Fall 2018

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • Colorado • Texas

IN BRIEF

UTAH

- Dewhirst & Dolven attorneys recently obtained summary judgment in favor of a Defendant RV sales lot company which was sued for a plaintiff's slip and fall on the lot. Summary judgment was granted due to the plaintiff's inability to satisfy the burden of proof as to a temporary premises condition.

.....Page 1

COLORADO

- The Colorado Supreme Court held that prejudgment interest on the amount of a settlement agreement cannot be recovered because there was no judgment rendered.

.....Page 3

WYOMING

- In a premises liability case, the Wyoming Supreme Court determined that a signed liability release agreement was valid because it was the entire agreement of the parties, did not violate public policy, and expressed the parties' intent to eliminate liability for injuries from negligent acts.

.....Page 4

TEXAS

- The Texas Court of Appeals held that an insurer did not have any obligations toward a covered insured, because of that insured's failure to comply with conditions precedent under the policy. Those conditions were to cooperate with the defense of the action, and that failure prejudiced the insurer.

.....Page 5

UTAH

DEWHIRST & DOLVEN OBTAINS DEFENSE SUMMARY JUDGMENT IN NEGLIGENCE ACTION INVOLVING SLIP AND FALL ON RV SALES LOT

Davis County: Plaintiff Rochelle Rackham filed suit against Defendant Sierra RV Corp. for injuries which she claimed to have sustained when she slipped while on Sierra's RV sales lot. Dewhirst & Dolven was retained to defend Sierra RV against the claims.

In her lawsuit, Plaintiff generally identified slipping on the sales lot due to compacted ice or snow. She identified sustaining injuries to her hip, spine, leg, jaw, and teeth. At her deposition, Plaintiff described falling while she was inside of an RV trailer while shopping for one. She was walking down some carpeted stairs from a second floor loft area to the main floor of the trailer. She fell and ended up on the floor. She then observed some snow by her shoes. She first testified that she fell because the design of the stairs was shallower than she anticipated. She later testified that she slipped because snow from her own shoes came lose as she descended down the stairs. She described there not being any snow on the stairs prior to her fall and that the snow would have come from her own shoes.

Dewhirst & Dolven attorneys Rick Haderlie and Kyle Shoop filed a motion for summary judgment on behalf of Sierra RV, as to all of Plaintiff's claims. They argued that, under Utah's temporary premises condition law, Sierra RV never had any notice or knowledge of the condition that Plaintiff slipped on. This was because the condition was created by Plaintiff concurrently with the fall. Thus, Sierra RV did not breach any duty toward Plaintiff. The motion also argued that Sierra RV was not responsible for the design of the stairs, which Plaintiff initially attributed to her fall. Plaintiff's argument focused on Sierra RV not remedying the snow conditions on the sidewalk outside of the trailer.

At the court hearing on the motion, attorney Kyle Shoop also argued that all of the facts set forth in Sierra RV's motion are deemed admitted due to Plaintiff's failure to dispute them with any admissible evidence. Indeed, much of the motion was based upon Plaintiff's own deposition testimony. He also focused on Utah authority stating that property owners are generally not insurers of the safety of those who come onto their property, even though they are business invitees.

Continued on Page 2

IN THIS ISSUE

Continued from Page 1

The Court agreed with Sierra RV's motion. It held that all of the facts stated in the motion were deemed admitted and that they established that Plaintiff created the conditions herself that lead to the fall. As such, summary judgment was granted in Sierra RV's favor and all of Plaintiff's claims were dismissed.

Rackham v. Sierra RV Corp., Case No. 170700131 (Court ruling issued June 27, 2018).

CONSTRUCTION DEFECT LAWSUIT AGAINST GENERAL CONTRACTOR DEEMED TIME-BARRED UNDER THE STATUTE OF REPOSE

Utah Supreme Court: A homeowners association, Plaintiff Gables and Villas at River Oaks Homeowners Association ("HOA"), sued general contractor Defendant Castlewood Builders. The subject of the lawsuit was several alleged construction defects.

