Fall 2017

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LEGAL UPDATE

Utah • Wyoming • Colorado • New Mexico • Texas

IN BRIEF

UTAH

- The Utah Supreme Court held that a homeowner's construction defect claims against the homebuilder were barred for lack of privity on the basis that he did not acquire a sufficient assignment of claims.

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COLORADO

- The Colorado Supreme Court held that a pit bull owner did not owe any duty of care toward a minor child who was injured after running into the street away from the dogs, because the dogs did not directly injure the child.

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- In a UIM coverage case, the Wyoming Supreme Court adopted the "cause theory" when determining how many accidents occurred under the UIM policy for successive events.

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- In a case brought by multiple injured sledders at a national park, the Tenth Circuit Court of Appeals determined that the injuries occurred due to the government's discretionary functions, and thus the case was dismissed for lack of jurisdiction.

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TEXAS

- The Texas Court of Appeals dismissed lawsuits against a property manager and insurance agent, finding that they complied with their duties as to a condominium complex that caught on fire.

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UTAH

UTAH SUPREME COURT AFFIRMS DISMISSAL OF PLAINTIFF'S CONSTRUCTION DEFECT CLAIMS FOR LACK OF PRIVITY OF CONTRACT

Utah Supreme Court: Lot 84 Deer Crossing, a single-purpose LLC, acquired a piece of property. Lot 84 then entered into an agreement with Douglas Knight Construction (DKC) to build a house on the property. In that contract, DKC provided a one year warranty on the construction. Lot 84 then assigned all of its rights to the home and construction agreement to Outpost Development, Inc. Prior to the home's completion, Outpost sold the home to Plaintiff Tomlinson. However, Outpost did not assign its interest in the construction agreement to Tomlinson, even though several construction defects had already come to light.

One defect was a leak that caused significant water damage. Pursuant to the warranty in the construction agreement, Outpost asked DKC to repair the defects. Despite DKC's efforts to do so, Tomlinson discovered that the leak still existed more than a year after he purchased the home. Nearly a year later, Tomlinson hired a different contractor to fix the leak and repair the water damage. When Tomlinson discovered several other defects, he filed suit against DKC and Outpost.

When Outpost declared bankruptcy it assigned all of its right, claims, and causes of action against DKC to Plaintiff. Plaintiff maintained that this assignment encompassed claims against DKC for breach of the construction agreement. Accordingly, Plaintiff's claims against DKC included claims based upon breaches of that construction agreement.

The district court granted several motions for summary judgment filed by DKC. In doing so, the district court ruled that Plaintiff never acquired any viable construction defect claims against DKC. This was because the bankruptcy assignment did not give Plaintiff a direct interest in the construction agreement. Plaintiff appealed.

In Utah, an "action for defective design or construction is limited to" an action for "breach of … contract, whether written or otherwise, including both express and implied warranties." U.C.A. § 78B-4-513. An action for defective construction or design may be brought "only by a person in privity of contract with the original contractor." Id. In addition, persons who have been assigned rights under a contract may pursue claims under it.

The Utah Supreme Court affirmed dismissal of Plaintiff's claims on the basis that there was no assignment to Plaintiff of Outpost's contract or warranty rights

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under the DKC construction agreement. Plaintiff was thus not an assignee. It determined that the bankruptcy assignment did not convey sufficient interest to assert claims against DKC. This was because the bankruptcy assignment only encompassed claims previously asserted or that could be asserted by Outpost in the future. The bankruptcy assignment thus omitted claims that Outpost could have brought at an earlier period against DKC but did not. Plaintiff's claims were thus dismissed on the basis that he was not in privity of contract with DKC and did not have an assignment for his claims.

Tomlinson v. Douglas Knight Construction, Inc., et al., 2017 UT 56 (Utah Supreme Court, decided August 29, 2017, not yet released for publication in the permanent law reports).

SUMMARY JUDGMENT AFFIRMED IN FAVOR OF DEFENDANT MOVIE THEATER FOR A TEMPORARY PREMISES CONDITION

Utah Court of Appeals: Plaintiff Ralph Mingolello was attending an afternoon matinee at Megaplex Theaters. About thirty minutes into the movie, Plaintiff got up to leave for a few minutes. He began to descend the stairs when he slipped on a small, camouflage-patterned flashlight. Plaintiff was injured.

