Court judicially adopted a new cause of action for filial consortium for losses sustained from a minor-child's serious injury. In adopting the cause of action, the Court held that the same statutory requirements for a spousal loss of consortium claim must be met.

.....Page 2

COLORADO

- In a construction defect case, the Colorado Court of Appeals interpreted when "substantial completion" of a contractor's work occurs under the builder's statute of repose. The Court held that substantial completion is when the contractor "finishes working on the improvement," rather than when the certificate of occupancy is issued.

.....Page 3

WYOMING

- The Wyoming Supreme Court adopted the notice-prejudice rule for denial of a claim due to untimely notice. That rule is: "Before being entitled to deny coverage based upon untimely notice of an occurrence that triggers coverage, an insurer must be prejudiced, regardless of the express language of the policy."

.....Page 4

TEXAS

- In a wrongful death case arising from a drug overdose, the Texas Supreme Court held that a malfunction in the 911 phone system did not waive governmental immunity under the Texas Tort Claims Act. The malfunction was determined not to be the cause of the death.

.....Page 5

UTAH

DEWHIRST & DOLVEN OBTAINS THREE DEFENSE VERDICTS IN A TRIAL DE NOVO

Salt Lake City County: Dewhirst & Dolven attorney Kyle Shoop obtained three defense verdicts upon a trial de novo to the bench. This matter involved alleged personal injuries from three Plaintiffs, who were brothers, after an alleged impact between Plaintiffs' vehicle and a semi tractor-trailer driven by Defendant Ryan Nesbit.

Plaintiffs initially filed their actions against Defendant Nesbit in small claims court. They alleged that the rear driver-side of Defendant's trailer impacted their vehicle as the truck made a right turn onto northbound Bangerter Highway. Though Plaintiffs alleged receiving soft tissue injuries from the impact, none of them received any medical care until over 70 days after the alleged impact. However, one month after the accident, the driver of the passenger vehicle, Plaintiff Wellington Damian, provided a recorded statement to the insurance carrier wherein he denied anyone in his vehicle having sustained any injuries. He also described the accident as "minor." Indeed, the impact only left a scrape on the hood of the Plaintiffs' vehicle. Based upon the directionality and the scrape and the point of impact of the vehicles, it was also doubtful that the impact would have occurred without Plaintiffs' vehicle rear-ending Defendant's trailer.

At the small claims trial, the judge ruled in Defendant's favor as to all three of the Plaintiffs' claims. The judge found that Plaintiffs would not have sustained their alleged injuries from such a minor accident which resulted in only a scrape mark to the vehicle. As such, the judge rendered three "no cause" verdicts in Defendant Nesbit's favor. He did not make a ruling as to fault for the accident, as doing so was unnecessary based upon his ruling of there being no damages sustained.

Plaintiffs appealed, seeking a trial de novo at the district court. At trial, Defendant stressed the multiple inconsistencies in Plaintiffs' medical records as to how the accident occurred and as to the alleged injuries. Upon bench trial, the district court judge also held that the alleged injuries did not match the vehicle's minor scrape mark. As such, the judge rendered "no cause of action" as to all three of the Plaintiffs' actions.

Damian v. Nesbit,
Case No. 168900005,
Salt Lake County, Utah.

IN THIS ISSUE

Utah Supreme Court Judicially Adopts Cause of Action for Loss of Filial Consortium

Utah Supreme Court: After a fourteen-year-old student at a high school suffered serious and life-threatening injuries in his drama class, his parents filed a lawsuit. His parents filed as Plaintiffs, individually and as parents and guardians of the student. They asserted negligence claims and also sought to bring a personal claim for loss of filial consortium. For the claim, they had sought to recover damages for the loss of consortium, companionship, services, comfort, society, and attention of their minor child. The district court dismissed the loss of filial consortium claim, and the parents appealed.

The issue before the Utah Supreme Court was: whether Utah should "judicially adopt a cause of action that allows the parents of a tortuously injured minor child to recover for loss of the child's consortium." The Court ruled: "we adopt a cause of action for loss of filial consortium allowing parents to recover for loss of filial consortium due to tortious injury to a minor child in cases where the injury meets the definition set forth in U.C.A. § 30-2-11, the spousal consortium statute." In doing so, the Court also stated: "Like the relationship between spouses, the relationship between parents and a minor child is a legally recognized relationship involving legal obligations. Like the relationship between spouses, it also tends to be a particularly close relationship highly valued in society."

Benda v. Roman Catholic Bishop of Salt Lake City, 2016 UT 37 (Utah Supreme Court, filed August 25, 2016, not yet released for publication in the permanent law reports).