At the time that the initial complaint was filed, the HOA was not aware of the existence of Castlewood. The HOA thus did not initially file a complaint that named Castlewood. Due to several procedural issues, by the time that the HOA did file a viable complaint against Castlewood, the six year statute of repose under U.C.A. § 78B-2-225 had run on six buildings in the project. The HOA had filed a motion for leave to file an amended complaint against Castlewood. The amended complaint naming Castlewood was not filed until after that motion was granted.

Castlewood thus moved for summary judgment, asserting that the HOA's claims were time-barred. The district court disagreed and denied the motion. Castlewood then appealed that decision.

The issue on appeal was whether the HOA's action against Castlewood was commenced by the HOA's filing of a motion for leave with the court, or instead by the subsequent filing of its amended complaint. The Utah Supreme Court analyzed the language of the statute of repose under U.C.A. § 78B-2-225 in determining when the action had been commenced. The statute provides that an action is commenced by filing a complaint or serving the complaint and a summons. The statute is silent as to a motion for leave to file a complaint triggering the commencement of an action. The Utah Supreme Court thus held that the lawsuit was not commenced until after the repose period had expired.

Gables and Villas at River Oaks Homeowners Assoc. v. Castlewood Builders, LLC, 2018 UT 28, 422 P.3d 826 (Utah Supreme Court, decided June 29, 2018).

COMMUNITY CHURCH HELD NOT TO HAVE A DUTY TOWARD A MINOR TRESPASSER FOR FATAL ELECTROCUTION ACCIDENT

Utah Supreme Court: This case concerns a wrongful death lawsuit that stems from the death of a teenage boy ("A.C."). A.C. died from injuries he sustained while trespassing on the roof of a one-story building owned by Defendant Gateway Community Church. Due to faulty wiring of a sign, he was electrocuted while attempting to climb down. The boy's parents brought the wrongful death lawsuit against the church, claiming that the church breached its duties under common law as well as under a city sign ordinance.

The church filed a motion for summary judgment, arguing that it held no duty toward the boy because he was a trespasser. The district court agreed and granted the motion, and the Utah Court of Appeals affirmed the decision.

On appeal before the Utah Supreme Court was the issue of whether the church held a duty toward A.C. It was undisputed that A.C. climbed on the roof without permission. Plaintiffs presented three arguments that the church still owed A.C. a duty, even though he was a trespasser: (1) under common law, (2) based upon the roof being an attractive nuisance, and (3) under the city's sign ordinance.

As to the first argument about a common law duty, the Utah Supreme Court first agreed that A.C. was a trespasser because he was on the roof without permission. "The only duty a possessor of land owes to a trespasser is to not willfully or wantonly injure him." Though there are exceptions to this duty, such as for artificial conditions that are highly dangerous to constant trespassers, none of those exceptions applied to A.C. This was because Plaintiffs failed to show that there were constant trespassers on the roof which the church had knowledge about.

As to the alleged duty for being an attractive nuisance, the court also held that Plaintiffs failed to establish the necessary element of the church knowing that the sign posed an electrocution risk.

As to Plaintiffs' last argument under the city's sign ordinance, they argued that the ordinance established the city's intention to protect trespassers from electrocution resulting from improperly installed signs. The Court determined, though, that the ordinance did not specifically identify an intention to create a tort duty to trespassers. Thus, the Court held that the Church did not have a duty toward A.C. for the sign's condition, and affirmed dismissal of the action.

Colosimo v. Gateway Community Church, 2018 UT 26, 424 P.3d 866 (Utah Supreme Court, decided June 26, 2018).

SUMMARY JUDGMENT IN INSURER'S FAVOR REVERSED IN SUBROGATION ACTION

Utah Court of Appeals: Plaintiff National Union Fire Insurance Company of Pittsburg ("NUF") sued Defendant Michael Smaistrala, seeking to recover $127,000 that NUF paid out on behalf of Smaistrala. Smaistrala was NUF's insured. Smaistrala was injured when he was in the sleeper unit of a semi-truck that rolled on ice. NUF paid Smaistrala about $127,000 for medical services and disability benefits as a result of the accident.