Neither Plaintiff nor Megaplex knew how the flashlight got on the stairs or how long it had been there. Megaplex employees used large black or blue flashlights to perform their duties. The manager claimed he had inspected the theater about thirty minutes before the movie and did not see the flashlight.

Plaintiff filed suit against Megaplex, and the district court granted summary judgment in favor of the theater. On appeal, Plaintiff contended that there was an issue of material fact upon which the theater was not entitled to judgment as a matter of law. Plaintiff argued that the movie started nearly four hours later than the theater manager claimed. There was thus a longer time between the incident and the manager's inspection for the theater under which the theater was to have constructive notice of the flashlight's presence.

The Utah Court of Appeals determined that Plaintiff did not provide any evidence to identify how long the temporary condition of the flashlight existed. This was Plaintiff's burden. Plaintiff had agreed that Megaplex did not have actual notice of the flashlight's existence. Thus, there was no evidence to determine whether the temporary condition had existed long enough that Megaplex should have discovered or remedied it. The Utah Court of appeals therefore affirmed summary judgment in favor of Megaplex.

Mingolello v. Megaplex Theaters, 391 P.3d 361, 2017 UT App. 4 (Utah Court of Appeals, decided January 6, 2017).

GROSS NEGLIGENCE CLAIMS DISMISSED IN GUIDED HORSEBACK-INJURY CASE

Utah Supreme Court: Plaintiff Lisa Penunuri asserted claims for negligence and gross negligence against Defendants after she was injured when she fell off her horse during a guided trail ride at Sundance Resort. The named Defendants included the company that provided trail guide services and the resort.

During the guided ride, the guide (employed by Defendants) continuously slowed down in an effort to keep the tour group together. At one point, the guide announced they were going to stop at a clearing up ahead so that the guide could go back and assist an eight-year-old girl who was getting too far behind the group. Plaintiff fell off the back of her horse and was injured as the guide was in the process of turning around.

At issue in this appeal was the district court's dismissal of Plaintiff's gross negligence claims. The district court had ruled that no reasonable trier of fact could conclude that the guide had shown "conscious disregard of, or indifference to" the safety of her riders. The court also determined that Plaintiff's expert was unqualified to render expert opinion testimony on the standard of care; thus, Plaintiff also lacked evidence of any gross negligence.

On appeal, the Utah Supreme Court ruled that "summary judgment dismissing a gross negligence claim is appropriate where reasonable minds could only conclude that the defendant was not grossly negligent under the circumstances, regardless of whether the standard of care is fixed by law." The Court then affirmed that there was no evidence of Defendants being grossly negligent. Evidence of Defendants breaching the standard of care was alone insufficient to establish Defendants being grossly negligent. Rather, Plaintiff must have pointed to evidence that Defendants' conduct exposed Plaintiff to a "significantly elevated level of risk." As this was not done, the district court's dismissal of Plaintiff's gross negligence claims was affirmed.

Penunuri v. Sundance Partners, Ltd. et al., 2017 UT 54 (Utah Supreme Court, decided August 25, 2017, not yet released for publication in the permanent law reports).

$2.9 MILLION JURY VERDICT IN MEDICAL MALPRACTICE ACTION

Salt Lake County: This wrongful death action was brought when Keith Wilcox, a 55-year-old male, reportedly sustained an aortic dissection. Wilcox was survived by his spouse, mother, and four children. Wilcox died following care by Defendants Exodus Healthcare Networks and its physician assistants. Wilcox's estate contended that Defendants negligently failed to provide informed consent, failed to appropriately work up, diagnose, and treat Wilcox's complaints of chest and abdominal pain. It also asserted that Defendants failed to timely and appropriately treat Wilcox's vascular disease and aortic dissection. Defendants denied liability.

