Spring 2016

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

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

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UTAH

MINIMUM AGE BELOW WHICH A CHILD IS DEEMED INCAPABLE OF NEGLIGENCE HELD TO BE FIVE YEARS OLD

Utah Supreme Court: The issue in this case was whether there is a minimum age below which a child is conclusively deemed incapable of negligence, and if so, a determination of that age.

Plaintiff Carol Nielsen was babysitting a boy who was four years and nine months old. The boy threw a toy rubber dolphin at Plaintiff, striking her in the eye. Plaintiff had previously received a cornea transplant and the impact caused her to lose all vision in that eye. Plaintiff sued the boy for negligence.

Defendant moved for summary judgment. In response, Plaintiff asserted that a four-year-old boy could be liable for negligence under Utah law. The district court agreed with Plaintiff, ruling that it could not find, as a matter of law, that the boy was incapable of negligence.

On appeal, the Utah Supreme Court held that based on its precedents, children under the age of five may not be held liable for negligence. Despite Plaintiff arguing that there was not a minimum age, the Court held that "there is an age at which a child is so young and immature as to require the court to judicially know that he is not responsible for his act." However, the question of whether a child is five or over is reserved for the fact-finder, unless a court determines that no reasonable jury could disagree on the issue.

Nielson v. Bell, 2016 UT 14 (Utah Supreme Court, decided March 24, 2016, not yet released for publication in the permanent law reports).

NEW LOCATION:
Casper, Wyoming

UTAH COURT OF APPEALS HOLDS THAT A COURT MAY NOT REWRITE AN INSURANCE CONTRACT IF ITS LANGUAGE IS CLEAR AND UNAMBIGUOUS

Utah Court of Appeals: Plaintiff Pamela Graves was injured on a speedboat trip offered by Defendant Prime Insurance's insured, Rocket Tours of Key West. Graves notified Rocket Tours of her injury and claims at least five times. However, no one notified Prime of Graves' claims until more than a year after Rocket Tours' insurance policy had expired. Because Prime Insurance had not been notified of Graves' claim in accordance with the terms

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of the insurance policy, Prime initiated an action against Rocket Tours seeking declaratory relief from the trial court that it had no obligation to defend or indemnify Rocket Tours for Graves' claim.

About a week later, Prime filed a motion for summary judgment claiming that under "the undisputed facts of the case and the clear terms of Rocket Tours' insurance policy, Prime owed no obligations to Rocket Tours or Graves." The district court granted Prime's motion.

On appeal, the Court of Appeals upheld and affirmed the district court's ruling. The Court held: "[i]n general, a court may not rewrite an insurance contract for the parties if the language is clear and unambiguous," even if the policy's terms "may create harsh outcomes." Coverage under the Rocket Tours' policy required written notification within a specified period. Despite Graves' notification to Rocket Tours, she conceded that Prime was never given actual notice. Graves also did not challenge the insurance policy. Thus, the Court held that Graves had not carried her burden to demonstrate that Prime was not entitled to summary judgment as a matter of law.

Prime Ins. Co. v. Graves, 2016 UT App 23 (Utah Court of Appeals, decided February 4, 2016, not yet released for publication in the permanent law reports).

ENACTED UTAH LEGISLATION

The following bills have recently been signed into law by Governor Herbert:

H.B. 36: This bill amends U.C.A. § 31A-22-202 to allow a motor vehicle liability policy to be rescinded or cancelled as to an insured for fraud, material misrepresentation, or any reason allowable under the law. It also adds a provision that any motor vehicle liability policy may not be rescinded for fraud or material misrepresentation, as to minimum liability coverage limits under U.C.A. § 31A-22-304, to the detriment of a third party for a loss otherwise covered by the policy. *House Bill 36 (signed into law by Governor Herbert on March 22, 2016).*