Smaistrala sued the driver of the truck and multiple others for his injuries. Counsel for Smaistrala informed NUF of a mediation and offered to "represent and protect NUF's interests regarding the subrogation." NUF declined that offer. The case settled, and Defendants agreed to pay Smaistrala $300,000. The lawsuit was then dismissed with prejudice.

NUF subsequently filed an action against Smailstrala, alleging that he breached the insurance contract by failing to preserve NUF's right to subrogation against the defendants. Smaistrala also refused to pay NUF the $127,000. The district court found that Smaistala breached the insurance contract by settling with the defendants and agreeing to dismissal of the action with prejudice before BUF could assert its right of subrogation. This was because the insurance contract included a provision that Smaistala would aid NUF in "preserving its rights against those responsible for such loss…"

More on Page 3

Continued from Page 2

On appeal, the Utah Supreme Court disagreed. It held that questions of fact remained that precluded summary judgment being entered in NUF's favor. Specifically, a determination of fault never occurred. As such, Smaistrala did not breach his contract because "those responsible for such loss" had not been determined. The Court of Appeals thus reversed the grant of summary judgment and remanded the action back to the district court.

National Union Fire Insurance Company of Pittsburg, PA v. Smaistrala, 2018 UT App. 170 (Utah Court of Appeals, decided August 30, 2018, not yet released for publication in the permanent law reports).

LAWSUIT BY NON-INSURED AGAINST INSURANCE COMPANY DISMISSED

Utah Court of Appeals: Plaintiff Fabiola Carmona sued Badger Creek Associates for personal injuries she sustained when she slipped and fell on ice in a common stairway at the Badger Creek Apartments. Badger Creek carried liability insurance through Defendant Travelers Casualty Insurance Company of America. The Travelers policy included an indemnity provision which stated that Travelers would pay medical expenses up to $5,000 for bodily injury caused by an accident on Badger Creek's premises. The payments were to be made regardless of fault.

When Carmona learned of this provision, she moved to amend her complaint to add Travelers as an additional defendant. She alleged that Travelers owed her a contractual duty to pay medical bills for her injuries. The district court denied the motion, finding that Carmona did not have a cause of action against Travelers. The district court held: "Utah law is clear regarding parties seeking to sue a tortfeasor's insurer … a plaintiff must direct his action against the actual tortfeasor, not the tortfeasor's insurer."

Carmona then filed a second lawsuit against Travelers alone, claiming to be a third party beneficiary under the policy. This lawsuit was also dismissed, with the district court finding that Carmona was not a third party beneficiary under the policy. It also held that the prior dismissal of the first lawsuit constituted res judicata meriting dismissal of the second lawsuit.

The Utah Court of Appeals affirmed dismissal of the complaint. In doing so, the Court affirmed long-standing law in Utah that "it is not enough that the parties [to an insurance contract] know, expect or even intend that others will benefit from the contract. The contract must be undertaken for the plaintiff's direct benefit and the contract itself must affirmatively make this intention clear." Because the policy did not specifically identify Carmona, she was therefore not a third party beneficiary. Her action against Travelers was thus dismissed.

Carmona v. Travelers Casualty Insurance Company of America, 2018 UT App 128 (Utah Court of Appeals, decided June 28, 2018, not yet released for publication in the permanent law reports).

Colorado

PREJUDGMENT INTEREST HELD NOT RECOVERABLE ON A SETTLEMENT AGREEMENT

Colorado Supreme Court: This issue in this case was whether an insured is entitled to collect prejudgment interest when he settles an uninsured motorist ("UM") claim with his insurer instead of filing a lawsuit and proceeding to judgment.

After Plaintiff Joel Munoz was injured in a car accident with an uninsured motorist, he filed a UM claim with his insurer, Defendant American Family Insurance Company. During settlement negotiations, Plaintiff asked American Family to include prejudgment interest in its offer. American Family declined to do so, stating that prejudgment interest was only required after a judgment. American Family offered $10,008 to settle the claim. Plaintiff stated that he would accept the offer if American Family included prejudgment interest. When American Family declined, Plaintiff sued.