Utah Supreme Court Holds the Savings Statute Does Not Apply to Actions Under the Governmental Immunity Act of Utah

Utah Supreme Court: Plaintiffs filed a tort lawsuit against Defendant Provo City based upon an alleged false arrest. Plaintiffs' lawsuit was brought under the Governmental Immunity Act of Utah ("GIA"). As required by the GIA, Plaintiffs submitted a "Notice of Claim" to Provo City before filing an action in court. Upon their claim being denied, Plaintiffs filed their lawsuit in court within the one year filing period provided for in the GIA. However that lawsuit was dismissed on the basis that it was filed without the $300 bond required under the GIA.

By the time the court dismissed the lawsuit, the one year filing period had expired. Plaintiffs nonetheless filed a second lawsuit (with the bond). Defendant again moved to dismiss, but this time due to the lawsuit being outside the one year filing period. In response, Plaintiffs argued that the Savings Statute, U.C.A. § 78B-2-111, excused their failure to file within the one year period. The Savings Clause generally allows a plaintiff to commence a new action within one year of the dismissal of a previous action that was timely when filed, but which was dismissed for reasons other than on the merits.

The district court granted Defendant's motion to dismiss, holding that claims against governmental entities are comprehensively governed by the GIA. As the GIA does not provide a savings provision, Plaintiffs' claims were thus time-barred.

The issue on appeal was thus whether the Savings Clause applies to actions brought under the GIA. The Utah Supreme Court held: "We interpret the Governmental Immunity Act to foreclose the applicability of the Savings Statute…." The Court noted that the GIA even includes a savings provision of its own, and thus the filing-period requirement under the GIA was exclusive of the Savings Statute.

Craig et al. v. Provo City, 2016 UT 40 (Utah Supreme Court, filed August 26, 2016, not yet released for publication in the permanent law reports).

Homeowner's Insurance Policy Terms Held Not to Cover Water Damage from a Temporary Roof

Utah Court of Appeals: The issue in this appeal was whether an insurance policy covered water damage to a house without a complete roof.

Plaintiffs purchased a homeowner's insurance policy from Defendant Farmers Insurance Exchange to cover Plaintiffs' primary residence. The policy generally excluded from coverage water intrusion into the house with certain exceptions outlined in a limited water coverage provision. As relevant to the case, that provision did not cover water damage unless the water entered through an opening in the roof caused by a windstorm. The provision further specified that temporary coverings were not to be considered as roofs.

Plaintiffs had begun replacing shingles on the roof of their house. As Plaintiffs installed the last two rolls of underlayment below new shingles, a sudden and severe storm arrived, bringing with it torrential rains. The storm ripped the underlayment off the roof, allowing the rain to penetrate the house. This resulted in damage to both the structure and personal property within the house. Plaintiffs filed an insurance claim, which Defendant denied under the terms of the policy.

At the district court, Plaintiffs provided an expert affidavit stating that the underlayment layers were not a temporary covering because those layers were to be installed on the roof permanently. However, that expert recognized that the underlayment alone was not a complete roof system without shingles. The district court therefore entered summary judgment in Defendant's favor, on the basis that there was not a roof installed on the house within the policy terms.

On appeal, the Utah Court of Appeals recognized Utah's policy of liberally construing policy terms in favor of the insured. Despite this, the Court determined that there was no ambiguity in the policy's term "roof," which required a completed roof. As Plaintiffs' expert even recognized there was not a complete roof system installed, the Court affirmed the district court's ruling.

Poulsen v. Farmers Insurance Exchange, 2016 UT App 170 (Utah Court of Appeals, filed August 4, 2016, not yet released for publication in the permanent law reports).

Colorado

"Substantial Completion" Interpreted Under the Builder's Statute of Repose

Colorado Court of Appeals: In this construction defect dispute, Plaintiff Sierra Pacific Industries ("Sierra") appeals the district court's entry of summary judgment in favor of Defendant Jason Bradbury d/b/a Bradbury Construction ("Bradbury").

Sierra was hired by a contractor to supply windows and doors for the construction of condominiums at Ajax Lofts Condominium Association. Sierra hired Bradbury to install the windows and doors. Bradbury began and completed its work in 2002. In June 2004, Denver City and County issued a certificate of occupancy for all units. When residents began complaining of water infiltration, Sierra and the general contractor attended to them from 2004 through 2011. Bradbury participated in some repairs efforts in 2004, but none thereafter.