S.B. 11: This bill amends U.C.A. § 31A-22-322 to require an insurer, upon cancellation of auto insurance coverage by an insured, to discontinue any automatic payments and withdrawals related to the cancelled policy before the later of: (a) 15 days after the request for cancellation; or (b) 15 days after the effective date of the cancellation. The bill prohibits an insurer from reinstating the cancelled policy after cancellation by an insured without the express consent of the insured. The bill also requires that the insurer refund any funds collected to which the insurer is not entitled, calculated according to the terms of the insurance policy, before the later of (a) 30 days after the request for cancellation; or (b) 30 days after the effective date of the cancellation. An insurer in violation of this section can be ordered to forfeit up to $2,500 to the state for each violation. *Senate Bill 11 (signed into law by Governor Herbert on March 21, 2016).*

S.B. 215: This bill amends U.C.A. § 31A-22-305.3 to provide that a claimant may demand payment of policy limits from all liability insurers by sending notice to all applicable underinsured motorist ("UIM") insurers. It requires the insurer, upon tendering limits to a claimant, to provide notice of the tender to all UIM insurers for which the insurer received notice. Under the amendment, if a claimant accepts the policy limits tender of each liability insurer, the liability insurer shall pay the claimant the accepted policy limits.

The amendment also provides that the subrogation rights of an UIM insurer are waived, unless: (A) within five days of delivery of the notice of tender from the liability insurer, the UIM insurer affirmatively asserts its rights to subrogation by delivering notice to the liability insurer of the UIM insurer's rights to subrogate; and (B) the UIM insurer reimburses the liability insurer for the policy limits paid to the claimant. The amendment further provides that if the subrogation rights of an UIM insurer are not waived, any liability release signed by the claimant or the claimant's representative is rescinded. In addition, a claimant's UIM coverage is preserved if the claimant provides notice to the UIM insurer. *Senate Bill 215 (signed into law by Governor Herbert on March 28, 2016).*

COLORADO

HUSBAND HELD NOT TO BE AN INSURED UNDER WIFE'S UNDERINSURED MOTORIST POLICY WHERE HUSBAND HAD SEPARATED FROM WIFE

Colorado Court of Appeals: Defendant Ryan Collins, and his wife co-owned a motorcycle and a Jeep. Upon separation, Ryan took possession of the motorcycle and his wife took possession of the Jeep. A month later, Ryan's wife purchased a new policy from GEICO to cover only the Jeep, informing the GEICO representative that she and Ryan were separated and that she did not consider him to be a member of her household for purposes of the policy. Ryan was not rated or considered for coverage under the policy.

About three months later, Ryan was injured in a motorcycle accident with an UIM vehicle. Two months later, the divorce became final. Two months after that, Ryan filed a claim with GEICO for UIM coverage. GEICO denied the claim on the basis that Ryan was not a resident relative because he did not reside in his former wife's household at the time of the accident, and therefore he was not an insured under the policy. GEICO filed a declaratory action against Ryan on the issue, and the district court granted summary judgment in favor of GEICO.

On appeal, the Court stated that the issue of whether a person is a resident of a household for purposes of insurance coverage is determined by the facts and circumstances of each case. In this matter, the fact that Ryan lived apart from his wife at the time of the accident did not foreclose the possibility that he was a resident of her household, nor was the fact that they were married dispositive.

Rather, the Court stated that the critical questions were (1) whether the spouses' separation was intended to be permanent, and (2) whether the contracting parties intended the insurance policy to cover both spouses. Given the dissolution petition, the permanent protection order barring Collins from the house where his wife lived, the undisputed evidence that the couple did not discuss or contemplate

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reconciliation, and their lack of contact after the dissolution petition, the Court of Appeals concluded that Ryan's absence from the residence at the time of the accident was intended to be permanent. Moreover, the undisputed facts showed that neither GEICO nor the wife intended Ryan to be covered under the UIM provisions of the policy. Thus, Ryan was not a resident of his former wife's household at the time of his motorcycle accident.

GEICO Cas. Co. v. Collins, 2016 COA 30 (Colorado Court of Appeals, decided February 25, 2016, not yet released for publication in the permanent law reports).