The district court held that prejudgment interest was not required to be paid on a settlement offer because the claim did not result in a judgment through litigation. On appeal the Colorado Supreme Court, the Court held: "under the plain language of the prejudgment interest statute, C.R.S. § 13-21-101, an insured is entitled to prejudgment interest only after (1) an action is brought, (2) the plaintiff claims damages and interest in the complaint, (3) there is a finding of damages by a jury or court, and (4) judgment is entered." Because Plaintiff Munoz did not meet those conditions, he was deemed not entitled to prejudgment interest.

Munoz v. American Family Insurance Company, 2018 CO 68 (Colorado Court of Appeals, decided September 10, 2018, not yet released for publication in the permanent law reports).

COLORADO'S DRAM-SHOP ACT INTERPRETED TO REQUIRE ACTUAL KNOWLEDGE OF AGE TO ESTABLISH POTENTIAL LIABILITY

Colorado Supreme Court: The issue in this case was: "Does Colorado's dram-shop liability statute require a social host who provides a place to drink alcohol to have actual knowledge that a specific guest is underage to be held liable for any damage or injury caused by that underage guest?"

Defendants threw a party at a house they were renting. The party was to celebrate one defendant's birthday and another's college graduation. Between 20 to 120 guests attended at various points throughout the evening. Not all who came had been specifically invited by Defendants. Some guests may have brought their own alcohol, but alcohol was provided by the party hosts as well.

Plaintiff Jared Przekurat went to the party with Hank Sieck and Victor Meija. Sieck was 20 years old. None of the Defendants knew Sieck before that night, and there may have been only one encounter between Sieck and any of the Defendants. There is no evidence that any of the Defendants knew that Sieck was underage. Sieck drank both beer and hard alcohol during the party. Afterwards, Sieck, Meija, and Plaintiff Przekurat left in Przekurat's car. Sieck drove, at time going more than 100 mph. He lost control, sending the car rolling into a ditch. Plaintiff Przekurat

More on page 4

Continued from Page 3

was thrown from the car, sustaining life-altering injuries.

Plaintiff sued Defendants as hosts of the party, alleging that they should be liable under Colorado's dram-shop act for knowingly providing Sieck, an underage person, with a place to consume alcohol. Defendants move to dismiss the lawsuit, arguing that there was no evidence of Defendants having actually known that Sieck was underage. Plaintiff opposed the motion by arguing that constructive knowledge was sufficient to constitute knowledge under the dram-shop act. Plaintiff alleged that Defendants had constructive knowledge by providing alcohol without any restrictions, and there were multiple underage drinkers at the party. The district court agreed with Defendants and dismissed the action. Plaintiff appealed.

The dram shop act provides that a social host who furnished alcohol is only civilly liable to an injured person if it "is proven that the social host … knowingly provided the person under the age of twenty-one a place to consume an alcoholic beverage."

On appeal to the Colorado Supreme Court, the Court refused to expand the definition of "knowingly" to include circumstances of constructive knowledge. The Court held that the plain language of the statute only required actual knowledge of a person being underage. As such, the Court affirmed the dismissal of Plaintiff's lawsuit against Defendants.

Przekurat by and through Przekurat v. Torres et al., 2018 CO 69 (Colorado Supreme Court, decided September 10, 2018, not yet released for publication in the permanent law reports).

UNDERINSURED MOTORIST CLAIM PRECLUDED BY INSURER'S AGREEMENT TO PAY UNDERLYING TORT JUDGMENT IN FULL

Colorado Court of Appeals: The issue in this lawsuit is "whether an underinsured motorist ("UIM") policy is triggered under Colorado's UIM statute, C.R.S. § 10-4-609, if the negligent driver's insurance company agrees to pay the full extent of the jury's verdict."

