Spring 2015

DEWHIRST & DOLVEN LLC Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas • Arizona

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UTAH

PRIOR PERSONAL INJURY JUDGMENT DOES NOT BAR SUBSEQUENT WRONGFUL DEATH ACTION

Utah Supreme Court: The issue in this case was whether a judgment rendered in favor of the plaintiff in a personal injury suit bars a subsequent wrongful death claim arising out of the same injury and against the same defendants.

In addressing this issue, the Utah Supreme Court interpreted a wrongful death cause of action under U.C.A. § 78B-3-106 and determined that the statute provides an independent cause of action belonging to the decedent's heirs for wrongful death. The Court noted that the statute did not tie the cause of action to any prior underlying personal injury claim. The Court also discussed that causes of action for personal injury and wrongful death are aimed at compensating for different types of loss. The Supreme Court thus held: "[A] decedent's heirs may bring an action for wrongful death even when the decedent prevailed in a related personal injury suit during his or her lifetime."

Riggs v. Georgia-Pacific LLC et al., 2015 UT 17 (Utah Supreme Court, decided January 30, 2015, not yet released for publication in the permanent law reports).

DECEDENT'S HEIR MAY BRING ACTION AGAINST HERSELF AS TORTIOUS ACTOR IN WRONGFUL DEATH LAWSUIT

Utah Court of Appeals: Barbara Bagley appeals from the district court's ruling that she is barred from maintaining two causes of action arising out of an automobile accident that claimed her husband's life. Bagley found herself on both sides of the dispute because not only was she her husband's heir and estate personal representative, but she was also the defendant driver whose negligence allegedly caused the accident. Bagley's interests as a defendant were represented by her insurance carrier.

The issue before the Court of Appeals was: "[W]hether the plain language of the wrongful death and survival action statutes bars a tortfeasor from bringing an action against herself for damages if she asserts those causes of action in her capacity as an heir or as the

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personal representative of the decedent's estate." The Court noted that both statutes only allow a cause of action for injury or death "caused by the wrongful act or negligence of another…." However, it ruled that the phrase "of another" means someone other than the decedent, rather than someone other than the decedent's heir or personal representative.

The Court therefore held that the wrongful death and survival action statutes do not bar an heir or personal representative from pursuing those causes of action even when the heir or personal representative is the defendant tortfeasor.

Bagley ex rel. Vom Baur v. Bagley, 2015 UT App. 33 (Utah Court of Appeals, decided February 12, 2015, not yet release for publication in the permanent law reports).

EXCLUSION OF POLICE OFFICER AS AN EXPERT IS AFFIRMED DUE TO UNTIMELINESS OF THE EXPERT DESIGNATION

Utah Court of Appeals: Plaintiff Kris Solis appeals from a jury verdict in favor of Defendants Burningham Enterprises and Raymond Davis, concerning claims stemming from a motor vehicle accident. Plaintiff argued that the trial court erred in ruling that she failed to designate an investigating police officer as an expert witness. Plaintiff had designated the officer as a fact witness, and both parties had inquired as to the officer's expert opinions at his deposition. Plaintiff also argued that the trial court abused its discretion in failing to extend expert disclosure deadlines to allow her to designate the officer as an expert.

Defendants argued that exclusion of the officer as an expert was appropriate because Plaintiff had failed to actually designate the officer as an expert. Even though the officer's expert opinions were discussed at his deposition, Defendants argued they would have inquired as to the officer's qualification had he been disclosed as an expert witness. Defendants thus asserted they were prejudiced by Plaintiff's non-disclosure.

The Court of Appeals held that Rule 26 of the Utah Rules of Civil Procedure requires a party to formally disclose individuals as an expert witness. Thus, the officer's expert opinions were properly excluded because Plaintiff failed to comply with the rule. In addition, the Court held that Plaintiff failed to provide a reasonable justification for non-disclosure of the officer as an expert, and thus the district court's ruling to not extend the expert disclosure deadline was affirmed.

Solis v. Burningham Enters. Inc. et al., 2015 UT App. 11 (Utah Court of Appeals, decided January 15, 2015, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN UIM BAD FAITH CASE

U.S. Dist. Ct., D. Utah: Plaintiff Rachelle Eldredge was driving a moped on a highway in Hawaii when she allegedly flipped over the handlebars and struck a utility pole. She claimed to have been struck by a phantom vehicle. She was reportedly insured by three policies issued by Defendant State Farm Mutual. Due to her sustained injuries, Plaintiff sued State Farm for bad faith breach of contract when State Farm denied her underinsured motorist claim.