COLORADO PREMISES LIABILITY ACT HELD TO BE AN EXCLUSIVE REMEDY AGAINST A GENERAL CONTRACTOR

Colorado Court of Appeals: Plaintiff Rodney Reid sustained injuries after falling through an unsecured guardrail at a construction site where Defendant Daniel Berkowitz d/b/a Shimon Builders was the general contractor. Work was also done by two subcontractors on the project. Plaintiff sued Defendant, a landowner as defined by the Colorado Premises Liability Act ("PLA"), C.R.S. § 13-21-115. Defendant designated the subcontractors as nonparties at fault, after which Plaintiff amended his complaint to add claims against the subcontractors. The subcontractors defaulted and the court entered judgments against them.

After a damages hearing, the district court entered a default judgment in the amount of $844,308.92 total against both subcontractors. The court made no findings on whether Defendant Shimon Builders was vicariously liable for the judgments against the subcontractors.

The PLA claim against Defendant proceeded to a jury trial, wherein the default judgments were not mentioned to the jurors. The jury awarded Plaintiff $400,000 in damages. Despite Defendant's request, the jury was not instructed to apportion fault to the subcontractors nor to evaluate Plaintiff's comparative negligence.

On a prior appeal, the Court of Appeals ordered a retrial solely on the issue of Plaintiff's comparative negligence. A second jury then allocated Defendant with 90% fault, and 10% fault to Plaintiff. Defendant paid the amount awarded. Plaintiff then moved for declaratory relief, requesting that the district court find Defendant Shimon Builders liable for 90% of the default judgments entered against the subcontractors. After a hearing, the court held Defendant liable for the entirety of the default judgments with compound interest totaling $1,457,149.10.

On this appeal, the sole argument the Court of Appeals addressed was whether Defendant could be simultaneously liable for damages as a landowner under the PLA and vicariously liable for the default judgments against its subcontractors. The Court held that the PLA is an exclusive remedy against a landowner for injuries that occur as a result of conditions, activities, or circumstances on his property. Thus, the judgment and orders were reversed and the case was remanded to vacate the judgments against Defendant.

Reid v. Berkowitz, 2016 COA 28 (Colorado Court of Appeals, decided February 25, 2016, not yet released for publication in the permanent law reports).

$5.8 MILLION VERDICT IN CONSTRUCTION DEFECT CASE

Arapahoe County District Court: Plaintiff Vallagio North Association was a homeowner's association. Defendants were the general contractor and developer for the Vallagio North Project. Plaintiff alleged that Defendants improperly constructed certain parts of the project, including the balconies, stucco, windows, concrete flat work, asphalt, roof, and subterranean garage. Plaintiff claimed approximately $6 million in damages. Defendants asserted the affirmative defenses of Plaintiff's failure to mitigate, the expiration of the statute of limitations, Plaintiff's comparative negligence, and a non-party being at fault. Plaintiff's final demand before trial was purportedly $6 million. Defendants reportedly did not make an offer.

Upon jury trial, the jury determined Plaintiff's damages to be $5,818,172.07. As there were several causes of action against each Defendant, the Court ruled that Plaintiff could not collect more than 100% of the award on the combined causes of action.

Vallagio North Assoc. v. Metropolitan Homes et al., 14 CV 31203.

Wyoming

CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS NOT PRECLUDED UNDER WORKERS COMPENSATION ACT'S EXCLUSIVE REMEDY PROVISION

Supreme Court of Wyoming: The issue in this case was whether a father's tort claim for negligent infliction of emotional distress was barred by the Wyoming Worker's Compensation Act.

Plaintiff Charley Collins and his son, Brett, were both employed by Defendant COP Wyoming, LLC. Defendant Roger Ross was also employed by COP Wyoming as the job superintendent. Mr. Ross was operating a large track hoe excavator to excavate inside a trench box at the job site. He instructed Brett to enter the trench box and work there while Mr. Ross was operating the track hoe. Mr. Ross struck Brett in the head with the bucket of the track hoe, severely injuring him. Charley was notified, and he immediately came to the aid of his son and attempted to administer first aid. In spite of those efforts, Brett did not survive. Brett's estate received worker's compensation benefits as a result of his death. Charley sued COP Wyoming and Mr. Ross alleging a cause of action for negligent infliction of emotional distress.