The case was tried to a jury. The jury concluded that one of Defendants' two physician assistants breached the standard of care, and that led to Wilcox's death. However, the jury also found that Wilcox failed to use reasonable care in the course of his medical care and treatment. Defendants were found to be 70% at fault, and Wilcox was 30% comparatively at fault. The total verdict in favor of Plaintiff was $2,940,250.

Wilcox v. Exodus Healthcare Network PLLC et al, 2017 WL 3277230.

Colorado

Pit Bull Owner Held Not to Have Duty in Incident Resulting in Injuries to Minor

Supreme Court of Colorado: A minor child was walking past Defendant Alexander Trujillo's home on his way to a playground when Trujillo's two pit bulls rushed at the front-yard fence. The dogs never left the yard and did not touch the child. Rather, the frightened child ran across the street and was struck by a passing van, seriously injuring the child.

Maria Lopez, the child's mother, sued Trujillo for negligence. Lopez alleged that Trujillo had actual knowledge of previous incidents in which his dogs had frightened other passers-by. Trujillo moved to dismiss the case on the basis that he did not have any duty toward the child. The district court agreed and dismissed the case.

On appeal before the Colorado Supreme Court was whether Trujillo owed the child a duty of care under the circumstances where his dogs stayed in his yard and never touched the child. The Court concluded that Trujillo held no duty toward the child. This was because the claim against Trujillo was predicated on alleged nonfeasance, or the failure to act. Moreover, this case is distinguishable from cases in which a dangerous or vicious animal attacks and directly injures someone. Thus, the child was required to plead that a special relationship existed between himself and Trujillo, such that a duty was created by that special relationship. However, Plaintiff conceded that no such special relationship was pled. Thus, Trujillo was determined not to have any duty toward the child, and dismissal of the case was affirmed.

N.M. by and through Lopez v. Trujillo, 397 P.3d 370, 2017 CO 79 (Colorado Supreme Court, decided June 26, 2017).

Colorado Supreme Court Deems Real Estate Contract Valid by Enforcing Liquidated Damages Provision

Colorado Supreme Court: The issue before the Colorado Supreme Court in this case was: "whether a liquidated damages clause in a contract is invalid because the contract gives the non-breaching party the option to choose between liquidated damages and actual damages."

The case arose when prospective condominium unit purchasers brought action against developer One Hill Place for breach of contract after they were unable to obtain financing for the full purchase prices. The purchasers had paid earnest money and construction deposits of fifteen percent of the purchase price for each unit. Because the purchasers were unable to obtain financing, they were thus unable to close by the agreed-upon deadline. The purchasers thus breached their agreements with the developer.

The parties' agreements contained a clause that permitted the developer to retain all or some of the paid deposits as liquidated damages or, alternatively, to pursue actual damages. In response to the purchasers' breaches, the developer kept the full deposits as liquidated damages. The purchasers thus filed suit, seeking the return of their deposits. They argued that the agreements were unenforceable because they gave the developer the option to choose liquidated damages or actual damages.

Recognizing the "strong policy of freedom of contract," the Colorado Supreme Court concluded that the parties were free to bargain for the scope of their damages. Since the dispute between the parties pertained to the developer keeping the liquidated damages, "[a]ll that this court requires is that the parties intended to liquidated damages." As this was provided for in the agreements, the Court thus determined that the agreements were valid.

Ravenstar, LLC et al. v. One Ski Hill Place, LLC, 401 P.3d 552, 2017 CO 83 (Supreme Court of Colorado, decided September 11, 2017).

Golfing Tournament Injury Claims Dismissed at Trial on Directed Verdict

Arapahoe County: Plaintiff Anne Taylor was attending a golf tournament at Blackstone Country Club when she asked Spencer Thompson, an employee at the club, to give her a ride to the bathroom. Thompson agreed and the two set out on a Toro Workman utility vehicle that Thompson was driving within the scope of his employment. Plaintiff alleged that Thompson made an unexpected left turn, resulting in her being ejected from the vehicle. She alleged that she suffered a fractured skull and subarachnoid hemorrhage when her head struck the cart path. She further alleged that her injury resulted in permanent cognitive deficiencies that would result in substantial future wage loss, future treatment, and permanent impairment.