This case arose from a car accident between Plaintiff Bruce Bailey and another driver. Plaintiff sued that driver for negligence. Plaintiff also sued his own insurer, Defendant State Farm, for UIM benefits. The other driver's insurance policy had a coverage limit of $100,000. Plaintiff's UIM policy had a limit of $100,000. Coincidentally, State Farm issued both policies involved in the case.

Six days before trial, the other driver disclosed a letter from his insurance company. The letter included the statement that "you are fully protected from any compensatory damage award which may be awarded at trial, regardless of amount." A jury awarded Plaintiff with $300,000 in damages. After the trial, State Farm paid the entire judgment. State Farm then asserted that its letter to the other driver precluded Plaintiff from recovering UIM benefits. This was because there was no difference between the coverage limit and the amount of damages awarded. The district court agreed with State Farm.

On appeal to the Colorado Court of Appeals, the Court affirmed the ruling in State Farm's favor. The Court held that the UIM statute's plain language indicated that the legislature did not intend for a plaintiff to recover UIM benefits in excess of the total amount of actual damages. Rather, the UIM statute "provides that UIM benefits are intended to cover the difference between the negligent driver's liability limits and the damages." In addition, UIM benefits are not triggered until the damages exceed the negligent driver's liability coverage limits. Adopting Plaintiff's position would result in a windfall recovery.

Bailey v. State Farm Mutual Automobile Insurance Company, 2018 COA 133 (Colorado Court of Appeals, decided September 6, 2018, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN PREMISES LIABILITY ACTION INVOLVING UNCOVERED MANHOLE

La Plata County: Plaintiff Grisel Xahuentitla-Flores fell into an uncovered and unattended manhole while on commercial property owned by Defendants. Defendants leased the property to a tenant for use as a restaurant. On the day of the accident, the tenant called an HVAC company and the HVAC company sent a worker to the property to repair refrigeration equipment in the crawlspace below the restaurant. The worker removed the cover to the crawlspace, which was located directly out the back door, and began his work under the restaurant.

Plaintiff was an employee of the restaurant. She opened and exited the back door and fell several feet into the uncovered, concrete-walled manhole. She sustained head and brain trauma, including a fractured skull, and was unconscious.

Plaintiff settled pre-lawsuit with the HVAC company. She then sued Defendants as the premises owner. She alleged that the location of the manhole was a dangerous condition for which Defendants either knew or should have known about. Defendants asserted that the location of the manhole was not a dangerous condition; rather, it was only dangerous due to the manhole being left opened. Defendants had no knowledge of the manhole being left open. Defendants thus alleged that the HVAC company was liable, and that Plaintiff was comparatively at fault.

Plaintiff's initial demand was $1,525,000. Her final demand before trial was $795,000. No known offers were made by Defendants prior to trial. Upon trial, a verdict was rendered in Defendants' favor.

Xahuentitla-Flores v. The Orlando Griego Living Trust et al., Case No. 17CV30042.

Wyoming

LIABILITY RELEASE AGREEMENT ENFORCED BY WYOMING SUPREME COURT IN PREMISES LIABILITY LAWSUIT

Wyoming Supreme Court: Plaintiff Skylar Dimik was injured when he fell into a septic tank on property owned by Defendant Scott Hopkinson. Plaintiff sued Defendant under a cause of action for negligence, and also sought recovery for punitive damages due to alleged willful and wanton conduct of Defendant.

Fort Bridger Rendezvous is a four day "mountain main" gathering held each year at the Fort Bridger State Historic Site, where enthusiasts reenact the fur-trading era. Defendant owns a ranch adjacent to the site. During the rendezvous, the ranch is used as a campground for attendees. Upon entering, attendees sign a release of liability. Plaintiff was one of those attendees and signed a release.

More on Page 5

Continued from Page 4

Plaintiff went to a work area of the property to retrieve a wooden pallet for his use at the campground. Upon doing so, he stepped on a piece of metal underneath the pallet, instantly falling through an opening into the septic tank. Defendant had placed the sheet metal on top of the manhole as a cover for debris, and placed the wooden pallet on top of it to prevent someone from stepping on it. Once in place, Defendant had tested the cover by jumping up and down on it.