Defendants filed a motion to dismiss, asserting that the lawsuit against them was barred by the exclusive remedy provision of the Wyoming Worker's

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Compensation Act, W.S.A. § 27-14-104(a). After a hearing, the district court granted the motion to dismiss, holding that the father's claim was barred because his injury was derivative of the son's covered death.

On appeal, the Wyoming Supreme Court held that Charley's claim for emotional injury was based upon a duty to him that was independent of the covered death of his son. Thus, his claim was not barred by the Act's exclusive remedy provision. The Court therefore reversed the decision of the district court.

Collins v. COP Wyoming, LLC et al., 2016 WY 18, 366 P.3d 521 (Wyoming Supreme Court, decided February 10, 2016).

DENIAL OF EMPLOYER'S DISPOSITIVE MOTION AS TO INDEPENDENT CONTRACTOR'S EMPLOYEE IS AFFIRMED

Supreme Court of Wyoming: Defendant Merit Energy Company needed to clean out its oil and gas wells that had become clogged with debris over time. It hired an independent contractor, Basic Energy Services, to do the job. Plaintiff Blake Horr, an employee of Basic, was seriously injured during the job.

Wyoming has a general rule that the employer of an independent contractor is not liable for physical harm caused to another by an act or omission of the contractor or his servants. Two exceptions to this rule exist: (1) if the employer has a direct legal duty to the independent contractor's employee due to the employer retaining control over the work; and (2) based upon vicarious liability due to its right to control the means and manner of the work. Horr sued Merit based on these exceptions to the general rule. Upon jury trial, the jury returned a verdict finding Merit substantially at fault, and awarding Horr over $2 million in damages.

Merit appealed, arguing that the district court erred in denying its motion for judgment as a matter of law. The motion argued that the evidence was insufficient to raise an issue as to whether Merit owed Horr a duty or not. On appeal, the Supreme Court held that the evidence, when viewed in the light most favorable to Horr, was sufficient to permit more than one reasonable inference as to whether there was sufficient control by Merit to impose a duty. The Court noted that Merit controlled the pressure of its well and retained control over the equipment used to control the pressure. The Court thus affirmed the district court's judgment.

Merit Energy Company, LLC v. Horr, 2016 WY 3, 366 P.3d 489 (Wyoming Supreme Court, decided January 6, 2016).

Arizona

AWARD OF ATTORNEY FEES AND EXPERT COSTS AFFIRMED IN CONSTRUCTION DEFECT CASE

Arizona Court of Appeals, Div. 1: This case concerned a challenge to the superior court's award of over $6 million in attorneys' fees, expert witness fees, and taxable costs to Plaintiffs following lengthy construction defect litigation.

Prior to suit, counsel for Plaintiffs sent a letter to Defendants titled "Notice of Construction Defects and Opportunity to Inspect and Repair." The Notice stated that it was being provided in accordance with the Purchaser Dwelling Act ("PDA"). Four years after a lawsuit was filed, Defendants filed a motion for summary judgment arguing that Plaintiffs did not comply with the PDA because the Notice failed to provide "a reasonably detailed description of the alleged defects in a fair and representative sample of the affected residential units," as required by A.R.S. § 12-1363. Defendants further argued that as a result of the non-compliance, the attorney fees and costs provisions of the PDA did not apply. The superior court denied the motion, concluding that during the four years of litigation Defendants never asserted their rights under the PDA and had therefore waived them.

A jury trial awarded Plaintiffs with about $4.1 million in damages, in addition to the over-$6 million that the court awarded for attorneys fees, expert fees, and taxable costs. Defendants paid the damages awarded by the jury but appealed the award of attorney fees, expert fees, and costs.

The Court of Appeals affirmed the judgment of the superior court in regard to attorney fees and expert costs and found that Defendants articulated no basis for reversing the superior court's award. However, the Court vacated the award of $231,913 in copying costs because its review did not support the inclusion of copying costs as taxable costs. The Court remanded the case for further proceedings regarding Defendants request for sanctions under Arizona Rule of Civil Procedure 68, based on their partial success on appeal.