Plaintiff sued both Thompson and the Country Club. Her allegations included Thompson being negligent for failing to inform her of the turn. She alleged that Thompson had a duty to notify her based upon the Club's procedures and the Toro operation manual. Defendants argued that Thompson was not negligent because there was no evidence that he was speeding or driving erratically. Defendants provided evidence that the centrifugal forces created at the estimated speeds at the time of the incident would be insufficient to eject Plaintiff from the vehicle if she had been paying attention.

Plaintiff sought damages exceeding one million dollars. Reportedly, Defendants' pre-trial settlement offers of $250,000 and $300,000 were declined by Plaintiff. During trial, the court granted Defendants' motion for a directed verdict and dismissed Plaintiff's claims for lack of evidence to support her claims.

Taylor v. Sequoia Golf Blackstone, LLC et al., Case No. 16-CV-030193.

Wyoming

WYOMING SUPREME COURT ADOPTS THE CAUSE THEORY IN INTERPRETING POLICY AS TO THE NUMBER OF ACCIDENTS FOR SUCCESSIVE EVENTS

Wyoming Supreme Court: Larry and Sara Hurst were riding their bicycles when they were negligently and consecutively struck by uninsured driver Hannah Terry. Larry was killed and Sara was seriously injured as a result. Sara then filed an uninsured motorist (UIM) claim on behalf of herself and as representative of Larry's estate, with their insurer, MetLife.

The Hursts' policy with MetLife provided UIM coverage and benefits in the amount of "$300,000 each person/$300,000 each accident." MetLife contended that the Hursts' injuries were the result of one accident, resulting in a maximum of $300,000 coverage. The Hursts argued that their injuries stemmed from two accidents, warranting $600,000 in coverage. The district court granted summary judgment in favor of MetLife, finding there was only one accident. The Hursts appealed.

At the time of the accident(s), the Hursts were riding separate bicycles. Sara was riding about 30 feet in front of Larry. They were both on the shoulder of the road, within the emergency lane and out of the lane of traffic. Terry was driving her minivan in the same direction. She was traveling at approximately 50 mph when she entered the emergency lane. Terry first struck Larry's bicycle from behind, throwing Larry over the roof of the minivan and approximately 166 feet from the point of impact. After striking Larry, Terry continued to travel in the emergency lane for about 30 more feet before striking Sara's bicycle from behind. After impact, Sara's bicycle was pushed by the minivan until it came to a stop. Sara struck the windshield of the minivan and remained on its hood until it stopped. About one-half to one second passed between when Terry struck Larry and Sara.

The Hursts' UIM policy stated that $300,000 would be paid for "any one accident." In interpreting the meaning of that phrase, the Wyoming Supreme Court adopted the "cause theory." Under this theory, "the number of accidents is determined by the number of causes of the injuries, with the court asking if there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage." Moreover, "if one cause is interrupted and replaced by another intervening cause, then the chain of causation is broken, resulting in two or more occurrences depending on the number of intervening causes." The Court further commented: "When collisions between multiple vehicles are separated by a period of time or the insured maintains or regains control of the vehicle before a subsequent collision, there are multiple occurrences."

The Wyoming Supreme Court noted that the district court correctly adopted the "cause theory." In doing so, the district court focused on temporal and spatial considerations, namely that the impacts occurred about 30 feet apart and one second apart. However, the district court did not give any consideration to Terry's control of the vehicle. That consideration is significant, if not overriding. As there were no facts in the record concerning Terry's control of the vehicle, the Court remanded the case for trial on that matter.

Hurst v. Metro. Prop. & Cas. Ins. Co., 401 P.3d 891, 2017 WY 104 (Wyoming Supreme Court, decided September 12, 2017).

ARBITRATION CLAUSE ENFORCED IN WRONGFUL DEATH ACTION

Wyoming Supreme Court: Ninety-three year-old Aletha Boyd died following her discharge from Defendant Kindred Nursing Home and Rehabilitation. Her daughter, Plaintiff Susan Boyd, filed a wrongful death action against Kindred alleging that its negligence in caring for Aletha caused her death.