The district court granted summary judgment in Defendant's favor. Among the bases for summary judgment was the validity of the release agreement as to Plaintiff's claims. Plaintiff appealed.

The Wyoming Supreme Court first noted that a valid release agreement will protect a defendant from negligence claims, but not punitive damages claims. The Court determined that the release was valid because it was the entire agreement of the parties, did not violate public policy, and expressed the parties' intent to eliminate liability for injuries from negligent acts.

In examining the sufficiency of Plaintiff's punitive damages claim for willful and wanton conduct, the Court identified such claim as involving "some element of outrage, similar to that usually found in crime." Defendant placed things over the manhole and tested it by jumping on top. The manhole was also in a work location away from the campground area. The Court was thus persuaded that Defendant's actions were not willful and wanton. Summary judgment was thus affirmed in Defendant's favor.

Dimick v. Hopkinson et al., 2018 WY 82, 422 P.3d 513 (Wyoming Supreme Court, decided July 23, 2018).

DEFENSE VERDICT IN STAIRWAY FALL CASE

U.S. District Court, D. Wyoming: Plaintiff Brent Walker was injured when he allegedly lost his footing, fell through a stairway, and hit the ground. This occurred while he was climbing to inspect a storage tank using a steel stairway constructed by Defendant JTM Equipment. Plaintiff claimed that the stairway lacked a barrier between the top rail and bottom runners, which left an unguarded opening that he fell through. Plaintiff alleged that he sustained back injuries as a result of the fall.

Plaintiff alleged that Defendant failed to comply with OSHA standards in the design and assembly of the stairway. He also claimed that Defendant failed to warn him of the risks in using the stairs and failed to properly design, manufacture, and assemble them. Plaintiff also sought recovery against Defendant under strict liability causes of action for the stairs.

Defendant denied liability. It argued that it did not design or manufacture the stair that Plaintiff was using at the time of the fall, and that if it did, Plaintiff's employer had significantly altered it without notice to Defendant. Defendant also alleged that Plaintiff's long history of back conditions was the cause of his alleged injuries. Upon trial, the jury returned a verdict in favor of Defendant.

Walker v. JTM Equipment, Inc., Case No. 2:15CV00060.

Texas

INSURER HELD NOT TO HAVE POLICY OBLIGATIONS DUE TO THE INSURED'S FAILURE TO COOPERATE

Texas Court of Appeals: Jonathan Medina was injured when he was struck by a truck listed as a covered vehicle on a policy issued by American National County Medical Insurance Company ("American"). The vehicle was driven by Angel Freeman, who was the sister of the policyholder, Paul Freeman. A question arose concerning who owned the vehicle that Angel was driving.

American thus denied coverage on Medina's claim on the basis that Paul did not own the vehicle. Medina sued Angel and Paul. American obtained defense counsel for Paul. Paul was eventually dismissed from the lawsuit. Angel never filed an answer to the lawsuit, and Medina obtained a default judgment against her. Angel then assigned her claims to Medina, and Medina sued American. All parties agreed that if Paul did not own the vehicle, then there was no coverage under the American policy. A primary issue at trial was thus the ownership of the vehicle.

A jury found that Paul owned the truck on the date of the accident. But the jury also made findings favorable to American, including that Angel did not cooperate with American's

More on Back Page

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
- 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.

Dewhirst & Dolven's Legal Update
is published quarterly by
Rick N. Haderlie, Esq and
Kyle L. Shoop, Esq
of
Dewhirst & Dolven, LLC

For more information regarding legal developments, assistance with any Utah, Wyoming, Colorado or Texas matter, or to receive this publication via email, contact Rick Haderlie at
rhaderlie@dewhirstdolven.com
4179 Riverboat Road
Suite 206
Salt Lake City, UT 84123
(801) 274-2717
www.DewhirstDolven.com

DEWHIRST & DOLVEN
Attorneys at Law
www.DewhirstDolven.com

SALT LAKE CITY
4179 Riverboat Road,
Ste 206
Salt Lake City, UT 84123
(801) 274-2717