After Sierra settled with the general contract and the association, Sierra eventually filed suit against Bradbury to recover for the losses. Bradbury filed a motion for summary judgment, arguing that Sierra's claims were time barred under the six-year statute of repose in Colorado's Construction Defect Action Reform Act ("CDARA"), § 13-80-104, C.R.S. 2015. In response, Sierra made two arguments: (1) that its claims did not arise until after it reached the settlement with the general contractor and association; and (2) even if the statute of repose was not tolled by the settlement, then the statute of repose still had not began to commence until 2011, when the improvements to the property in connection with Bradbury's work were substantially completed.

Bradbury's response was two-fold: (1) that there is no settlement exception to the statute of repose; and (2) that the statute of repose commence, at the latest, when its work was completed in 2004.

With regard to Sierra's first argument, the Colorado Court of Appeals held that the statute of repose was not tolled until the settlement of the underlying action. The Court found that, unlike a statute of limitations, a statute of repose cannot be tolled.

As to Sierra's second argument, the Court noted that § 104 provides: "in no case shall such an action be brought more than six years after the substantial completion of the improvement to the real property." The Court thus ruled that "substantial completion" for a subcontractor is when it "finishes working on the improvement." This occurred by Bradbury at the earliest in 2002, and in 2004 at the latest. Thus, Sierra's lawsuit was time barred under the statute of repose.

Sierra Pacific Industries, Inc. v. Bradbury, 2016 COA 132 (Colorado Court of Appeals, filed September 8, 2016, not yet released for publication in the permanent law reports).

Colorado Supreme Court Interprets Formation of a Common Interest Community Under the CCIOA

Colorado Supreme Court: In this decision, the Colorado Supreme Court addressed "when and how common interest communities are formed under the Colorado Common Interest Ownership Act ("CCIOA"), §§ 38-33.3-101 to -402, C.R.S. (2016)."

The Countryside Townhome Subdivision is a residential common interest community in Fountain, Colorado. Their homeowners' association filed a complaint against the subdivision's developer seeking over $400,000 in past-due assessments for maintenance of the developer's unsold properties. The developer's liability turned on when its properties became part of the subdivision under the community's governing instruments and the CCIOA.

The Colorado Court of Appeals had determined that the community was formed when the document containing the community's covenants and the plat for the community were recorded. It also determined that the developer's properties were brought into the community when those documents were recorded. Thus, per the Court of Appeals' decision, the developer was liable for the assessments under both the community's covenants and the CCIOA.

The Colorado Supreme Court disagreed. On the facts of the case, the Court concluded that recordation of the covenants and plat did not create a common interest community. Rather, the community was created when the developer first subjected the property to the covenants, and the remaining property could not become part of the community until the developer added it in accordance with certain prescribed steps. Because the developer's property could not become part of the community until it was added, the Court held that the developer was not liable for the assessment. Accordingly, the Court of Appeals' ruling was reversed.

Pulte Home Corp., Inc. v. Countryside Community Assoc., Inc., 2016 CO 64 (Colorado Supreme Court, filed September 26, 2016, not yet released for publication in the permanent law reports).

Defense Verdict in Medical Malpractice Action Which Sought $10 Million

El Paso County: Plaintiff Mina Beall alleged that she suffered cardiopulmonary arrest and a profound hypoxic brain injury as a result of Defendants' negligence. Plaintiff sued three of her medical doctors for negligently failing to evaluate her heart function prior to an upper undoscopy ("EGD").

Plaintiff alleged that an echocardiogram should have been performed prior to the EGD. She also alleged that Defendants failed to review imaging before the procedure; that there was substantial evidence to support not proceeding with the EGD; and that Defendants should not have gone forward with the procedure. Defendants claimed that their care and treatment of Plaintiff was reasonable.

More on page 4

Continued from Page 3

They also claimed that there was no need to perform a heart evaluation prior to the EGD. They explained that during the procedure Plaintiff had an airway obstruction that is a known potential complication of the EGD. Further, Plaintiff suffered respiratory arrest that was unrelated to the heart function.

Plaintiff was 29 years old, and alleged that she would need lifetime care and would be unable to work. She sought damages up to $10 million for lifetime care and lost earnings. Her final demand before trial was $3 million total ($1 million to each Defendant). In response, one Defendant offered $50,000, and the other two Defendants did not make any offer. The jury returned a verdict in favor of Defendants.

Beall v. Solano, MD et al., Case No. 14CV31351.

Wyoming

WYOMING SUPREME COURT ADOPTS THE NOTICE-PREJUDICE RULE FOR DENIAL OF INSURANCE CLAIMS

Wyoming Supreme Court: The following question was certified to the Wyoming Supreme Court from the U.S. Court of Appeals: "Whether, under Wyoming law, an insurer must be prejudiced before being entitled to deny coverage when the insured has failed to give notice as soon as practicable." In certifying that question, the U.S. Court of Appeals also noted that many states have expressly adopted a notice-prejudice rule under which an insurer will only be able to disclaim coverage if it demonstrates it was actually prejudiced by late notice of a claim.