Kindred moved to compel arbitration of the action, pursuant to an alternative dispute resolution (ADR) agreement signed by Leanna Putnam. Leanna was Aletha's other daughter and representative under a power of attorney at the time of her admission into Kindred.

The district court denied the motion to compel arbitration. Kindred appealed the decision. On appeal to the Wyoming Supreme Court were the issues of: whether Leanna had authority to sign the ADR agreement; whether the ADR agreement was unconscionable; and whether the ADR agreement was enforceable under the National Arbitration Forum (NAF) Mediation Rules and Code of Procedure.

As to Leanna's authority to enter into the agreement, the Court determined that she had actual authority as Aletha's agent. This was because the power of attorney was unambiguous, enforceable, and provided Leanna authority to enter into such types of agreements. In addition, the agreement was not unconscionable just because it was provided within a packet of documents by Kindred. Lastly, Plaintiff argued that the agreement could not be valid because it required compliance with the NAF's rules, which were no longer available. The Court found that the parties nevertheless mutually agreed to have their disputes resolved by the ADR process. The Court thus reversed the district court's ruling and instructed that the parties are to undergo arbitration.

Boyd v. Kindred Healthcare Operating, Inc. et al., 2017 WY 122 (Wyoming Supreme Court, decided October 12, 2017, not yet released for publication in the permanent law reports).

New Mexico

PERSONAL INJURY ACTIONS DISMISSED AS DISCRETIONARY FUNCTION, IN CASE INVOLVING RECREATIONAL SLEDDING AT CIBOLA NATIONAL FOREST

Tenth Circuit Court of Appeals: The Capulin Snow Play Area was originally constructed in response to numerous snow play and traffic injuries that occurred along highways within Cibola National Forest. The slope of Capulin followed the natural slope of the hill and the Forest Service decided to operate Capulin without supervision, due to limited funding. The Forest Service posted notice and provided flyers advising that there was minimal supervision and that sledders are responsible for maintaining control and avoiding collisions. The Forest Service visited Capulin daily to assess amenities, observe slope and weather conditions, clear trash, remove large human-made jumps and natural moguls, and determine whether to open the area to the public that day.

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Capulin underwent an environmental assessment in 2007 which found that the sliding areas were too steep and created unsafe and hazardous conditions for the public. Plaintiffs in this action were multiple individuals who were injured at Capulin between 2009 and 2012. They all filed negligence claims against the United States under the Federal Tort Claims Act (FTCA). The United States moved to dismiss the complaints for summary judgment on the merits, or, alternatively, on the basis that the Court lacked subject-matter jurisdiction over the lawsuit. The district court denied the summary judgment motion but granted dismissal due to the lack of subject-matter jurisdiction. Plaintiffs appealed.

At issue on appeal was the ability for Plaintiffs to bring their actions under the FTCA. The FTCA authorizes suites against the United States for damages that arise out of the negligence of any employee of the government while acting within the scope of the employee's office or employment in circumstances where the U.S. would be liable to a claimant if the U.S. were a private person. Excluded from claims, however, are actions based upon the performance of a "discretionary function or duty on the part of a federal agency or an employee of the Government." To determine if an act is a discretionary function for which a lawsuit cannot be brought, the Court: (1) looks at the conduct at issue to see if it was discretionary, meaning whether it was a matter of judgment or choice for the acting employee; and (2) examines whether the decision required exercising judgment based upon public policy considerations.

Plaintiffs argued that the government employees were subject to mandatory duties in the Forest Service Manual to inspect and correct conditions, close affected area, and adequately warn of hazards. However, the Court of Appeals determined that the Forest Service was required to consider its limited resources and its mission to provide recreational activities in close harmony with the surrounding environment. The Forest Service did so when posting large warning signs for the public. "The United States has convincingly argued that the level of warnings provided involved a policy-based decision shielded by the discretionary function exception." Dismissal of the actions was thus affirmed.

Clark v. United States et al., 695 Fed. Appx. 378, 2017 WL 2644635 (United States Court of Appeals, 10th Cir., decided June 20, 2017, not yet released for publication in the permanent law reports).