State Farm alleged that there was no evidence of another vehicle involved in the accident, that UIM coverage thus did not apply, and that it was reasonable in its investigation and denial of Plaintiff's claim. The jury found that Plaintiff was not hit by an unidentified motor vehicle, and rendered judgment in State Farm's favor.

Eldredge v. State Farm Mut. Auto Ins. Co., Case No. 2:12CV00900, 2014 WL 7639865.

Colorado

'NOTICE-PREJUDICE' RULE HELD NOT TO APPLY TO A DATE-CERTAIN REQUIREMENT IN CLAIMS-MADE INSURANCE POLICY

Colorado Supreme Court: In this opinion, the Supreme Court addressed the following question of law certified to it from the U.S. Court of Appeals, 10th Circuit: whether the notice-prejudice rule applies to a date-certain notice requirement in a claims-made liability insurance policy.

Under Colorado's "notice-prejudice rule," an insured who gives late notice of a claim to his/her insurer does not lose coverage benefits unless the insurer proves by a preponderance of the evidence that the late notice prejudiced its interests. A claims-made policy covers only those claims brought against the insured during the policy period and reported to the insurer by a date-certain.

The Colorado Supreme Court held: "[T]he notice-prejudice rule does not apply to a date-certain notice requirement in a claims-made insurance policy. In a claims-made policy, the date-certain notice requirement defines the scope of coverage. Thus, to excuse late notice in a violation of such a requirement would rewrite a fundamental term of the insurance contract."

Colorado Supreme Court: Craft v. Philadelphia Indem. Ins. Co., 2015 CO 11 (Colorado Supreme Court, decided February 17, 2015, not yet released for publication in the permanent law reports).

SUPREME COURT DISMISSES LAWSUIT WHICH TOOK SEVEN YEARS TO SERVE

Colorado Supreme Court: Defendant Villegas petitioned the Supreme Court for relief from a district court order granting Plaintiff Malm's motion to reopen her personal injury lawsuit. The district court denied Defendant's motion to reconsider and dismiss the action for failure of Plaintiff to prosecute the action, despite the passage of more than seven years between the filing and service of the complaint. Relying on Plaintiff's self-reported efforts to find and serve Villegas (who was eventually found in Germany), the district court ruled that service was made within a reasonable time.

On Defendant's petition for relief, the Colorado Supreme Court ruled: "By virtually any standard, the seven-and-a-half years between filing and service in this case far exceeded the relatively short initial period not requiring specific jurisdiction. By the same token, permitting lengthy delay beyond the running of statute of limitations in this case would have effectively tripled the time statutorily contemplated for putting Villegas to her defense of allegedly tortious conduct. While certainly extraordinary circumstances might excuse even this substantial delay … the district court's reliance on Malm's efforts to locate and serve Villegas … could not do so." The Supreme Court thus held that the district court abused its discretion in declining to dismiss the lawsuit for failure to prosecute.

Malm v. Villegas,
2015 CO 4, 342 P.3d 422
(Colorado Supreme Court,
decided January 20, 2015).

DEFENSE VERDICT IN HOMEOWNERS ASSOCIATION TRIP AND FALL LAWSUIT

Adams County: Plaintiff Ted Schlachter sued Defendant Ranch Creek Villas HOA for injuries he sustained when he tripped and fell over a barrier wall in a common area on Defendant's property. Plaintiff claimed that the barrier wall presented a dangerous condition on the premises and that Defendant knew of the dangerous condition. Defendant denied that it was a dangerous condition and asserted Plaintiff's comparative negligence. Defendant said that the barrier wall marked a slope elevation change. Plaintiff's alleged injuries included a rotator cuff tear requiring surgery and future replacement.

Plaintiff's final demand before trial was $385,000. Defendant made no offer. The jury returned a verdict for Defendant.

Schlachter v. Ranch Creek Villas
HOA, Inc.,
Case No. 2013CV147.

Wyoming

SERVICE OF LAWSUIT RULED DEFICIENT FOR LACK OF DUE DILIGENCE IN PERSONAL INJURY CASE

Wyoming Supreme Court: Plaintiff Jessica Dirks filed a complaint against Defendant Ken Jimenez alleging that she was injured in a motor vehicle accident that occurred due to Defendant's negligence. Plaintiff served Defendant under Wyoming's nonresident motorist statute, W.S.A. § 1-6-301, by serving the Secretary of State and sending a copy by certified mail to an address for Defendant that was provided in the accident report. However, Plaintiff had obtained a more current address for Defendant during discovery in a prior proceeding involving the same parties. Plaintiff also stated that the complaint and summons had been sent to Defendant's attorneys from the prior proceeding.