Defendant Jim Hipner LLC, a trucking company, obtained a $2 million umbrella policy from Plaintiff Century Surety Company. That policy provided a notice provision that Hipner was to notify Century of a claim in writing "as soon as practicable." Failure to do so "will result in exclusion of coverage whether we are prejudiced or not."

On March 31, 2011, one of Hipner's drivers created a road obstruction that produced an injury-generating, multi-vehicle collision. Hipner learned of the accident the same day that it occurred. Hipner was informed by a police officer that "there were no serious injuries." The police report reflected there being individuals who sustained injuries from the accident. On the day of the accident, Hipner reported the accident to representatives of Willis of Wyoming and Great West Casualty Company, the underlying primary insurance companies for Hipner. But no one at Hipner notified Century. Hipner testified at a deposition that he thought notifying Willis of Wyoming satisfied his obligations to notify all of the insurance companies.

One of the individuals involved in the accident was rendered quadriplegic. Hipner learned about this in May 2011. In September 2011, Century was first notified of the accident indirectly through Willis of Wyoming. Century later declined to participate in a settlement with the injured individual because it determined Hipner was not covered due to lack of timely notification. Century then filed suit against Hipner, seeking a declaratory judgment that it did not have a duty to defend or indemnify Hipner for the accident.

The Wyoming Supreme Court adopted the notice-prejudice rule, which requires proof of prejudice for an insurer to avoid liability in the event that a policyholder provides untimely notice of an event. In adopting the rule, the Court was influenced by the uneven bargaining power between a policyholder and an insurance company. It also was influence by public policy of enforcing insurance contracts.

Century Surety Co. v. Jim Hipner, LLC et al., 2016 WY 81, 377 P.3d 784 (Wyoming Supreme Court, filed August 17, 2016).

COMMERICIAL GENERAL LIABILITY POLICY HELD VALID UNDER ANTI-INDEMNITY STATUTE IN OIL RIG INJURY CASE

U.S. Court of Appeals, 10th Cir.: Darrell Jent suffered serious injuries while working on an oil rig. The rig's owner, Defendant Precision Drilling, paid Mr. Jent a settlement. An issue existed concerning who was ultimately responsible for payment of the settlement. Precision contended that its insurance company, Plaintiff Lexington, should reimburse the money Precision paid for the settlement. Lexington issued two commercial general liability polices to Precision, which covered accidents exactly like the one sustained by Mr. Jent.

Lexington argued that a Wyoming statute rendered the policies a nullity, so that any coverage was illusory instead of real. The district court agreed and held that that Lexington was free from any liability.

On appeal, the Wyoming Supreme Court stated: "There can be no doubt that Wyoming law [under the State's Anti-Indemnity Statute, W.S.A. § 30-1-131] prohibits those engaged in the oil and gas industry from contractually shifting to others liability for their own negligence." However, the Court noted that the Anti-Indemnity Statute specifically states that the provision "shall not affect the validity of any insurance contract."

Lexington further argued that the policy was void under the Anti-Indemnity Statute because Precision did not pay for the policy. Rather, the well-site manager paid the policy to insure Precision, at the request of another entity (the leaseholder). Lexington argued that the policy arrangement therefore was identical to an indemnity agreement that was barred under the statute. It thus asked the Wyoming Supreme Court to bar Precision from claiming coverage under a policy someone else had to purchase.

More on Page 5

Continued from Page 4

The Wyoming Supreme Court disagreed with Lexington's argument. Rather, the Court was influenced by the statutory language upholding the validity of "any" insurance contract. The Court thus refused to override the plain meaning of the statute.

Lexington Insurance Co. v. Precision Drilling Co., L.P. et al., 830 F.3d 1219 (U.S. Court of Appeals, 10th Circuit, filed July 26, 2016).

TEXAS

MALFUNCTION OF 911-SYSTEM RULED NOT TO WAIVE GOVERNMENTAL IMMUNITY IN WRONGFUL DEATH LAWSUIT

Texas Supreme Court: Hours before Matthew Sanchez died from a drug overdose, a 911 operator dispatched an ambulance to his apartment complex. Once on scene, however, the emergency personnel provided assistance to a different drug overdose victim and then left the premises without rendering aide to Sanchez. They erroneously concluded that the two closely-timed 911 calls concerning overdose victims at the same location were redundant. In a wrongful death lawsuit against Defendant City of Dallas, Sanchez's parents allege the 911 telephone system malfunctioned and disconnected Sanchez's call before the responders could establish the overdose victims were not duplicative.