Zelkind et al. v. Del Webb Communities, Inc. et al., No. 1 CA-CV 14-0816 (Arizona Court of Appeals, Div. 1, decided March 24, 2016, not yet released for publication in the permanent law reports).

New Mexico

NEW MEXICO SUPREME COURT INTERPRETS RIGHT TO TRADITIONAL INDEMNIFICATION

Supreme Court of New Mexico: This case concerned a cross-claim for contractual and traditional indemnification in a negligence accident. Plaintiffs suffered injuries when a baby changing table collapsed in a Safeway store, and that the collapse was the result of negligence by Defendants Safeway, Inc., Rooter 2000 Plumbing and Drain SSS. The issue on appeal was whether the right to traditional indemnification is available notwithstanding New Mexico's adoption of comparative fault where the jury compared and apportioned fault among concurrent tortfeasors.

Safeway filed a cross-claim against Rooter seeking defense, indemnification, contribution, and

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damages pursuant to both New Mexico common law and an agreement signed by both parties. The agreement also stated that Rooter was to name Safeway as an additional insured under its insurance policy. Both Rooter and its insurance carrier refused to defend or indemnify Safeway. Rooter took the position that New Mexico's anti-indemnification statute, NMSA § 56–7–1, voided any obligation it had to Safeway, and Rooter's insurance company denied coverage because it had not been named as an insured on the Rooter policy.

The district court found as a matter of law that there was no dispute that Safeway would not have to pay for any negligence that was found to have been committed by Rooter. The district court granted Rooter's motion for summary judgment, finding that the agreement's contractual indemnification requirements were void and unenforceable as a matter of New Mexico law.

Plaintiffs ultimately settled all of their claims against Rooter. The case then proceeded to trial on Plaintiffs' claims against Safeway. At the close of evidence, the jury returned apportioned 40% fault to Safeway and 60% to Rooter.

On appeal, the New Mexico Supreme Court held that the right to traditional indemnification does not apply when the jury finds a tortfeasor actively at fault and apportions liability using comparative fault principles. This had occurred with the jury's verdict. The Court also held that the duty to insure and defend under the agreement between Rooter and Safeway was void and unenforceable under NMSA § 56–7–1. The Court thus affirmed the district court's grant of summary judgment.

Safeway, Inc. v. Rooter 2000 Plumbing & Drain SSS, 2016-NMSC-009 (New Mexico Supreme Court, decided February 18, 2016, not yet released for publication in the permanent law reports).

Texas

PRIOR OWNER OF A CHEMICAL PLANT HELD NOT TO OWE DUTY TO PERSON INJURED AT THE PLANT

Supreme Court of Texas: Plaintiff Jason Jenkins was an employee of a chemical plant. He sustained injuries due to alleged defects in design of an acid-addition system installed by the vendor of the plant eight years before the vendor conveyed the plant to the employer. Plaintiff brought suit against the vendor, Defendant Occidental Chemical Corp., alleging negligence.

On appeal, the issue was whether the prior owner of real property (the plant), who created the allegedly dangerous condition on the property, held a duty to warn of the dangerous condition or to make it safe.

The Supreme Court held that under premises liability principles, Defendant did not owe a duty to Plaintiff after it sold the real property to Plaintiff's employer. The Court held that a claim against a previous owner for injury allegedly caused by a dangerous condition of real property remains a premises liability claim, regardless of the previous owner's role in creating the condition. Liability under a premises liability claim for the condition of real property typically ends with the property's sale. Thus, the Court held that Defendant did not owe a duty to Plaintiff for the alleged defects in design of the plant. The denial of Defendant's motion for summary judgment was therefore reversed.

Occidental Chem. Corp. v. Jenkins, 478 S.W.3d 640 (Texas Supreme Court, decided January 8, 2016).

About Our Firm

DEWHIRST & DOLVEN OPENS OFFICE IN CASPER, WYOMING

Dewhirst & Dolven is pleased to serve clients in Wyoming from its new office in Casper, Wyoming at: 123 West 1st Street, Suite 675, Casper, Wyoming 82601.

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DEWHIRST & DOLVEN OPENS OFFICE IN CASPER, WYOMING

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