The district court found that Plaintiff failed to demonstrate due diligence in locating Defendant and thus did not comply with the nonresident motorist statute. Plaintiff's attempted service was therefore quashed and the case was dismissed. On appeal, Plaintiff challenged the district court's ruling, arguing that the attempted service was sufficient.

The Wyoming Supreme Court held that "a diligent effort [must] be made to locate an absent defendant before means of substitute service become available." Plaintiff did not attempt service at Defendant's last known address, given the information in Plaintiff's possession from the prior court proceeding. Moreover, service to Defendant's prior attorneys did not constitute actual notice to Defendant under the nonresident status. The district court's ruling was thus affirmed.

Dirks v. Jimenez,
2015 WY 36
(Supreme Court of Wyoming,
decided March 6, 2015,
not yet released for publication
in the permanent law reports).

$103,000 VERDICT IN YELLOWSTONE NATIONAL PARK MOTOR VEHICLE ACCIDENT

U.S. Dist. Court, Dist. of Wyoming: Plaintiff Jennifer Buhl and her minor son were traveling in a vehicle northbound on a loop road in Yellowstone National Park. A southbound vehicle operated by Defendant Murray Allen Friedman rounded a corner at a high rate of speed, spun out of control, and headed directly toward Plaintiff's vehicle. This caused Buhl to pull over to the right in an effort to avoid a collision. However, Friedman's vehicle skidded across the northbound lane and collided with Buhl's vehicle in the ditch off the shoulder of the road. The collision apparently killed a passenger in Defendant's vehicle, which was not at issue in Plaintiffs' lawsuit.

Plaintiff Buhl asserted recovery for her cervical and lumbar injuries. Her son suffered a bayonet fracture of the proximal right femur, which required open reduction internal fixation surgery and casting for immobilization. Plaintiffs claimed that Defendant was negligent, reckless and wanton for, among other things, speeding, driving recklessly, and failing to maintain his lane. Defendant denied liability and disputed Plaintiffs' claimed damages. Upon a jury trial, Buhl was awarded $28,000, and her son was awarded $75,000. Thus, the total jury verdict was $103,000.

Buhl v. Friedman,
Case No. 2:13CV00208.

Arizona

INSURERS NOT REQUIRED TO IDENTIFY PRICE TO COMPLY WITH UIM COVERAGE STATUTE

Arizona Supreme Court: Plaintiff Katelin Newman was injured in a motor vehicle accident by another driver whose insurance was insufficient to cover her damages. Plaintiff sought UIM coverage from her insurer, Defendant Cornerstone National Insurance Company. Cornerstone denied Plaintiff's claim because Plaintiff had waived UIM coverage. Cornerstone had offered Plaintiff UIM coverage on a form approved by the Arizona Department of Insurance, but Plaintiff declined that coverage.

The issue in this case was whether Ariz. Rev. Stat. § 20-259.01(B) requires motor vehicle insurers writing liability policies to specify the cost of UIM coverage when "making available" and offering "by written notice" UIM coverage to their insureds. Plaintiff argued that that statute requires the insurer to "offer" the UIM coverage, and that an offer cannot be made without including the price. Defendant argued that the plain language of the statute does not require price to be identified.

The Arizona Supreme Court agreed with Defendant. In holding that the statute's plain language does not require identification of the price of UIM coverage, the Court also stated that the statute "requires only that the insurer provide written notice offering the coverage that, if accepted, binds the insurer."

Newman v. Cornerstone Nat'l Ins. Co. dba Freedom Nat'l Ins. Servs., Case No. CV-14-0121-PR (Arizona Supreme Court, decided March 18, 2015, not yet released for publication in the permanent law reports).

'REASONABLE EXPECTATIONS DOCTRINE' APPLIED TO EXPAND COVERAGE UNDER UMBRELLA POLICY

Arizona Court of Appeals, Div. 1: The issue in this case was "whether the reasonable expectations doctrine applies to an umbrella insurance policy sold by [Plaintiff] State Farm Fire and Casualty Company." For nearly 30 years, Arizona courts have used the "reasonable expectations doctrine" in analyzing adhesion contracts establishing insurance coverage. "Reasonable expectations" are those expectations "that have been induced by the making of a promise."