LOSS OF CONSORTIUM CLAIMS PERMITTED AGAINST THE CITY OF ALBUQUERQUE IN WRONGFUL DEATH LAWSUIT

New Mexico Supreme Court: The Plaintiffs in this case were the surviving children of their father, Mickey Owings, who was shot and killed by Albuquerque Police Department officers. Plaintiffs sued the City of Albuquerque, the police chief and the police officer for loss of consortium. The district court dismissed the case for failing to state a claim based upon sovereign immunity.

The issues before the New Mexico Supreme Court were: (1) may the minor children sue for loss of consortium damages under the New Mexico Tort Claims Act (TCA) for alleging their father was wrongfully shot; and (2) may the minor children bring the lawsuit even if the parent's estate did not sue for wrongful death damages? In regards to both issues, the Court responded 'yes.'

As to the first issue, the Court determined that the TCA waives a law enforcement officer's sovereign immunity from liability for personal injury and bodily injury damages resulting from battery. Loss of consortium damages qualify as those types of damages, which were pled by the children. As to the second issue, the Court determined that loss of consortium damages belong to the individuals who sustained those types of damages. As such, loss of consortium damages do not belong to the estate or the injured person. Thus, the children could bring claims for loss of consortium despite the estate not bringing claims.

Thompson v. City of Albuquerque et al., 397 P.3d 1279, 2017 NMSC 21 (New Mexico Supreme Court, decided June 19, 2017).

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Texas

DISMISSAL AFFIRMED AGAINST INSURANCE AGENT AND PROPERTY MANAGER IN HOA LAWSUIT INVOLVING CONDOMINIUM FIRE

Texas Court of Appeals, 1st Dist.: The Maravilla Condominiums were operated by the Maravilla Homeowners Association (HOA). The HOA was operated by its board of directors. Defendant William Etheridge entered into an agreement with the HOA to be the property manager for the complex. The agreements specified: "It shall be the Board's sole responsibility to ensure the proposer insurance coverage is in effect." Etheredge would still review the amount of insurance coverage, and would make recommendations to the Board. Etheredge also agreed to be responsible for maintenance and upkeep of the premises.

Etheridge twice recommended that the board increase its insurance coverage. The Board raised the coverage to five million dollars after his first recommendation, but did not raise it to ten million dollars after Etheridge's second recommendation a couple years later. Defendant Ted W. Allen & Associates (TWA) was the insurance agent that assisted with procuring that five million dollar policy.

A fire broke out in the complex from a spark during some welding work. The welders stated that they tried to put out the fire with some water hoses, but no water came out. Additionally, police logs reflected there being inadequate water and water pressure to put out the fire. Half of the complex was damaged. The HOA's insurer paid out the full five million dollars, but that coverage was insufficient for losses. The unit owners thus filed suit against Etheredge and TWA, asserting that they failed to comply with their obligations to properly insure the property against fire damage. Against Etheredge, the unit owners also asserted that he failed to comply with his maintenance obligation to ensure the fire suppression equipment was in working condition.

The trial court granted both Defendants' motions for summary judgment, on the grounds that the unit owners had no evidence to support their claims. The unit owners appealed.

As to Etheredge, the Texas Court of Appeals held that the unit owners failed to provide any evidence drawing a causal connection between Etheredge's alleged failures and their damages. Regarding the amount of insurance, the Court was influenced by the language of the agreement holding the Board solely responsible for insurance determinations. As to the fire suppression equipment, the Court assumed that it was not working correctly. However, the unit owners failed to establish what the problem was with the equipment that Etheredge was to remedy. As such, the problem could have been due to something beyond his control (i.e. a problem with the city's water pressure).

As to TWA, the Court found that TWA had no obligation to procure insurance for the HOA beyond the amount requested from it. As TWA procured the five million dollar policy as requested, the Court affirmed dismissal of the unit owners' claims.

Rush v. Ted W. Allen, & Associates, Inc., Case No. 01-15-01081-CV, 2017 WL 4682031 (Texas Court of Appeals, decided October 19, 2017, not yet released for publication in the permanent law reports).