GRAND JUNCTION
2695 Patterson Road
Ste 2, #288
Grand Junction, CO 81506
(970) 241-1855

DENVER
650 So. Cherry St.,
Ste 600
Denver, CO 80246
(303) 757-0003

DALLAS
5430 LBJ Freeway
Ste 1200
Dallas, TX 75240
(972) 789-9344

COLORADO SPRINGS
405 S. Cascade Ave., Suite 301
Colorado Springs, CO 80903
(719) 520-1421

PORT ISABEL
400 North Yturria Street
Port Isabel, TX 78578
(956) 433-7166

FORT COLLINS
2580 East Harmony Rd.
Ste 201
Fort Collins, CO 80528
(970) 214-9698

CASPER
123 West 1st Street
Ste 675
Casper, WY 82601
(307) 439-6100

CLM

Continued from Page 5

investigation or defense of Medina's claim. The jury also found that American was prejudiced by Angel's failure to cooperate. Despite those findings in American's favor, the trial court rendered judgment in American's favor. American appealed.

American argued that, even if Angel was a covered insured under the policy, Angel failed to satisfy all conditions precedent to coverage due to Angel's failure to cooperate with American. The Texas Court of Appeals stated: "An insurer's obligation depends upon proof that all conditions precedent have been performed." An insurer must also be prejudiced by the failure of an insured to cooperate. The jury had determined that these things occurred. Thus, the legal effect of the jury's findings was to discharge American's obligations under the policy. The Court of Appeals found that the trial court's ruling improperly ignored those jury findings. As such, the trial court's judgment was reversed, and judgment was rendered in favor of American.

American National County Mutual Insurance Company v. Medina, 2018 WL 4037357 (Texas Court of Appeals, Dallas Div., decided August 22, 2018, not yet released for publication in the permanent law reports).

UNDERINSURED MOTORIST COVERAGE HELD PRECLUDED UNDER THE REGULAR-USE EXCEPTION

Texas Court of Appeals: Plaintiff Edwin Emenike was driving a Dodge Grand Caravan when he was struck head-on by another vehicle. Emenike sustained head injuries and settled with the tortfeasor. However, his bodily injury damages exceeded the amount available under the tortfeasor's automobile policy.

Emenike was insured by Defendant Progressive County Mutual Insurance Company. Emenike owned four vehicles identified on the policy declarations page as "covered autos." The Dodge Grand Caravan was not one of those vehicles. The Caravan was leased from Austin Cab, Inc., and was operated as a taxi cab. Emenike made a claim for underinsured motorist ("UIM") benefits in the amount of $50,055 under the Progressive policy.

Progressive denied the claim, asserting that Emenike was not driving a covered vehicle based upon the "regular-use exception" of the policy. That exception excluded UIM benefits for a person using a "motor vehicle that is owned by or available for the regular use of you..."

The district court granted summary judgment in favor of Emenike, and denied Progressive's motion for summary judgment. Emenike had submitted a copy of his agreement with Austin Cab and his own deposition testimony to support his motion.

The evidence supported Emenike leasing the van from Austin Cab on a weekly basis for purposes of operating a taxi business. He had been renting the van continuously for three to six days a week over the past year. He would normally keep the vehicle parked at his house. The vehicle was available to him at any time without limitation so long as he continued to pay the lease.

Emenike contended that "regular use" meant a vehicle that was available for his use without charge. On appeal, the Texas Court of Appeals stated that "regular use" means "a use steady or uniform in course, practice or occurrence not subject to unexplained or irrational variation." The Court found that Emenike's use of the vehicle was not unusual, temporary, or sporadic. Thus, the vehicle was in his regular use and thereby fell under the regular-use exception to coverage. As such, judgment was reversed and entered in Progressive's favor.

Progressive County Mutual Insurance Company v. Emenike, 2018 WL 4087718 (Texas Court of Appeals, Austin Div., decided August 28, 2018, not yet released for publication in the permanent law reports).