Alicia Fisk was seriously injured in a one-car accident while riding in a car driven by her fiancé, Defendant Rocky Sapp. They had lived together in a home owned by Fisk's parents (the Hartwigs), who owned the vehicle and purchased both auto insurance and an umbrella policy through State Farm. The Hartwigs testified that they had expected Sapp to be covered under the umbrella policy. In a conversation between the Hartwigs and the State Farm agent, the agent had led the Hartwigs to believe that the same individuals covered under the auto policy would be covered by the umbrella policy. However, both parties agreed during litigation that Sapp was not an insured person as defined under the umbrella policy.

State Farm paid for Fisk's injuries under the auto policy. State Farm then filed a declaration action for the trial court to determine that Sapp was not covered under the umbrella policy and that it had no obligation to defend or indemnify Sapp against any claims against Sapp brought by Fisk. The trial court granted summary judgment in Sapp's favor, and State Farm appealed.

State Farm argued that the reasonable expectations doctrine can be used to subtract a boilerplate term in the policy but cannot be used to add coverage. The Court of Appeals disagreed, stating that "the doctrine's whole purpose is to prevent insurance providers from refusing coverage when insureds reasonably believed they possessed coverage." The Court then pointed to the Hartwigs' expectation of coverage for Sapp based upon their conversation with the State Farm agent. Thus, summary judgment in Sapp's favor was affirmed.

State Farm Fire and Cas. Co. v. Sapp et al., Case No. 1 CA-CV 13-0623, 2015 WL 632138 (Arizona Court of Appeals, Div. 1, decided February 12, 2015, not yet released for publication in the permanent law report).

New Mexico

STATUTORY MANDATE FOR PAYMENT OF INTEREST ON OIL AND GAS PROCEED-PAYMENTS CANNOT BE CONTRACTED AROUND

New Mexico Supreme Court: This case presents the issue of whether payees who are entitled to interest on suspended oil and gas production proceed-payments can contract away their statutorily mandated interest payments.

Defendant Yates Petroleum argued that Plaintiffs are not entitled to interest on the funds, pursuant to a provision in Yates' standard form division order and marketing agreement. This agreement was signed by each of the Plaintiffs, who were the First Baptist Church of Roswell, the Historical Society for Southeast New Mexico, and the Roswell Women's Club. According to Yates, this agreement allows it to withhold payment of oil and gas royalties pending the resolution of title issues. When it eventually disburses royalties, the agreement thus allows Yates to pay the proceeds without interest.

The district court awarded interest payments to Plaintiffs on the basis that N.M.S.A. § 70-10-4 mandates that payees "shall" be paid interest on funds to which they are entitled. The district court thus held that the provision of the agreement was unenforceable because it contravened the statute. The Court of Appeals reversed, holding that the parties

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could contract around the provisions of the statute.

The Supreme Court noted New Mexico's "strong public policy of freedom to contract that requires enforcement of contracts unless they clearly contravene some law or rule of public morals." Moreover, contracts are "void as being contrary to public policy when they are clearly contrary to what the legislature … has declared to be the public policy." The Court thus held that "Section 70-10-4 has a clear public policy in favor of [Plaintiffs'] right to interest on funds to which they are entitled, and this statutory provision cannot be contracted around."

The First Baptist Church of Roswell et al. v. Yates Petroleum Corp., 2015 NMSC 004 (New Mexico Supreme Court, decided February 20, 2015, not yet released for publication in the permanent law reports).

Texas

SUPREME COURT REVERSES 40 YEARS OF LAW IN HOLDING NON-USE OF SEAT BELT IS ADMISSIBLE EVIDENCE

Texas Supreme Court: This case concerns a motor vehicle accident involving Defendant Nabor Wells Services' transport truck and a Chevrolet Suburban with eight occupants, all of whom were Plaintiffs in this action. The accident occurred when the suburban went to pass the truck on the left side just as the truck began a left turn. Upon impact, the suburban rolled several times, resulting in the death of one of the passengers and injuries to the other occupants. There was conflicting evidence concerning which of the occupants were wearing safety belts and which were ejected from the vehicle.

At trial, Defendant sought to offer expert testimony as to which occupants where unbelted and that the occupants' failure to use seat belts caused their injuries. The trial court excluded this testimony. The jury found Defendant 51% at fault and the Plaintiff-driver 49% at fault. Plaintiffs were collectively awarded just over $2.3 million. The Court of Appeals affirmed the exclusion of the seat belt evidence.