The issue on appeal before the Texas Supreme Court was whether the Texas Tort Claims Act ("TCA") waives the City's immunity from suit based upon allegations in the lawsuit that a condition of the City's telephone system proximately caused Sanchez's death. Plaintiffs alleged that Sanchez was prevented from receiving potentially life-saving medical care due to the telephone system issue. The TCA provides a limited waiver of governmental immunity for "personal injury and death so caused by a condition or use of tangible personal property … if the governmental unit would, were it a private person, be liable to the claimant according to Texas law."

The Texas Supreme Court held that governmental immunity is not waived, and dismissal is therefore required, because the causal nexus between the alleged telephone condition and Sanchez's injury was not established. The Court ruled that for immunity to be waived under the TCA, the personal injury or death must be proximately caused by a condition or use of tangible personal property. To establish this, the phone's condition must have been determined to be a proximate cause of Sanchez's death. The Court determined that the causal connection between the phone system and the death was too far attenuated, especially since six hours passed between the phone malfunction and when Sanchez passed away.

City of Dallas v. Sanchez, 2016 WL 3568055 (Texas Supreme Court, filed July 1, 2016, not yet released for publication in the permanent law reports).

Dewhirst & Dolven would like to recognize and thank several of its attorneys for their recent philanthropic activities:

- The firm has supported the Argonaut Group to benefit Portland's Transitional Community School.
- Miles Dewhirst has supported the Pikes Peak Challenge hike to benefit the Brain Injury Alliance. He has also sponsored the Down Syndrome Association buddy walk.
- Pat Maggio serves on the Edson Foundation Board, a non-profit philanthropic organization that provides grants to help young people expand educational and career choices.
- Lars Bergstrom serves on the board of The Homes Front Cares, which provides emergency grants to pay essential life expenses for veterans.
- Susan Pray and Kathleen Kulasza spent time last fall, winter, and spring coaching high school mock trial.
- Marilyn Doig heads the firm's holiday giving program, which provides books to children from low income families and gives a needy family a holiday dinner, new winter clothes, and toys to make the season festive.
- Kyle Shoop has spoken at elementary assemblies to promote reading among students and families.

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

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

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CLM

DEFENSE SUMMARY JUDGMENT REVERSED IN SLICK FLOOR, PREMISES LIABILITY CASE

Texas Court of Appeal, Austin District: Plaintiff Gerald Kostecka filed a lawsuit against Defendant Smokey Mo's BBQ, seeking recovery for personal injuries. He alleged that while eating at the restaurant, he reached across the table for the salt. While doing so, his chair "shot out" from under him, causing him to fall to the floor and hurting himself. Specifically, his left leg and knee were injured. He claimed, among other things, that the floor on the restaurant was coated with a material that created an unsafe surface.

The elements of Plaintiff's premises liability claim were: (1) he was an invitee; (2) Smokey Mo's BBQ was the possessor of the premises; (3) a condition of the premises posed an unreasonable risk of harm to him; (4) Smokey Mo's had actual or constructive knowledge of the condition; (5) Smokey Mo's did not exercise reasonable care to eliminate the condition; and (6) the failure thus caused Plaintiff's injuries.

Smokey Mo's filed a motion for summary judgment. In doing so, it did not contest that Plaintiff was in invitee of its premises or that it was the possessor of the premises. Rather, it sought summary judgment on the basis that all of the other elements of the claim were unsupported by evidence. In opposition to the motion, Plaintiff submitted a lengthy affidavit. Included in this affidavit were statements from Smokey Mo's employees to Plaintiff about how the business was aware of the slick floor condition created by the bottom of the chairs and the paint used on the floor. Plaintiff was also told about how the business tried to sand down the floor to eliminate the slick condition. The affidavit also stated that Plaintiff was not warned of the floor condition. Despite this affidavit, the district court granted Defendant's motion for summary judgment.

Plaintiff appealed. On appeal, Defendant argued that Plaintiff's affidavit was self-serving and did not provide any evidence of the matter set forth in affidavit. However, the Texas Court of Appeals disagreed. It held that Defendant should have filed an objection to the affidavit, and because it didn't, the objection was waived. Thus, evidence existed (by the affidavit) that created an issue of fact as to Defendant's knowledge of the unsafe condition. Accordingly, the Court reversed the grant of summary judgment.

Kostecka v. Smokey Mo's BBQ, 2016 WL 5874868 (Texas Court of Appeal, Austin District, filed October 7, 2016, not yet released for publication in the permanent law reports).