The Texas Supreme Court held that "relevant evidence of use or non-use of seat belts, and relevant evidence of a plaintiff's pre-occurrence, injury-causing conduct generally, is admissible for the purpose of apportioning responsibility under our proportionate-responsibility statute, provided that the plaintiff's conduct caused or was a cause of his damages." In issuing this ruling, the Court recognized that it was reversing over forty years of common law which had excluded such evidence. The Court noted that several

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Dewhirst & Dolven is pleased to announce that Aldo DelPiccolo and Lars Bergstrom have accepted membership with the firm.

Mr. DelPiccolo has been practicing insurance defense trial work for 23 years primarily in the areas of construction defect litigation. He has handled over 100 cases involving the defense of general contractors, builders, developers, and subcontractors in lawsuits concerning claimed defects in the design and construction of residential and large commercial buildings. Other significant areas of practice include employment litigation, personal injury, products liability, real estate and insurance brokerage malpractice, and E&O. Mr. DelPiccolo received his Bachelors of Arts in political science from the University of California at Los Angeles, and received his Juris Doctorate degree from the University of Denver's School of Law. He is admitted to practice law in Colorado state and federal courts.

Mr. Bergstrom's practice involves civil litigation defense, premises liability cases, commercial vehicle accidents, and personal injury defense. Mr. Bergstrom also provides representation for highway construction companies and snow removal professionals. He also represents security professionals, nightclubs and bars in excessive use of force cases, as well as civil assault and battery claims. Mr. Bergstrom received his Bachelors of Science in Foreign Service at Georgetown University, and received his Juris Doctorate degree, cum laude, from Tulane Law School. He is licensed to practice law in Colorado and Nebraska state and federal courts. In addition, Mr. Bergstrom is a Major in the U.S. Army JAG Corps and has received the Meritorious Service, Army Commendation, and Army Achievement Medals.

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.

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legislative changes had occurred over the forty years and that the law now requires seat belt usage. The Court thus reversed and remanded Plaintiffs' judgment.

In holding that seatbelt non-use is admissible, the Court clarified that the evidence is only admissible if it is relevant, and that it is still subject to potential objection and exclusion under Texas Rule of Evidence 403. In addition, the evidence bears no relationship to the failure-to-mitigate-damages doctrine, as such doctrine pertains to post-occurrence actions by the plaintiff.

Nabors Well Servs., Ltd. v. Romero et al., 2015 WL 648858 (Texas Supreme Court, decided February 13, 2015, not yet released for publication in the permanent law reports).

TEXAS COURT OF APPEALS COMPELS ARBITRATION IN CONSTRUCTION DEFECT LAWSUIT

Texas Court of Appeals, Houston:
Pursuant to the parties' contract, Defendant LDF Construction remodeled and repaired Plaintiff Texas Friends of Chabad Lubavitch's ("Chabad") facility. Chabad filed suit against LDF, alleging construction defects and that the work was non-compliant with building codes and the parties' contract. LDF filed a motion to compel binding arbitration under the Texas General Arbitration Act, Tex. Civ. Prac. & Rem. Code §§ 171.001-.098. The trial court denied LDF's motion, and LDF appealed.

Under the Act, the trial court must stay proceedings and compel arbitration if the moving party demozstrates: (1) an agreement to arbitrate; and (2) the opposing party's refusal to arbitrate.

LDF contended that it proved the existence of an agreement to arbitrate as found within the parties' contract. Chabad disputed the existence of an arbitration agreement, and argued that any such agreement is procedurally unconscionable. Though the parties' contract itself did not contain an arbitration clause, it incorporated a separate, unsigned form which included an arbitration provision. The trial court had deemed there not to be an agreement to arbitrate because the contract itself did not contain the provision and because the separate form was unsigned.

However, the Texas Court of Appeals ruled that the parties agreed to the arbitration provision because their contract had specifically incorporated the separate form. The Court held: "A valid agreement to arbitrate exists when a signed contract incorporates by reference another document containing the arbitration clause." The Court also found that the trial court record lacked any evidence to suggest that the agreement was procedurally unconscionable. Thus, the Court reversed the trial court's ruling and instructed the trial court to compel arbitration.

LDF Construction, Inc. v. Texas Friends of Chabad Lubavitch, Inc., 2015 WL 1020766 (Texas Court of Appeals, Houston, decided March 5, 2015, not yet released for publication in the permanent law reports).